



# LEGISLATIVE DRAFTING MANUAL

**FIRST EDITION**

**MINISTRY OF JUSTICE AND  
LABOUR RELATIONS**

Prepared by the Directorate: Legislative Drafting, Ministry of Justice and Labour Relations

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## **Foreword by Minister of Justice and Labour Relations**



This drafting manual is the culmination of work by the then Ministry of Justice and in particular of the Directorate: Legislative Drafting team, who spent many years compiling the thorough document you see before you. The manual serves as a step-by-step guide for those who write laws, outlining clearly the proper form and style used as well as the acceptable principles and approaches to writing law. It is Namibia's first ever guide to legislative drafting – an important procedural milestone in and of itself.

Yet the publication of this manual represents so much more than an achievement in internal processes. Its purpose is not only to strengthen and streamline drafting within existing circles – it is to expand on who can draft. This manual was made to enable Namibians beyond the Ministry of Justice to better understand and engage with the legislative process. It was made to empower Namibians in putting down on legislative paper their aspirations – aspirations of how the law can help Namibia grow stronger. Ultimately, this manual intends to remove barriers to engage with legislative drafting in the first place. It aims to inform and empower.

I am proud of the hard work put into this document by those with extensive drafting experience. By sharing their guidance, experience and insight on paper in an organised and accessible way, they are helping to build a stronger and more accessible democracy. Their work represents an important step toward the inclusive growth and shared prosperity that this government has been working to deliver.

We hope that any and all Namibians interested in the legislative process will learn something from this first edition, and that it might contribute to a more robust legislative process which we can all be proud of.

**Hon. Fillemon Wise Emmanuel**  
**Minister of Justice and Labour Relations**

## **Foreword by Dr. Audrin Mathe, Executive Director**



The drafting of Bills, regulations, administrative notices and proclamations is a complex process requiring skill, expert knowledge of the law, an eye for detail, dedication, and passion.

The onerous task of drafting legislation is bestowed upon the legislative drafters in the Ministry of Justice and Labour Relations.

It takes a very special calibre of legal officer to draft legislation, and we are honoured to have a dedicated and skilled team of legislative drafters who have gone the extra mile to compile this drafting manual. The manual depicts their expert knowledge in the field of drafting legislation and it is carefully compiled in a manner that will enable its readers and users to make sense of the complexities of the process and navigate accordingly.

The manual will further enable users to submit well-articulated instructions to the legislative drafters thereby reducing the risks of extended timelines, miscommunication and ambiguity.

The Ministry of Justice and Labour Relations is proud of this remarkable achievement of our legislative drafters and we urge all our clients to make optimal use of this manual. Let us work together to enhance efficiency and effectiveness in the delivery of services to the people.

**Audrin Mathe**

**Executive Director**

**Ministry of Justice and Labour Relations**

## Preface to the Drafting Manual



The discipline of legislative drafting is one of the most unknown and misunderstood in the legal profession. “What do you do?” “I am a legislative drafter” “What does that mean?”. “Oh! I write laws for government”. “Oh awesome.” But the facial expression often does not agree or comprehend the explanation. Various jurisdictions have various names for those who write the laws for government, with some referring to them as parliamentary counsel, legislative counsel and others as legislative drafters as in Namibia.

Legislative drafters translate government policy into legislation. These are persons with degrees in law, who take on this daunting task that requires of them to be a legal advisor, policy advisor, legal researcher, a judge, a layperson, an editor and a proofreader. To date, Namibia has enacted some 661 Acts of Parliament as result of laws drafted by the legislative drafters over the years since the date of the country’s independence on 21 March 1990.

This manual is a result of years of meetings and endless discussions about where to place the comma, which punctuation to use, and the change of mind one year after the other. Immense gratitude goes out to the forerunners of this manual, Dr. Zenda, the late Mr. Bekker, Mr. Frindt and Mr. Nepaya for their valuable input. Profound gratitude also goes to the editing and proofreading team Dr. Zenda, Ms. Kandanga-Nangolo, Mr. Xamseb, Ms. Nghiishililwa and Ms. Jansen for their dedication to finalise this process.

This is the continuation of building institutional memory in legislative drafting and building drafting capacity in Namibia.

Ms. Felicity !Owoses

Chief: Directorate Legislative Drafting

Ministry of Justice and Labour Relations

## GLOSSARY

Administrative act:	Is any act of an administrative nature which the President, a minister or other functionary is required or authorised to perform in terms of or under the Namibian Constitution or any law of Namibia and which act is required to be published in the <i>Gazette</i> .
Act:	Is a Bill passed by Parliament, assented to by the President and published in the <i>Gazette</i> and this includes pre-independence Acts and other primary legislation.
Bill:	Is a proposal to make primary legislation or amend an existing Act of Parliament.
Cabinet:	Represents the Executive branch of government and consists of the President, Vice-President, Prime Minister, Deputy Prime Minister and Ministers.
CCL:	Is the Cabinet Committee on Legislation.
<i>Gazette</i> :	Is the official publication of Government in which Acts of Parliament and other legal instruments are published.
Law:	Includes statutory law, common law, customary law and case law.
Parliament:	Is the National Assembly acting subject to the review of the National Council.

Policy:	With reference to government policy means a set of decisions by government to deal with a problem or issue and sets out key principles, objectives and strategies on how to achieve the objectives. One of the strategies Government may identify to solve or deal with a problem is by coming up with legislation.
Primary legislation:	Is an Act of Parliament and includes Ordinances and Proclamations made before independence having the status of primary legislation.
Sponsoring Minister/Ministry:	Is the Minister/Office, Ministry or Agency that is responsible for the administration of the subject matter of a piece of legislation.
Subordinate legislation:	Also called delegated, secondary or subsidiary legislation is legislation made by functionaries to whom the Namibian Constitution has conferred subordinate legislative powers or Parliament has conferred subordinate legislative powers in terms of an Act of Parliament, such as proclamations issued by the President, and regulations, rules, codes and determinations made or issued by ministers or other functionaries.

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## CHAPTER 1 INTRODUCTION

### **1. Why have a drafting manual**

- (1) Namibia is a constitutional democracy founded on the principles of supremacy of the Constitution, rule of law, democracy, justice for all, as well as separation of powers among the organs of the State. The rule of law demands that laws be clear and understandable, and this places an obligation on those involved in the lawmaking process to uphold this principle.
- (2) Although there are various sources of law in Namibia such as the Namibian Constitution, statutory law, common law, case law, customary law and international law. Statutory law remains an indispensable source of law and sine qua non for the regulation of the State (L Du Plessis, Re-Interpretation of Statutes, 2002 at p 20).
- (3) The rule of law also calls for the development of a coherent and consistent statute book. To heed this call, those who write laws to enable Parliament to carry out its constitutional mandate of making and repealing laws must adopt best practices and approaches to assist the development of a coherent and consistent statute book.
- (4) It is against this background that a drafting manual becomes an important tool in promoting a coherent and consistent development of the Namibian statute book.

### **2. What is a drafting manual**

A drafting manual is an important tool containing guidelines on form and style for those who write laws (legislative drafters). These guidelines are drawn from the Commonwealth drafting manual and the drafting manuals of other Commonwealth countries. These drafting manuals contain generally acceptable principles and approaches for drafting primary legislation and subordinate legislation.

### **3. Status of this drafting manual**

- (1) This manual sets out the principles and approaches that the Directorate of Legislative Drafting uses in drafting legislation for Namibia.



- (2) The manual has been prepared by the Directorate of Legislative Drafting in the Ministry of Justice and Labour Relations.
- (3) The manual is primarily intended for use by –
  - (a) legislative drafters in the Ministry of Justice and Labour Relations; and
  - (b) persons who prepare layperson drafts of Bills, proclamations, regulations, rules, codes and determinations.
- (4) The manual is also intended to be a resource material for ministers and officials involved in the drafting of policy and laws, members of the National Assembly and the National Council, legal officers in the employ of the State, legal practitioners, judicial officers, lecturers and students of law, among others.
- (5) The manual does not contain an exhaustive list of drafting principles and approaches. Therefore, legislative drafters and those making use of this manual must consult other material on legislative drafting. **Annexure 1** contains a list of some of these research materials.
- (6) The Directorate: Legislative Drafting will regularly review, update and publish the manual on the Ministry of Justice and Labour Relations website. If you have any comments or guidance, please send them to [Drafters@mojlr.gov.na](mailto:Drafters@mojlr.gov.na) or [info@mojlr.gov.na](mailto:info@mojlr.gov.na).

#### **4. What a drafting manual can provide**

A drafting manual can –

- (a) provide uniformity and standardisation in form, style and language of legislation;
- (b) provide accuracy and clarity in drafting;
- (c) assist the speedy finalisation of legislation;
- (d) serve as a training tool for new legislative drafters;
- (e) be a reference tool for experienced legislative drafters;

- (f) be a statement of best drafting practices; and
- (g) provide resource material for non-drafters.

## **5. What a drafting manual cannot do**

- (1) A legislative drafter is required to have good knowledge of the law, research skills, analytical skills, listening and writing skills, focused attention to detail and a passion for the drafting of legislation. Drafting of legislation is a daunting task which requires constant self-motivation.
- (2) Although the manual can guide the legislative drafter as to form and style of drafting legislation, it cannot confer the attributes mentioned in subparagraph (1) which a legislative drafter is required to have.
- (3) A legislative drafter must be willing to put in hours of reading laws, including case law, researching, asking questions, taking criticism positively and be willing to be trained and mentored. A legislative drafter must know that there is no perfect draft and be free to be creative and be willing to learn from mistakes in order to evolve and become experienced in the discipline.

## **6. Directorate: Legislative Drafting**

- (1) The Directorate: Legislative Drafting is a directorate in the Ministry of Justice and Labour Relations.
- (2) The mandate of the Directorate is to –
  - (a) scrutinise and draft Bills for Parliament as initiated by Government offices, ministries and agencies, agreed to by the Cabinet Committee on Legislation and approved by Cabinet in principle;
  - (b) scrutinise and draft subordinate legislation submitted by offices, ministries and agencies;
  - (c) scrutinise and draft administrative notices submitted by offices, ministries and agencies, including subordinate legislation and administrative notices emanating from

regional councils, local authority councils and statutory bodies that are channelled through line offices, ministries and agencies;

- (d) advise offices, ministries and agencies on the lawmaking process;
- (e) advise the Cabinet Committee on Legislation on any piece of proposed primary legislation; and
- (f) publish legal instruments (Acts of Parliament, proclamations, regulations, rules, codes, determinations, administrative acts and other legal documents that are required by law to be published in the *Gazette*).

(3) The Directorate certifies –

- (a) Bills before submission to the Attorney-General for certification and transmission to the Secretary to the National Assembly for printing and subsequent introduction by the sponsoring minister;
- (b) proclamations by the President before submission to the Attorney-General for certification and transmission to the *Gazette* Office for publication; and
- (c) subordinate legislation and administrative acts before they are signed by the duly authorised functionary and transmitted to the *Gazette* Office for publication in the *Gazette*.

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## CHAPTER 2

### LEGISLATIVE HISTORY OF NAMIBIA

#### 7. Introduction

- (1) When the Namibian Constitution came into force on 21 March 1990, a plethora of laws made during the South African administration of South-West Africa, as Namibia was known, became part of Namibian law by virtue of Article 140 of the Namibian Constitution. These laws still exist in Namibia until they are repealed or amended by Parliament or declared unconstitutional by a competent court.

- (2) It is therefore important that the legislative drafter familiarises himself or herself with the legal history of Namibia, application of laws and transfer of laws and the implications. What follows in the next paragraphs is an amplified summary of an extract from NAMLEX prepared by the Legal Assistance Centre of Namibia.

## **8. South-West Africa under South African administration**

- (1) “South-West Africa” became a Protectorate of the Union of South Africa in terms of the Peace Treaty of Versailles which was signed on 28 June 1919.
- (2) South-West Africa was to be administered by South Africa under a League of Nations mandate subsequent to which –
- (a) the mandate for South-West Africa established pursuant to this treaty was reproduced in Government Notice No. 72 of 6 June 1921;
  - (b) the Treaty of Peace and South-West Africa Mandate Act No. 49 of 1919 gave effect to the Mandate for South-West Africa;
  - (c) the Treaty of Peace and South-West Africa Mandate Act delegated administration of the territory of South-West Africa to the Governor-General of the Union of South Africa, who was given both legislative and executive powers; and
  - (d) the Governor-General subsequently delegated administrative powers over the Territory to the Administrator of South-West Africa through SA Proclamation No. 1 of 2 January 1921.
- (3) The Administration of Justice Proclamation No. 21 of 1919 issued by the Administrator for South-West Africa introduced Roman-Dutch law to South-West Africa.
- (4) In 1989 after a protracted war of liberation, Namibia under the auspices of the United Nations held its first general election for the Constituent Assembly to draft and adopt a constitution for the independent Republic of Namibia.
- (5) The political parties that participated in that election and won seats formed the Constituent Assembly and adopted the Namibian Constitution that established the Republic of Namibia as

a sovereign, secular, democratic and unitary State founded upon the principles of democracy, the rule of law and justice for all. On 21 March 1990, the Constituent Assembly declared the Republic of Namibia as a free and an independent State.

- (6) According to Article 140 of the Namibian Constitution, the pre-independence laws remain in force in Namibia until repealed or amended by an Act of Parliament or declared unconstitutional by a competent court. It is therefore important to determine which of the South African laws were continued. There are two classes of legislation applicable to Namibia, namely –
  - (a) laws made for South Africa that also applied to Namibia; and
  - (b) laws made by the various structures created by the South African government especially for Namibia.
- (7) In general, a law passed by the South African Parliament was not automatically applicable in South-West Africa. If such an Act however explicitly states that it applies in “South-West Africa” it was applicable in Namibia.
- (8) A large number of South African statutes continued their application in Namibia in this manner. This was especially true for the period 1968-1977, when the South African government intended to administer South-West Africa as a fifth province of South Africa
- (9) The “application to South-West Africa” section was usually near the end of the Act and usually accompanied by a definition of “Territory” to mean “South-West Africa”. It is important to note that the presence of such a definition does not necessarily mean that the Act was applicable in Namibia. The reader must always consult the actual applicability clause. This clause may for example provide that the Act may be made applicable or that only certain provisions apply.
- (10) An important issue with the applicability provision is that it usually states that the Act in question “with any amendments thereof” applies in South-West Africa. As will be explained below, this phrase does not mean all amendments up to independence, but only amendments up to the date when particular executive powers were transferred to the Administrator-General for South-West Africa.
- (11) The South African government also established various bodies and functionaries that had the power to make laws for South-West Africa. These bodies or functionaries are outlined in the ensuing paragraphs.

