

OFFICE OF THE SPECIAL PROSECUTOR (AMENDMENT)
BILL, 2021

MEMORANDUM

The object of the Bill is to amend the Office of the Special Prosecutor Act, 2017 (Act 959) to accord with article 8(2) of the 1992 Constitution.

Section 13(1)(a) of the Office of the Special Prosecutor Act, 2017 (Act 959) disqualifies a person who owes allegiance to a country other than Ghana from being appointed as Special Prosecutor. The Supreme Court decided in *Professor Stephen Kwaku Asare v Attorney-General* [2012] ISCGLR 460, that any attempt to add to the list of persons excluded in article 8(2) would amount to an amendment of the Constitution and the amending legislation must thus strictly comply with the procedures for amending the Constitution.

Considering the decision of the Supreme Court in the *Professor Stephen Kwaku Asare* case, section 13(1)(a) is rendered unconstitutional. This is because the offices specified in article 8(2) of the Constitution do not include the Office of the Special Prosecutor. Even though article 8(2) empowers Parliament to extend the list of offices beyond those specified in the Constitution, the Supreme Court has determined that the power granted to Parliament by article 8(2)(g) is subject to articles 289 and 291 of the Constitution. Thus, any attempt by Parliament to extend the list of offices that a dual citizen may not hold can only be effected by enacting legislation in accordance with articles 289 and 291 of the Constitution. The Office of the Special Prosecutor Act, 2017 (Act 959) was however not enacted in accordance with article 291 of the Constitution.

In the recent case of *Dr. Dominic Akuritinga Ayine v Attorney-General* [2020] DLSC8799, Dordzie, JSC, in a dissenting opinion, indicated that to the extent that paragraph (a) of subsection (1) of section 13 of Act 959 sought to add the Office of the Special Prosecutor to the disqualification list that bars citizens who owe allegiance to countries other than Ghana from holding the specified offices, it is unconstitutional on the authority of the decision in the *Asare* case.

By repealing the offending paragraph (a) of subsection (1) of section 13 of Act 959, the said section would accord with article 8 of the 1992 Constitution and the Office of the Special Prosecutor, which was added

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to the exclusion list in contravention of the Constitution, would be removed. The effect of the repeal is that until article 8(2) of the Constitution is amended to include the Office of the Special Prosecutor, a person who owes allegiance to any other country in addition to Ghana may be appointed to the Office of the Special Prosecutor.

The *clause* of the Bill amends subsection (1) of section 13 of Act 959 by repealing paragraph (a) to remove the Office of the Special Prosecutor from the list of offices limited to a citizen who does not owe allegiance to any other country.

HON. KENNEDY OSEI NYARKO

MP for Akim Swedru

Date: 9th June, 2021.