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REFORMING THE OFFICE OF ATTORNEY GENERAL AND THE JUDICIAL & LEGAL SERVICE IN MALAYSIA

Written by

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EXECUTIVE SUMMARY

- There are two main models of the office of Attorney General ('AG') in the Commonwealth: the political or politico-legal AG, which developed in the Westminster Parliament, and the non-political or purely legal AG, which was the norm in most British colonies.
- In the politico-legal model (eg, in England, Canada, Australia, etc), the AG is a member of the Legislature as well as a minister of the Crown, and is answerable to Parliament for various aspects of the administration of criminal justice. The AG may in some countries also be a full member of the Cabinet: eg, as Minister for Law/Justice.
- In the purely legal model (eg, in India, Pakistan, Singapore, etc), the AG is not a voting member of the Legislature or of the Executive, but may have the right to attend meetings of either body *ex officio*, on a regular basis or as invited from time to time. The AG may be a career legal officer or be appointed from the Bar, and may in some countries also hold the office of Public Prosecutor ('PP').
- While the two models of the office of AG are equally legitimate, several countries that originally had a purely legal AG have shifted towards the politico-legal model (eg, New Zealand ('NZ') in 1877, Malaysia in 1963, Kenya in 2010, etc). In the case of Malaysia, this was followed by a shift back towards a purely legal AG.
- Regardless of the model of AG that is adopted, recognition of the importance of preventing political influence or other interference in criminal prosecutions has led to the establishment in many countries of a separate Director of Public Prosecutions ('DPP') with a greater degree of separation and independence from the Executive (eg, England in 1879, Australia in 1983, Canada in 2006, Kenya in 2010, etc).
- The importance of shielding criminal prosecutions in Malaysia from political influence and interference has come to even greater public significance due to the absence/failures of constitutional safeguards during the 1MDB affair and the dismissal of the AG by former PM Najib Tun Razak, as well as other instances of selective prosecution and unequal enforcement of the criminal law.

Recommendations

Separation of Attorney General & Public Prosecutor

- In order to shield criminal prosecutions from political influence or other interference, the PP should be a constitutional officer separate from the AG. As the AG is a political appointee without security of tenure, he should cease to hold the office of PP and to be a member of any Service Commission. His authority should extend only to the Federal AG's Chambers ('AGC') and not to the rest of the Legal Service ('LS').
- There should be no major changes to the current provisions for the selection and tenure of the AG. The Prime Minister ('PM') should have the flexibility to choose the best candidates for the office of AG and for the position of Minister of Law/Justice, and should be able to combine both positions in one individual, as he may judge appropriate. However, Parliament should have the right to require the PM to submit his advice for the approval of a parliamentary committee.
- Whether or not the AG is a member of the Cabinet or of the Legislature, he should attend Cabinet on a regular basis, and should also have the right, like a Cabinet minister, to participate *ex officio* in the proceedings of both Houses of Parliament. If, however, the AG is appointed Minister of Law/Justice, then he must be a member of one or other House.
- The PP should be appointed by the Yang di-Pertuan Agong ('YDPA') upon the recommendation of the appropriate Service Commission, which may after considering the advice of the PM be returned to the Commission once for reconsideration. Parliament should have the right to require the PM, before advising the YDPA, to submit his advice for the approval of a parliamentary committee.
- The PP should be appointed for a single term of eight years, subject to the same maximum retirement age, and with the same security of tenure, as a Federal Court ('FCt') judge.
- Parliament, in the exercise of its legislative jurisdiction over criminal law and criminal procedure, should have the power to require the PP to consult with the AG in particular cases, but must not require the PP to act subject to the consent or under the direction or control of any person. The PP should, however, submit an annual report to Parliament and appear in person before parliamentary committees whenever required to answer questions or give evidence.

- Parliament should have the power to authorize specialist agencies (eg, the Malaysian Anti-Corruption Commission ('MACC'), the Securities Commission, local authorities, etc) to initiate and conduct prosecutions for specific offences within their remit, but the PP should have power, with the permission of the court or of the agency concerned, to take over any prosecution.

Separation of the Judicial and Legal Services

- The Judicial & Legal Service ('JLS') should be divided into a Judicial Service ('JS') and a separate LS, each with its own Service Commission. The former should include all court registrars, sessions court judges and magistrates, while the latter should include all federal counsel, deputy and assistant PPs and other legal officers.
- The Judicial Service Commission ('JSC') should revert to being chaired by the Chief Justice ('CJ') as the head of the judiciary, with other judicial office-holders and the deputy chairman of the Public Services Commission ('PSC') as *ex officio* members.
- The JSC should also regain responsibility for nominating members of tribunals for the removal of superior court judges and for proposing any suspensions pending the decisions of such tribunals. Responsibility for nominating superior court judges should either be returned to the JSC or vested in a separate Judicial Appointments Commission.
- The Legal Service Commission ('LSC') should cease to have the AG as an *ex officio* member, with his place being taken by the Solicitor General ('SG') and the PP. It should be responsible for the appointments, promotions, transfers and discipline of all members of the LS. It should also have responsibility for nominating members of a tribunal for the removal of the PP and for proposing any suspension pending the decision of such a tribunal.
- The AG and SG should not have authority over members of the LS appointed or seconded to serve the PP's Chambers, State Governments, Parliament or independent Commissions.
- Law reform should continue to be the responsibility of individual ministries, working together with the Federal AGC. However, a Law Reform Commission ('LRC') consisting of legal academics and retired judges should be created, under the oversight of the Ministry of Law/Justice, to make proposals for law reform, which should be laid before Parliament.

I INTRODUCTION

This legal and policy research paper has been commissioned by Bersih 2.0—

- as a study of the current constitutional arrangements governing the AG and the JLS in Malaysia, including—
  - the selection process and tenure of the AG,
  - the scope and nature of the AG/AGC's advisory, representational, drafting and prosecutorial functions,
  - the AG/AGC's relationship with independent federal institutions and the States, and
  - the lack of constitutional safeguards relating to the AG prosecutorial role, which has led to selective prosecutions and unequal enforcement of the criminal law; and
- as a study of best practices from other countries in the Commonwealth,

in order to generate recommendations for necessary, comprehensive reforms to the constitutional and institutional arrangements governing the AG and the JLS; and to ensure—

- prosecutorial independence,
- professionalism and accountability in the provision of legal advisory, representational and drafting services to independent federal institutions and State Governments; and
- the proper relationship of the AG with the subordinate judiciary.

Kuala Lumpur
October 2021

II THE ATTORNEY GENERAL AND OTHER LAW OFFICERS

A *Historical and comparative background*

1 *The Law Officers of the Crown in England*

The position of AG in the English-speaking world has its origins in the 13th-century offices of the King's Attorney and King's Serjeant(s), who were charged with the responsibility of maizntaining the Sovereign's interests before the common law courts in England. The first King's Attorney was recorded in 1243, and the title of AG first appeared in 1461. The title of King's Solicitor appears around the same period, and in 1515 was known by the title of SG. From the outset, the SG was recognised as *secundarius attornatus*, or the AG's junior.[1]

The titles of Attorney and Solicitor come from the names of legal practitioners in the English courts prior to the unification of the courts by the Judicature Acts of 1873–5. Attorneys practised in the common law courts, while solicitors practised in the courts of equity. A separate profession of proctors practised in the admiralty and ecclesiastical/divorce courts, which administered Roman civil law rather than common law or equity.[2]

Beginning in the 16th century, the barristers of the Inns of Court gradually gained exclusive rights of audience in all common law and equity courts, and since then, the AG and SG have almost invariably been appointed from among their ranks. Until 1872, a third Law Officer, the King's Advocate or Advocate-General, was also appointed from among the advocates of Doctors' Commons,[3] to advise the Crown on international law, admiralty and ecclesiastical matters.[4]

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[1] John Edwards, *The Law Officers of the Crown: A Study of the Offices of Attorney-General and Solicitor-General of England, with an Account of the Office of the Director of Public Prosecutions of England* (Sweet & Maxwell, 1964) 3 ('*Law Officers of the Crown*').

[2] The King's Proctor or Procurator-General had the function of intervening on behalf of the Crown in the admiralty and ecclesiastical/divorce courts, under the supervision of the AG. A notable function of the Queen's Proctor to this day is to intervene in divorce proceedings to prevent decrees nisi improperly obtained from being made absolute: Ibid 152–3; *Matrimonial Causes Act 1973* (UK), s 8.

[3] The advocates of Doctors' Commons were the equivalent, in the admiralty and ecclesiastical courts, of the barristers of the Inns of Court.

[4] The office of Advocate-General lapsed with the dissolution of Doctors' Commons, as the admiralty and ecclesiastical courts were opened to barristers, and its functions were largely taken over by the Legal Adviser to the Foreign Office: Edwards (n 1) 131 et seq.

As the AG and SG's political status increased in the 16th and 17th centuries, they began to overshadow the Kings' Serjeants as the senior legal representatives of the Crown.[5] Finally, in 1814, they were given precedence over the most senior King's Serjeants, and were recognized as the leaders of the English Bar.

2 *Relationship with Parliament and the Executive*

From 1461, the English Law Officers were summoned, together with judges, to attend Parliament as assistants to the House of Lords. Their role in the 16th century included the carrying of bills between the two Houses, drafting and amending where called upon to do so. Beginning in the 17th century, it became normal first for the SG, and then the AG, to be appointed from among the members of the House of Commons.[6] There they were available to answer on behalf of the Crown on questions of law and draftsmanship, as well as to be held accountable for the administration of criminal justice.[7]

The primary role of the Law Officers as chief counsel for the Crown in the courts began to shift towards a more ministerial role at the end of the 19th century. In 1873, the AG was first appointed to the Privy Council, the (largely honorific) body of the Sovereign's counsellors. In 1892, the Cabinet resolved that the Law Officers be prohibited from representing any clients other than the Crown. In the following year, a permanent Law Officers' Department was established to provide the Law Officers with clerical support.

This transition towards a more ministerial AG reached its zenith in England in 1912, when the AG was made a member of the Cabinet, a practice that continued until 1922. The practice of appointing the AG to Cabinet was abandoned in 1928, because of parliamentary opposition in the aftermath of *Campbell's case* (where the AG's discontinuance of a prosecution in 1924, allegedly due to political influence by members of the Cabinet, led to the fall of the UK's first Labour government).

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[5] The serjeants-at-law of Sergeants' Inns were a special order of senior barristers who had exclusive rights of audience in the (common law) Court of Common Pleas, and from among whom judges were appointed. Following the Judicature Acts of 1873–5, no further serjeants-at-law were created and the order died out: Ibid 279–80.

[6] Ibid 35–38.

[7] Ibid 50–1.

3 *Law Officers in the British Commonwealth*

(a) Development of constitutional government

In most British colonies, it was the usual practice for the AG to be an *ex officio* member of both the colonial Executive Council (ExCo) and Legislature. However, as these bodies began to exercise real power as many colonies moved towards responsible self-government, the AG's position in the ExCo began to be questioned. In 1862, Mr Justice Boothby of South Australia, referring to English constitutional practice, wrote that the Law Officers—

> …were never Cabinet Ministers in the whole course of English constitutional government. That these officers have been made members of the [ExCos] of Colonies has only arisen from this, that constitutional government has not existed, and the Law Officers so situated had only the right to offer advice, without any power to compel that advice being adopted.[8]

In 1866, NZ went so far as to pass an Act that provided that AG should not be a member of the ExCo or of either House of the General Assembly, and that he should not be removed except in the like manner as a judge.[9] However, another Act of 1876 reversed this position, permitting the AG to be a member of the ExCo and of the General Assembly, and providing that he should hold office during the Governor's pleasure.[10] Similar shifts also occurred in South Australia in 1873, and in New South Wales in 1878.[11]

(b) Canada, Australia & New Zealand

From the time of Confederation in 1867, the AG of Canada has been a member of the Cabinet and has invariably held the portfolio of Minister of Justice, a practice formalized by an Act of 1868.[12] Likewise, since 1877, the AG of NZ has been a minister of Cabinet rank, often also holding the portfolio of Minister of Justice. In Australia, the

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[8] John Edwards, *The Attorney General, Politics, and the Public Interest* (Sweet & Maxwell, 1984) 167–8.

[9] *Attorney-General's Act 1866* (NZ) 30 Vict 63, ss 3 & 5.

[10] *Attorney-General's Act 1876* (NZ) 40 Vict 71, s 3.

[11] Edwards (n 8) 169.

[12] *Department of Justice Act* (Canada) RSC 1985 c J-2.

Commonwealth AG has since Federation in 1901 been a minister of State (though not always with Cabinet rank[13]), overseeing the AG's Department.

Although both Australia and NZ settled on politico-legal AGs, the position of SG in each country has, unlike in England and Canada, generally been a purely legal position, appointed either from private practice or from government service.[14]

(c) India

Article 76 of the *Constitution of India 1950* provides for an AG to be appointed by and to hold office during the pleasure of the President of India. The Article is based on a similar provision in the *Government of India Act 1935*,[15] and provides that the AG should be a person qualified to be appointed as a judge of the Supreme Court ('SCt').

The Indian AG is usually a senior advocate of the SCt Bar, rather than a politician. He is not a member of either House of Parliament, nor of the Union Cabinet, which contains a separate Minister of Law & Justice, but has the right to participate *ex officio* in the proceedings of either House and of any committee thereof of which he has been named a member (but not to vote in either case).[16] However, the AG has appeared before Parliament only a handful of times since Independence.[17]

While the Indian Constituent Assembly rejected an amendment that would have required the AG to resign upon the resignation of the PM,[18] a constitutional convention has since developed that has the same effect,[19] which allows each new PM to appoint his own choice of AG and SG.

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[13] In Australia, the Cabinet is a committee of the Federal ExCo (just as the UK Cabinet is a committee of the Privy Council) and not all ministers are members of the Cabinet.

[14] In NZ since 1873, and in Australia since the creation of the office of the Commonwealth SG in 1916: John McGrath, 'Principles for Sharing Law Officer Power: The Role of the New Zealand Solicitor-General' (1998) 18 *New Zealand Universities Law Review* 197, 200; Edwards (n 8) 370.

[15] *Government of India Act 1935* (UK) 26 Geo 5 c 2, s 16.

[16] *Constitution of India 1950* Art 88 ('*COI 1950*').

[17] SH Patil, *The Constitution, Government and Politics in India* (Vikas Publishing House, 2016) 262.

[18] 'Article 76: Attorney-General for India', *Constitution of India* <https://www.constitutionofindia.net/constitution_of_india/the_union/articles/Article%2076>.

[19] Patil (n 17) 262.