- (12) The South African State President and his predecessor the Governor-General both had unlimited power to make laws for South-West Africa, and such laws were made by proclamations that appeared in the South African Government *Gazettes*.
- (13) The Governor-General of South Africa then appointed the Administrator for South-West Africa from 1921 until 1977. The Administrator who was a South African official also had executive and legislative powers over the Territory. He made laws by proclamations published in the South-West African Official *Gazettes*. The Administrator was advised by an Advisory Council established in terms of the South-West Africa Council Proclamation 1 of 1921.
- (14) The Administrator-General for South-West Africa was appointed in 1977 until independence in 1990 and he had executive and legislative powers and made laws by proclamations published in the Official *Gazettes* of South-West Africa. Proclamations by the Administrator-General were made by notice in the Official *Gazette* identified by the letters AG and the number and year in which they were made. An example is Proclamation AG No. 8 of 1980.
- (15) The transfer of executive powers to the Administrator-General was done by notice in the Official *Gazette*. In addition to legislative proclamations, the Administrator-General also had power to issue administrative proclamations that are similar to proclamations issued by the President of Namibia. Government notices issued by the Administrator-General were published in the Official *Gazette* identified by the letters AG and number and year they were made.
- (16) The Legislative Assembly of South-West Africa was a body elected on a constituency basis by the white electorate. This body was similar to South African provincial councils, but it had somewhat wider legislative powers except those “reserved” for the South African Parliament. This body made ordinances, a number of which are still applicable. The Executive Committee was an administrative body elected from the members of the Assembly and some ordinances specifies it as the administrative organ. The powers of that body now vest in the President of Namibia (unless it has been delegated see below)
- (17) The first Legislative Assembly created by the South-West Africa Constitution Act, 1925 (Act No. 42 of 1925) also made laws referred to as Acts. In 1985, the South African State President created a second Legislative Assembly by Proclamation R.101 of 1985. This Assembly also made Acts, a fair number of which still exist (mainly in the form of amendments to existing laws). That Legislative Assembly was dissolved in 1989 as part of the process of implementing UN Resolution 435.

- (18) The Administrator-General also created second tier government structures based on ethnicity. Every ethnic group had a legislative council and an executive council. The legislative council had the power to make laws (called ordinances) on a range of “prescribed matters”. They made few ordinances other than appropriation ordinances. There are however probably a few ordinances from those bodies that still exist. They will however only apply to the ethnic group in question and are for that reason of doubtful legal validity.
- (19) A self-government structure also existed in Rehoboth created by the Rehoboth Self-Government Act, 1976 (Act No. 56 of 1976), which is an Act of the South African Parliament. The South African government also started to implement the “homeland” system in South-West Africa, and created some structures that may have existing legislation that are not yet repealed.

## **9. Transfer of control from South African Government to Administrator-General**

- (1) The importance of the transfer proclamations is that amendments to South African laws stopped being applicable to South-West Africa on the date of transfer of the administrative powers. The transfer of powers for laws administered by each South African minister was done by separate AG proclamations. For example, the Minister of Justice of South Africa had transferred all the matters administered by him on 1 November 1979 to the corresponding functionary in Namibia. This means that amendments to, for example, the Criminal Procedure Act, 1977 (Act No. 51 of 1977) that were made before that date are applicable in Namibia but those made after that date are not.
- (2) The laws administered by every South African minister have their own transfer proclamation. A list of these proclamations with the date of transfer is in **Annexure 2**. Please note that this description is somewhat of a simplification especially with reference to the bringing into operation of certain Acts. It is therefore important that when the question arises whether certain amendments apply, one must consult the actual provisions of the transfer proclamation to ensure that there are no special provisions made with regard to the Act in question.
- (3) All the transfer proclamations refer to “the General Proclamation” which is Proclamation AG No. 7 of 1977. The specific proclamations then contain qualifications and special provisions in relation to certain laws which sometimes exclude the operation of the General Proclamation and sometimes contain amendments of the Act or other special arrangements.

- (4) Some Acts that were not yet in operation on the transfer date came into operation when the South African President put them into operation. It is therefore necessary to consult the specific proclamation in the case where such questions arise.
- (5) Some problems with the scheme are that some laws, such as the Prescription Act, 1969 (Act No. 68 of 1969) did not have any minister assigned to administer them. There seems to be a difference of opinion as to whether such Acts were transferred to the minister that would usually be responsible for the Act on the date of transfer, (the Minister of Justice and Labour Relations in the case of the Prescription Act) or whether all amendments up to independence applied in Namibia.
- (6) Another challenge which was brought about by these transfer proclamations is found in the Livestock Improvement Act, 1977 (No. 25 of 1977). This resulted in a case in which the High Court cast some doubt as to whether that Act is in force in Namibia. See the case of *S v Loft-Eaton & Others* (1) 1993 NR 370 (HC).

## **10. Transfer of powers from South African functionaries to Government of Namibia**

- (1) Article 140 of the Namibian Constitution reads as follows:

- “(1) Subject to the provisions of this Constitution, all laws which were in force immediately before the date of Independence shall remain in force until repealed or amended by Act of Parliament or until they are declared unconstitutional by a competent Court.*
- (2) Any powers vested by such laws in the Government, original Minister or other official of the Republic of South Africa shall be deemed to vest in the Government of the Republic of Namibia or in a corresponding Minister or official of the Government of the Republic of Namibia, and all powers, duties and functions which so vested in the Government Service Commission, shall vest in the Public Service Commission referred to in Article 112 hereof.*
- (3) Anything done under such laws prior to the date of Independence by the Government, or by a Minister or other official of the Republic of South Africa shall be deemed to have been done by the Government of the Republic of Namibia or by a corresponding Minister or official of the Government of the Republic of Namibia, unless such action is subsequently repudiated by an Act of Parliament, and anything so done by the*



*Government Service Commission shall be deemed to have been done by the Public Service Commission referred to in Article 112 hereof, unless it is determined otherwise by an Act of Parliament.*

(4) *Any reference in such laws to the President, the Government, a Minister or other official or institution in the Republic of South Africa shall be deemed to be a reference to the President of Namibia or to a corresponding Minister, official or institution in the Republic of Namibia and any reference to the Government Service Commission or the government service, shall be construed as a reference to the Public Service Commission referred to in Article 112 hereof or the public service of Namibia.*

(5) *For the purposes of this Article the Government of the Republic of South Africa shall be deemed to include the Administration of the Administrator-General appointed by the Government of South Africa to administer Namibia, and any reference to the Administrator-General in legislation enacted by such Administration shall be deemed to be a reference to the President of Namibia, and any reference to a Minister or official of such Administration shall be deemed to be a reference to a corresponding Minister or official of the Government of the Republic of Namibia.”.*

(2) The provisions of Article 140 turned out to be problematic because immediately before independence almost all administrative powers vested in the Administrator-General as the result of the various transfer laws.

(3) This meant that although the laws may refer to a minister, the power actually vested in the Administrator-General. This necessitated the enactment of the Assignment of Powers Act, 1990 (Act No. 4 of 1990). Section 3 of that Act reads as follows:

*“3. (1) The President may assign the administration of any provision in any law which entrusts -*

*(a) to the President any power, duty or function, to the Prime Minister or any Minister; or*

*(b) to a Minister any power, duty or function, to the Prime Minister or any other Minister;*

*either specifically or by way of a general assignment of the administration of any law or of all such laws entrusting powers, duties or functions to the President or to such first-mentioned Minister, as the case maybe.*

*(2) Any power delegated to the Prime Minister or a Minister by the President under the provisions of the Delegation of Powers Proclamation, 1983 (Proclamation AG. 4 of 1983), before the commencement of this Act, shall be deemed to have been assigned to the Prime Minister or the Minister concerned under the provisions of subsection (1)(a).”.*

- (4) It is also necessary to take note of the fact that certain areas in the country had slightly different rules with regard to the applicability of laws. These areas are Rehoboth, Walvis Bay and the former Caprivi Zipfel (now Zambezi region). One may consult the Namlex Index on these matters. The Namlex Index is a handy source of information, but a legislative drafter must always ensure that the information contained in the Namlex Index is accurate by verifying the information with the primary sources which are the published *Gazettes*.

## **11. Types of legislation in Namibia**

- (1) The following are types of primary legislation in Namibia –
- (a) the Namibian Constitution which is the supreme law of the country meaning all laws are tested against the Constitution;
  - (b) Acts passed by the South African Parliament that were made applicable to South-West Africa;
  - (c) Acts and Ordinances made by various Legislative Assemblies of South-West Africa;
  - (d) Proclamations made by the Governor-General of South Africa, Administrator of South-West Africa, State President of South Africa, and Administrator-General of South-West Africa, that were enacted as primary legislation; and
  - (e) Acts passed by the Parliament of the Republic of Namibia on or after independence that is 21 March 1990.
- (2) The following are types of subordinate legislation in Namibia –

- (a) proclamations (made or issued as subordinate legislation) and other subordinate legislation made or issued by the various South African government institutions or officials prior to 1990;
- (b) proclamations issued by the President from 1990 as subordinate legislation, for example the state of emergency regulations; and
- (c) regulations, rules, codes, determinations and directives by ministers and other functionaries (local authority councils and other statutory bodies).

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### CHAPTER 3

#### LAW MAKING PROCEDURE, KEY REFERENCE LAWS AND ROLE OF STATUTORY INTERPRETATION

#### **12. Law-making procedure for primary legislation (How Bills become Acts)**

- (1) In Namibia the need for primary legislation can arise because of a societal problem which needs to be addressed, government policy, international agreements binding on Namibia, public demand advocacy groups or reports published by the Law Reform and Development Commission of Namibia among others.
- (2) Bills are tabled in the National Assembly by the relevant Minister under whose area of jurisdiction the subject matter of the proposed legislation falls, however a member of the National Assembly may also initiate a Bill referred to as a “private member’s Bill”.
- (3) The process of how Bills become Acts of Parliament is set out in the Administrative Directive No. 1 of 26 January 1993, published under Government Notice No. 16 of 5 February 1993. (**Annexure 3**)

#### **13. Law-making procedure for subordinate legislation**

- (1) Subordinate legislation, also called delegated or subsidiary legislation, derives its authority from primary legislation such as an Act of Parliament.

- (2) Subordinate legislation takes the form of regulations, rules, codes of conduct and even proclamations such as when the President issues state of emergency regulations by proclamation.
- (3) Subordinate legislation is initiated by the functionary to whom the Namibian Constitution or Parliament has conferred the lawmaking power, be it the President, Chief Justice, Judge President, a minister, a board or an authority or any other functionary.
- (4) Subordinate legislation does not go to Parliament, unless the Constitution or primary legislation requires that.
- (5) Subordinate legislation is made by the functionary authorised by the primary legislation and instructions to draft subordinate legislation are the same as for Bills. The instructions are submitted to the Directorate Legislative Drafting, scrutinised, drafted and certified by the legislative drafters, approved by the functionary and published in the *Gazette*.

#### **14. Key reference laws**

- (1) The key reference laws to be used when drafting legislation are the Namibian Constitution and the Interpretation of Laws Proclamation, 1920 (Proclamation No. 37 of 1920) **(Annexure 4)**.
- (2) It is imperative that a legislative drafter be familiar with the Namibian Constitution which –
  - (a) contains the principles upon which the government is established;
  - (b) regulates the powers of the various authorities it establishes;
  - (c) directs the persons or authorities who must or may exercise certain powers;
  - (d) determines the manner in which the powers it confers are to be confined or exercised;
  - (e) specifies the limits to which powers are confined in order to protect individual rights and prevent the abusive or arbitrary exercise of power; and
  - (f) is the cornerstone of the rule of law and provides for the Executive, the Legislature and the Judiciary.

- (3) The Interpretation of Laws Proclamation –
- (a) provides the basic rules about how the courts should interpret certain legislative provisions;
  - (b) defines certain words and expressions and removes the necessity to repeat definitions in other legislation;
  - (c) apart from definitions and rules of construction, includes substantive rules of law such as provisions related to the effect of the repeal of legislation;
  - (d) clarifies the rules of construction, avoids repetition and promotes consistency of language. It is to be noted however, that the definitions in the Proclamation can be ousted by a particular definition in other legislation.
- (4) A legislative drafter must be very conversant with these two enactments in order to advance the rule of law and ensure consistency of language.
- (5) With regard to statutory interpretation, the legislative drafter should read books on statutory interpretation, constitutional interpretation, legislative drafting and other relevant research materials listed in **Annexure 1** and be familiar with Namibian case law and case law in comparative jurisdictions.

## **15. Role of statutory interpretation**

- (1) Statutory interpretation is the process by which the courts give meaning to the provisions of statutes, such as the Namibian Constitution, primary legislation and subordinate legislation using the common law, rules, principles and presumptions.
- (2) A legislative drafter should know that the Constitution is treated as a special form of statute hence there are different rules and principles for interpreting statutes and the Constitution.
- (3) The general rule of interpreting statutes is that a statute is interpreted in the context. This means that a provision is interpreted in the context of the whole Act. The first rule of interpretation is that words are given their ordinary literal grammatical meaning. Courts will only deviate from this rule if such an interpretation would lead to a manifest absurdity, inconsistency or hardship or would be contrary to the intention of the legislature.

- (4) The approach that the courts use for interpreting the provisions of the Constitution is that the provisions of the Constitution must be interpreted purposively. The legislative drafter must know the scope and application of this approach.
- (5) Statutory provisions can be challenged in court if they are not clear or if they cannot be understood or if they infringe on fundamental rights and freedoms entrenched in the Constitution. Thus, it is important for the legislative drafter to test the proposed legislation against the rules and principles of statutory interpretation.

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## CHAPTER 4 LEGISLATIVE DRAFTERS

*“A fine Legislative Drafter must be an architect of social structures, an expert in the design of frameworks of collaboration for all kinds of purposes, a specialist in the high art of speaking to the future, knowing when and how to try and bind it and when not to try at all. Thus, those who seek to practice the art of the Legislative Drafter should be persons genuinely interested in legislative drafting with every likelihood of making legislative drafting a career.”* (Prof. VCRAC Crabbe, Crabbe on Legislative Drafting, 2008).

### PART 1 ROLE OF LEGISLATIVE DRAFTERS

#### **16. Role of legislative drafters**

- (1) A legislative drafter provides specialised and expert services to the Government by translating policy into legislation and advising the Government in its legislative capacity.
- (2) The legislative drafter must provide legislative advice and drafting services in a professional, confidential and impartial manner.
- (3) It is not the role of the legislative drafter to blindly accept whatever an instructing office, ministry or agency wants at all costs.

- (4) On occasion legislative drafters have to speak the unpalatable truth or expose the weakness in a proposed legislative scheme. This does not always make them popular with ministers or policy-makers, but it is a necessary part of their job.
- (5) Legislative drafting is a demanding profession and is not just a technical exercise, as it requires hard work, devotion, focused attention, and the ability to communicate policy in an understandable and user-friendly form.
- (6) A legislative drafter plays a major role with regard to both the form and content of legislation.
- (7) The work of a legislative drafter relates to the practical goal of preparing laws that are clear and readily understandable and that will carry out the policies of the Government in a form understandable to Parliament.
- (8) It is the responsibility of legislative drafters to draft legislation that –
  - (a) observes the principle of constitutional democracy, which includes constitutional supremacy, democracy, rule of law, separation of powers, entrenched rights and freedoms;
  - (b) is clear, understandable and does not create ambiguity;
  - (c) promotes consistency and coherence of the statute book;
  - (d) can be effectively implemented and enforced.
- (9) A legislative drafter should be aware that the Directorate often receives drafting instructions with unclear policy directions. The drafting instructions will mostly be in the form of an already prepared layperson's draft Bill or draft subordinate legislation.
- (10) Offices, ministries and agencies do not always have in house legal officers with drafting expertise or the capacity to draft comprehensive policy or drafting instructions. They rely heavily on consultants to assist them to draft their layperson's draft legislation.
- (11) Thus, a legislative drafter must as a rule first do a proper analysis of the instructions and research before commencing with the actual drafting and scrutiny of the proposed legislation.