The AG has never performed the function of PP under the Indian Constitution or the Code of Criminal Procedure ('CrPC'), which since before Independence has provided for the appointment of PPs for each local area by the relevant provincial/State governments.[20]

B *The Attorney General in Malaysia*

1 *Colonial Law Officers*

The office of AG in Malaysia has its local origin in the offices of the AG of the Straits Settlements ('SS') and the Legal Adviser ('LA') of the Federated Malay States ('FMS'). The former, based in Singapore, was assisted by an SG based in Penang. On the formation of the Malayan Union in 1946, the Law Officers in the States of Malaya were replaced by the AG and SG of the Malayan Union, and on the dissolution of the Union in 1948, by the AG and SG of the Federation of Malaya ('FM').[21]

Under the *FM Agreement 1948*, the AG was, together with the Chief Secretary and Financial Secretary, an *ex officio* member of both the Federal ExCo and Legislative Council ('LegCo').[22] The Agreement provided for the AG and SG to be appointed by the High Commissioner, as well as an LA for each State and Settlement.[23]

2 *The Merdeka Constitution*

In 1956, submissions were made before the FM Constitutional Commission (the 'Reid Commission') on how the position of the AG should be adapted with the advent of *Merdeka*. On behalf of the Malay Rulers, for instance, it was submitted that the AG should become a political appointment (and if the PM saw fit, a member of the Cabinet), with the legal service headed by a permanent SG.[24]

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[20] *Code of Criminal Procedure 1898* (India No V of 1898) ('*CrPC 1898*') s 492.

[21] Abdul Kadir Yusof, 'The Office of Attorney General, Malaysia' [1977] 2 *Malayan Law Journal* ms xvi.

[22] *Federation of Malaya Agreement 1948* (GN 6 of 1948) cll 23 & 37.

[23] In the case of the Malay States, to be appointed with the concurrence of the Ruler of the State: Ibid cll 84 & 85.

[24] Keeper of the Rulers' Seal, *Proposals of Their Highnesses the Rulers Made to the Constitutional Commission* (28 September 1956) [48] ('*Proposals of Their Highnesses*').

In February 1957, the Reid Commission delivered its report, which considered both options of a political and a non-political AG. It came down in favour of the latter option, but did not specifically exclude the former:

> In some Commonwealth countries the [AG] holds a political office. In others the political functions normally exercised by a political [AG] are exercised by a Minister of Justice or Minister of Law, while the [AG] (or Advocate-General) exercises the more professional functions of giving independent legal advice to the government, representing the government in the courts, and perhaps assuming responsibility for public prosecution. On the whole we prefer the latter. In the [UK] the political and the professional functions of the Law Officers are conventionally kept distinct and the latter are not regarded as within the jurisdiction of the Cabinet. It would be difficult to keep the functions distinct in a country exercising responsible government for the first time; and it is significant that India, Pakistan, and Ceylon have all preferred the non-political [AG]. In the draft Constitution we have assumed this solution, though the [UK] practice of having political Law Officers has not expressly been excluded.[25]

Following consideration by a Working Party of colonial officials and Malayan representatives, a more definitive stance on the side of a non-political, purely legal AG, with security of tenure and responsibility for criminal prosecutions, was adopted in the White Paper on constitutional proposals for the Federation:

> It is proposed to accept the recommendation of the Constitutional Commission that the [AG] should not hold a political office. It is also proposed that he should have the power, exercisable at his discretion, to institute, continue or discontinue any proceedings, other than proceedings before a Muslim court or a court-martial. It is essential that, in discharging his duties the [AG] should act in an impartial and quasi-judicial spirit. A clause has therefore been included to safeguard the [AG]'s position by providing that he shall not be removed from office except on the like grounds and in the like manner as a Judge of the [SCt].[26]

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[25] However, the appointment of political AG along the English model would have been impossible as a result of inclusion of the AG in the definition of an 'office of profit', the holding of which is a disqualification from membership of either House: Colonial Office (UK), *Report of the Federation of Malaya Constitutional Commission* (1957) draft Arts 42(1)(c) & 151(2) ('*Reid Commission Report*'); *Federal Constitution* Arts 48(1)(c) & 160(2) ('*FC*').

[26] Colonial Office (UK), *Constitutional Proposals for the Federation of Malaya* (Cmnd 210, 1957) [52] ('*White Paper*').

As before, the AG was required to be a person qualified to be a judge of the then-SCt,[27] but in the White Paper he was also required to be appointed from among the members of the JLS.[28]

In addition, while the Reid Commission had proposed to give the AG the right to take part in either House of Parliament and of any committees of which he was named a member (without having any vote),[29] the White Paper removed the AG's right to take part in parliamentary proceedings other than in committees.[30]

The amended provision on the AG was adopted as Article 145 of the Federal Constitution ('FC'). It is reproduced in its original and current forms, together with the original Reid Commission draft, at Appendix 1.

3 *The 1960 & 1963 constitutional amendments*

Not all provisions of the *Merdeka* Constitution came into force on *Merdeka* Day, and the AG remained an *ex officio* member of the LegCo until it was finally dissolved in 1959. RH Hickling, parliamentary draftsman and then-Commissioner of Law Revision, referring to this change, noted:

> One fact that has emerged is that since the disappearance from the political scene of the [AG], the Government has been handicapped by an absence of specialised legal talent on the Government benches.[31]

Within a year of the first meeting of the new Parliament, a constitutional amendment bill was introduced, which made extensive alterations to the checks and balances in the Constitution. One such change was to the office of AG. Tun Abdul Razak, then Deputy PM, introduced the change as follows:

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[27] The FM SCt consisted of a HCt and a Court of Appeal ('CA'). In 1963, these became the HCt in Malaya and the FCt of Malaysia. Appeals from the FCt to the Privy Council in London were retained until 1985, when the FCt was renamed the SCt. The SCt reverted to the name of FCt, with a new intermediate CA below it, in 1994.

[28] *FC* (n 25) Art 145(1).

[29] Colonial Office (UK) (n 25) draft Art 50.

[30] *FC* (n 25) Art 61.

[31] RH Hickling, 'The First Five Years of the Federation of Malaya Constitution' (1962) 4(2) *Malaya Law Review* 183, 194.

> Under the present arrangement the [AG], who is the Government's chief legal adviser, must be a permanent official in the [JLS]. It is not possible to have as [AG] a political man as is the practice in several countries including the [UK]. The Government is of the view that with the progress of our country and of our democratic institutions, it may prove desirable at some future date to have an [AG] as a member of the Government and a member of this House … to sit in this House to explain and answer legal matters.[32]

The 1960 amendment removed the AG's security of tenure and the requirement that he be appointed from the JLS, providing instead that he should hold office during the pleasure of the YDPA.[33]

Despite the previous precautions of both the Reid Commission and the Working Party, no consideration appears to have been given to separating the AG's quasi-judicial responsibilities in the area of criminal prosecutions from the now potentially political office of AG. Tan Sri Abdul Kadir Yusof, then Minister of Law and AG, wrote in 1977 that '[i]t was, no doubt, considered that the nation had sufficient political maturity to adopt the system and traditions which had worked with such eminent success in the [UK]'.[34]

The *Malaysia Act 1963* made further consequential amendments to Article 132 FC to provide that the AG should not be regarded as a member of the public services, except for the purpose of Article 136 (impartial treatment of federal employees) and Article 147 (protection of pension rights). The primary consequence of this amendment is that the AG, even if appointed from the JLS, does not come within the jurisdiction of the Judicial and Legal Service Commission ('JLSC') or enjoy the protections of Article 135 (restriction on dismissal and reduction in rank). The office of AG was also removed from the definition of an 'office of profit', to enable the AG to be a member of either House of Parliament.

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[32] Federation of Malaya, Parliamentary Debates, House of Representatives, 22 April 1960, vol II no 3, cols 309–10 (Tun Abdul Razak).

[33] *Constitution (Amendment) Act 1960* (No 10 of 1960) s 26.

[34] Abdul Kadir Yusof (n 21) xix.

4 *Attorney Generals since 1963*

The 1960 & 1963 amendments came into force upon the retirement of the last British AG, Tan Sri Cecil Sheridan, on Malaysia Day, 1963. His successor, Abdul Kadir Yusof, was not initially a politician, having previously been SG and a career legal officer. He became Minister for Legal Affairs (subsequently Law & Justice) in 1970, was sworn in as a Senator in 1971, and subsequently elected as a Member of Parliament ('MP') in 1974. He was succeeded as AG and Minister for Law & Justice by Hamzah Abu Samah, another MP, who held office from 1977 to 1980.

From the appointment of Abu Talib Othman in 1980, however, the AG reverted to being a career legal officer. Since then, no AG has been a member of Cabinet or of either House of Parliament, although one AG, Tommy Thomas (2018–20) has been appointed from outside the JLS.

A list of AGs since 1957 is provided in Appendix 2.

C *Recent reforms and developments*

1 *Kenya*

Upon independence in 1963, the constitutional provisions relating to the AG of Kenya were substantially similar to those contained in the *Merdeka* Constitution. The AG was to be a member of the public service appointed upon the advice of the PSC, was responsible for public prosecutions, and would hold office until retirement, unless removed by a tribunal on the grounds of misbehaviour or inability to perform the functions of his office.[35]

However, unlike in Malaysia, the AG of Kenya was also *ex officio* a non-voting member of the House of Representatives, and like Cabinet ministers, entitled to take part in the proceedings of both Houses.[36] These provisions were substantially unchanged when Kenya became a presidential republic in 1964, and when it adopted a revised

[35] *Constitution of Kenya 1963* Arts 86 & 189.

[36] Ibid Art 57.

Constitution in 1969.[37] In 1986, however, as in Malaysia in 1963, the security of tenure of the AG of Kenya was removed.[38]

Following its transformation into a multi-party democracy in 1992, Kenya adopted a new constitution in 2010, after a lengthy process that included the establishment of a Constitution of Kenya Review Commission, the convening of a National Constitutional Convention, a failed referendum in 2005, multiple Parliamentary Select Committees, a Committee of Experts and, finally, a successful referendum in 2010.[39]

The Commission in its final report recorded that 'the majority of the people lamented the lack of impartiality and independence in the discharge of functions by holders of constitutional offices' and that 'as regards the office of the [AG] there should be clear separation of powers '.[40]

All drafts of the new Constitution therefore provided for the separation of the offices of AG and DPP. While earlier drafts provided for security of tenure for both the AG and the DPP, the final draft that was approved in 2010 provides for security of tenure only for the DPP.

Under the 2010 Constitution, the AG is nominated by the President and appointed subject to the approval of the National Assembly (the lower House of Parliament).[41] The AG is the principal legal adviser to the Government and represents the Government in all legal proceedings other than criminal proceedings,[42] and is specifically required to 'promote, protect and uphold the rule of law and defend the public interest'.[43] In Kenya's reformed presidential system, the AG is a member of Cabinet and therefore cannot be a member of Parliament.[44] However, there have since been attempts to return Kenya to a parliamentary system of government.

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[37] *Constitution of Kenya 1969* Arts 26, 36 & 109.

[38] Constitution of Kenya Review Commission, *Final Report of the Constitution of Kenya Review Commission* (2005) 33.

[39] Christina Murray, 'Kenya's 2010 Constitution' (2013) 61 *Jahrbuch des öffentlichen Rechts der Gegenwalt* 747.

[40] Constitution of Kenya Review Commission (n 38) [20.3.4].

[41] *Constitution of Kenya 2010* Art 156(2).

[42] Ibid Art 156(4).

[43] Ibid Art 156(6).

[44] Ibid Art 152.

III PUBLIC PROSECUTIONS AND DIRECTOR OF PUBLIC PROSECUTIONS

A *Historical and comparative background*

1 *Prosecutions under the common law*

It has long been the responsibility of the Law Officers in England to pursue those criminal prosecutions—such as for treason, sedition, etc—that are of particular interest to the Crown.

However, outside the realm of State trials, the conduct of criminal prosecutions in England has historically been highly decentralized. Before the formation of police forces in the 19th century, the initiation and conduct of prosecutions for common offences was left to aggrieved citizens, justices of the peace or justices' clerks. With the formation of the first local police forces—beginning with the Metropolitan Police in 1829—the prosecution of offenders began to be taken over by local police forces.[45]

Although the prosecution of criminal offences in England has never been restricted to the Crown and its officers, where prosecutions are initiated by other parties, the AG has a prerogative, on behalf of the Crown, to issue a *nolle prosequi* to halt the prosecution.

2 *The Director of Public Prosecution in England*

The lack of a central public prosecutor in England was the subject of numerous public inquiries and legislative initiatives through most of the 19th century. Finally, in 1879, a law was passed establishing the office of DPP, appointed by the Home Secretary and with responsibility for initiating and undertaking criminal prosecutions under the superintendence of the AG.[46]

The creation of the office of DPP did not result in the centralization of all prosecutions. Instead, the right of private citizens to initiate and undertake prosecutions was

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[45] Edwards (n 1) 337–8; Philip B Kurland and DWM Waters, 'Public Prosecutions in England, 1854–79: An Essay in English Legislative History' [1959] (4) *Duke Law Journal* 493.

[46] *Prosecution of Offences Act 1879* (UK) 42 & 43 Vict c 22.

expressly preserved,[47] the DPP's duty being only to undertake criminal proceedings in cases of 'importance or difficulty' or which for any other reason required his intervention, or in special cases as directed by the AG.[48]

Accordingly, for most of the 20th century, the overwhelming majority of prosecutions in England continued to be brought by local police forces, government and local departments, corporations and private individuals, rather than by the DPP.[49] Nevertheless, there are a large number of statutory offences (eg, under the *Official Secrets Act 1920*) that cannot be prosecuted except with the consent of the AG, the DPP or other specified authority.[50]

3 *Public Prosecutors in India*

The 1898 Indian CrPC originally provided for PPs to be appointed in any local area by the Governor-General ('GG') in Council or the local government. This power was transferred to provincial governments in 1935, and to State governments in 1950. Where no PP had been appointed, the district magistrate could appoint someone to act as PP for the purpose of any case.[51]

Under CrPC, trials before a court of session were required to be prosecuted by a PP,[52] but a trial before a magistrate's court could be prosecuted by the State Advocate-General, standing counsel, government solicitor, PP or other officer empowered by the State government. In addition, a magistrate could permit any other person to prosecute a case before him.[53]

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[47] *Ibid 7.*

[48] Ibid 2.

[49] As late as 1960, the DPP brought only 4.9% of prosecutions in the English assizes and quarter sessions, and only 0.05% of prosecutions in the magistrates' courts: Edwards (n 1) 337.

[50] CPS, 'Legal Guidance: Consents to Prosecute' <https://www.cps.gov.uk/legal-guidance/consents-prosecute>.

[51] *CrPC 1898* (n 20) s 492.

[52] Ibid s 270.

[53] Ibid s 495.

B *The Public Prosecutor in Malaysia*

1 *The Attorney General as sole Public Prosecutor*

Unlike their Indian forerunner, the Criminal Procedure Codes ('CPCs') of the SS and FMS each provided for a single PP in the person of the colonial AG or LA.[54] The FMS CPC, which has since been extended throughout Malaysia, provides that the AG 'shall be the [PP] and shall have the control and direction of all criminal prosecutions and proceedings under this Code'.[55]

However, the PP's power to conduct prosecutions under the CPC was never exclusive: the CPC also allowed any public officer authorized by statute to prosecute in any court. In addition, in summary, non-seizable offences, the CPC also authorized police officers, officers of certain government departments, local authorities and statutory bodies, as well as any private citizen prosecuting an offence against his person or property, to conduct prosecutions in a magistrate's court.[56]

As we have seen, the *Merdeka* Constitution as drafted by the Working Party entrenched the status quo by vesting in the AG the power to institute, conduct or discontinue proceedings in the criminal courts. However, it was not until the 1997 case of *Repco Holdings v PP* that the AG's powers in respect of criminal prosecutions were held to be exclusive not just under the CPC, but constitutionally under Article 145(3) FC as well, and that statutory provisions conferring upon officers of the Securities Commission the power to conduct prosecutions under those statutes were held to be unconstitutional.[57]

The finding in *Repco Holdings* has been doubted in a number of other High Court ('HCt') cases, but the judgment has been applied by higher courts and has never been overturned.[58] At present, the CPC permits advocates and various public officials with the written authorization of the PP to conduct prosecutions, subject to his control and

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[54] *Criminal Procedure Code* (SS No X of 1910) s 384; *Criminal Procedure Code* (FMS cap 6, now Act 593) s 376 ('*CPC*').

[55] *CPC* (n 54) s 376(1).

[56] Ibid s 380.

[57] *Repco Holdings Bhd v Public Prosecutor* [1997] 3 MLJ 681, 691 (Gopal Sri Ram JCA).

[58] Roger Tan, 'The ACA and the Power to Prosecute', *New Straits Times* (online, 16 July 2008) <https://www.malaysianbar.org.my/article/news/legal-and-general-news/members-opinions/the-aca-and-the-power-to-prosecute>.

direction,[59] but continues also to permit a private citizen in a magistrate's court to prosecute non-seizable offences against his own person or property.[60]

2 *Reviewability of the Public Prosecutor's decisions*

In *Long bin Samat v PP*, the FCt held that the AG/PP had a 'very wide discretion' under Article 145(3) FC that could not be the subject of judicial review:

> Not only may he institute and conduct any proceedings for an offence, he may also discontinue criminal proceedings that he has instituted, and the courts cannot compel him to institute any criminal proceedings which he does not wish to institute or to go on with any proceedings which he has decided to discontinue. … Anyone who is dissatisfied with the [AG]'s decision … should seek his remedy elsewhere, but not in the courts.[61]

Where the decision being challenged is the decision to bring criminal proceedings (eg, on the grounds of *mala fides*), there are often steps that can be taken within the criminal proceedings themselves. In very rare circumstances, judicial review can also be brought.[62] However, it is much more difficult where the PP unjustifiably refuses to bring criminal proceedings.

In England, as we have seen, where the prosecuting authorities decline to bring a criminal prosecution, a private citizen may nonetheless pursue a private prosecution (subject to the AG's right to issue a *nolle prosequi*), a right described by the House of Lords in *Gouriet's case* as 'a valuable constitutional safeguard against inertia or partiality on the part of authority'.[63]

In Malaysia, however, because the AG has the exclusive power to initiate criminal prosecutions, where the AG refuses to bring a prosecution, there is no person or authority that can cause one to be brought. In 2015, then-AG Tan Sri Mohamed Apandi Ali exonerated then-PM Najib Razak over his involvement in the 1MDB affair, directed

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[59] *CPC* (n 54) s 377.

[60] Ibid s 380.

[61] *Long bin Samat & Ors v Public Prosecutor* [1974] 2 MLJ 152, 158 (Suffian LP).

[62] See *Sundra Rajoo a/l Nadarajah v Menteri Luar Negeri, Malaysia & Ors* [2021] MLJU 943.

[63] *Gouriet v Union of Postal Workers & Ors* [1978] AC 435 ('*Gouriet's Case*') (Lord Wilberforce).

the MACC to close its as-yet incomplete investigations, and refused to consider the MACC's requests for mutual legal assistance from foreign agencies. The Malaysian Bar sought to challenge the AG's decisions, but was refused leave to bring judicial review, and its appeal against the refusal was dismissed by the Court of Appeal ('CA').[64] Leave to appeal to the FCt was also subsequently refused.

C *Recent reforms and developments*

1 *Australia*

The office of DPP was first introduced by the State of Victoria in 1982, after a study of the office of DPP in England & Wales. The objectives of the reform were 'the removal of the process of criminal prosecution from the political arena' and 'the creation of a more efficient system for the operation and conduct of prosecutions in the superior courts'.[65]

The Victorian Act provided for the DPP to take over all criminal prosecutions conducted by the AG, preserving only the AG's power to issue a *nolle prosequi*.[66] While the DPP has independent authority over his prosecutorial functions, he is responsible to the AG for the due performance of those functions, and has to submit to the AG an annual report, which the AG must lay before both Houses of Parliament.[67] The DPP has security of tenure and cannot be removed from office except with the approval of both Houses of Parliament.[68]

Over the following years, the Commonwealth and every other State and territory in Australia have followed suit in legislating for the appointment of DPPs. In general, the Commonwealth DPP is responsible for prosecuting offences under Commonwealth

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[64] 'Leave Application in the Federal Court of Malaysia (28 July 2017): Malaysian Bar v Attorney General of Malaysia & Malaysian Anti-Corruption Commission', Circular No 157/2017 from Roger Chan, Secretary of the Malaysian Bar to Members of the Malaysian Bar, 18 July 2017.

[65] *The Pursuit of Justice: 25 Years of the DPP in Victoria* (Director of Public Prosecutions, Victoria, 2008) 8 ('*The Pursuit of Justice*').

[66] *Director of Public Prosecutions Act 1982* (Vic) ss 14(2) & 18(2); *Public Prosecutions Act 1994* (Vic) s 25.

[67] *Public Prosecutions Act 1994* (n 66) ss 10 & 12.

[68] *Constitution Act 1975* (Vic) s 87AE.

laws, while State and territory DPPs are responsible for prosecuting offences under State or territory laws.

The Commonwealth legislation, adopted in 1983, contains several noteworthy features that preserve the AG's overall ministerial responsibility for criminal prosecutions. The Commonwealth DPP is appointed for a renewable fixed term of up to seven years, and may be removed by the GG on the grounds of misbehaviour or incapacity.[69] The DPP's powers to institute and carry on criminal prosecutions are not exclusive, and are without prejudice to the right of the AG and any other person to initiate and conduct prosecutions.[70]

The Act provides for the AG and the DPP to consult with each other in respect of the latter's exercise of his functions or powers, where either requests the other to do so.[71] It also provides for the AG, after consultation with the DPP, to issue directions and guidelines for the conduct of prosecutions. These may relate to particular cases, but must in any case be laid before both Houses of Parliament and published in the *Gazette*.[72] Only seven directions were issued by the Commonwealth AG during the period 1983–2019.[73]

2 *India*

India continues to have a decentralized system of prosecuting officers. The 1973 CrPC provides for the Central and State Governments to appoint a PP for each HCt, after consultation with that court, to conduct prosecutions on behalf of that Government, as the case may be. Each State Government must also appoint a PP in every district, while the Central Government may appoint one or more PPs for the purpose of conducting any case or class of cases in any district or local area.[74]

One or more Additional PPs may also be appointed by the Central and State Governments for each HCt or district. In addition, Assistant PPs are also appointed by

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[69] *Director of Public Prosecutions Act 1983* (Cth) ss 18 & 23.

[70] Ibid s 10.

[71] Ibid s 7.

[72] Ibid s 8.

[73] 'Australia's Independent Prosecution Service', *Transparency Portal* (19 December 2019) <https://www.transparency.gov.au/annual-reports/office-director-public-prosecutions/reporting-year/2018-2019-10>.

[74] *Code of Criminal Procedure 1973* (India No 2 of 1974) ('*CrPC 1973*') s 24(1)–(3).

the State Government, and may be appointed by the Central Government for any case or class of cases, to conduct prosecutions before magistrates' courts.[75]

District PPs and Additional PPs must be appointed from a panel of names drawn up by the District Magistrate or, where there is a regular cadre of prosecuting officers, from that cadre.[76] Following a series of recommendations by the Law Commission of India,[77] the CrPC now provides that a State Government may establish a Directorate of Prosecution headed by a Director of Prosecution, under the administrative control of the State Home Department, to have authority over all PPs and other prosecuting officers in the State.[78]

3 *England & Wales*

As a result of concerns over the quality and independence of prosecutorial decisions made by local police forces in England & Wales, and following the recommendations of a Royal Commission on criminal procedure, a national Crown Prosecution Service ('CPS') headed by the DPP was created in 1986 to take over the conduct of criminal prosecutions from local police forces and their local prosecuting solicitors' departments.[79] Each CPS area in England & Wales has a Chief Crown Prosecutor and various Crown Prosecutors who operate under the direction of the DPP.[80]

As before, the DPP operates under the superintendence of the AG, but is now appointed by the AG instead of by the Home Secretary,[81] currently for a renewable term of five years.[82] The DPP makes an annual report to the AG on the discharge of his functions, which the AG must lay before Parliament. The DPP also issues a *Code for*

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[75] Ibid s 25.

[76] Ibid s 24(4)–(5).

[77] See Law Commission of India, *One Hundred and Fifty-Fourth Report: On the Code of Criminal Procedure, 1973* (August 1996) 8–12.

[78] *CrPC 1973* (n 74) s 25A.

[79] Joshua Rozenberg, *The Case for the Crown: The Inside Story of the Director of Public Prosecutions* (Equation, 1987) 81–2.

[80] *Prosecution of Offences Act 1985* (UK) s 1.

[81] Ibid ss 2 & 3.

[82] 'Next Director of the CPS Announced', *GOV.UK* <https://www.gov.uk/government/news/next-director-of-the-cps-announced>.

Crown Prosecutors, which sets out guidelines for the institution and continuance of prosecutions.[83]

While the DPP has now taken over conduct of prosecutions formerly initiated by police, immigration, customs and revenue authorities, among others, the 1985 Act preserves the rights of other parties, such as local authorities and private citizens, to bring criminal prosecutions. However, the DPP has the right to take over any such prosecution at any stage.[84]

In addition to the CPS, a Serious Fraud Office ('SFO') was created in 1988 as a specialist body to investigate and prosecute serious or complex fraud. Like the DPP, the SFO Director also operates under the superintendence of the AG, and delivers to him an annual report, which the AG must lay before Parliament.[85] In 2008, the SFO was also given authority to investigate and prosecute cases of bribery and corruption.[86]

In 2008, the Government published a White Paper and draft bill that sought, *inter alia*, to reform the role of the AG in relation to criminal prosecutions.[87] The draft bill would have ended the AG's power to give directions in individual cases to the DPP and SFO Director, save in exceptional cases giving rise to issues of national security, which the AG would have to report to Parliament.[88] The requirement for the AG's consent to the prosecution of certain offences would have been transferred to the DPP,[89] and the relationship between the AG and the Directors would have been governed by a statutory protocol.[90] The Directors would only have been removable by the AG on the grounds of inability, unfitness or unwillingness to carry out their functions, having regard to the protocol.[91] The AG's power to issue *nolle prosequi* would also have been abolished.[92]

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[83] *Prosecution of Offences Act 1985* (n 80) ss 9–10.

[84] Ibid s 6.

[85] *Criminal Justice Act 1987* (UK) s 1 & Sch 1 para 3.

[86] Ibid s 2A.

[87] Ministry of Justice (UK), *The Governance of Britain: Constitutional Renewal* (Cm 7342-I, 25 March 2008); *Draft Constitutional Renewal Bill* (Cm 7342-II).

[88] *Draft Constitutional Renewal Bill* (n 87) cll 2 & 12–15.

[89] Ibid cll 7 & 8.

[90] Ibid cl 3.

[91] Ibid cll 4–6.

[92] Ibid cl 11.

In the end, however, the Government decided not to proceed with the reforms proposed in the White Paper, choosing instead to implement changes to the relationship between the AG and the DPP and SFO Director via a new non-statutory protocol.[93]

4 *Kenya*

Under Kenya's 2010 Constitution, the DPP is now a separate constitutional officer from the AG. He must be qualified to be a HCt judge,[94] and is nominated by the President and appointed for a non-renewable term of eight years, subject to the approval of the National Assembly.[95] He may instruct the Inspector-General of Police to investigate any crime,[96] and has the power to initiate prosecutions, to take over prosecutions initiated by other authorities, subject to their permission, and to discontinue proceedings, subject to the permission of the court.[97] The DPP is required to 'have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process'.[98]

The DPP may not be removed from office except for gross misconduct or misbehaviour, inability to perform the functions of his office, etc, by a tribunal constituted by the President on the advice of the PSC.[99]

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[93] Alexander Horne, *The Law Officers* (No SN/PC/04485, House of Commons Library, 1 August 2014).

[94] *Constitution of Kenya* (n 41) Art 157(3).

[95] Ibid Art 157(2) & (5).

[96] Ibid Art 157(4).

[97] Ibid Art 157(6) & (8).

[98] DP

[99] *Constitution of Kenya* (n 41) Art 158.

IV THE ATTORNEY GENERAL AS GUARDIAN OF THE PUBLIC INTEREST

A *Background*

In addition to his functions in respect of criminal proceedings and in civil proceedings where the Crown is party, the AG also has a number of responsibilities as the guardian of the public interest in civil proceedings at common law. For instance, the AG has the sole power to bring proceedings for contempt of court, to bring proceedings to restrain vexatious litigants, and to bring or intervene in certain matrimonial, charity and other legal proceedings in the public interest.

Examples of the last category of proceedings include actions brought by the AG or by a third party in his name and with his consent (through 'relator' proceedings) to enforce public rights in the civil courts: eg, to prevent the commission of a criminal offence or other breach of public law.

The AG's exclusive role in respect of civil actions in the public interest was highlighted in the 1977 case of *Gouriet v Union of Postal Workers*.[100] In that case, the English AG refused his consent to allow a third party to bring a relator proceedings for an injunction to prevent an illegal boycott of the processing of mail to South Africa. It was held by the courts that the AG's exercise of his discretion to refuse consent to relator proceedings was not reviewable, and that the only option open to the plaintiff was a private prosecution after a crime had been committed, subject to the AG's power to issue a *nolle prosequi* or to call in the private prosecution and offer no evidence.

[100] *Gouriet's Case* (n 63).

B *Public interest proceedings in Malaysia*

In the 1988 *UEM case*, the then-SCt applied the principle in *Gouriet's case* that only the AG can enforce public law rights in civil proceedings, rejecting Lim Kit Siang's attempt to injunct UEM's signing of the North–South Highway agreement with the Federal Government.[101] In Malaysia, the AG's special role in enforcing public law rights is reinforced by provisions of the *Government Proceedings Act 1956* that require the consent of the AG for actions brought by private persons against public nuisances where no special damage has been caused,[102] and against alleged breaches of express or constructive trusts for public, religious, social or charitable purposes.[103]

Nevertheless, the *Gouriet* principle that the AG's discretion whether or not to grant consent for relator proceedings is unreviewable has ceased to be good law in Malaysia. In 2019, the FCt held that the AG's discretion to give or withhold consent for relator actions under section 9 of the 1956 Act was not unfettered and could be reviewed by the courts.[104] Thus, while the AG continues to play a special role in the enforcement of public rights in the civil courts, that power is subject to judicial review.