PART 2  
QUALITIES AND ETHICS OF LEGISLATIVE DRAFTERS

**17. Qualities of legislative drafters**

- (1) Besides academic qualifications and good basic knowledge and experience in law, a legislative drafter must –
  - (a) have good writing and compositional skills;
  - (b) have an understanding of the legislative process as well as the impact and effectiveness of the instructions received, should the instructions be translated into law;
  - (c) be able to draft in simple and clear language, bearing in mind the end-user;
  - (d) be able to work in close collaboration with the instructing client and ensure that, as far as possible, legislation is based on sound legal principles, gives effect to the intended policy and is as clear and understandable as practicable.
- (2) A legislative drafter should –
  - (a) have sound basic knowledge of the sources of Namibian law, namely the Namibian Constitution, statutory law, common law, customary law, international law and case law;
  - (b) be a person who has a passion in legislative drafting and legal writing;
  - (c) pay meticulous attention to detail and have a clear systematic approach to problems;
  - (d) have an analytical mind;
  - (e) keep up to date with socio-economic and political events in Namibia and events in the world generally;
  - (f) be in a position to appreciate the political, economic and social policies that will undoubtedly be the background to any specific legislation;



- (g) be a team player and cooperate openly with all other persons involved in the drafting process;
  - (h) be concerned with the policy objectives and the administrative and other requirements necessary in the practical and effective implementation of the law;
  - (i) be prepared to accept criticism with tolerance and good humour and by doing so, learn and evolve as an experienced legislative drafter;
  - (j) undertake extensive legal and factual research beyond the drafting instructions, including reading existing legislation and other legislation that may be affected by the proposed law as well as looking at comparative legislation of other jurisdictions;
  - (k) make frequent use of the sources of legal research for Namibian laws (Acts, case law, reports) and some of the research materials that the drafter can consult are listed in **Annexure 1**; and
  - (l) be creative and make the correct choice of words which are appropriate for the legislation being drafted without embarking on a creativity spree that may distort the intention of the proposed law.
- (3) A legislative drafter should observe the **ABC** by Susan Larsen, Oral History interview with Richard Diebenkorn, 1985:

Assume nothing;

Believe nothing; and

Check everything.

- (4) In his book *The Seven C's of Basic Legislative Drafting 2020*, Chris Michelie highlights the **seven C's** of basic legislative drafting a legislative drafter must observe to achieve the objective of translating policy into legislation for the maintenance of the rule of law in the best interest of good governance:

**Communication:** the essence of the work of a legislative drafter is to communicate the intention of Parliament to the governed.

<b><i>Clarity:</i></b>	legislative intention must be made very clear to the end user. Clarity can be achieved through the use of plain language.
<b><i>Comprehensible:</i></b>	legislative intention must be made comprehensible (understandable) to the end user.
<b><i>Concise:</i></b>	legislation must only contain words or phrases which are necessary. Unnecessary or repetitive words must be avoided.
<b><i>Completeness:</i></b>	legislation must provide for every reasonably foreseen circumstance.
<b><i>Consistency:</i></b>	the legislative drafter must use the same language and style throughout the draft.
<b><i>Certainty:</i></b>	the legislative intention must be certain so that those affected are not left in doubt as to the extent of their duties (obligations), powers, options or rights or the procedures required to be followed in a given situation.

## **18. Legislative drafters and ethics**

- (1) Principles of public service dictate that the public servants including legislative drafters –
  - (a) should operate with the understanding that they are in a fiduciary relationship with the public;
  - (b) owe the public the highest quality of service;
  - (c) have a duty to develop a harmonious and co-operative working relationship with instructing officers to deliver good service.
- (2) Principles of professionalism require legislative drafters –
  - (a) to maintain the honour and dignity of the legal profession;

- (b) to observe professional ethics and maintain a relationship with an instructing ministry, office or agency similar to that between a legal practitioner and a client in matters of confidentiality;
  - (c) to carry out their functions with integrity;
  - (d) to be apolitical officers that serve in an impartial and non-partisan manner.
- (3) Principles of constitutionalism require legislative drafters –
- (a) to cultivate and foster a culture of constitutionalism and benchmark this supreme law;
  - (b) to uphold the rule of law;
  - (c) to observe the “need to know” policy of Cabinet documents and maintain their secrecy.
- (4) Principles of outreach require that legislative drafters should –
- (a) be mindful of the welfare of the community and society at large;
  - (b) encourage stakeholder engagement in consultative processes for proposed legislation;  
and
  - (c) engage in public education and awareness programs.
- (5) Principles of self-assessment require legislative drafters –
- (a) to conduct self-assessment of the quality, effectiveness and efficiency of the legal service offered;
  - (b) to engage in continuous education programmes to upgrade their legislative drafting skills.

## 19. Ridiculed attributes of legislative drafters

- (1) Although legislative drafters aim for excellence, the attributes of legislative drafters have been ridiculed in this satire by Sir James Comyn, *The Parliamentary Draftsman: Poem, in Poetic Justice 1947*:

*“I’m the parliamentary draftsman  
I compose the country’s laws,  
And of half the litigation  
I’m undoubtedly the cause.  
I employ a kind of English  
Which is hard to understand.  
Though the purists do not like it,  
All the lawyers think it’s grand.”*

- (2) It must be the objective of a legislative drafter to achieve exactly the opposite of this satire and prevent litigation.
- (3) Well-drafted legislation withstands the test of time, and it should be the objective of every legislative drafter to achieve this aim.

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## CHAPTER 5 DRAFTING AND STRUCTURE OF BILLS

### PART 1 DRAFTING OF BILLS

## 20. What is a Bill

- (1) A Bill is a proposal to make primary legislation that is an Act of Parliament or to amend existing primary legislation.
- (2) A Bill, as opposed to a draft Bill, is a proposed legislation approved by Cabinet, while a draft Bill is a proposed legislation not yet approved by Cabinet.

- (3) When a Bill is passed by the National Assembly and confirmed by the National Council on review and receives the Presidential assent (that is the signing of the Bill by the President and the publication of the Act in the *Gazette*), it becomes an Act of Parliament.

## **21. Submission of instructions for scrutiny and drafting of Bills**

- (1) Once –
- (a) the sponsoring office, ministry or agency has sorted out policy matters through consultations with stakeholders and prepared an explanatory memorandum and the draft Bill which has been cleared by CCL; and
  - (b) the draft Bill or policy framework has been approved by Cabinet in principle,
- the sponsoring office, ministry or agency must then submit the instructions to the Chief: Legislative Drafting, in the Ministry of Justice, for scrutiny and drafting.
- (2) The instructions to scrutinise and draft a Bill must be under the letterhead of the instructing office, ministry or agency and signed by the Minister or Executive Director, and –
- (a) must be addressed to the Chief: Legislative Drafting, Ministry of Justice and Labour Relations;
  - (b) must be hand-delivered at the Directorate: Legislative Drafting, Ministry of Justice and Labour Relations;
  - (c) must be entered in the legislative drafting register and allocated a file number; and
  - (d) a file must be opened for the Bill.
- (3) The Chief: Legislative Drafting may assign the instructions to a legislative drafter or to two or more legislative drafters working together.
- (4) On receipt of the instructions from the Chief: Legislative Drafter the legislative drafter must ensure that the instructions include –

- (a) the layperson's draft Bill/detailed drafting instructions (hard and soft copy send to Drafters@mojlr.gov.na);
- (b) the Cabinet Decision/Action letter;
- (c) the CCL minutes and explanatory memorandum;
- (d) the explanatory notes, if any, and all documents submitted to Cabinet and CCL in connection with the instructions; and
- (e) the name, telephone number, email address and mobile number of the contact person.

## **22. Responsibilities of legislative drafters regarding consultations**

- (1) The first step the legislative drafter must undertake in the drafting process is that of spending time in analysing the drafting instructions. This means reading the drafting instructions, including the Bill, in order to understand the policy. In the case of the repeal of or amendment to an existing law, the legislative drafter must make time and read the repealed law or amended law carefully to have a complete picture of the existing policy and the proposed policy. A legislative drafter must not make the mistake of starting to format the draft Bill and rewording sentences as this can lead to wasted time, losing focus of the policy or misunderstanding the policy.
- (2) Analysing instructions, also includes consulting Namlex, NamibLII, SAFLII and the e-Justice website to see if the policy matter is already covered in other laws and its extent and to find any case law that dealt with the policy matter. In order to understand the policy, the legislative drafter may also need to look at similar laws of other jurisdictions. It is at this stage that the legislative drafter must create a folder containing the drafting instructions and all research materials for reference purposes.
- (3) If a legislative drafter to whom instructions are assigned for scrutiny and drafting legislation notices that the instructions are incomplete or not clear, the legislative drafter must prepare a list of policy and legal questions, discuss with his or her supervisor for their input and then request for further information or consultation with the client. (**Examples** of some of the policy and legal issues that the drafter may raise are listed in **Annexure 5**).

- (4) A legislative drafter must normally avoid consultation through the phone, and most consultations must be conducted by means of a meeting at the legislative drafter's office and minutes of the meeting must be recorded and confirmed by the client. Where the consultation involves a person at the level of Executive Director and above, the legislative drafter must consult at a venue designated by that person.
- (5) Where consultation is conducted through the phone, the legislative drafter must request the contact person to reduce the instructions or information given to the legislative drafter through the phone to writing, or the legislative drafter may reduce such instructions or information to writing and furnish them to the contact person for confirmation and record keeping.

### **23. Responsibilities of client regarding consultations**

The responsibilities of a client (instructing office, ministry or agency) apart from preparing the drafting instructions, are to –

- (a) explain the instructions by means of a conference or meeting at the legislative drafter's office but where the consultation involves a person of the level of Executive Director or above, the meeting should take place at a venue designated by that person;
- (b) respond promptly to issues raised by the legislative drafter;
- (c) read the drafts prepared by the legislative drafter carefully and understand the provisions. It often happens that the sponsoring offices, ministries or agencies do not take time to read and understand the laws that they are to implement, thus relying on the legislative drafter to give explanations when such is required in Parliament among others;
- (d) check instructions for consistency;
- (e) test the draft against different scenarios to make sure it is robust and will achieve its objectives;
- (f) consider whether the draft is clear and understandable by the user;
- (g) provide comments on the draft promptly;

- (h) co-ordinate the interests of any stakeholders who have been consulted or requested the client to articulate their interests through the legislative proposal; and
- (i) consider whether the proposed law can be implemented in terms of infrastructure, human resources and funding.

#### **24. Scrutiny, drafting and finalisation of Bills**

- (1) Before scrutiny and drafting, the legislative drafter must consider and raise problems and issues of legal significance set out in paragraph 22 and advise the client accordingly.
- (2) If the legislative drafter believes that most of the above-mentioned issues have been ironed out, the legislative drafter must start with the drafting of the Bill and complete the process of drafting.

#### **25. Procedure after completion of Bills**

- (1) On completion of a Bill, the legislative drafter must submit the Bill to the client by way of a letter of submission of Bill requiring the client to consider whether the Bill meets all their requirements.
- (2) The client may propose some changes to the Bill, and if the drafter accepts the changes, the legislative drafter must incorporate them in the Bill. The legislative drafter must keep a record of the proposed changes for future reference.
- (3) If the client is satisfied with the correctness of the Bill, the client must furnish the legislative drafter with a letter of satisfaction and advise the legislative drafter to proceed with the process.
- (4) On receipt of the letter of satisfaction, the legislative drafter must make three copies of the Bill and certify two of them with the Directorate certification stamp, indicate his or her name and sign on the stamp.
- (5) The Directorate keeps one certified print out for filing and forwards the other certified print and a clean print of the Bill to the secretary to the CCL. It must be noted that although this is what the 1993 Directive requires, the practice has been that the legislative drafters certify the Bills and forward them directly to the Attorney-General for further certification and submission to the National Assembly.



- (6) On receipt of the Bill as certified by the Attorney-General, the Secretary to the National Assembly must arrange for the printing of the Bill.
- (7) When the Secretary to the National Assembly receives printed copies of the Bill from the printers, the Secretary must forward a copy of the Bill to the client and the legislative drafter for proofreading in accordance with the General Proofreading Guidelines set out in **Annexure 6**.
- (8) After proofreading by the legislative drafter, client and the Secretary to the National Assembly, the final Bill is printed and the Secretary arranges for its distribution to members of the National Assembly before it is tabled by the sponsoring Minister.

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## PART 2 STRUCTURE OF BILLS

### **26. Form and structure of Bills**

Depending on the requirements of a particular Bill, the basic structure of a Bill is as follows:

#### *Bill*

*Long title*

*Sponsoring Minister (Introduced by the Minister of Information)*

*Arrangement of Act*

*Preamble (if any)*

*Enacting clause*

*Definitions and interpretation (if any)*

*Application (if any)*

*Main provisions*

*General provisions (including binding of State, regulations, repeal, savings and transitional provisions)*

*Short title and commencement*

*Schedules (including Tables and Annexures) (if any)*

## 27. Long title

- (1) The long title –
  - (a) is the starting point of a Bill and summarises the content of the Bill;
  - (b) is a useful aid to ascertain the scope of the Bill;
  - (c) must be wide enough to embrace the whole content of the Bill; and
  - (d) must focus more on principal matters and not on incidental or connected matters which is why long titles conclude with general phrases such as “and to provide for incidental matters.”.
- (2) The long title of an amending Bill differs from the long title of a new Bill that does not amend any Act. (See paragraph 95 on the long title for an amendment Bill).

**Example** of a long title of a Bill is as follows:

<b><i>BILL</i></b>	
<b><i>To</i></b>	<b><i>provide for the establishment of a Council for the Engineering profession in Namibia; to provide for the registration of professional engineers and engineers in training, incorporated engineers in training, engineering technicians and engineering technicians in training; and to provide for incidental matters.</i></b>

## 28. Preambles

- (1) Legislative drafters must avoid the use of preambles in Bills of a general nature and may only use them in a Bill of a political or historical nature or importance, or in a Bill to domesticate an international agreement.
- (2) Legislative drafters use preambles to explain the reasons for the enactment of the legislation.
- (3) The expression “WHEREAS” used in a preamble of a Bill should be written in capital letters and should not be in bold, but the expression “***NOW THEREFORE BE IT ENACTED***” should be written in capital letters and be in bold.

**Example 1:**

The Application of Laws to the Eastern Caprivi Zipfel Act, 1999 (Act No. 10 of 1999).

**ACT**

**To** *provide for the application of certain laws to the Eastern Caprivi Zipfel, the operation of which was excluded by virtue of the provision of certain pre-independent laws.*

*(Signed by the President on 24 June 1999)*

**Preamble**

**WHEREAS** *section 38(5) of the South-West Africa Constitution Act, 1968 (Act No. 39 of 1968) provided that no Act of the Parliament of the Republic of South Africa and no Ordinance of the Legislative Assembly of the then Territory of South-West Africa passed on or after the first day of November 1951 would apply in that part of the said Territory that was demarcated and known as the Eastern Caprivi Zipfel, unless it was expressly declared so to apply;*

**AND WHEREAS**, *notwithstanding the repeal of that section by Article 147 of the Namibian Constitution, that provision presently still has effect by virtue of section 11(2) of the Interpretation Proclamation, 1920 (Proclamation No. 37 of 1920);*

**AND WHEREAS** *it is considered necessary to empower Ministers to extend to the said Eastern Caprivi Zipfel the operation of laws which by virtue of the South-West Africa Constitution Act, 1968, presently do not apply in that part of Namibia;*

**NOW THEREFORE BE IT ENACTED** *by the Parliament of the Republic of Namibia, as follows:—*

## Example 2:

Conferment of Status of Founding Father of the Namibian Nation Act, 2005 (Act No.16 of 2005)

### *ACT*

**To** *provide for the conferment on the first President of the Republic of Namibia, His Excellency Dr Sam Nujoma, of the status of Founding Father of the Namibian Nation; and to provide for matters incidental thereto.*

*(Signed by the President on 23 December 2005)*

### **Preamble**

*WHEREAS we the people of Namibia recognise the historical contribution made by the first President of the Republic of Namibia, His Excellency Dr Sam Nujoma, to the attainment of the Independence of Namibia;*

*AND WHEREAS we the people of Namibia further recognise the contribution made by the first President of the Republic of Namibia, His Excellency Dr Sam Nujoma, to the achievement of national reconciliation; the fostering of peace and national unity; and the promotion of the well-being of the people of Namibia,*

***NOW THEREFORE BE IT ENACTED*** *by the Parliament of the Republic of Namibia, as follows: -*

## **29. Structure of Bill**

- (1) A legislative drafter may divide a Bill into chapters, parts and sub-divisions to create clarity in the presentation of the Bill, depending greatly on the length and complexity of the Bill.
- (2) Chapters, parts and headings add to the clarity in the structure of the Bill and a legislative drafter should use them only as a guide to the subject matter of the Bill.
- (3) In the Namibian Constitution –

- (a) the basic units of the Namibian Constitution are called Articles (Arabic numerals 1, 2, 3);
- (b) the sub-divisions of Articles are called Sub-Articles (Arabic numerals in brackets (1), (2), (3));
- (c) Sub-Articles are further divided into paragraphs (Alphabetic small letters in brackets (a), (b), (c)); and
- (d) paragraphs are further subdivided into subparagraphs (Alphabetic small double similar letters (aa), (bb), (cc)).

**Note:** The numbering used in the Namibian Constitution for subparagraphs deviates from the conventional numbering of subparagraphs in legislation that is Roman small numerals in brackets (i), (ii), (iii). The numbering of subparagraphs ((aa), (bb), (cc)) used in the Namibian Constitution is the numbering used for items in legislation. Legislative drafters should use the numbering of subparagraphs used in the Namibian Constitution when amending the Namibian Constitution to maintain consistency.

- (4) In primary legislation –
  - (a) the basic unit in the legislation is a section (Arabic numerals 1, 2, 3);
  - (b) a section can be divided into subsections (Arabic numerals in brackets (1), (2), (3));
  - (c) a subsection can be divided into paragraphs (Alphabetic small letters in brackets (a), (b), (c));
  - (d) a paragraph can be divided into subparagraphs (Roman small numerals in brackets (i), (ii), (iii)); and
  - (e) a subparagraph can be divided into items (Alphabetic small double similar letters (aa), (bb), (cc)).
- (5) In Parliamentary proceedings, even though the subdivisions of a Bill amending the Namibian Constitution are written as Articles and Sub-Articles and for an ordinary Bill or ordinary amendment Bill are written as sections and subsections –

- (a) in a Bill amending the Namibian Constitution, Articles and Sub-Articles are called clauses and subclauses;
  - (b) in an ordinary Bill or ordinary amendment Bill, sections and subsections are called clauses and subclauses; and
  - (c) in a Bill amending the Namibian Constitution or an ordinary Bill or ordinary amendment Bill, paragraphs, subparagraphs and items are called paragraphs, subparagraphs and items as well.
- (6) Bills with few provisions do not need to be divided into chapters or parts.
  - (7) For further details on other legal instruments, see the Family Tree of Legal Instruments set out in **Annexure 7**.
  - (8) An amendment Bill does not require an arrangement of sections, because it is inappropriate. The amended, inserted or added provisions will become part of the principal Act.

### **30. Enacting formula**

- (1) The enacting formula is a source of authority to enact legislation and is required for every Bill.
- (2) The enacting clause must come after the arrangement of sections or a preamble, if any.
- (3) The enacting clause must be in the form and wording that follow:

- (a) The previous enacting clause for Namibia which is no longer used is as follows:

<i><b>BE IT ENACTED</b> as passed by the Parliament of the Republic of Namibia as follows: -</i>
--

- (b) The enacting clause for Namibia which has been adopted is as follows:

<i><b>BE IT ENACTED</b> as passed by the Parliament, and assented to by the President, of the Republic of Namibia as follows:</i>
---

- (4) Use a colon at the end of an enacting clause and nothing else.

- (5) Where a preamble is used the enacting clause reads as follows:

***NOW THEREFORE BE IT ENACTED*** as passed by the Parliament, and assented to by the President, of the Republic of Namibia as follows:

- (6) When the Namibian Constitution is being amended the enacting clause reads as follows:

***BE IT ENACTED*** in accordance with Article 132 of the Namibian Constitution as passed by the Parliament, and assented to by the President, of the Republic of Namibia as follows:

### **31. Headings for parts and sections of Bills**

- (1) If a Bill is arranged into main parts (chapters, parts and subparts), use capital letters for the heading of the main parts.
- (2) A heading (marginal note) is a brief description designed to disclose the subject of the provision that follows.
- (3) Each section is given a heading which provides a guide to the contents of the section.
- (4) Headings do not form part of the provisions of a Bill of an Act. In Parliament only the number of the section is read and not the heading. That is why headings are not voted on in Parliament.
- (5) A heading should not be referred to in the text of the Bill as it is only intended to guide the reader on the content of a provision of the Bill.
- (6) A heading must –
  - (a) be short and accurate and be written in bold;
  - (b) start with a capital letter followed by small letters and not indented and has no punctuation marks; and
  - (c) exclude auxiliary verbs, adverbs, adjectives and articles such as “a”, “an”, “the”, “this” etc. to promote brevity.

**Example** of headings for sections of a Bill are as follows:

<b><i>Definitions</i></b>	
<b><i>1.</i></b>	.....
<b><i>Establishment of NIPAM</i></b>	
<b><i>2.</i></b>	.....
<b><i>Regulations</i></b>	
<b><i>3.</i></b>	.....
<b><i>Short title</i></b>	
<b><i>4.</i></b>	.....

(d) In the arrangement of a Bill –

- (i) the section numbers are not in bold and have full stops;
- (ii) the heading starts with a capital letter and the rest are lower case letters;
- (iii) if there are chapters and parts, these should be in capitals, centred and not bolded (**see Annexure 8**);
- (iv) chapters and parts should be numbered in Arabic numerals (1, 2, 3) (**see Annexure 8**);
- (v) if there is a schedule, the first letter is capitalised and the schedule is not numbered;
- (vi) if there is more than one schedule, the schedules should be numbered in Arabic numerals (1, 2, 3) (**see Annexure 8A**); and
- (vii) every word of the heading of a schedule is capitalised and not bolded (**see Annexure 8A**).



### **32. Numbering in Bills**

- (1) The number of a section is written in bold, indented and with a full stop.
- (2) Use the following terminology and numbering when drafting a Bill –
  - (a) section 2 – Arabic numeral;
  - (b) subsection (1) – Arabic numeral in brackets;
  - (c) paragraph (a) – Alphabetic small letter in brackets;
  - (d) subparagraph (i) – Roman small numeral in brackets; and
  - (e) item (aa), (bb) – Alphabetic doubled small letters in brackets.
- (3) For further details on numbering refer to paragraph 35 on indentation and for the Family Tree of Sub-divisions of Legislative Instruments see **Annexure 7**.

### **33. Reference to numbers and figures within text**

- (1) Refer to numbers from zero up to nine in words (zero, one, two etc.).
- (2) Refer to numbers from ten and more in Arabic numerals (10, 11, 12,).
- (3) Refer to series of numbers and numbers in tables in Arabic numerals.

**Example:** 1, 2, 3, 4, 5 (*series of numbers*); *periods of 5, 10 and 15 months*.

- (4) Express in words a number that begins a sentence.

**Example:** *Twelve members of the Board form a quorum*.

- (5) For sums of money, times, percentages, ages and units of measurement use figures.

**Example:** *N\$10, 10h00, 10 percent, 8 years of age and 10 centimetres*.

- (6) Write the big sums of money as follows: *N\$1 000, N\$10 000, N\$500 000, N\$1 000 000 and N\$1 000 000 000.*

#### **34. Internal references in Bills**

- (1) A reference to another chapter, part, subpart, section, subsection, paragraph or subparagraph within a Bill is identified by its number, numeral or figure and not by the terms “preceding”, “following” or “herein provided”, and similar expressions.

##### **Example:**

Do not write: *The person referred to in the preceding/above/below paragraph.*

Write: *The person referred to in paragraph (b) (if the reference is within the same section/ subsection).*

*The person referred to in subsection (2)(b) (if the reference is to a paragraph in another subsection in the same section).*

*The person referred to in section 6(2)(b) (if the reference is to a paragraph in another section).*

*The person referred to in section 6(2)(b) of the Anti-Corruption Act, 2003 (Act No. 3 of 2003) (if the reference is to a paragraph in another Act).*

- (2) Expressions such as “of this Act” should not be used unless necessary to avoid confusion where reference is also made to another Act.

##### **Example:**

Do not write: *Section 230 of this Act applies to this section.*

Write: *Section 230 applies to this section.*

- (3) Expressions such as “of this section”, “of this subsection”, “of this paragraph” and similar internal references should not be used in –

- (a) subsections of a section;  
**Example:** subsection (3) of this section
- (b) paragraphs of a subsection; and  
**Example:** paragraph (a) of this subsection
- (c) subparagraphs of a paragraph;  
**Example:** subparagraph (ii) of this paragraph

unless necessary to avoid confusion with a reference to a provision outside the section, subsection, paragraph or subparagraph.

### 35. Indentation

- (1) The indentation of numbering in a Bill takes the following form:

**“Establishment of Board** ..... heading

**3.** (1) ..... section and subsection

(2) ..... subsection

(a) ..... paragraph

(b) ..... paragraph

(i) ..... subparagraph

(ii) ..... subparagraph

(aa) ..... item

(bb) ..... item”.

- (2) The Family Tree of Sub-divisions of Legislative Instruments is in **Annexure 7**.

### 36. Page layout

- (1) Spacing is as follows: Before: 0 point, After: 0 point, Line: 1.5 spacing.
- (2) Font size: 12 points; and
- (3) Font face: Times New Roman.

### 37. Definitions

- (1) A Bill often contains a definition section which sets out the meanings of words and expressions used on more than one occasion in the Bill.
- (2) Definitions are placed right at the beginning of the Bill after the enacting formula usually as section 1 and, where applicable, some are placed at the beginning of the specific chapter or part or section to which they exclusively apply (**Example:** Financial Institutions and Markets Act, 2021 (Act No. 2 of 2021)).
- (3) When defining a word or an expression a legislative drafter must be aware of the implications of the Interpretation of Laws Proclamation. This Proclamation defines certain words and expressions applicable to all laws, therefore the drafter does not need to redefine them. (**see Annexure 4**).

**Example** of a definition section is as follows:

<p><b><i>Definitions</i></b></p> <p><b>1.</b>        <i>In this Act, unless the context otherwise indicates –</i></p> <p><i>“Agribank” means Agribank referred to in section 3;</i></p> <p><i>“Board” means the Board of the Agribank appointed in terms of section 7;</i></p> <p><i>“Loan means –</i></p> <p><i>(a).....</i></p> <p><i>(b)..... ”.</i></p>
---

- (4) For full details on definitions refer to paragraphs 46 to 60.

### **38. Objectives of Act**

- (1) Legislation does not usually require statements of policy or purpose and legislative drafters should generally avoid them. However, where statements of policy or purpose are necessary legislative drafters should rather use “objectives of the Act” rather than “purposes of Act”.
- (2) The objectives provision states “why” the legislation is necessary, and the rest of the provisions of the text which implement the objectives state “what” the law is.
- (3) When drafting an objectives clause, the legislative drafter must bear the following in mind –
- (a) it should be placed in the introductory provisions just after the definitions, if any;
  - (b) it must state accurately and unambiguously the objectives of the Bill;
  - (c) the language must be consistent with the language of the substantive provisions of the Bill; and
  - (d) the specificity of an objectives provision must be clearly stated and appropriate.

**Example** of an objectives provision:

#### ***Objectives of Act***

**2.** *The objectives of this Act are -*

- (a) *to state principles and rules for the interpretation of legislation;*
- (b) *to shorten legislation by avoiding the need for repetition; and*
- (c) *to promote consistency in the language and form of legislation.*

### 39. Application provision

- (1) This provision gives an indication of the application of the Bill to remove uncertainties and may be used in the following circumstances –
- (a) the geographic area, where a specific part of the country is to be affected as well;

**Example:**

*“75. This Act and any amendment thereof shall apply also in the territory, including the Eastern Caprivi Zipfel.”.*

- (b) the particular class of persons or things to be affected; and

**Example:**

*“3. (1) This Act applies to the initiation, preparation, procurement management and implementation of public private partnership projects.”.*

- (c) where the legislation or part of it is to be given extra-territorial effect.

**Example:**

*“93. This Act applies to all members of the Defence Force and of any auxiliary services, medical service or reserve force, whether such members are serving within or outside Namibia, and whenever it is necessary to enforce this Act outside Namibia any sentence, fine or penalty pronounced or imposed for the purpose of such enforcement is as valid and effectual and is carried into effect as if it had been pronounced or imposed in Namibia.”*  
(Defence Act, 2001 (Act No. 1 of 2002).

- (2) The application provision is usually placed at the beginning as part of preliminary provisions in the Bill.

### 40. Main provisions

The main provisions of a Bill, depending on the nature of the Bill, contain the main subject matters of the Bill such as creation of administrative structures licensing, and enforcement provisions.