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[101] *Government of Malaysia v Lim Kit Siang; United Engineers (M) Bhd v Lim Kit Siang* [1988] 2 MLJ 12 ('*UEM Case*').

[102] *Government Proceedings Act 1956* (Act 359) ('*GPA 1956*') s 8.

[103] Ibid s 9.

[104] *Peguam Negara Malaysia v Chin Chee Kow (as secretary of Persatuan Kebajikan dan Amal Liam Hood Thong Chor Seng Thuan) and another appeal* [2019] 3 MLJ 443.

V GOVERNMENT LEGAL SERVICES

A *Historical and comparative background*

1 *England*

As previously noted, the AG and SG in England & Wales have historically been MPs (and, occasionally, members of the House of Lords) who are senior members of the English Bar. A Law Officers' Department or Legal Secretariat (now also known as the AG's Office) was created in 1893 to provide clerical support to the AG and SG.

The office of Treasury Solicitor or Solicitor of the Exchequer has existed in England since at least 1655. Since 1806, the office has been held by a barrister, who has been precluded from private practice. Beginning in 1841, the Treasury Solicitor's Department has absorbed the solicitors' offices of most other government departments.[105] In 1884, the office of Treasury Solicitor was also combined with that of DPP, but the two offices were again split in 1908.[106]

In 2015, the Treasury Solicitor's Department was renamed the Government Legal Department ('GLD'),[107] with the Treasury Solicitor as the Permanent Secretary to the GLD and the head of the Government Legal Service.[108]

Today, the Law Officers' departments comprise the AG's Office as well as the other departments superintended by the AG; namely, the CPS, SFO, GLD and Her Majesty's CPS Inspectorate.[109] In addition, there is a separate Office of Parliamentary Counsel (ie, parliamentary draftsmen) within the Cabinet Office.

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[105] Edwards (n 1) 372–3.

[106] *Prosecution of Offences Act 1884* (UK) 47 & 48 Vict c 58, s 2; *Prosecution of Offences Act 1908* (UK) 8 Edw VII c 3, s 1.

[107] 'Treasury Solicitor's Department', *GOV.UK* https://www.gov.uk/government/organisations/treasury-solicitor-s-department

[108] GLS, 'About Us', *GOV.UK* https://www.gov.uk/government/organisations/civil-service-government-legal-service/about

[109] AG's Office, 'About Us', *GOV.UK* https://www.gov.uk/government/organisations/attorney-generals-office/about

2 *Australia*

In Australia, the Commonwealth AG is a Senator or MP who is a solicitor or barrister, in line with the Westminster politico-legal model. As First Law Officer of the Commonwealth, she has the statutory power to issue directions to any body carrying out Commonwealth legal work.[110] Each of the Australian States also has its own Law Officers and legal services.

The AG is supported by the Commonwealth SG, the Second Law Officer of the Commonwealth, a purely legal position which is filled for a fixed term by a senior barrister who is not a Senator or MP. The SG's role is to act as counsel for the Commonwealth as well as to provide opinions on questions of law referred to him by the AG, and to carry out other functions ordinarily performed by counsel.[111]

The AG's Department is headed by a permanent Secretary, who is a non-lawyer. Within the AG's Department is the office of the Australian Government Solicitor ('AGS', known until 1983 as the Commonwealth Crown Solicitor)—who performs a role similar to the Treasury Solicitor in the UK.

In comparison with the centralized GLD in the UK, however, the Australian Commonwealth legal services have become relatively decentralized in recent years. The AGS charges other Commonwealth government departments for the majority of its legal services.[112] In 2015, most legal work was done by in-house departmental legal teams (52%) and private law firms (22%), with the AGS handling only 15% of Commonwealth legal work (down from 46% in 1998).[113]

In 2018, an Australian Government Legal Service was established as the professional network covering all Commonwealth government lawyers, regardless of which department or entity they work for.[114]

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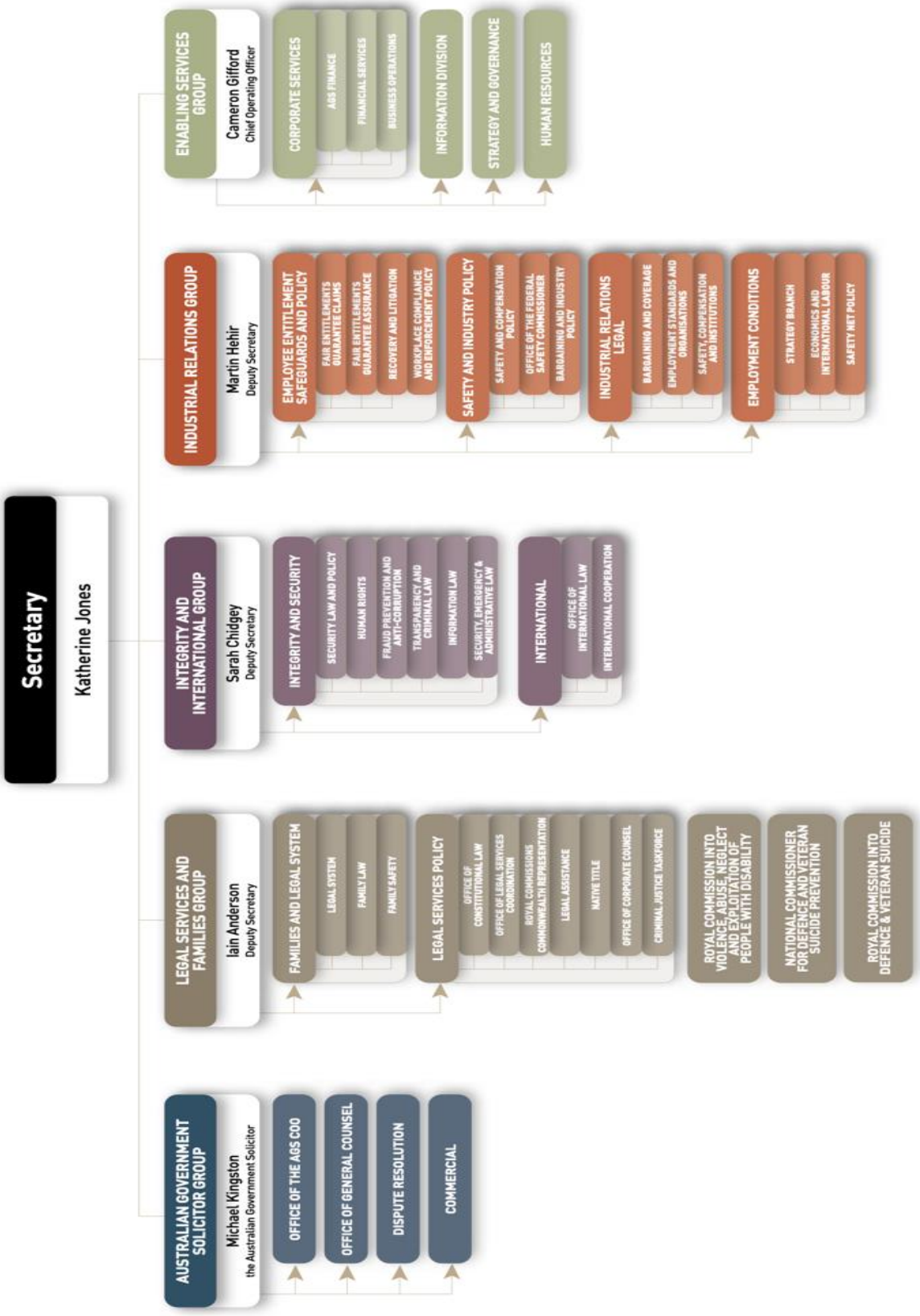
[110] *Judiciary Act 1903* (Cth) s 55ZF.

[111] *Law Officers Act 1964* (Cth) s 12.

[112] Chris Moraitis, *Secretary's Review of Commonwealth Legal Services* (AG's Department, Commonwealth of Australia, 2016) 41.

[113] Ibid 3.

[114] 'About the Australian Government Legal Service', *Australian Government Legal Service* https://www.governmentlawyers.gov.au/about



Commonwealth of Australia AG's Department, organization chart (24/08/2021)

3 *India*

The AG of India is assisted by an SG and an Additional SG. There is, in addition, an Assistant SG for each High Court. The Indian Law Officers are senior advocates appointed from the Bar for a fixed term, who are not allowed to represent or advise clients other than public authorities and are paid monthly retainers and fees for court appearances.[115] Each State in India also has its own Advocate-General,[116] who may be assisted by an officer known as the Legal Remembrancer.

In India, the separation of the Executive and Judiciary was a key demand of the Indian independence movement. Hence, when the Indian Civil Service ('ICS') was replaced by the Indian Administrative Service upon Independence, a policy decision was taken to bring to an end the colonial practice of appointing ICS officers to serve as District and Sessions judges.[117]

The Indian public services may be organized at Union or State level by the appropriate legislature, or constituted as an All-India service by the Council of States.[118] Unlike in Malaysia, the various public services do not each have Service Commissions of their own, but all come under either the Union or State PSC (or the Joint State PSC of a group of States).[119]

Since Independence, the subordinate judiciary has been organized at the State level, with appointments made by State Governors in consultation with the local High Court,[120] with control over promotions, postings and leave being exercised by the relevant High Court.[121] Although the Constitution of India was amended in 1976 to allow for an All-India judicial service, no action has yet been taken to set one up, due

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[115] *Law Officers (Conditions of Service) Rules 1987* (India) rr 7 & 8.

[116] *COI 1950* (n 16) Art 165.

[117] Law Commission of India, *One Hundred Sixteenth Report: On the Formation of an All-India Judicial Service* (November 1986) 3.

[118] *COI 1950* (n 16) Art 309.

[119] Ibid Art 315.

[120] Ibid Art 233.

[121] Ibid Art 235.

to linguistic difficulties.[122] The Indian LS, constituted in 1957, serves the Union Government only.[123]

B *Government legal services in Malaysia*

1 *The Judicial & Legal Service*

Unlike in India, the principle of the separation of powers, as far as the subordinate judiciary was concerned, was not a significant political concern in Malaya at the time of *Merdeka*. No action was therefore taken to separate the JLS into distinct judicial and legal services, a situation that largely continues to this day.

However, as the Reid Commission recognized in its report, the continued existence of a combined JLS was not in strict accordance with constitutional principles, and would therefore need to be addressed at some point in the future:

> It will no doubt be necessary, at some future time, to apply the principle of separation of powers more strictly and thus deprive public officers of magisterial powers.[124]

In recent times, concerns that sessions court judges and magistrates appear to be under the influence of the AG have led to efforts to achieve at least an administrative separation between the judicial and legal divisions of the JLS. Under this proposal, the legal division of the JLS would come under the AG, while the judicial division would come under the Chief Registrar ('CR') of the FCt.[125]

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[122] *Constitution (Forty-Second Amendment) Act 1976* (India); amending *COI 1950* (n 16) Art 312.

[123] *Indian Legal Service Rules 1957*.

[124] Colonial Office (UK) (n 25) [128].

[125] Razak Ahmad, 'Judicial and Legal Service Commission to Be Split', *The Star* (19 March 2017) https://www.thestar.com.my/news/nation/2017/03/19/judicial-and-legal-service-commission-to-be-split

2 *The Judicial & Legal Service Commission*

At the 1956 London Conference, it was agreed that in order for an independent Federation to maintain an 'efficient and contented public service', it was essential that the service conditions and prospects of public servants should be free from political influence:

> The first essential for ensuring an efficient administration is that the political impartiality of the public service should be recognised and safeguarded. … [I]n order to do their job effectively public servants must feel free to tender advice to Ministers, without fear or favour, according to their conscience and to their view of the merits of a case. … [P]ublic servants should know that their service conditions and prospects are not subject to political or personal influence of any kind.

Accordingly, it was agreed that while the Government and Legislature would be responsible for fixing establishments and terms of employment, there should be a PSC, JSC and Police Service Commission, each independent of the Executive, and with authority over appointments, promotions and discipline of their service members.

In the Reid Commission draft, the planned JSC was given jurisdiction over members of the JLS and retitled the JLSC. The JLSC would consist of the CJ as chairman, the AG, the chairman of the PSC and two other persons appointed by the YDPA, at least one of whom should be a serving or retired SCt judge.[126] In view of the inclusion of the AG in the membership of the JLSC, the Reid Commission disapproved of the suggestion that the JLSC should have jurisdiction over SCt judges, and provided that they should be appointed by the YDPA after consultation with the CJ.[127]

Under the White Paper and *Merdeka* Constitution, the membership of the JLSC was finalized with the CJ as chairman, the senior puisne judge,[128] the AG, the deputy chairman of the PSC, and one or more serving or retired SCt judges appointed by the YDPA after consultation with the CJ. The JLSC was not given jurisdiction over the AG or SCt judges.[129] However, the YDPA was required to act on the recommendation of the

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[126] Colonial Office (UK) (n 25) draft Art 130.

[127] Ibid [124].

[128] Ie, the senior judge other than the CJ.

[129] *FC* (n 25) Art 138.

JLSC in the appointment of SCt judges,[130] as well as in the appointment of members of tribunals constituted to advise on their removal, and on their suspension pending the report of such tribunals.[131]

3 *The 1960 & 1963 constitutional amendments*

The 1960 amendment abolished the JLSC and placed members of the JLS under the jurisdiction of the PSC. The YDPA was no longer required to act on the recommendation of the JLSC in the appointment or suspension of SCt judges and in the appointment of tribunals appointed to advise on their removal.[132]

The *Malaysia Act 1963*, however, restored jurisdiction over members of the JLS to a recreated JLSC with a very different membership. The JLSC now comprises the chairman of the PSC as chairman, the AG (or, if the AG is an MP/Senator or is appointed from outside the JLS, the SG), and one or more members who are serving or retired superior court judges,[133] or who are qualified to be appointed as such. However, the JLSC's role in the appointment and suspension of superior court judges and in the appointment of tribunal members was not restored.

At present, the additional members of the JLSC consist of the CJ, the President of the CA, the two Chief Judges and three other FCt judges.[134] There is also a Board of Officers, consisting of the SG and the CR, to which has been delegated approvals of confirmation of service and conferment of pensionable status.[135]

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[130] The YDPA also had to consult with the Conference of Rulers and could, after considering the advice of the PM, refer a recommendation back to the JLSC once: Ibid Art 123(3) & (4).

[131] Ibid Art 125(4) & (5).

[132] *Constitution (Amendment) Act 1960* (n 33).

[133] Ie, judges of the High Court or above.

[134] 'Members of the Commission', *JLSC Official Website* http://www.spkp.gov.my/portal/eng/ahliSuruhanjaya.php

[135] JLSC, 'Board of Officers' http://www.spkp.gov.my/portal/eng/jemaahPegawai.php

4 *The Federal Attorney General Chambers today*

The AG is the only Law Officer in Malaysia who holds a constitutional office, although the Constitution refers to and presupposes the existence of an office of SG.[136]

At present, the AG is assisted by an SG and an SG II, whose responsibilities are divided as follows:

SG	SG II
Prosecution Division	Advisory Division
Civil Division	Parliamentary Draftsman
Appellate & Trial Division	Commissioner of Law Revision and Law Reform
Management Division	International Affairs Division
	Research Division
	Shari`ah and Harmonisation of Law Division

The organization of the Federal AGC is set out in the chart at Appendix 3.