**Example of main provisions:**

2. *The Engineering Council of Namibia*
3. *Constitution of council and first meeting*
4. *Qualifications of members of council and circumstances under which they vacate office*
5. *Term of office of members of council*
6. *President and vice-president of council*
7. *General powers of the council and powers of the Minister in regard to certain matters in respect of which the council has made recommendations*
8. *Funds of council and the keeping and auditing of books*
9. *Reports to the Minister*
10. *Committees of council*
11. *Registration of professional engineers and engineers in training*
12. *Registration of incorporated engineers and incorporated engineers in training*
13. *Registration of engineering technicians and engineering technicians in training*

#### 41. General provisions

The general provisions are also referred to as miscellaneous provisions, and cover matters arising out of the main objects of the Act these may include delegation, limitation of liability, preservation of secrecy, offences and penalties, additional jurisdiction and regulations etc.

**Example** of general provisions:

GENERAL PROVISIONS	
38.	<i>Delegation</i>
39.	<i>Limitation of liability</i>
40.	<i>Preservation of secrecy</i>
41.	<i>Appeals</i>
42.	<i>Offences and penalties</i>
43.	<i>Regulations</i>
44.	<i>Act binds State</i>
45.	<i>Repeal and amendment of laws</i>
46.	<i>Savings and transitional provision</i>
47.	<i>Short title and commencement</i>
<i>Schedule</i>	

#### 42. Repeal, savings and transitional provisions

- (1) When a legislative drafter repeals or amends existing legislation, the saving and transitional provisions become relevant and necessary.



- (2) A repeal provision in a Bill –
- (a) repeals existing legislation that needs to be repealed by the Bill; and
  - (b) may also repeal a provision in any other legislation that is not part of the legislation being repealed.
- (3) All laws and provisions repealed are usually set out in a Schedule of “laws repealed and amended” that always appears close to the last heading “short title” just before the transitional or savings provision. A repealed law or provision is no longer in force, unless otherwise indicated in a savings provision.
- (4) A savings provision serves to preserve a law, a right, a privilege or an obligation that would otherwise cease to have effect due to the repeal or amendment.
- (5) A transitional provision serves to make special provision for the application of the legislation to the circumstances that exist at the time when that new legislation comes into force.
- (6) When drafting savings or transitional provisions a legislative drafter must have regard to section 11(2) of the Interpretation of Laws Proclamation that sets out the effect of repeal of laws.

**Example** of a Schedule for laws repealed and amended:

SCHEDULE 7  
LAWS REPEALED AND AMENDED  
(Section 372(1))

<i>No. and year of law</i>	<i>Short title</i>	<i>Extent of repeal or amendment</i>
<i>Ordinance No. 34 of 1963</i>	<i>Criminal Procedure Ordinance, 1963</i>	<i>The repeal of sections 300(3) and 370</i>
<i>Act No. 51 of 1977</i>	<i>Criminal Procedure Act, 1977</i>	<i>The repeal of the whole</i>
<i>Act No. 8 of 2000</i>	<i>Combating of Rape Act, 2000</i>	<i>The repeal of sections 11 to 18, inclusive</i>

<i>Act No. 9 of 2000</i>	<i>International Co-operation in Criminal Matters Act, 2000</i>	<i>The amendment of Schedule 2 by the deletion of the entries relating to the Criminal Procedure Act, 1977</i>
<i>Act No. 10 of 2001</i>	<i>Appeal Laws Amendment Act, 2001</i>	<i>The repeal of sections 4 and 5</i>
<i>Act No. 4 of 2003</i>	<i>Combating of Domestic Violence Act, 2003</i>	<i>The amendment of the Second Schedule by the deletion of the entries relating to the Criminal Procedure Act, 1977</i>
<i>Act No.24 of 2003</i>	<i>Criminal Procedure Amendment Act, 2003</i>	<i>The repeal of the whole</i>

**Example** of a savings and transitional provision:

Please take note that in this example subsections (1) to (4) are savings provisions, while subsections (5) and (6) are transitional provisions.

***Savings and transitional provisions***

**81.** (1) *Any school fund, trust fund and other funds for a state school established in terms of any law repealed by this Act and existing at the date of commencement of this Act is deemed to be a school development fund established under section 25.*

(2) *A state school, class, hostel, teachers' resource center, school clinic, and other facility, established under a law repealed by this Act and existing at the date of commencement of this Act, is deemed to have been established under this Act.*

(3) *A state school, class, hostel, teachers' resource center, school clinic, and other facility, established under a law repealed by this Act and existing at the date of commencement of this Act, is deemed to have been established under this Act.*

(4) *Unless otherwise provided in this Act, anything done under any law repealed by this Act, and which could have been done under a corresponding provision of this Act, is deemed to have been done under that corresponding provision.*

(5) *The school boards and school committees and other governing bodies for state schools which exist at the date of commencement of this Act must, within a period of 12 months from the date of commencement of this Act, be dissolved and constituted in terms of this Act.*

(6) *A private school which has been registered in terms of any law repealed by this Act must be re-registered in terms of section 42 within the period of 12 months from the date of commencement of this Act.*

#### **43. Short title**

- (1) The short title is the short name given to a particular Act and it embodies the year of enactment.
- (2) A later Bill can also amend the short title of an existing Act. This can happen for example, where subsequent amendments render the short title incorrect or misleading.
- (3) As general rule, a legislative drafter must take particular care when naming a Bill to ensure that the name the drafter chooses is as informative as possible and does not cause unnecessary confusion.

**Example** of a short title:

##### ***Short title***

**4.** *This Act is called the Labour Act, 2007.*

#### **44. Commencement provisions**

- (1) A commencement provision sets out the date or time when the Act or a specific provision of the Act comes into operation.
- (2) A Bill may provide for different dates of commencement, or it may empower a functionary to determine different dates of commencement.
- (3) When a Bill does not provide for a commencement provision, it means that the Act comes into operation on the date of its publication in the *Gazette*.

- (4) Have a critical look at the following four **Examples**:

***Short title***

**34.** *This Act is called the Inspection of Financial Institutions Act, 1984.*

***Short title and commencement***

**23.** *This Act is called the Meat Industry Act, 1981, and comes into operation on a date determined by the Minister by notice in the Gazette.*

***Short title and commencement***

**40.** (1) *This Act is called the Correctional Services Act, 2011 and comes into operation on a date determined by the Minister by notice in the Gazette.*

(2) *The Minister may determine different dates for different provisions under subsection (1).*

***Short title and commencement***

**9.** *This Act is called the Income Tax Amendment Act, 2010, and commences on the date of its publication in the Gazette, but -*

- (a) *in the case of a taxpayer other than a company, it commences at the beginning of the year of assessment commencing on or after 1 March 2009;*
- (b) *section 1(a), (c) and (d) commence on the first day of the month in which this Act is published in the Gazette;*
- (c) *section 3 commences at the beginning of the year of assessment of such company commencing on or after 1 January 2010; and*
- (d) *section 8(b) commences at the beginning of the year of assessment of such company commencing on or after 1 January 2009.*

**Note 1:** In the *first example*, the short title is given without the commencement date and this means that in terms of section 12(1) of the Interpretation of Laws Proclamation the Act commences on the date of its publication in the *Gazette*.

**Note 2:** The *second example* defers the commencement to a later date so the Act does not commence on the date of publication, but it awaits a notice in the *Gazette* that notifies its commencement date. The Minister may only give such a notice when all the machineries necessary to implement the Act are in place. The Minister must publish the notice in the *Gazette* and not elsewhere.

**Note 3:** The *third example*, defers the commencement to a later date so the Act does not commence on the date of publication, but it awaits a notice in the *Gazette* that notifies its commencement date. The Minister may only give such a notice when all the machineries necessary to implement the Act are in place, and must publish the notice in the *Gazette*. The Act also empowers the Minister to put different provisions into operation on different dates.

**Note 4:** In the *fourth example*, the Act provides for –

- (a) its commencement on the date of its publication in the *Gazette*;
- (b) the commencement of certain provisions namely paragraphs (a) and (d) on the specified dates even a year earlier, in other words with retrospective effect; and
- (c) the commencement of certain provisions on specified dates in the future after the occurrence or fulfilment of a particular event or condition.

#### **45. Schedules**

- (1) A schedule deals with matters of detail or procedure to make an Act more readable and simplify interpretation and a provision under which the Schedule is provided must always be indicated immediately under the heading of the Schedule for ease of reference.

## *SCHEDULE*

### *REPEAL AND AMENDMENT OF LAWS*

#### *(Section 10)*

- (2) Schedules may be used *inter alia* –
- (a) for laws to be repealed or amended;
  - (b) to prescribe categories of things for example the Schedule to the Medicines and Related Substances Control Act, 2003 (Act No.13 of 2003);
  - (c) to stipulate or provide in the form of a mini-law for example the Military Discipline Code to the Defence Act, 2002 (Act No. 1 of 2002);
  - (d) to prescribe forms; or
  - (e) to annex a text of an international convention or agreement.
- (3) Acts of Parliament often give powers to a minister or other functionary to amend a Schedule through subordinate legislation. Where such power is not expressly given, subordinate legislation cannot amend the Schedule. It is often advisable to give the power to amend a Schedule by subordinate legislation because it is easier and faster.

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## PART 3

### DRAFTING OF DEFINITIONS

#### **46. Purpose of definitions**

The purpose of definitions are –

- (a) to *particularise*, that is, to restrict the word to a particular thing without changing its ordinary meaning;

**Example:** *“African” means a citizen of Namibia, Botswana or Angola;*

- (b) to *avoid vagueness or settle doubts*, that is, to remove a doubt as to whether a word means a particular thing;

**Example:** *“highjack” means the forceful takeover of an aircraft;*

- (c) to *abbreviate or to shorten and thus simplify composition*, that is, to use one word to stand for a long name;

**Example:** *“Movement” means the Movement of Freedom and Justice;*

- (d) to *delimit*, that is, to set the limits of meaning, without altering the normal meaning;

**Example:** *“wages” means remuneration paid by an employer to an employee for the work performed by the employee for the employer;*

- (e) to *narrow*, that is to narrow the ordinary meaning of a word or an expression by excluding things which otherwise would be part of that meaning;

**Example:** *“fruit” means oranges, tangerines, lemons, lime and bananas;*

- (f) to *enlarge*, that is, by retaining the ordinary meaning of a word and adding a meaning the word does not ordinarily have;

**Example:** *“African” includes a person either of whose parents are of African descent;*

- (g) to clarify;

**Example:** *A shark is a fish whereas a loan shark is someone who lends money at exorbitant interest;*

#### 47. Language to be used in definitions

Drafting language in definitions usually uses the words:

*“means”* which is restrictive;

*“includes”* which is extensive/extends the usual meaning of a word;

*“does not include”* which is limiting or excluding.

#### 48. Types of definitions

There are three types of definitions –

- (a) delimiting definitions that do not alter the conventional meaning of a word but give it a limited meaning, for **example**:

*“contract”* means a contract executed on 24 March 2022;

*“advertisement”* means a publication in the newspapers; and

*“application to own use”*, in relation to goods, means applying the goods for personal use.

- (b) extending definitions which broaden the scope of the common usage of a word for **example** –

*“vegetable” includes apples, oranges and bananas;*

*“domestic animals” includes birds and reptiles;*

*“branch” includes the head office of a business;*

*“child” includes a child born out of marriage; and*

*“constable” includes a police officer of any rank.*

- (c) narrowing definitions that stipulate a meaning narrower than common usage for **example** –



*“aircraft” means an aircraft other than a military aircraft;*

*“animals” means cattle and goats;*

*“fruit” means oranges, tangerines, lemons, limes and bananas; or*

*“deposition” means summary evidence.*

“aircraft” means an aircraft other than a military aircraft;

“animals” means cattle and goats;

“fruit” means oranges, tangerines, lemons, limes and bananas; or

“deposition” means summary evidence.

#### **49. Definitions provision**

- (1) A Bill often contains an interpretation section that appears as section 1, and the heading of this section is “Definitions”.
- (2) In our jurisdiction the name of the heading for the interpretation section is “Definitions”, since the word “interpretation” has a wider meaning than the word “definition”.
- (3) Where the section contains definitions and interpretations, both the words “definitions and interpretation” should be used as heading (see section 1 of the Communications Act, 2009 (Act No. 8 of 2009)).
- (4) The definitions section –
  - (a) sets out the definitions of various words and expressions used in the Bill on more than one occasion;
  - (b) is placed in a single basic-unit right at the beginning of the Bill, so as to inform the reader of the words which are to be given special meanings; and

(c) assists in conveying to the reader the intended meaning of particular words in the legislation in a simple, unambiguous and consistent manner as possible.

- (5) Where a definition is intended to affect only one chapter, part or section, it should be placed in that chapter, part or section, and should be placed in the first section of the chapter, part or at the beginning of the section as the first subsection.

## **50. Nature and use of definitions**

- (1) A legislative drafter should use definitions sparingly, and before inserting a definition, a legislative drafter must decide how it will assist in the correct interpretation of the Act, therefore a careful check of the Interpretation of Laws Proclamation is required.
- (2) A legislative drafter can generally omit a definition of a word if the Interpretation of Laws Proclamation has already defined the word in the sense intended.
- (3) It may be advisable to avoid a precise definition and to leave the interpretation of a word to normal usage or to the courts.
- (4) A legislative drafter should use definitions sparingly and only for the purposes referred to in paragraph 46.
- (5) The legislative drafter should first settle the main substantive provisions of the Bill before preparing the definitions, and while drafting must make notes of the words and expressions whose definitions may be required.
- (6) Generally, a legislative drafter should use each term in the Bill, as far as possible, according to its ordinary (everyday) or technical meaning.
- (7) A legislative drafter should provide a definition only when it is necessary for the sake of clarity and precision.

## **51. Drafting definitions in primary legislation**

- (1) The rules for drafting definitions in primary and subordinate legislation are the same, but there are some significant differences in the introductory sentences (see paragraph 122).

- (2) In primary legislation, such as Acts of Parliament, proclamations and ordinances, the definitions section usually has an introductory sentence that reads as follows:

***“Definitions***

***1. In this Act, unless the context otherwise indicates –”***

- (3) The words “unless the context otherwise indicates” means that if a word is defined and that same word is used in the same Act but in another context then that word derives its meaning from the context it finds itself, though such instances are very rare and one should always be on the safer side to include those words.

**Example:**

*“prescribed” means prescribed by regulations; (in this context regulations are made by the Minister).*

The legislative drafter can still use the word “prescribed” in the same Bill but meaning something else, such as: *“A person may not prescribe medication for a patient suffering from a mental illness unless that person is registered as a psychiatrist in terms of this Act...”*.

In the above example the context indicates otherwise.

- (4) A legislative drafter should not place much reliance on the meaning of “*unless the context otherwise indicates*” but should rather aim to satisfy the rule of consistency that a defined term should not be used in the same legislation in a different sense.

## **52. Role of Interpretation of Laws Proclamation**

- (1) The Interpretation of Laws Proclamation (**Annexure 4**) has an important role to play in the interpretation and definitions of words and expressions in legislation and it mainly –
- (a) lays down basic rules;
  - (b) simplifies the law;
  - (c) avoids repetition;

- (d) promotes consistency;
  - (e) is of general application;
  - (f) clarifies the construction of an Act; and
  - (g) includes substantive rules of law such as on repeals.
- (2) Before defining a word or an expression in the legislation, a legislative drafter must acquaint himself or herself with section 2 of the Interpretation of Laws Proclamation which provides as follows:
- “The following expressions shall, unless the context otherwise requires or unless in the case of any law it is otherwise provided therein, have the meanings hereby respectively assigned to them, namely: -”.*
- (3) Where the Interpretation of Laws Proclamation has defined a word, a legislative drafter need not define it in the legislation being drafted, unless in that legislation the legislative drafter intends the word to have a meaning different from the meaning given in that Proclamation.