5 *State Legal Advisers and Attorney Generals*

(a) Background

In 1956, counsel for the Malay Rulers submitted to the Reid Commission that the position of State LA should not ordinarily be filled from the Federal LS because of the possibility of conflicts of interest:

> It is felt that because of the possibility of conflicts on those matters on which legal advice is necessary the posts of [LAs] should, in principle, be divorced from the Federal [LS], and the view Their Highnesses and their advisers came to ultimately was that the best solution would be … [to] let the State Governments retain their own [LAs] to advise them.[137]

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[136] *FC* (n 25) Art 138(2)(b).

[137] Federation of Malaya Constitutional Commission, *Hearing of Counsel on Behalf of Their Highnesses the Rulers Held in the Executive Council Chamber, Maxwell Road, Kuala*

While it might in some States be necessary to second a member of the federal LS to the State, the Rulers preferred where possible to be able to appoint as LA a private practitioner who was not a member of the federal LS—on a part-time basis if necessary—due to a fear of divided loyalties.[138]

While both the Reid Commission draft and the *Merdeka* Constitution were silent on the manner of appointment of State LAs, Article 132 FC envisages that State LAs may be appointed from outside the JLS, providing that an LA is not to be regarded as a member of the public services—

> … if provisions for the manner of his appointment and removal from office is [*sic*] specifically included in the Constitution of the State, or if he is appointed otherwise than from among the members of the [JLS] or of the public service of the State.[139]

Since *Merdeka*, however, the practice has emerged of State LAs invariably being appointed from among the members of the JLS.

(b) Manner of appointment in the States of Malaya

In 1992, following one of then-PM Dr Mahathir Mohamad's conflicts with the Malay Rulers, the YDPA and six of the Rulers—with the exception of the Sultans of Kedah, Kelantan and Johore—adopted a Proclamation of Constitutional Principles,[140] which stated, *inter alia*, that:

> We shall appoint the State Secretary, the State [LA] and the State Financial Officer on the recommendation of the appropriate [PSC], and also in accordance with the practice and the provisions of the State Constitution, after the name of the candidate has been submitted to us by the [MB].[141]

Lumpur, on Friday and Saturday, 14th and 15th September, 1956 (2 October 1956) 89 ('*Hearing of Counsel on Behalf of Their Highnesses*') (Neil Lawson QC).

[138] Keeper of the Rulers' Seal (n 24) [50].

[139] *FC* (n 25) Art 132(4)(b).

[140] MalaysiaNow, 'Code of Ethics Signed by Malay Rulers 30 Years Ago Draws the Line on Politics, Business and Media', *MalaysiaNow* (1 July 2021) https://www.malaysianow.com/news/2021/07/01/code-of-ethics-signed-by-malay-rulers-30-years-ago-draws-the-line-on-politics-business-and-media

[141] 'Proclamation of Constitutional Principles' (4 July 1992) https://www.malaysianow.com/uncategorized/2021/07/01/proclamation-of-constitutional-principles/ [5.1].

Between 1993 and 1996, these six States, together with Malacca and Penang, adopted constitutional amendments removing the role of the Ruler or Yang di-Pertua Negeri ('YDPN') and Menteri Besar ('MB') or Chief Minister ('CM') of the State in the appointment of the State Secretary, State LA and State Financial Officer. The three senior officers are now to be appointed 'by the appropriate Service Commission from amongst the members of any of the relevant public services'.[142] The appropriate Service Commission and the relevant public service are not stated, but from the wording of Art 132(4)(*b*), it appears that a State LA may be appointed from the JLS or from the State public service,[143] or from neither service.

In Kedah, Kelantan and Johore, on the other hand, the Ruler retains the role of appointing the LA from amongst full-time members of the public services upon the recommendation of the appropriate Service Commission (which, again, is not stated). The Ruler must consider the advice of the MB and may once refer the recommendation back to the JLSC for reconsideration.[144]

(c) The State Attorney General Chambers in Sabah and Sarawak

In Sabah and Sarawak, each State has a State AG who is not recruited from the JLS, while the senior JLS officer in each State is the federally-appointed State Director of Prosecutions.[145] The State AG is appointed by the YDPN on the advice of the CM from a list drawn up by the State PSC, after consulting the Federal Government.[146] Unlike the States of Malaya, each of the Borneo States has its own State AGC and LS, which recruits its own legal officers, and from whose ranks the State AG is often chosen.

The *Malaysia Agreement 1963* provided for the establishment of a branch in Borneo of the JSLC, which had jurisdiction over members of the JLS employed in the Borneo States, as well as members of the State public services of the Borneo States seconded

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[142] Eg, *Constitution of the State of Penang* Art 6A; *Laws of the Constitution of Selangor 1959* Art 52.

[143] The Federal PSC has jurisdiction over the State public services in Malacca and Penang, as well as in Negeri Sembilan and Perlis by virtue of State enactments: *FC* (n 25) Art 139(1) & (2).

[144] Eg, *Law of the Constitution of 1895* (Johore) Second Part, Art 6; This follows the procedure for appointments to 'special posts': *FC* (n 25) Art 144(4).

[145] For a brief period in 1976, the State AGs of Sabah and Sarawak also held the position of DPPs in their States: *Criminal Procedure Code* (Act 593) s 376(1)(iA) ('*CPC*'); inserted by the *Criminal Procedure Code (Amendment and Extension) Act 1976* (Act A324) s 2; repealed by the *Criminal Procedure Code (Amendment) Act 1976* (Act A365) s 3.

[146] *Constitution of the State of Sabah* Art 11; *Constitution of the State of Sarawak* Art 11.

to the JLS, until August 1968, and thereafter until the Federal Government decided to the contrary.[147] This provision was finally repealed in 1976. Since the disbandment of the branch, the members of the State LSs in the Borneo States have come under the jurisdiction of their State PSCs.

(d) Relationship with the Executive Council and Legislature

The Reid Commission and White Paper draft constitutions of Malacca and Penang provided for the State LA to have the right to participate *ex officio* in the State Legislative Assembly and to be appointed a member of committees thereof, but to have no vote.[148] Most State constitutions in the States of Malaya also include this provision and have now also extended this right to participation in the State ExCo and its committees, provided that the LA first takes an oath of secrecy.[149] However, no corresponding provisions exist in the State constitutions of Sabah or Sarawak in respect of their State AGs.

[147] The branch consisted of the CJ of Borneo as Chairman, together with the State AGs and State PSC chairmen, and two other members designated by the Federal Government: *FC* (n 25) Art 146A.

[148] *Constitution of the State of Malacca* Art 23; *Constitution of the State of Penang* (n 142) Art 23.

[149] The right is also extended to the State Secretary and State Financial Officer: eg, *Constitution of the State of Penang* (n 142) Art 6A(3) & (4); *Laws of the Constitution of Selangor 1959* (n 142) Art 52(3) & (4); *Law of the Constitution of 1895* (n 144) Second Part, Art 6(3) & (4).

B *Recent reforms*

1 *United Kingdom*

The AG and SG for England & Wales are the principal legal advisers of the UK Government for England & Wales. Until 1972, Northern Ireland ('NI') had its own Government and Parliament and its own Law Officers. Between 1972 and 1999, when NI was ruled directly from Westminster, the AG for England & Wales also concurrently held the office of AG for NI. The UK Government was also advised in matters of Scottish law by the Lord Advocate of Scotland.

Since the establishment of devolved government in Scotland, Wales and NI in 1999, the following Law Officers have advised the UK Government and the devolved administrations:

	UK Government	Devolved administration
England	AG for England & Wales and Advocate-General for NI	(none)
Wales		Counsel-General for Wales
NI		AG for NI
Scotland	Advocate-General for Scotland	Lord Advocate

The governments of most British overseas territories and Crown dependencies also have their own Law Officers.

VI OPTIONS FOR REFORM

A The Attorney General & the Public Prosecutor

1 *Separation of offices*

The United Nations ('UN') *Guidelines on the Role of Prosecutors* provides that states must ensure that prosecutors 'are able to perform their functions without … improper interference'.[150] This is elaborated in a UN publication on *The Status and Role of Prosecutors*, as follows:

> On the one hand, prosecutorial independence is an individual state of mind that enables an individual prosecutor to make decisions rationally and impartially on the basis of the law and the evidence, without external pressure or influence and without fear of interference. On the other hand, prosecutorial independence should also underpin the institutional and operational arrangements that the State must establish to enable prosecutors to exercise their responsibilities properly and impartially. **This means that protecting the prosecution of a case from political influence or other interference must be assured by the authority and independence of the prosecution service to which the prosecutor belongs and must be guaranteed by government** [emphasis added].[151]

That the present constitutional arrangements in Malaysia, which concentrate prosecutorial power in a single individual who holds office at the PM's pleasure, do not adequately protect the prosecution service from political influence or other interference can amply be demonstrated by the extraordinary circumstances of the 1MDB affair and the 2015 dismissal of the then-AG, Tan Sri Abdul Gani Patail, before he could institute criminal charges for corruption against the then-PM, Najib Razak.[152] Due to the absence or failure of constitutional safeguards, no action could be taken to safeguard the public and national interest until a new AG was appointed three years later, following Najib's defeat in the 2018 general election. Even discounting this

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[150] UN, *Guidelines on the Role of Prosecutors* (1990) Art 4.

[151] UN, *The Status and Role of Prosecutors: A United Nations Office on Drugs and Crime and International Association of Prosecutors Guide* (2014) 9.

[152] Sharanjit Singh, 'Ali Hamsa Reveals How Gani Patail Was Issued Termination Letter', *NST Online* (24 August 2020) https://www.nst.com.my/news/crime-courts/2020/08/618989/ali-hamsa-reveals-how-gani-patail-was-issued-termination-letter

extraordinary case, Malaysian news is regularly filled with reports of the unequal enforcement of the criminal law against ordinary citizens and those in positions of power—most recently in the unequal '*dua darjat*' enforcement of COVID-19 restrictions.[153]

As we have seen, when the drafters of the FC vested responsibility for criminal prosecutions in the AG, they gave him security of tenure equal to that of a SCt judge, in order to ensure that he could act in an 'impartial and quasi-judicial spirit'.[154] The removal of that security of tenure in 1963 critically undermined those careful arrangements.

There are, in theory, two ways to resolve this problem. The first would be to return to the *Merdeka* Constitution model of a combined AG & PP with security of tenure, leaving political responsibilities to a separate Minister of Law/Justice. The second would be to have an AG, who could either be politico-legal (as in England) or purely legal (as in India), and a separate PP/DPP with security of tenure.

There is ultimately a compelling practical, rather than principled, reason for opting for the second option. As Tan Sri Thomas has recently written:

> … [M]y personal experience convinced me that it was impossible for one person to properly or effectively discharge the duties of both offices. Things may have been different at the time of Merdeka, but sixty years later the demands of both offices had multiplied infinitely. There were about 600 [deputy PPs] doing criminal law for the nation, spread across the breadth and width of the thirteen states. The civil law work of the AG had increased exponentially. Civil law is far more expansive than criminal law, and contains within it all the branches of law that are not criminal. Thus, it includes international law, civil litigation, arbitration, advisory and [mutual legal assistance], to list a few.[155]

Because of the much greater responsibilities of the AG today, it is clear that Malaysia should follow the lead of other countries who have adopted the expedient of having a

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[153] Nor Ain Mohamed Radhi and Teh Athira Yusof, 'Ensure All SOP Flouters Face the Music', *NST Online* (24 August 2020) https://www.nst.com.my/news/nation/2020/08/618898/ensure-all-sop-flouters-face-music

[154] See section II.B2.

[155] Tommy Thomas, *My Story: Justice in the Wilderness* (Strategic Information and Research Development Centre, 2021) 540.

dedicated PP/DPP whose function is solely to oversee the impartial enforcement of the criminal law in the public interest.

2 *Relationship between Attorney General and Public Prosecutor*

Although many countries have a separate AG and DPP, the relationship between the two offices varies greatly. At the one extreme we have England & Wales, where the AG superintends the DPP and may give the latter directions, even in individual cases, and where the AG's consent is needed for various prosecutions (although as we have seen, there have been moves to restrict these powers except in cases of national security). In the Commonwealth of Australia, the AG can similarly give the DPP directions (including on rare occasions in individual cases), but must publish them in the *Gazette* and lay them before Parliament. Finally, in India and Kenya, the AG has no role whatsoever in criminal prosecutions, and the PPs/DPP operate(s) independently of the AG.

In England & Wales and in Australia, the AG's continuing role in criminal prosecutions is commonly justified by the need for accountability to Parliament for the administration of criminal justice.[156] In 1978, Sam Silkin, then AG for England & Wales, wrote:

> To whom would [an] independent, non-political Law Officer be accountable? Through whom would he be accountable to Parliament, as is the [AG] today? If there were no Minister through whom he could be accountable, we should have to invent one. And if there were, we have returned full circle; for accountability without control is meaningless, and whatever Minister was answerable for the "independent" Law Officer would have to control him; else we should have the semblance of accountability and not the reality. And in my experience there is no more potent weapon in a democratic society than the reality of accountability to Parliament.[157]

[156] The English model is favoured by the authors of an IDEAS paper on this subject: Aira Nur Ariana Azhari and Lim Wei Jiet, *Separating the Attorney-General and Public Prosecutor: Enhancing Rule of Law in Malaysia* (Policy IDEAS No 34, December 2016).

[157] SC Silkin, 'The Functions and Position of the Attorney-General in the United Kingdom' (1978) 59 *The Parliamentarian* 149, 157.

However, doubt was cast on the effectiveness of parliamentary accountability as a check on the AG in a modern democracy by Lord Shawcross, another former English AG, writing also in the aftermath of *Gouriet's case*:

> The fact is that we have moved away from Dicey's age of reasoned democracy into the age of power. Responsibility to Parliament means in practice at the most responsibility to the party commanding the majority there which is the party to which the [AG] of the day must belong … that party will obviously not criticise the [AG] of the day for not taking action which, if taken, might cause embarrassment to their political supporters.[158]

In any case, the AG in Malaysia is answerable to no-one, as was noted by the HCt in the *UEM case*:

> In Malaysia the [AG]'s position is very different from that of his British counterpart. … He is not answerable to anybody, not to any Minister or Ministry, not even to the [PM], not to parliament and not to the people (in that his is not a political appointment). However, he holds office during the pleasure of the [YDPA] which in effect means during pleasure of the executive.[159]

Bearing in mind the need to avoid political influence or other interference in public prosecutions, the UN publication on *The Status and Role of Prosecutors* has set out how accountability to the elected Legislature may be achieved without direct control:

> One method is the preparation and tabling of annual reports to the legislature and, in some jurisdictions, the subsequent publication of those reports. The appearance of senior members of the prosecution services before legislators to answer questions regarding the operation of the prosecution service is an example of another method.
>
> However, care should be taken to ensure that any accountability to Parliament does not extend to permitting the legislature to give directions to a prosecutor in any individual case or to compel the disclosure of information which is properly confidential.[160]

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[158] Lord Shawcross, 'The Attorney General's Discretion', *The Times* (Letters to the Editor, 3 August 1977).