### **53. Arrangement of definitions**

- (1) Definitions –
- (a) form part of a section or subsection;
  - (b) are listed in alphabetical order and separated by semi-colons;
  - (c) begin with a lower-case letter (except where the word or expression defined is capitalised in the text e.g. “Authority”) and the word or expression defined is not in bold and is placed in double inverted commas (“”); and
  - (d) are not numbered like paragraphs in a section or subsection for **example:** “(a) “Board” means the Board of the Authority referred to in section 8;”.

- (2) Subdivisions within an individual definition take the form of paragraphs separated by using semi-colons but are not indented, and where there are further divisions in subparagraphs one should indent and separate the subparagraphs by semi-colons.

**Example 1:** Paragraphs not indented.

*““dramatic work” includes –*

- (a) a choreographic work or entertainment in dumb show, if reduced to the material form in which the work or entertainment is to be presented; and*
- (b) a scenario or script from an audio-visual work, but does not include an audio-visual work;”.*

**Example 2:** Subparagraphs indented.

*“adaptation”, in relation to –*

- (a) a dramatic work, includes conversion of the work from –*
  - (i) non-dramatic form into dramatic form;*
  - (ii) dramatic form into non-dramatic form,**whether the work is in its original language or not;*
- (b) a literary work, whether in a non-dramatic form or in a dramatic form, includes –*
  - (i) a translation of the work;*
  - (ii) a version of the work in which the story or action is conveyed solely or mainly by means of pictures in a form suitable for reproduction in a book or in a newspaper, magazine or similar periodical;”.*

#### 54. Ordinary meaning of words

- (1) Legislative drafters should use each term in legislation as far as possible according to its ordinary (everyday) or technical meaning.
- (2) We do not have a specific dictionary that we use to check the meaning of ordinary words but it is advisable that legislative drafters should have regard to the use of words in the Oxford Concise Dictionary.

#### 55. No substantive content

- (1) A definition should not contain any substantive matters.

##### **Example:**

*Do not define:*

*“prescribed” means prescribed by regulation made by the Minister under section 108, after consultation with the Council;*

This definition has a substantive content and it is actually a full provision in itself that empowers the Minister to make regulations after consulting the Council, so this is wrong and undesirable.

Rather define as follows:

*“prescribed” means prescribed by regulation; (When the word “regulation” is defined); or*

*“prescribed” means prescribed by regulation made under section 25; (When the word “regulation” is not defined).*

##### **Example 2:**

Other examples of undesirable definitions that deal with substantive provisions are the definition of “dividend” and many other definitions in section 1 of the Income Tax Act, 1981 (Act No. 24 of 1981).

- (2) Legal provisions, statements, pronouncements, declarations and assertions in the Bill must be set out in substantive provisions but not in the definitions section.

**Example of declaration provision:**

*(2) The Minister, by notice in the Gazette, may declare any practice to be an undesirable practice for the purposes of section 5.*

**56. Avoid artificiality**

A definition should not give an artificial or unnatural meaning to the word defined.

*Example: “table” includes a chair.*

**57. Consistency of words**

A legislative drafter should not use a defined word in the same legislation in a different sense, unless the context clearly indicates otherwise.

**58. Grammatical variations**

A legislative drafter should avoid including the grammatical variations in the definition of the word defined.

**Example**

*“sell” includes, except in section 11 –*

- (a) to attempt or agree to sell;*
- (b) to mark with a selling price;*
- (c) to offer, advertise or expose for sale;*
- (d) to export, transmit, convey, deliver or prepare for sale;*
- (e) to exchange; and*
- (f) to dispose of for any consideration whatsoever;*

*and “sale” has a corresponding meaning;”.*

*It is not necessary to say “sale” has a corresponding meaning because “sale” is a grammatical variation of “sell”.*

## **59. Defined words in definitions**

- (1) Avoid using the defined word in the definition as this creates confusion.

Do not write: “animals” means animals, reptiles, fish, birds, insects and invertebrates;

Write: “animals” means reptiles, fish, birds and other vertebrates, insects and invertebrates;

- (2) The word “means” or the word “includes” introduces the definition of the defined word.
- (3) The word “means” indicates that the meaning set out intends to be complete in itself.

### **Example:**

*“Council” means the National Youth Council established by section 2;*

- (4) The word “includes” indicates that the usual meaning of the word is to extend to the particular meaning set out.

### **Example:**

*“premises” includes a vehicle, an aircraft and a vessel;*

- (5) A legislative drafter should not use the expression “means and includes” as the significance of each of these words differs.

### **Example:**

*“law” means and includes any law, proclamation or other enactment having the force of law; (Interpretation of Laws Proclamation)*

- (6) “Means” is explanatory and restrictive and prescribes the meaning of the word or expression.



- (7) “Includes” –
- (a) expands and is thus extensive;
  - (b) indicates that the word or expression defined has its ordinary meaning and also a meaning which the word or expression does not ordinarily mean; and
  - (c) is used to catch anything that did not happen to catch the mind of the legislative drafter.
- (8) If a legislative drafter needs to prescribe, restrict and extend the meaning of a word or expression, the legislative drafter may define it as follows:

**Example:**

*““accommodation establishment” means any premises in or on which the business of providing accommodation with or without meals for reward to tourists is or is intended to be conducted and includes a rest camp, guest farm, holiday farm, pension, caravan park and a safari undertaking, ...;*  
(Accommodation Establishments and Tourism Ordinance, 1973 (Ordinance No. 20 of 1973).

- (9) If something is to be excluded from the definition, use the words “does not include”.

**Example:**

*““authorised operator” means any person who by virtue of a right granted in terms of the scheme performs a service, but does not include, except for the purposes of sections 22 and 32, a person who by virtue of such right slaughters animals at an abattoir;”*  
(Abattoir Industry Act, 1976 (Act No. 54 of 1976).

**60. Definitions in amending legislation**

- (1) The rules for definitions in amending legislation or amending subordinate legislation are the same as for the definitions in principal legislation or principal subordinate legislation.
- (2) In amending legislation –

- (a) if the principal legislation has the defined words or expressions in bold or italics, that form should be maintained in the amending legislation to maintain consistency with the principal legislation;
- (b) a word defined in the principal legislation need not be redefined in the amending legislation.

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## PART 4

### DRAFTING OF OTHER SPECIFIC PROVISIONS IN BILLS

#### 61. Extra-territorial application

- (1) The general approach should be that legislation must apply within the Namibian territory unless there are special reasons why it should apply to persons, things or events outside the territorial jurisdiction of Namibia.
- (2) Legislation has extra-territorial effect if it applies to persons, things or circumstances occurring outside the territorial jurisdiction of the lawmaker. There are several examples of when extra-territorial jurisdiction may be desirable.
  - (a) **Example:** Where the legislation applies to certain nationals of Namibia who commit the offences whether within or outside Namibia:

**“93.** *This Act applies to all members of the Defence Force and of any auxiliary services, medical service or reserve force, whether such members are serving within or outside Namibia, and whenever it is necessary to enforce this Act outside Namibia any sentence, fine or penalty pronounced or imposed for the purpose of such enforcement is as valid and effectual and is carried into effect as if it had been pronounced or imposed in Namibia.”*  
(Defence Act, 2001 (Act No. 1 of 2002)).

- (b) **Example:** Where the legislation applies to all persons on board aircraft whether registered in Namibia or not.

- (3) *“212. A person who commits an act or omission on an aircraft in flight outside Namibia that would be an offence under this Part if it occurs within Namibia is, subject to this Act, liable as if the act or omission had occurred in Namibia.” (Civil Aviation Act, 2016 (Act No. 6 of 2016)).*
- (4) *“213. (1) A person who commits an act or omission on an aircraft in flight outside Namibia that would, if it occurred in Namibia, be an offence of disorderly behaviour or fighting in a public place or common assault or willful damage or indecent exposure is liable as if the act or omission had occurred in Namibia.” (Civil Aviation Act, 2016 (Act No. 6 of 2016)).*

**Note:** In the above examples the obligation is imposed by international conventions and requires that Namibia establishes jurisdiction to try persons who have committed civil aviation offences anywhere in the world if the aircraft lands in Namibia with the suspect on board or the suspect happens to be present in Namibia.

- (c) **Example:** Where the legislation applies to all persons irrespective of their nationality or the place where the offence was committed that is sometimes known as universality jurisdiction in international law.

- “(1) Any person who, in Namibia or elsewhere, commits, or aids, abets or procures the commission by another person of, a grave breach of any of the Conventions or of Protocol I is guilty of an offence.*
- (3) *This section applies to all persons, irrespective of their nationality or citizenship.”. (section 2 Geneva Conventions Act, 2003 (Act No. 15 of 2003)).*

**Note:** The obligation described above arises from international obligations assumed under Conventions such as those on counter terrorism or those that require the observance of humanitarian laws during times of armed conflict.

## 62. Penal provisions

- (1) Penal provisions are provisions which state what action is prohibited and the punishment for failing to comply with or contravening the prohibited provisions.

- (2) The sponsoring office, ministry or agency may propose various penal provisions for various conduct.
- (3) The type of penal provisions that can be imposed are criminal penalties including minimum sentences, administrative penalties, forfeitures, confiscations and attachments, cancellations or suspensions of licenses among others.
- (4) In drafting penal provisions, the legislative drafter should familiarise himself or herself with the rules and principles relating to penal provisions in Namibia such as those contained in the Namibian Constitution, common law and presumptions, Criminal Procedure Act, 1997 (Act No. 51 of 1977), Interpretation of Laws Proclamation, Magistrates Courts Act, 1994 (Act No. 32 of 1944), High Court Act, 1990 (Act No.16 of 1990) and Supreme Court Act, 1990 (Act No. 15 of 1990) and the respective rules as well as those contained in other statutes as well as case law.
- (5) A penal provision must state clearly –
  - (a) what is prohibited, the *actus reus* (*physical element*) and the *mens rea* (*mental element*), if any. The legislative drafter must apply his or her mind as to whether it is necessary to include *mens rea* as a requirement, if the prohibition does not warrant strict liability;

**Note:** The legislative drafter must consider the nature of the transgression as well as the proposed penalty to determine whether *mens rea* should form part of the offence. In this regard the legislative drafter must be mindful of the common law presumption that *mens rea*, in the form of intention, or knowledge of the wrongfulness of the act, is an essential ingredient in every offence; but that presumption is liable to be displaced either by the words of the statute creating the offence or by the subject-matter with which it deals, and both must be considered. Statutes often use words such as “intentionally”, “knowingly”, “willfully”, “recklessly” etc. to introduce *mens rea*.

Although in a large number of statutory offences “*mens rea*” is not usually a requirement, a legislative drafter should always consider whether to include *mens rea* in a penal provision with due regard to the nature of the transgression and the proposed penalties. However, whether a penal provision includes *mens rea* or not the courts will often infer it, especially for serious offences that attract heavy penalties such as a term of imprisonment.

Courts look at factors such as the nature of the transgression, the stipulated penalty, the easiness with which the law can be evaded if *mens rea* was a requirement etc., the court can infer that *mens rea* is required even though not stated.

- (b) whether the provision applies to everybody or only to a person belonging to a certain category, for example, to an owner of a motor vehicle or to a citizen; and
  - (c) the penalty or sanction for the offence.
- (6) The following are common formulas for penalties used by legislative drafters but for a discussion on prescribing and imposition of penalties see paragraph 63:

**Example 1**

*“(8) A person who knowingly or recklessly furnishes a document or information which is false or misleading in connection with an application for registration or a certificate, commits an offence and on conviction is liable to a fine not exceeding N\$4 000 or to imprisonment for a period not exceeding 12 months, or to both such a fine and such imprisonment.”.*

**Example 2:**

*“196. A person who, whether in or outside Namibia, intentionally uses any device, substance, or weapon, that endangers or is likely to endanger the safety of an international airport or any other airport –*

*(a) to commit an act of violence that causes or is likely to cause serious injury or death at the airport;*

*(b) to destroy or seriously damage the facilities of the airport;*

*(c) to destroy or seriously damage an aircraft that is not in service and is located at the airport; or*

*(d) to disrupt the services of the airport,*

*commits an offence and on conviction is liable to -*

*(i) imprisonment for a period not exceeding 14 years; or*

- (ii) *in the case where the conduct concerned is the same as conduct which constitutes under the laws of Namibia -*
  - (aa) *culpable homicide, a fine or imprisonment; or*
  - (bb) *murder, imprisonment not exceeding life imprisonment.”. (Civil Aviation Act, 2016 (Act No. 6 of 2016))*

***“Offences relating to safety and security of airports***

**196.** *A person who, whether in or outside Namibia, intentionally uses any device, substance, or weapon, that endangers or is likely to endanger the safety of an international airport or any other airport –*

- (a) *to commit an act of violence that causes or is likely to cause serious injury or death at the airport;*
- (b) *to destroy or seriously damage the facilities of the airport;*
- (c) *to destroy or seriously damage an aircraft that is not in service and is located at the airport; or*
- (d) *to disrupt the services of the airport,*

*commits an offence and on conviction is liable to -*

- (i) *imprisonment for a period not exceeding 14 years; or*
- (ii) *in the case where the conduct concerned is the same as conduct which constitutes under the laws of Namibia -*
  - (aa) *culpable homicide, a fine or imprisonment; or*
  - (bb) *murder, imprisonment not exceeding life imprisonment.”. (Civil Aviation Act, 2016 (Act No. 6 of 2016))*

### Example 3:

*“187. (1) Every bill, placard, poster, pamphlet, circular or other printed matter, whether published electronically or not, having reference to an election or referendum must bear on the face of it or in its content, in addition to the name of the political party, organisation or candidate approving such, the name and address of the printer and of the publisher thereof.*

*(2) A person who prints, publishes or posts, or causes to be printed, published or posted any matter referred to in subsection (1) which does not bear on the face of it the name and address of the printer and publisher and the name of the political party, organisation or candidate endorsing such, commits an offence and is liable –*

- (a) on a first conviction to a fine not exceeding N\$25 000 or to imprisonment for a period not exceeding five years, or to both such fine and such imprisonment;*
- (b) on a second or subsequent conviction to a fine not exceeding N\$50 000 or to imprisonment for a period not exceeding 10 years, or to both such fine and such imprisonment.”. (Electoral Act, 2014 (Act No. 5 of 2014))*

- (7) A legislative drafter must create an offence for each type of conduct that warrants criminalisation and in most cases the sponsors of the legislation are expected to properly instruct the legislative drafter on such violations. A legislative drafter should avoid creating general offences which tend to criminalise unidentified provisions of an Act, or any regulations or other subordinate legislation made under the Act.

### Example 1

*“42. (1) A person who –*

- (a) subject to subsection (4), contravenes or fails to comply with any provision of this Act applicable to him or her, the contravention of or failure to comply with which is not elsewhere in this Act prescribed to be an offence;*
- (b) fails to carry out any order or decision of the Board or to comply with any condition imposed or rule or code made by the Board; or*
- (c) being a licensee, contravenes or fails to comply with any condition applicable to the licence concerned,*

*commits an offence and is liable to a fine not exceeding N\$16 000 or to imprisonment for period not exceeding two years, or to both such fine and such imprisonment.”. (Electricity Act, 2007 (Act No. 4 of 2007)).*

### **Example 2**

*“49. Any person who contravenes or fails to comply with any provision of this Act or of any regulation for the contravention whereof or for the failure to comply wherewith no penalty is specially provided shall be liable on conviction to a fine not exceeding R250.”. (Births, Deaths and Marriages Registration Act, 1963 (Act No. 81 of 1963)).*

- (8) In both examples the offences which are to be penalized are not identified in the provisions. This is left to the person who is conducting the prosecution to scan the whole Act and identify the conduct that the person considers to be an offence. In addition, the subordinate rules, codes, regulations or measures whose contravention constitutes offences are also not identifiable and left to be determined by the prosecutor.

These kinds of provisions are undesirable as they create uncertainty in the law which could be in conflict with the constitutional requirements of adherence to the rule of law.

## **63. Determination of penalties**

- (1) Namibia does not have a penal code or legislation regulating the determination or imposition of criminal and administrative penalties. However, the practice in the Directorate is that a baseline for ordinary offence is a fine not exceeding N\$4 000 as equal to imprisonment for a period not exceeding 12 months. For administrative penalties there is no baseline though administrative penalties are relatively high in some cases compared to criminal penalties.
- (2) The legislative drafter must check whether the penal provision fits into the background of the general law, and must consider whether –
- (a) it is necessary to create a new offence or whether the matter can be dealt with adequately under other existing legislation;
  - (b) the new offence falls within the jurisdiction of a particular court or whether some specific provision is needed to this effect;



- (c) there are any relevant restrictions in the Namibian Constitution;
  - (d) it is necessary to take positive measures such as seizing contaminated food for public health reasons or whether it is necessary to control actions or conduct in the public interest where an act needs to be prevented;
  - (e) an administrative penalty is to be imposed in addition to the criminal penalty and if so, the effect of that administrative penalty on the criminal penalty.
- (3) The legislative drafter is required to consider –
- (a) the gravity of the offence;
  - (b) the prevalence of the offence and the need for a deterrent sentence; and
  - (c) the need to maintain a consistent pattern with the structure and scale of penalties in other legislation.
- (4) Sometimes a legislative drafter receives instructions without the creation of offences and penalties or with offences but no penalties or with offences and disproportionate penalties. Thus, it is the duty of the legislative drafter to see to it that the appropriate offences and penalties are provided for but the legislative drafter must consult the client if the penalty is intended.
- (5) A legislative drafter must consider the practice of the Directorate in determining penalties especially the maximum penalties given for certain offences in respect of fines and periods of imprisonment.
- (6) Financial and economic offences, offences involving rape, abduction and abuse of persons and other serious offences attract the highest maximum penalties in our jurisdiction and even the highest maximum administrative fines.

**Example:**

*“(7) An insider who knows that he or she has inside information may not encourage or cause another person to deal or discourage or stop another person from dealing in the securities traded on a regulated market to which the inside information relates or which are likely to be affected by the inside information.*

*(8) A person who contravenes or fails to comply with subsection (1), (3), (5) or (7) commits an offence and on conviction is liable to a fine not exceeding N\$5 000 000 or to imprisonment for a period not exceeding 10 years or to both such fine and such imprisonment.”. (Section 156 of the Financial Institutions and Markets Act, 2021 (Act No. 2 of 2021)).*

- (7) For a very serious offence, the instructions may require the imposition of a minimum penalty or penalty with no option of a fine though it restricts the discretion of the court. The legislative drafter may use the following formula only in exceptional cases.

For more examples of a minimum sentence, refer to cases of *S v Vries* 1996 NAHC 53, *Prosecutor- General v Daniel & Others* 2017 NASC 31 and *S v Tcoeib* 1996 NASC 1.

- (8) It is sometimes necessary to provide for increased penalties for subsequent commission of the same offence after first conviction of the person.

**Example:**

*“15. (1) Any person who is convicted of an offence under this Act shall, subject to the provisions of subsections (2), (4) and (5), be liable –*

- (a) in the case of an offence referred to in section 5, 6(1) or (4), 7, 8(6), 9(10) or 11(1), to a fine not exceeding N\$20 000 or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment;*
- (b) in the case of an offence referred to in section 2(b), to a fine not exceeding N\$40 000 or to imprisonment for a period not exceeding ten years or to both such fine and such imprisonment;*
- (c) in the case of an offence referred to in section 2(a), notwithstanding anything to the contrary in any other law contained –*

- (i) *on a first conviction, to imprisonment for a period of not less than ten years without the option of a fine;*
- (ii) *on a second or subsequent conviction, to imprisonment for a period of not less than fifteen years without the option of a fine.”. ( section 15 of the Motor Vehicle Theft Act, 1999 (Act No. 12 of 1999)).*

- (9) The legislation may impose liability for a further fine or other penalty for each day that the offence continued.

**Example:**

*“114. (1) Any person who provides telecommunications or broadcasting services or owns or operates a network for which a licence is required by this Act without a licence to provide such services is liable to a penalty contemplated in section 115(4) and guilty of an offence and on conviction liable to a fine not exceeding N\$1 000 000 or to imprisonment for a period not exceeding three years.*

*(2) Any person who provides broadcasting services or telecommunications services or owns or operates a telecommunications network outside the scope of a licence or who does not comply with a condition of the licence held by that person is liable to a penalty contemplated in section 115(4) and guilty of an offence and on conviction liable to a fine not exceeding N\$500 000 or to imprisonment for a period not exceeding two years.*

*(3) Any person who fails to comply with an enforcement order or any other order or request that this Act authorises the Authority to make, is liable to a penalty contemplated in section 115(4) and is guilty of an offence and liable to a fine not exceeding N\$100 000 or imprisonment for a period not exceeding two years.*

*(4) An additional penalty or fine of N\$10 000 for each day which an offence referred to in this section continues may be imposed by the Authority or court as the case may be.”. (Communications Act, 2009 (Act No. 8 of 2009)).*

**Note:** subsection (4) provides for an additional penalty for each day that the offence continues in addition to the penalties after conviction by the court.

- (10) The appropriate penalty must generally be prescribed for each offence but where the offences are of similar gravity they can have a general penalty.
- (11) The legislative drafter may receive instructions about freezing, seizing and forfeiture, the cancellation of licences and the payment of compensation. The Bill must make it clear if these matters are to arise automatically on conviction or not.

**Example:**

*“11. (1) If any police officer suspects upon reasonable grounds any dependence-producing drug or plant from which such drug may be manufactured, to be on or in a place, vessel, vehicle or aircraft, and that a contravention of this Act is being or has been committed by means or in respect of such drug or plant, such police officer may at any time without a warrant enter and search such place, vessel, vehicle or aircraft and seize such drug or plant, or may search and interrogate any person whom he may find on or in such place, vessel, vehicle or aircraft with a view to obtaining from such person information concerning the presence of any dependence- producing drug or such plant or the cultivation of such plant on or in that place or elsewhere.*

*(2) In searching a woman, the provisions of section 36(3) of the Criminal Procedure Act, 1955 (Act No. 56 of 1955), shall mutatis mutandis apply.*

*(3) Any article, substance or plant so seized shall be dealt with as if it had been seized under the provisions of the said Criminal Procedure Act or, if seized in the territory, as if it had been seized under the Criminal Procedure Ordinance, 1963 (Ordinance No. 34 of 1963), of the territory.”. (Abuse of Dependence-Producing Substances and Rehabilitation Centres Act, 1971(Act No. 41 of 1971)).*

For more example refer to sections 23, 35 and 30 of the Criminal Procedure Act, 1977 on seizure, forfeiture and disposal of seized property, respectively, and to sections 59, 61, 64, 66, 67 and 68 of the Prevention of Organised Crime Act, 2004 (Act No. 29 of 2004) on application for a forfeiture order, making of a forfeiture order, forfeiture order by default, appeal against a forfeiture order, effect of a forfeiture order and fulfilment of forfeiture order, respectively.

#### **64. Administrative penalties**

- (1) An administrative penalty is a monetary penalty which can be imposed on natural persons or legal persons who fail to comply with requirements of a statute. Administrative penalties

are now mainly found in legislation that establishes regulatory bodies that are empowered to impose these penalties such as Bank of Namibia, CRAN, NAMFISA and the Financial Intelligence Centre.

- (2) Administrative penalties can be used alone, in conjunction with an order or a permit or licensing sanction, e.g. suspension or cancellation, or as part of a progressive enforcement strategy when other enforcement tools have been ineffective.
- (3) Administrative penalties have become a new means of enforcing compliance with regulatory legislation and legislative drafters have to be very cautious when drafting such provisions authorising administrative penalties.
- (4) There are certain safeguards that those proposing this type of penalty regime as well as legislative drafters of such provisions must observe.
- (5) Some of the guidelines to be observed when drafting legislation imposing administrative penalties are the following:
  - (a) objective of the administrative penalty;
  - (b) is the administrative penalty imposed in addition to criminal penalties and other sanctions for instance cancellation, suspension, forfeiture, confiscation, attachment etc.;
  - (c) in what circumstances will the administrative penalty be imposed, for failure to comply with or contravention;
  - (d) who will issue the administrative penalty notice and how?;
  - (e) do those affected have a right to appeal and to whom and how?;
  - (f) the basis of the administrative penalty for instance will it be based on financial turnover of the business;
  - (g) for which offences will administrative penalties be imposed?;

- (h) is there a limit of monetary sanctions to be imposed, for example not exceeding 1 million Namibia dollars;
  - (i) what are the mitigation and aggravation circumstances that will inform the amount of the fine?;
  - (j) who is liable to pay the fine? Is it for instance, an individual or body corporate or directors of the body corporate etc. and in what circumstances;
  - (k) to whom must the administrative penalty be paid and how?;
  - (l) will the decision to impose the administrative penalty be notified to the person and how will the notification be done?.
- (6) There is currently a trend in the financial services sector to relax the leaning on criminal penalties but rather impose administrative penalties for certain offences. For example, the Banking Institutions Act, 2023 (Act No. 13 of 2023) authorises the Bank of Namibia under section 94 of that Act to determine and impose administrative fines for any contravention of or failure to comply with some provisions of that Act and also prescribes the process leading to the imposition of such fines.

**Example:**

*“94. (1) If the Bank is satisfied after an inquiry under this section that a banking institution, microfinance banking institution or controlling company contravenes or fails to comply with section 7(14), 9(6), 10(4)(b), 14(7), 15(8), 16(6), 20(2), 21(3), 23(5), 25(5), 26(15), 28(11)(a), 29(9), 34(13)(a), 35(7)(b), 36(11)(b), 38(3), 39(4), 42(4), 43(4), 44(3), 45(4), 46(4), 47(2), 48(2), 50(4), 51(8), 52(6), 53(11), 54(13), 56(11), 58(8)(a), 59(5)(a), 60(6), 61(2), 62(6), 63(3), 65(12), 66(3), 67(9), 68(4) or 69(13)(a) or a determination referred to in section 108(3) the Bank may impose an administrative fine not exceeding an amount determined by the Bank or an amount determined by the Bank for every day during which contravention or non-compliance with the section continues.”.*

**65. Statutory presumptions**

- (1) The fundamental principle of criminal procedural law is that the State must prove every element of an offence in order to secure a conviction in a criminal case. Because of the challenges that

the prosecution sometimes encounters to prove all elements of the offence, it is sometimes a necessary common practice to create certain statutory presumptions to assist the State.

- (2) The burden on the State to prove often makes the administration of justice difficult, because the proof of certain facts is quite burdensome to the State, and the accused often denies these facts. This makes it difficult for the State to prove the denied facts.
- (3) In other cases, certain facts are peculiarly within the knowledge of the accused. By denying these facts or by simply leaving the burden of proof on the State, the accused can frustrate the administration of justice. Because of the constitutional limitation that the accused cannot give evidence against himself or herself, the prosecution cannot subject him or her to cross-examination like other witnesses of the State. In that case the truth of what happened in a particular case might never be known unless somehow the accused is required by law to give an explanation failing which the court can infer certain conduct of him or her if certain facts are proved.
- (4) To remedy this problem, one may sometimes create various types of statutory presumptions in legislation.
- (5) The first type of statutory presumption is a provision that states that if a certain fact is proved, another fact (which is usually an element of the statutory offence) is presumed to be present.

**Example:**

Section 10(1)(a) of the Abuse of Dependence-producing Substances and Rehabilitation Centres Act, 1971 (Act No. 41 of 1971) reads as follows:

*“(1) (a) If in any prosecution for an offence under section 2 it is proved that the accused was found in possession of –*

*(i) dagga exceeding 115 grams in mass;*

*(ii) any prohibited dependence-producing drugs,*

*it shall be presumed that the accused dealt in such dagga or drugs, unless the contrary proved.”.*

- (6) The effect of that provision is that if the person possesses –

- (a) more than 115 grams of dagga; or
- (b) any amount of prohibited dependence-producing drugs,

the burden of proof shifts to the accused to prove that he or she did not trade in dagga or drugs, and must prove it on a preponderance of probability (weight greater than 50%).

- (7) The second type of statutory presumption is where the presentation of a certain document at a criminal trial creates a presumption that certain facts (which usually appears from the document) are presumed.

**Example:**

*“Section 212 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977) in its various subsections provides that “if affidavits or certificates stating that certain facts are true, that certificate is prima facie proof of the facts stated.”.*

This is a departure from the normal rule that everything at a criminal trial is proved by means of oral evidence.

- (8) A third type of statutory presumption are the so-called “legal presumptions” or “irrefutable presumptions”. These provisions are not technically presumptions; they are actually legal rules formulated in the form of presumptions (a legal fiction the so-called deeming provision).
- (9) If a provision states that “any equipment capable of transmitting radio waves is deemed to be radio apparatus for the purposes of this Act”, the provision does not create a presumption that evidence can prove or disprove. The provision has the effect to treat the equipment for all purposes of the Act to be radio apparatus. A legislative drafter should treat this type of formulation with care and should preferably avoid it.