[159] *Lim Kit Siang v United Engineers (M) Bhd & Ors* [1988] 1 MLJ 51 (VC George J).

[160] UN (n 151) 13–14.

The publication also notes that prosecutors are also accountable to the courts, insofar as their actions are regularly under the scrutiny of the courts and can in some cases be reviewed by them.

As a matter of principle, it is clearly preferable that the PP should be fully independent of the Executive and not subject to the direction or control of any person. If the AG is the representative of the Executive, then he should not be able to give directions to the PP, nor should his consent be required for any prosecution. Conversely, if the AG is not the representative of the Executive, then there is no reason for one independent officer (the PP) to operate under the direction of another independent officer (the AG).

If accountability to the Legislature is desired, then it is better that the PP should account directly to Parliament by means of regular reports and attendance for questioning before parliamentary select committees. Parliament will, of course, continue to have the power to legislate in respect of the criminal law and criminal procedure,[161] and may through such legislation delegate to the Executive the power to make secondary legislation of a general nature.

The PP's independence from political direction or control should not, however, be confused with a prohibition on him consulting other persons, including members of the Executive. As the then-AG of England, Sir Hartley Shawcross, famously explained to the House of Commons in 1951:

> I think the true doctrine is that it is the duty of an [AG/DPP], in deciding whether or not to authorise [a] prosecution, to acquaint himself with all the relevant facts, including, for instance, the effect which the prosecution, successful or unsuccessful as the case may be, would have upon public morale and order, and with any other considerations affecting public policy.
>
> In order so to inform himself, he may, although I do not think he is obliged to, consult with any of his colleagues in the Government; and indeed … he would in some cases be a fool if he did not. On the other hand, the assistance of his colleagues is confined to informing him of particular considerations which might affect his own decision, and does not consist, and must not consist, in telling him what that decision ought to be.[162]

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[161] See *FC* (n 25), Ninth Schedule, List I, item 4.

[162] UK, Parliamentary Debates, House of Commons, 29 January 1951, vol 483 col 683 (Sir Hartley Shawcross, AG).

As the PP will need to consider the public interest before initiating prosecutions involving matters of national security, foreign relations, etc, it should therefore be permissible for Parliament to require the PP to consult with the AG before deciding whether to initiate or discontinue prosecutions for particular offences or classes of offences (eg, terrorism, official secrets, etc).

3 *Certain constitutional functions of the Attorney General*

With the transfer of the AG's prosecutorial functions under Article 145(3) to a separate PP, certain other constitutional functions of the AG will also need to be transferred. The power under Article 183 FC personally to provide or withhold consent to criminal proceedings against the YDPA or the Ruler of a State should be transferred to the PP, while the AG should retain that function in respect of civil proceedings.

The AG's role in providing written opinions to State Pardons Boards, and thus also his membership of the Pardons Board (or that of his nominee), under Article 42 FC should likewise be transferred to the PP or his nominee. As the prerogative of mercy is vested in the Ruler or YDPN of a State, the State LA/AG (or, in respect of the Federal Territories, the Federal AG or his nominee) should also be a member of the Pardons Board.

B The Attorney General

4 *Relationship with Parliament*

(a) Attendance

As we have seen, colonial AGs were invariably *ex officio* members of both the ExCo and the LegCo, and the Reid Commission recommended that the AG should continue to have the right to participate in the proceedings of both Houses of Parliament and of any committees thereof of which he was named a member, without having a right to vote. This provision was removed from the draft *Merdeka* Constitution, except in respect of parliamentary committees, by the Working Party in 1957.[163] However, in 1960, Article 145 FC was amended to allow the AG to sit as an MP, as in England, 'to explain and answer legal matters'.[164]

Despite the rationale given in 1960, since 1963, the AG has sat as a member of the Senate for only four years (1970–4) and as a member of the House of Representatives for only six (1974–80). It may be that the heavy responsibilities of overseeing both the criminal and civil litigation of the Federal Government, as well as the demands of drafting and advisory work, have made it difficult for AGs to sit in Parliament. This will be alleviated to a significant extent by the proposed transfer of prosecutorial responsibilities from the AG to a separate PP.

There should, in any case, be no objection to the restoration of the provision enabling the AG to participate *ex officio*, without the right to vote, in the proceedings of both Houses of Parliament, as most State LAs have continued to do in their respective Legislative Assemblies since *Merdeka*.

(b) Membership

As to whether the AG may be a full, voting member of either House of Parliament (as in England, Canada, Australia, etc) and thus eligible also to be Minister (of Law/Justice, etc), that would appear to be a matter of taste. Given the long-standing precedents in so many Commonwealth countries, including our own country 1970-1980—and in view of the proposed transfer of the AG's prosecutorial functions to a separate PP—there can be no innate objection to an MP or Senator being appointed as AG.

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[163] See section II.B2.

[164] See section II.B3.

While it might be felt that the legal opinions of a lawyer-politician might be less objective than those of someone who practises solely as a lawyer, it is equally true that a black-letter lawyer may lack the political sensitivity and understanding of government and political affairs of a lawyer MP or Senator. Much will, of course, depend on the abilities and professional integrity of the individual in question. Professor Edwards has noted that in England, when the Law Officers address Parliament, they are expected 'to assume an attitude of some independence and to speak as a lawyer, not as a politician bent on defending the position adopted by the government'.[165]

While in previous times the AG was expected to be able to advise personally on a wide range of matters, in practice today, much of this advice is prepared by legal officers within the AGC. The AG may also consult specialist counsel where necessary. It is worth noting that in Australia and NZ, it is the purely legal SG, rather than the politico-legal AG, who is the primary source of written legal opinions.[166]

For these reasons—as the Reid Commission appears to have been minded to permit—so long as the AG is a person qualified to be a FCt judge, it should be left to the discretion of the PM of the day to choose the best candidate for AG, whether from within or without Parliament, and whether from the LS or from the Bar.

As for the SG, while it is not necessary to rule out the appointment of additional SGs from outside the LS, it would be advantageous for the SG to continue to be a career LS officer to provide a degree of continuity of leadership at the top of the Federal AGC.

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[165] Edwards (n 1) 50–1.

[166] House of Commons Constitutional Affairs Committee (UK), *Constitutional Role of the Attorney General* (HC 306, 19 July 2007) https://publications.parliament.uk/pa/cm200607/cmselect/cmconst/306/306.pdf ('*Constitutional Role of the Attorney General*') Ev 63 & 66.

5 *Relationship with the Cabinet*

(a) Attendance

The AG can at present attend Cabinet on a regular or *ad hoc* basis, as long as he is invited to do so. There are indeed good reasons why he should do so on a regular basis—as is the practice in most State ExCos in Malaysia. Silkin, responding to a suggestion that the AG should be 'aloof from his colleagues in the Ministry' and should 'attend upon Cabinet, give his opinion and leave', noted:

> I regard it as the Law Officer's duty to learn as much as he can of his colleagues' policies, their intentions, their wishes, their methods, indeed their very temperaments and characters. … I am convinced that the more intimately the government principal legal adviser is aware of the battles and the arguments and the stresses and the strains that eventually result in policy, the better able he is to assist in ensuring that if there is a lawful and a proper way of achieving its objectives, that way will be found. I do not crave for either a vote or voice in Cabinet; I do not desire a share in Cabinet responsibility. Like the Chief Whip I would be content to listen and to speak only when asked to do so.[167]

Silkin's view has been echoed by Peter Wilkinson, a former AG of NZ,[168] and by Lord Goldsmith, former AG of England & Wales, giving evidence before the House of Commons Constitutional Affairs Committee in 2007:

> I think you are a better adviser if you understand what it is that your clients, the board of directors or the Cabinet is seeking to do. The fact is that today legal issues come up all the time in lots of different areas, in the balance between civil liberties and national security and new legislation. The fact is that with the way Cabinet is run it simply has not been possible to know in advance such and such an issue will come up. I think it has been right to be there in order to help with that and to intervene if necessary….[169]

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[167] Silkin (n 157) 156–7.

[168] Peter Wilkinson, 'Some Thoughts on Stepping Down' [1979] *New Zealand Law Journal* 116, 118.

[169] House of Commons Constitutional Affairs Committee (UK) (n 166) Ev 47.

However, two other former AGs, Lords Mayhew and Morris,[170] were in favour of the AG only attending by invitation to discuss specific legal items, cautioning against the AG being drawn into Cabinet debates on policy, and of being overwhelmed by preparatory work.[171]

(b) Membership

As to whether the AG may specifically also be a full, voting member of Cabinet (eg, as Minister of Law/Justice), Professor Edwards observed:

> [T]he widespread practice in many of the Commonwealth countries, for example in Canada and Australia, both in the federal and provincial or state governments, and in [NZ], of including the [AG] as a regular member of the Cabinet might suggest the absence of any innate objection to the policy.[172]

Nevertheless, as Lords Mayhew and Morris have pointed out, for practical reasons, it may be judged undesirable to burden the AG with matters of broader Cabinet policy and the associated preparatory work that will come with full Cabinet membership and a ministerial portfolio.

(c) Relationship with the Minister of Law/Justice

Once functions relating to criminal justice are transferred to the PP, the core functions of the AG will be the provision to the Federal Government of legal advice, legal draftsmanship and legal representation. As we have seen, the AG also traditionally has responsibility for the supervision of charities and as the guardian of the public interest in the civil courts.[173]

By contrast, the core functions of a Minister are the formulation of policy, the promotion of legislation to enable that policy, and the supervision of Executive departments to implement that policy, including the setting of levels of establishment, finance, resourcing, etc.

When, therefore, the Cabinet directs that a government bill be prepared, the task is shared between the ministry responsible for that area of policy (Home Affairs, Defence,

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[170] Formerly Sir Patrick Mayhew and Sir John Morris.

[171] House of Commons Constitutional Affairs Committee (UK) (n 166) Ev 17.

[172] Edwards (n 1) 176.

[173] See section.

etc), and the parliamentary draftsmen of the AGC, who translate that policy into legislation.

Ministerial portfolios and the areas they cover are largely a matter up to the discretion of the PM. Nevertheless, it would be desirable for there to be a Ministry of Law/Justice separate from the PM's Department. A Minister of Law/Justice would ordinarily be responsible for policies relating to the administration of civil and criminal justice and the resourcing of the administration of justice: eg, courts, tribunals, etc. Prisons and correctional facilities, etc, could legitimately be allocated either to the Home Ministry or to a Ministry of Justice. A Ministry of Law/Justice could also be responsible for constitutional reform and law reform in areas that do not fall within the remit of any specific ministry; eg, tort law, limitation periods, etc.

(d) Conclusion

There are clear reasons why the AG should attend Cabinet, though the benefits of his being a full member of Cabinet are far less clear, and are balanced by the practical disadvantages of his being tied down with the broader work of Cabinet policymaking. Nevertheless, it should be up to the PM of the day, depending on his judgment of the talents and abilities of the AG in question, to decide whether to combine his position with that of Minister of Law/Justice.

6 *Selection and tenure*

In view of the recommendations made above in respect of the AG's proper relationship with Parliament and the Cabinet, there should be no major changes to the current constitutional provisions for the selection and tenure of the AG.[174]

In some countries (eg, Kenya), the Constitution also provides for confirmation of the AG's appointment by the lower House of Parliament. It is recommended that Parliament should have the power to require the PM, before submitting his advice to the YDPA on any constitutional appointment, to submit such advice for the approval of a parliamentary committee.

[174] It is recommended in section VI.D3, that in view of the fact that the AG will continue to serve at the pleasure of the YDPA, even if he is appointed from within the LS, he should not continue to sit as a member of a reformed LSC. The alternative would be to provide that the AG, if appointed from the LS, should serve for a fixed term and have security of tenure.

C *The Public Prosecutor*

1 *Prosecutorial powers*

The separation of the offices of AG and PP is an opportune time to review the constitutional provisions that govern criminal prosecutions in Malaysia.

As we have seen, Malaysia is unusual among common law countries in having a completely centralized power of criminal prosecution. By virtue of the CPC and subsequent caselaw, the PP and his officers have an almost complete monopoly on the initiation and conduct of criminal prosecutions. This has no basis in the common law or in the Indian CrPC, from which our CPC is derived, both of which have a strong tradition of decentralized criminal prosecutions. The sole exception to this rule in this country is that under the CPC, private citizens may conduct prosecutions in the magistrates' courts for summary, non-seizable offences against their own persons and property.[175]

Given that a failure or refusal by the PP to initiate a criminal prosecution cannot generally be challenged or reviewed,[176] this over-concentration of power in a single individual is apt to give rise to a risk of abuse. It is therefore desirable that Parliament should have the power to authorize specialist agencies to initiate and conduct prosecutions for particular offences or classes of offences, where they have a particular interest or expertise, independently of the PP.

For instance, the MACC could be given the power to prosecute corruption offences, the Securities Commission authorized to prosecute securities industry offences and local authorities permitted to prosecute traffic and food hygiene offences. In each case, the PP should have the power, with the agreement of the agency concerned or with the permission of the court, to take over such prosecutions, to prevent abuses or miscarriages of justice.

Conversely, Parliament should be able to provide, as it can at present, that certain offences may only be prosecuted with the personal consent of the PP. This would be usual in cases where a prosecution would be particularly sensitive or should only be brought after a thorough consideration of the public interest: eg, in cases involving the administration of justice or the welfare of children. As already noted, Parliament should also be able to require the DPP to consult the AG before making decisions in respect of

[175] See section III.B1.

[176] See section III.B2.

particular offences or classes of offences, such as those involving national security or foreign relations.

It may also be desirable to provide that the PP's power to withdraw criminal proceedings before a court should only be exercised with the consent of the court, as is provided in the Indian CrPC and in the Constitution of Kenya.[177] This ought generally to be a formality except where there is an objection from the investigating authority or some other interested party; eg, where there is an allegation of corruption or abuse of prosecutorial power.

2 *Accountability*

As the UN publication on *The Status and Role of Prosecutors* notes:

> "Accountability" of the prosecutor means that a prosecution service may be required to account for its actions either by filing reports, responding to inquiries or, in some situations, acting as a respondent in a court hearing.[178]

It is recommended that the PP be required to submit to Parliament an annual report on the conduct of his functions, and such additional reports on matters within his remit as either House of Parliament or any committee thereof may require. He should also attend parliamentary committees in person whenever summoned to give evidence and answer questions.

[177] *CrPC 1973* (n 74) s 321; *Constitution of Kenya* (n 41) Art 157(8).

[178] UN (n 151) 13.

3 *Selection and tenure*

The method of selection of the PP should, in principle, follow the method set out by the Constitution for special posts;[179] that is to say, he should be appointed by the YDPA on the recommendation of the LSC. Before acting, the YDPA must consider the advice of the PM, and may refer the recommendation back to the LSC only once, in order that it may be reconsidered.

In some countries (eg, Kenya), the Constitution also provides for confirmation of the PP's appointment by the lower House of Parliament. As noted above, Parliament should have the power to require the PM, before submitting his advice to the YDPA on any constitutional appointment, to submit such advice for the approval of a parliamentary committee.

Since Merdeka, AGs/PPs have served for an average of six to seven years (with no AG/PP serving more than 14 years). This is in line with international comparators.[180] In order to protect the PP from political influence and to allow the reasonable progression of junior prosecuting officers, it is recommended that the PPs term be for a single term of eight years, subject to the same maximum retirement age as a FCt judge.

The PP should also enjoy the same security of tenure as a FCt judge. To mirror the provisions governing judges, the YDPA should be able to prescribe a code of ethics on the recommendation of the LSC and after consulting the CJ, and the LSC should be responsible for nominating tribunal members and for proposing any suspension pending the decision of such a tribunal.

[179] *FC* (n 25) Art 144(4).

[180] Eg, the Commonwealth of Australia, which provides for a renewable term of seven years, and Kenya, which provides for a non-renewable term of eight years.

D *The Judicial & Legal Service*

1 *Separation of the Judicial Service and Legal Service*

Sixty-four years after the Reid Commission first observed that it would be 'necessary, at some future time, to apply the principle of separation of powers more strictly',[181] the argument in favour of finally separating the judicial and legal arms of the JLS and the JLSC seems overwhelming. As the then-CJ, Tun Arifin Zakaria, observed in 2017, the existence of a combined JLS creates the appearance of a conflict of interest:

> The prosecutors are all under the [AG], and they appear before a sessions court judge or magistrate who is under the same service where the [AG] is the head. It doesn't look good, does it?[182]

Members of the subordinate judiciary, while serving as judicial officers, come under the general supervision of the local High Court and the relevant Chief Judge.[183] However, as members of the JLS, they come—for the purposes of promotions, transfers and discipline—under the jurisdiction of the JLSC, of which the AG (or, when the AG is an MP/Senator or appointed from outside the JLS, the SG) is a member.

Moreover, with a combined JLS, magistrates, Sessions Court judges and court registrars may expect, in the regular course of their careers, to be transferred to positions within the Federal AGC and there to serve under the AG, SG or other senior prosecutors, whom they may therefore be very reluctant to displease.[184]

The question of apparent bias is important whether or not the AG does in fact influence the decisions of judicial officers, because axiomatically, justice must not only be done, but must also be seen to be done.

It is therefore inappropriate for judicial officers to continue to be members of a combined JLS and under the jurisdiction of a combined JLSC. With a much larger legal service than existed at the time of *Merdeka*, the need for members of the Service to be able to fill any position, judicial or legal, no longer exists. However, the separation of

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[181] See section V.B1.

[182] Razak Ahmad (n 125).

[183] *Cheak Yoke Thong v Public Prosecutor* [1984] 2 MLJ 119, 121 (Salleh Abas LP).

[184] This can be seen in the career of the former Lord President, Tun Suffian, who was variously a magistrate, deputy PP, federal counsel, State LA, State Secretary and finally SG before being appointed to the HCt bench.

the JLS into separate services need not prevent occasional transfers between the two services, where individual officers choose to do so.

2 *Creation of a separate Prosecution Service*

It has been proposed—for instance, by the Institutional Reforms Committee established after the 2018 general election—that the separation of the offices of AG and PP should involve the further division of the LS to create a separate Prosecution Service.[185] Tan Sri Thomas has written:

> Senior officers of the AGC were opposed to separation in the beginning. This was natural and understandable. All of them had spent their careers in an AGC which encompassed both prosecution and non-prosecution services. Many enjoyed cross-overs, moving from prosecution to, say, advisory, and often returning to prosecution. Transfers are healthy. They also enhance the building up of lawyers who are generalists, possessing all round skills, rather than a narrow specialisation. However, the officers agreed to go on a national road show, and to hold a referendum among the 1200 AGC officers. Months later I was informed that by a comfortable margin, the majority had voted for separation. It was a pleasing result because staff morale will not suffer if separation takes place in the near future.[186]

While it is reassuring to know that members of the AGC are open to the creation of a separate Prosecution Service, it is nonetheless true that there is value in legal officers being able to gain experience of both prosecution and non-prosecution work during the course of their careers. It is important, therefore, that alternatives that would preserve a unified LS be fully considered.

One such alternative would be to ensure that a reformed LSC is fully independent of the Executive—as, of course, it ought to be—so that there is no risk of political influence or other interference by the Executive. Under the FC, the appointments, transfers, promotions and discipline of legal officers are the responsibility not of the AG or SG per se, but of the relevant Service Commission.

In a constitutional federation with a division of powers between the Federation and the States, between the Judiciary, Legislature and Executive, and between ministers, the

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[185] Institutional Reforms Committee, *Report of the Institutional Reforms Committee* (July 2018) Vol 1 [20.3].

[186] Thomas (n 155)540.

monarchy and independent commissions such as the Election Commission ('EC') and the various Service Commissions, it is inevitable that the interests of the various institutions will frequently diverge, and that disputes will arise in which each institution will require independent legal advice and representation.

Under this system, a legal officer serving a State Government or the EC ought to be able to bring a legal action against a Minister of the Federal Government to the best of his abilities without fear of any negative consequences to his career prospects. Likewise, a legal officer serving as a deputy PP should be able to prosecute a federal Minister without having any similar fears.

Rather than to create a separate Service and Service Commission for each office and institution where legal officers may be employed, it should be the aim of constitutional reformers to structure a reformed LSC that is capable of governing the appointments, transfers, promotions and discipline of all legal officers, whether they be appointed to serve in the Federal AGC, the PP's Chambers, a State LA's office, Parliament or an independent commission.

E *Service Commissions*

1 *The Judicial Service Commission*

The new JSC should, like the JLSC under the *Merdeka* Constitution, be chaired by the CJ as the head of the judiciary. The other judicial office-holders and the deputy chairman of the PSC should be *ex officio* members.

The JSC should regain the JLSC's previous responsibility for nominating members of tribunals constituted for the removal of superior court judges, and for recommending any suspensions pending tribunal decisions. This would prevent a recurrence of the summary suspensions of then-Lord President Tun Salleh Abas and other SCt judges, and the packing of tribunals with compliant members who recommended their removal, during the 1988 judicial crisis on the advice of then-PM Dr Mahathir.

Responsibility for the nomination of superior court judges should either be revested in the JSC, as in the *Merdeka* Constitution, or in a new, more broadly-constituted Judicial Appointments Commission.

2 The Legal Service Commission

As currently constituted, the JLSC is chaired by the PSC chairman, and includes the AG (or, if the AG is an MP/Senator or appointed from outside the JLS, the SG), the CJ and a number of other judges.[187]

The FC provides that a member of either House of Parliament may not be appointed to be a member of a Service Commission.[188] It also provides that an ordinary member [189] of a Service Commission may not work for or belong to the public services, a public body or a trade union.[190] Ordinary members of a Service Commission are appointed for a fixed term of up to five years, and enjoy the same security of tenure as a FCt judge.

While there is provision for the AG to be replaced by the SG when the AG is an MP/Senator or appointed from outside the JLS, it does not deal with the issue that unlike ordinary members of a Service Commission and members of the public services, the AG serves effectively at the pleasure of, and may at any time be dismissed by, the PM.

If, therefore, the AG continues to serve at the pleasure of the YDPA (as recommended above),[191] then he should cease to be a member of the LSC, and his place should be filled *ex officio* by the SG and the PP, both of whom will be appointed from within the LS and enjoy protection from summary dismissal.

While there is no objection to the PSC chairman continuing to serve as chairman of the LSC, it may be judged desirable in order to increase public confidence in the independence of the LSC to provide for the chairmanship to be held by serving or retired FCt judge, in which case the deputy chairman of the PSC should be an *ex officio* member.

At present, there may be a slight anomaly in the fact that the SG (though not the AG) may be both a member of the JLSC and subject to its jurisdiction.[192] If this is to be

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[187] See section V.B2.

[188] There is an exception for the chairman of the Police Force Commission: *FC* (n 25) Art 142(1).

[189] Ie, not an *ex officio* member or the chairman or deputy chairman.

[190] *FC* (n 25) Art 142(2) & (3).

[191] See section VI.B3.

[192] See *Public Prosecutor v Zainuddin* [1986] 2 MLJ 100, 103 (Salleh Abas LP).

remedied, then the SG should, like the PP, be made a constitutional officer with security of tenure and excluded from the jurisdiction of the LSC.

F *The Legal Service*

1 *The Federal Attorney General Chambers*

For the constitutional separation between the Executive and the Service Commissions to work as originally intended, it must be understood that the LS is broader than the Federal AGC. Members of the LS in the service of State Governments and of independent federal institutions not under the control of the Federal Government (such as the PP's Chambers, Parliament, the EC, etc) should not be regarded as being part of the Federal AGC and thus not under the authority of the AG and SG.

The Federal AGC should be responsible for the provision of legal advice, legal representation and legal draftsmanship to the Federal Government. The technical revision of laws under the *Revision of Laws Act 1968*) should also come under the aegis of the AGC, while law reform as a policy matter should continue to be the responsibility of the relevant ministries, working with the assistance of legal draftsmen from the AGC.

However, in order to ensure that the general laws of Malaysia (eg, criminal law, tort law, limitation periods, etc) continue to progress and be regularly updated and reformed, there should be established an LRC consisting of legal academics and retired judges (as exists in the UK, India and many other countries), under the oversight of the Ministry of Law/Justice, to come up with periodic proposals for law reform, which should be laid before Parliament.

2 *Other federal institutions*

While it may be the duty of the AG to advise and represent the YDPA, this should not preclude the YDPA or the Conference of Rulers from seeking further legal advice and counsel from constitutional scholars, retired judges or legal practitioners, wherever necessary.

Independent federal institutions such as Parliament and independent Commissions such as the EC and Suhakam should be able to appoint contract legal officers or to have legal officers seconded from the LS. Parliament should have legal officers to advise the Speaker/President and committees and parliamentary draftsmen to assist with private members' bills and motions.

3 *State Legal Advisers and Attorney Generals*

Article 132(4)(*b*) FC envisages that a State LA may be appointed from the JLS, from the State public service, or from the Bar. In practice, however, only the States of Sabah and Sarawak appoint their State AGs from outside the JLS. It is therefore up to the States to provide for the method of appointment and removal of their State LA or AG.

However, there are currently obstacles to the appointment of full-time State LAs recruited from the Bar. A part-time LA from the independent Bar (as envisaged by the Rulers at the time of *Merdeka*) would be able to rely on his rights of audience as an advocate & solicitor. However, while a full-time LA would be able to represent the State Government in ordinary civil proceedings, he would not currently be able to do so in judicial review proceedings or proceedings under Part VIII of the *Specific Relief Act 1950*.[193] These provisions should be amended to allow the States to appoint LAs of their choosing with full rights of audience in the courts, and to recruit legal officers from outside the LS (as in Sabah and Sarawak), should they so desire.

G *Conclusion*

The recommendations set out above will require the amendment of various provisions of the FC. Proposed draft amendments are set out in Appendix 4.

[193] *GPA 1956* (n 102) s 24 read together with s 2(1) (definition of 'civil proceedings' and 'legal officer'); *Legal Profession Act 1976* (Act 166) s 35(2) read together with s 3 (definition of 'legal officer').

APPENDIX 1
CONSTITUTIONAL PROVISIONS ON THE ATTORNEY GENERAL

(a) Reid Commission draft

Right of Ministers and Attorney-General to address Parliament

50. Every Minister and the Attorney-General shall have the right to speak in, or otherwise take part in the proceedings of, each House of Parliament, and of any committee thereof of which he may be named a member, but he shall not be entitled to vote in a House unless he is a member thereof.

Attorney-General

143.—(1) There shall be an Attorney-General who shall be a person qualified to be a judge of the Supreme Court and who shall be appointed by the Yang di-Pertuan Besar.

(2) It shall be the duty of the Attorney-General—

(*a*) to advise the Yang di-Pertuan Besar in respect of the exercise of his functions;

(*b*) to advise the Federal Government in respect of legal matters referred to him by that Government; and

(*c*) to do such other things of a legal nature as he may be required to do by federal law.

(3) In the exercise of his duties under this Article the Attorney-General shall have the right of audience in, and shall take precedence over all other counsel appearing before, any court or tribunal.

(b) Merdeka Constitution

Special provisions as to Cabinet and Attorney General

61.—(1) …

(2) Either House of Parliament may appoint as a member of any of its committees the Attorney General or any member of the Cabinet notwithstanding that he is not a member of that House.

(3) This Article does not authorise any person who is not a member of a House to vote in that House or any of its committees.

The Attorney General

145.—(1) The Yang di-Pertuan Agong shall, after consultation with the Judicial and Legal Service Commission, appoint from among the members of the judicial and legal service an Attorney General, who shall be a person qualified to be a judge of the Supreme Court.

(2) The Attorney General shall advise on legal matters referred to him by the Yang di-Pertuan Agong or the Cabinet, and shall have the power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Muslim court or a court-martial.

(3) The Attorney General shall have the right of audience in, and shall take precedence over any other person appearing before, any court or tribunal.

(4) Subject to Clause (5), the Attorney General shall hold office until he attains the age of sixty-five years or such later time, not later than six months after he attains that age, as the Yang di-Pertuan Agong may approve.

(5) The Attorney General may at any time resign his office but shall not be removed from office except on like grounds and in the like manner as a judge of the Supreme Court.

(c) Present-day Constitution

Special provisions as to Cabinet and Attorney General

61.—(1) …

(2) Either House of Parliament may appoint as a member of any of its committees the Attorney General or any member of the Cabinet notwithstanding that he is not a member of that House.

(3) This Article does not authorise any person who is not a member of a House to vote in that House or any of its committees.

…

The Attorney General

145.—(1) The Yang di-Pertuan Agong shall, on the advice of the Prime Minister, appoint a person who is qualified to be a judge of the Federal Court to be the Attorney General for the Federation.

(2) It shall be the duty of the Attorney General to advise the Yang di-Pertuan Agong or the Cabinet or any Minister upon such legal matters, and to perform such other duties of a legal character, as may from time to time be referred or assigned to him by the Yang di-Pertuan Agong or the Cabinet, and to discharge the functions conferred on him by or under this Constitution or any other written law.

(3) The Attorney General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Syariah court, a native court or a court-martial.

(3A) Federal law may confer on the Attorney General power to determine the courts in which or the venue at which any proceedings which he has power under Clause (3) to institute shall be instituted or to which such proceedings shall be transferred.

(4) In the performance of his duties the Attorney General shall have the right of audience in, and shall take precedence over any other person appearing before, any court or tribunal in the Federation.

(5) Subject to Clause (6), the Attorney General shall hold office during the pleasure of the Yang di-Pertuan Agong and may at any time resign his office and, unless he is a member of the Cabinet, shall receive such remuneration as the Yang di-Pertuan Agong may determine.

(6) The person holding the office of Attorney General immediately prior to the coming into operation of this Article shall continue to hold the office on terms and conditions not less favourable than those applicable to him immediately before such coming into operation and shall not be removed from office except on the like grounds and in the like manner as a judge of the Federal Court.

APPENDIX 2
LIST OF ATTORNEY GENERALS SINCE MERDEKA

Federation of Malaya

Attorney General

Thomas Vernon Alexander Brodie	1957–59
Cecil Majella Sheridan	1959–63

Malaysia

Attorney General

Abdul Kadir bin Yusof	1963–70

Attorney Generals & Ministers for Law/Justice

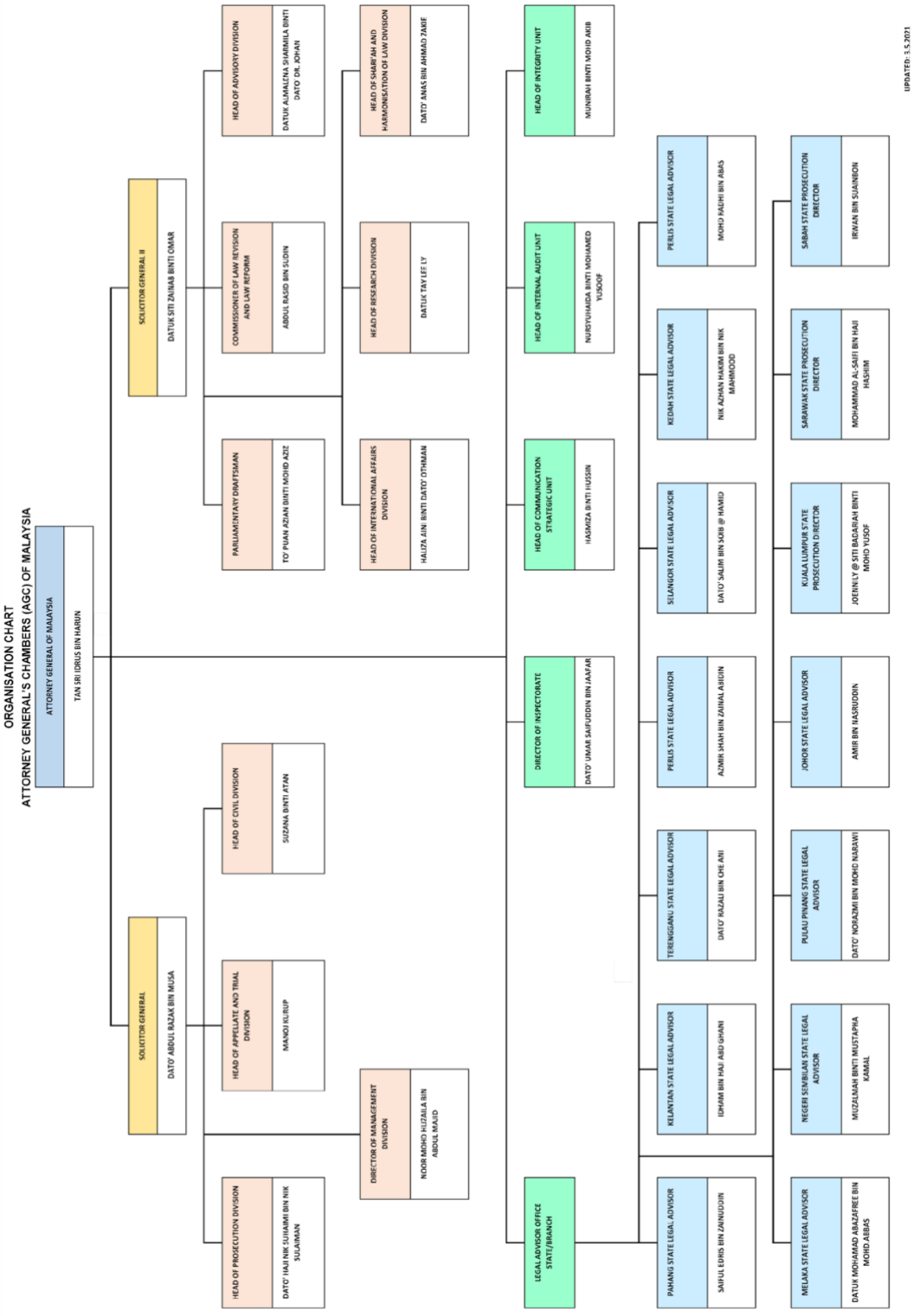
Abdul Kadir bin Yusof	1970–77
Hamzah bin Abu Samah	1977–80

Attorney Generals

Abu Talib bin Othman	1980–93
Mohtar bin Abdullah	1994–2000
Ainum binti Mohd Saaid	2001
Abdul Gani bin Patail	2002–15
Mohamed Apandi bin Ali	2015–18
Tommy Thomas	2018–20
Idrus bin Harun	2020–present

APPENDIX 3

ORGANIZATION CHART OF THE ATTORNEY GENERAL CHAMBERS



APPENDIX 4
PROPOSED AMENDMENTS TO THE FEDERAL CONSTITUTION

Separation of Attorney General and Public Prosecutor

1. Article 40 of the Federal Constitution is amended by inserting after Clause (3) the following clauses:

"(4) Where provision is made in any other Article for the Yang di-Pertuan Agong to act on, or to consider, the advice of the Prime Minister or the Cabinet in connection with an appointment to any office or post, federal law may require the Prime Minister, before tendering his advice or the advice of the Cabinet in respect of any specified office or post, to submit such advice for the confirmation of a committee of Parliament."

2. Article 61 of the Federal Constitution is amended by substituting for Clause (2) the following clause:

"(2) The Attorney General, whether or not he is a member of either House of Parliament, shall have the right to take part in the proceedings of each House of Parliament and of any committee thereof of which he may be named a member."

3. Article 145 of the Federal Constitution is amended—

(*a*) by inserting after Clause (2) the following clause:

"(2A) In the exercise of his functions under this Article, the Attorney General shall uphold and defend the rule of law and promote the public interest.";

(*b*) by substituting for the words "Subject to Clause (6), the" the word "The"; and

(*c*) by deleting Clauses (3), (3A) and (6).

4. The Federal Constitution is amended by inserting after Article 145 the following Articles:

"*The Public Prosecutor*

145A.—(1) There shall be a Public Prosecutor, who shall be appointed by the Yang di-Pertuan Agong on the recommendation of the Legal Service Commission from among the members of the legal service of the Federation who are qualified to be a judge of the Federal Court.

(2) Before acting on the recommendation of the Legal Service Commission in accordance with Clause (1), the Yang di-Pertuan Agong shall consider the advice of the Prime Minister, and may once refer the recommendation back to the Commission in order that it may be reconsidered.

(3) The Public Prosecutor shall have power, exercisable at his discretion subject to the following provisions of this Article, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Syariah court, a native court or a court-martial.

(4) The Public Prosecutor shall have the power to direct the Inspector General of Police to investigate any information or allegation of criminal conduct, and to direct a magistrate to inquire into the cause of, and the circumstances connected with, any death.

(5) Except where otherwise provided by this Constitution or by federal law, the powers of the Public Prosecutor may be exercised by prosecuting officers acting under his direction and control.

(6) Parliament may by law extend to any person or authority the power to institute, conduct or discontinue proceedings for any particular offence or class of offences, but the Public Prosecutor may at any time take over the conduct of such proceedings with the permission of the court or the consent of the person or authority concerned.

(7) In the exercise of his functions under this Article, the Public Prosecutor shall have regard to the public interest, the interests of the administration of justice and the need to prevent abuse of the legal process.

(8) The Public Prosecutor shall as soon as practicable after the end of each year submit to Parliament a report on the discharge of his functions during that year and shall, if required by either House of Parliament or a committee thereof, submit additional reports on any question or issue connected with the discharge of those functions.

Safeguard of independence of Public Prosecutor

145B.—(1) Subject to Clauses (2) and (3), the Public Prosecutor shall not require the consent of any person or authority for the institution or discontinuance of any criminal proceedings, and in the exercise of his powers or functions shall not be under the direction or control of any person or authority.

(2) Federal law may require the Public Prosecutor to consult with the Attorney General before instituting proceedings for any particular offence or class of offences.

(3) The Yang di-Pertuan Agong may on the recommendation of the Legal Service Commission, and after consultation with the Chief Justice of the Federal Court, prescribe a code of ethics for the Public Prosecutor and other prosecuting officers.

(4) Subject to Clause (5), the Public Prosecutor shall hold office until the sooner of—

(*a*) the date eight years after the date of his appointment; or

(*b*) the date he attains the age of sixty-six years or such later time, not later than six months after such date, as the Yang di-Pertuan Agong may approve.

(5) The Public Prosecutor may at any time resign his office but shall not be removed from office except on the like grounds and in the like manner as a judge of the Federal Court:

Provided that in connection with the removal or suspension of the Public Prosecutor, references in Clauses (3), (4) or (5) of Article 125 to—

(*a*) the code of ethics prescribed by Clause (3B) of Article 125 shall be construed as references to the code of ethics prescribed by Clause (4) of this Article; and

(*b*) the Judicial Service Commission shall be construed as references to the Legal Service Commission."

(6) Parliament shall by law provide for the remuneration of the Public Prosecutor and may provide for other terms of office, and the remuneration so provided shall be charged on the Consolidated Fund.

(7) The remuneration and other terms of office (including pension rights) of the Public Prosecutor shall not be altered to his disadvantage after his appointment.

Consequential amendments: references to the AG (Pardons Boards, actions against Rulers, etc)

5. Article 42 of the Federal Constitution is amended—

(*a*) in Clause (5) by substituting for the words "Attorney General of the Federation, the Chief Minister" the words "Public Prosecutor, the Chief Minister and the legal adviser" and for the second occurrence of the words "Attorney General" the words "Public Prosecutor";

(*b*) in Clause (9) by substituting for the words "Attorney General" the words "Public Prosecutor";

(*c*) in Clause (11) by substituting for the words "Agong and" the word "Agong," and by inserting after the word "Putrajaya" the words "and reference to the legal adviser of the State shall be construed as reference to the Attorney General or any person to whom the Attorney General has delegated his functions as a member of the Board"; and

(*d*) in Clause (12)(*b*)(ii) by substituting for the words "Attorney General" the words "Public Prosecutor".

6. Article 183 of the Federal Constitution is amended—

(*a*) in the marginal note by inserting after the words "Attorney General" the words "or Public Prosecutor"; and

(*b*) in the Article by inserting after the words "Attorney General" the words "in the case of civil actions or of the Public Prosecutor in the case of criminal actions, as the case may be".

Separation of the Judicial and Legal Services and role of Judicial Service Commission

7. Article 125 of the Federal Constitution is amended—

(*a*) in Clause (4) by inserting after the words "five persons" the words "appointed on the recommendation of the Judicial Service Commission, being persons" and substituting for the words ", or, if it appears to the Yang di-Pertuan Agong expedient to make such appointment, persons" the word "or"; and

(*b*) in Clause (5) by substituting for the words "Prime Minister and, in the case of any other judge after consulting the Chief Justice," the words "Judicial Service Commission".

8. Article 132 of the Federal Constitution is amended in Clause (4) by inserting after paragraph (*b*) the following paragraph:

"(*bb*) the Public Prosecutor; or".

9. Article 138 of the Federal Constitution is amended—

(*a*) by deleting the words "and Legal" and "and legal" wherever they appear;

(*b*) in Clause (2) by substituting for paragraphs (*a*), (*b*) and (*c*) the following paragraphs:

"(*a*) the Chief Justice of the Federal Court, who shall be Chairman;

(*b*) the President of the Court of Appeal;

(*c*) the Chief Judges of the two High Courts;

(*d*) the deputy chairman of the Public Services Commission; and

(*e*) one or more other members who shall be appointed by the Yang di-Pertuan Agong, after consultation with the Chief Justice of the Federal Court, from among judges or former judges of the Federal Court, Court of Appeal or a High Court."

10. The Federal Constitution is amended by inserting after Article 138 the following Article:

"*Legal Service Commission*

138A.—(1) There shall be a Legal Service Commission, whose jurisdiction shall extend to all members of the legal service of the Federation.

(2) The Legal Service Commission shall consist of—

(*a*) the chairman of the Public Services Commission, who shall be Chairman;

(*b*) the Solicitor General;

(*c*) the Public Prosecutor; and

(*d*) one or more other members who shall be appointed by the Yang di-Pertuan Agong, after consultation with the Chief Justice of the Federal Court, from among persons who are or have been or are qualified to be a judge of the Federal Court, Court of Appeal or a High Court.

(3) The person who is secretary to the Public Services Commission shall be secretary also to the Legal Service Commission."

11. Article 160 of the Federal Constitution is amended in Clause (2) by inserting after the definition of "Ruler" the following definition:

"Solicitor General" means the senior officer, by whatever style known, of the legal service of the Federation other than the Attorney General and the Public Prosecutor.

Consequential amendments: references to Services and Service Commissions

12. Article 123 of the Federal Constitution is amended in paragraph (*b*) by substituting for the word "judicial and legal service" the word "judicial or legal services".

13. Article 132 of the Federal Constitution is amended—

    (*a*) in Clause (1) by substituting for paragraph (b) the following paragraphs:

        "(*b*) the judicial service;

        (*bb*) the legal service of the Federation;"; and

    (*b*) in paragraph (*b*) of Clause (4) by substituting for the words "judicial and legal service" the words "legal service of the Federation".

14. Article 135 of the Federal Constitution is amended in paragraph (*c*) by deleting the words "and Legal".

LIST OF ABBREVIATIONS

AG	Attorney (-) General
AGS	Australian Government Solicitor
CJ	Chief Justice
CM	Chief Minister
CPC	Criminal Procedure Code
CPS	Crown Prosecution Service (UK)
CR	Chief Registrar
CrPC	Code of Criminal Procedure (India)
DPP	Director of Public Prosecutions
EC	Election Commission
ExCo	Executive Council
FC	Federal Constitution
FCt	Federal Court
FM	Federation of Malaya
FMS	Federated Malay States
GLD	Government Legal Department (UK)
GPA	Government Proceedings Act
ICS	Indian Civil Service
JLS	Judicial & Legal Service
JLSC	Judicial & Legal Service Commission
JS	Judicial Service
JSC	Judicial Service Commission
LA	Legal Adviser
LegCo	Legislative Council
LRC	Law Reform Commission
LP	Lord President
LS	Legal Service

LSC	Legal Service Commission
MACC	Malaysian Anti-Corruption Commission
MB	Menteri Besar
MP	Member of Parliament
NI	Northern Ireland (UK)
NZ	New Zealand
PM	Prime Minister
PP	Public Prosecutor
PSC	Public Service(s) Commission
SCt	Supreme Court
SFO	Serious Fraud Office (UK)
SG	Solicitor(-)General
SS	Straits Settlements
UK	United Kingdom
UN	United Nations
YDPA	Yang di-Pertuan Agong
YDPN	Yang di-Pertua Negeri

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