**Example** of the problems that this style of drafting can create is section 2(2) of the Combating of Immoral Practices Act, 1980, Act (Act No. 21 of 1980). Section 2(1) of that Act makes it an offence to keep a brothel. Section 2(2) then reads as follows:



*“(2) The following persons shall for purposes of subsection (1) be deemed to keep a brothel, namely –*

- (a) any person who lives in a brothel unless he proves that he was ignorant of the character of the house or place;*
- (b) any person who manages or assists in the management of any brothel;*
- (c) any person who knowingly receives all the money or any share of the money taken in a brothel;*
- (d) any person who is a tenant or occupier of any house or place and who knowingly permits it to be kept or used as a brothel;*
- (e) any person who is the owner of any house or place and who lets it or allows it to be let or to continue to be let, with a knowledge that such house or place is to be kept or used or has been kept or used as a brothel;*
- (f) any woman found in a brothel who refuses to disclose the name and identity of the keeper or manager thereof;*
- (g) any person whose spouse keeps or lives in or manages or assists in the management of a brothel, unless such person proves that he or she was ignorant thereof or that he or she lives apart from the said spouse and did not receive all the money or any share of the money taken therein.”.*

- (10) This provision is ambiguous. Does it mean that a person who complies with any of the paragraphs is free to prove that the person does in fact not keep a brothel? Does it mean that even if a person does not keep a brothel that person is still guilty of contravening section 2(1) if he or she falls within the scope of any of these paragraphs? *In Hendricks and Others v Attorney-General of Namibia and Others* 2002 NR 353 (HC) the High Court preferred the latter interpretation. The effect of the provision is explained as follows on page 369-70:

*“If the prosecution alleges that the accused is a person ‘deemed to keep a brothel (not one ‘keeping a brothel’), it will have to charge the accused accordingly with reference to the specific paragraph of s 2(2) allegedly contravened. It cannot charge the accused with ‘keeping a brothel’ in contravention of s 2(1) and then, by proving that the accused acted in the manner*

*contemplated in one of the paragraphs under s “2(2), secure a conviction on that charge. The ‘deeming’ provision in s 2(2) does not assist the prosecution’s case against an accused charged with a contravention of s 2(1) of the Act.”.*

- (11) This provision could have been drafted much more clearly by using words such as: *“The keeping of a brothel as contemplated in subsection (1) shall also include...”*.
- (12) Statutory presumptions have raised constitutional problems mainly because they are potentially contrary to Article 12(1)(d) of the Namibian Constitution in that such provisions mean that a person can be convicted even though certain elements of the offence have not been proved, however –
  - (a) in general, the test whether such a provision is constitutional is whether there is a rational connection between the fact that has been proved and the fact that has been presumed; and
  - (b) where a person is caught with a lorry full of dagga, it would be difficult to come to any other conclusion than that the person is trading. But the problem with the rational connection test in general is that it is often not easy to predict whether the court would find that there is a rational connection in a particular case.
- (13) A considerable amount of case law both in Namibia and elsewhere has dealt with these issues. All the legal issues involved in the determination of whether a specific provision is constitutional or not is outside the scope of this manual.
- (14) A safer approach is to put a provision in the section that does not shift the burden of proof, but that only places a duty to lead evidence to the contrary on the accused. If this approach had been followed in section 10(1)(a)(i) of the 1971 Act, the legal position would have been as follows –
  - (a) if the State proves that the accused possesses more than 115 grams of dagga, the accused cannot just close his or her case. The accused must actually lead evidence to the effect that he or she did not trade in the dagga;
  - (b) if the accused however does lead evidence, the court must weigh this evidence with all the other evidence;

- (c) if after everything has been considered, there is a reasonable doubt whether the accused traded in the substance, the court must acquit.
- (15) This approach largely addresses the mischief for which statutory presumptions are in legislation, without the constitutional problems of the older approach.
- (16) It is however important to keep in mind that even if a factual presumption or a duty to lead evidence exists the court can find it unconstitutional. The legislative drafter must therefore consider the issues involved, and –
  - (a) the most important of these is the logical link between the proving fact and the presumed fact;
  - (b) the second factor that will strengthen a conclusion of constitutionality, is whether the fact is particularly within the knowledge of the accused, but it will be difficult for the State to prove. These are things such as the knowledge or intention of the accused; and
  - (c) the third situation where statutory presumptions are often used (and where the courts appear to be sympathetic to statutory presumptions) is where the presumption relates to technical matters where the proof of the issues involved would require the calling of expert witnesses. It for example appears as though there has been no challenge against section 212 of the Criminal Procedure Act 1977 (Act No. 51 of 1977).
- (17) In general, the legislative drafter should avoid creating a presumption in instances where such presumption has no probative value.

**Example 1:**

A presumption that if a person charged with the possession of uncut diamonds, the presumption is that any diamonds found in his possession are uncut.

**Example 2:**

Section 10(1)(a)(ii) of the 1971 Act is another example where the presumption has no probative value. According to that provision, if a person is found in possession of any amount (even a milligram) of the stated substances this will create a presumption that, that person is trading in the substance concerned hence he or she must prove that he or she does not trade

in the substance concerned (position may be different if the person possessed say 1 kg of the substance).

- (18) **Example** of a provision that creates only an evidentiary burden is the following:

*“(3) For the purposes of subsection (1), a person shall, in the absence of evidence to the contrary, be deemed to carry on long-term insurance business in Namibia, if such person performs in Namibia ...”.*

This formulation is somewhat problematic, because it is not clear whether it creates a factual or a legal presumption because of the deeming term that is normally associated with creating legal fictions. From the surrounding provisions, it becomes clear that a factual presumption is intended. A better formulation would probably be the following:

*“(3) In criminal proceedings where a person is charged with the contravention of subsection (1), the person shall, in the absence of evidence to the contrary, be presumed to carry on long-term insurance business in Namibia, if it is proved that that person has performed in Namibia....”.*

A different approach to the formulation of an evidentiary burden is the following:

*“(2) If it is alleged in a charge in any criminal proceedings under this Act -*

*(a) that any petroleum product alleged to have been sold or purchased, or supplied or acquired, is a petroleum product of a particular class or kind;*

*or*

*(b) that any petroleum product or service is a petroleum product or service of a kind to which any provision of this Act applies,*

*such allegation is, unless the contrary is proved, prima facie proof of the matter alleged.”.*

The use of the word *prima facie* creates the evidentiary burden.

- (19) A less obvious case where a reverse onus provision has been declared unconstitutional is the following standard provision:

*“Provided that such a declaration of forfeiture shall not affect any rights which any person other than the convicted person may have to such implement, boat, vessel or vehicle, if it is proved that such other person took all reasonable steps to prevent the use thereof in connection with the offence.”.*

**Note:** The reason is that although the right holder is not subject to criminal conviction, the holder is still expected to prove his or her non-involvement in the offence to avoid adverse consequences see (*Freiremar SA v Prosecutor-General of Namibia and Another 1996 NR 18(HC)*).

## **66. Referential legislation**

- (1) Where one piece of legislation refers to another, it is important to ensure the status of the referred legislation and the effect of change in the “referred legislation”.
- (2) There may be problems with the meaning of words where the “referred legislation” has changed due to amendment, repeal or judicial interpretation.
- (3) In order to avoid the situation where a provision of legislation refers to another enactment to determine the meaning, a legislative drafter may, where practical, rather repeat the provision of the text referred to.
- (4) If a legislative drafter wants to define a word or phrase defined in another relevant legislation, the drafter may –
  - (a) incorporate the defined word or expression in the Bill that is being drafted by rewriting the definition of the word or expression;

### **Example:**

*“probation officer”, as defined in section 1 of the Child Care and Protection Act, means a person appointed or designated by the Minister responsible for protection of children as a probation officer in terms of section 35 of that Act or a person who is considered to be a probation officer in terms of that section;*

- (b) define the word or expression by reference to its definition as assigned to it in that other legislation.

### Example

*“agency” means an agency as defined in section 1 of the Public Service Act, 1995 (Act No. 13 of 1995);*

- (5) There is however an inherent problem with example under subparagraph (4) because certain pieces of legislation are long and complex and their definitions could refer to other provisions in the same or other legislation which do not exist in the legislation one is drafting therefore making it difficult for the definition to be rewritten in the manner described. Thus, when it is not practical to follow the scenario in subparagraph (4)(a), the legislative drafter is forced to follow subparagraph (4)(b). For example, the Financial Institutions and Markets Act, 2021 is one of the long and complex legislation with complex definitions which may make it difficult if not impossible to fit into subparagraph (4) (a) or (b).
- (6) Unless absolutely necessary, the legislative drafter should desist from using referential legislation as in the following **Examples**:

*“Section 10 applies subject to the provisions of any other Act or law;”*

Note: A provision of this nature expects a reader to read the whole of the statute book or the common law and case law to understand the enactment subject to which section 10 applies.

*“globe” has the meaning assigned to it by section 22 of the Forest Act, 1997;*

This construction is not advisable in cases where it possible to rewrite the definition as defined in that Act. It may also lead to confusion since “globe” may have been the subject of judicial interpretation unknown to the legislative drafter. However, it is acceptable when you cannot rewrite the definition as defined in that Act.

*11. Despite anything to the contrary in this Act or in any other law, this section regulates matters relating to the conclusion of a contract of lease.*

**Note:** This provision which refers to “any other law” can cause problems when another law dealing with the same subject of lease is enacted along the same lines that it excludes the application of any other law. Which exclusion prevails? Rather if the law being excluded is known then mention it e.g. “*Despite the provisions of the Labour Act, 2007...*”. But this is not the only law that the drafter may want to oust therefore it does not suffice to only refer to that specific one and leave the unknown.

- (7) The main goal of an *ouster clause* is that no matter what other laws say the ouster clause prevails. The former or latter law is irrelevant since the former and latter law are all excluded by the ouster clause. If you know one law that is relevant, name it, but the general phrase “or any other law” must be included in the construction so that it excludes the old and the new laws.
- (8) Otherwise in the case of a new “ouster clause” on the same subject matter one will be forced to apply the presumption that when Parliament makes a new law, it knows about the existence of a current law. So, the latter law prevails.

Parliament would be remiss if it comes up with a new law governing a cardinal subject matter without amending or repealing a current law in the statute book that deals with the same subject matter to avoid subsequent anomaly.

## **67. Retroactive and retrospective legislation**

- (1) The purpose of legislation is to guide or regulate present and future conduct so that a person subjected to such legislation knows what conduct may or may not be performed. So, the presumption is that legislation applies prospectively.
- (2) Article 12(3) of the Namibian Constitution provides as follows:

*“No person shall be tried or convicted for any criminal offence or on account of any act or omission which did not constitute a criminal offence at the time when it was committed, nor shall a penalty be imposed exceeding that which was applicable at the time when the offence was committed.”*

- (3) A statute may be said to be retroactive in operation or retrospective in operation. The two words are often used interchangeably but there is a subtle distinction.
- (4) It has been fairly stated that –
  - (a) A statute is retroactive where it changes the law from a date prior to the date of its enactment;
  - (b) a statute is retrospective where it attaches new consequences to an event that occurred prior to its enactment;

- (c) a statute is not retrospective by reason only that it adversely affects a pre-existing acquired right;
- (d) regulations cannot be given retrospective or retroactive effect unless the enabling legislation so authorises either expressly or by necessary implication;
- (e) there is one exception to the presumption against retrospective operation of an Act, that is, where an enactment is repealed and replaced, the new enactment is retrospective in so far as it is a repetition of the former enactment.

**Example** of retroactive application of a law:

*Any agreement entered into for the purchase of a motor vehicle, prior to 21 March 1990, is invalid and persons who have entered into such agreements are liable to a fine of N\$10 000 or imprisonment for a period not exceeding 5 years or to both such fine and such imprisonment.*

- (5) In the given example it is clear that prior to that provision entering into an agreement to purchase a motor vehicle was not prohibited but has now become an offence after the new law takes effect. This is the type of provision that is prohibited by Article 12(3) of the Namibian Constitution because it is retroactive i.e. it makes previous conduct an offence when it was not before and seeks to punish those who engaged in the conduct before it was declared to be an offence.
- (6) A legislative drafter must take note that retrospective legislation –
  - (a) is desirable when it confers some benefits accruing before the law was passed;
  - (b) is desirable when the new prejudicial consequences are intended as protection for the public rather than as punishment for a prior event; or
  - (c) is desirable when it validates actions or omissions which were taken or made before the law as long as no person is prejudiced.

**Example 1:**

Retrospective legislation was used to bring some laws into operation retrospectively such as the Namibia Institute of Pathology Act, 1999 (Act No. 15 of 1999).



**Example 2:**

The Veterans Amendment Act, 2013 (Act No.3 of 2013) was originally supposed to be brought into force by notice in the *Gazette*, but the Minister failed to issue that notice and actions were taken (veterans were paid) in terms of the Act that was not operational. The Veterans Amendment Act 2015, (Act No.5 of 2015) was introduced to validate those actions by amending the 2013 Act to come into force on its date of publication that was 7 May 2013.

**Example 3:**

Parliament introduced the Local Authorities Amendment Act, 2018 (Act No. 3 of 2018) partly to validate the invalidity of all the regulations made by local authority councils under section 94 of the Local Authorities Act, 1992 (Act, No. 23 of 1992) not in compliance with subsection (5) of that section that requires all the regulations, for the purposes of Article 111(5) of the Namibian Constitution, to be tabled by the responsible Minister in the National Assembly for them to be valid. The tabling must be done within 14 days after promulgation thereof, if the National Assembly is then in ordinary session, or if the National Assembly is not in ordinary session, within 14 days after the commencement of its next ensuing ordinary session. The regulations must remain on the Table of the National Assembly for a period of not less than 28 consecutive days awaiting a resolution to reject them, if not they become effective.

The amendment Act substituted section 96 in order to postpone the commencement of subsection (5) of section 94 of that Act that was already commenced by Government Notice No. 118 of 31 August 1992 and which was not complied with by the responsible Minister.

Section 96 was substituted by Act 3 of 2018 by the insertion of subsection (1A) and by the substitution of subsection (3):

*“96. (1) This Act shall be called the Local Authorities Act, 1992, and shall come into operation on a date determined by the Minister by notice in the Gazette.*

*(1A) Despite Government Notice No. 118 of 31 August 1992, section 94(5) is deemed to have come into operation on 1 April 2018.*

*(2) Different dates may be fixed under subsection (1) in respect of different provisions of this Act.*

*(3) A reference in this Act to the date of its commencement shall be construed as a reference to the applicable date determined under subsection (1) or prescribed by subsection (1A).”.*

- (d) is not desirable when the consequences adversely affect the rights and benefits of the persons;
  - (e) is not desirable when the consequences attaching to the prior event are prejudicial ones, namely, a new penalty, disability or duty.
- (7) The principles applying to the retrospective legislation apply equally to retroactive legislation.

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## PART 5

### DRAFTING OF FINANCIAL LEGISLATION

#### **68. Rules on public funds and government finance**

- (1) The source of rules on the receipt and expenditure of public funds and Government finance is the Namibian Constitution.
- (2) The Namibian Constitution is the legal authority for the State Revenue Fund into which public revenue is paid unless exempted. (see Art 125 of the Namibian Constitution and the State Finance Act, 1991(Act No. 31 of 1991))

- (3) The Minister responsible for finance must, before the end of each financial year, prepare and lay before Parliament annual estimates of revenue and expenditure for the following financial year.
- (4) Parliament debates the estimates and authorises the expenditure of money by what is called an Appropriation Act. If necessary, further expenditure is authorised it is so done by an Additional Appropriation Act. (**Example** of Appropriation Bill see **Annexure 9**)
- (5) Funds which are unspent lapse at the end of the financial year and revert to the State Revenue Fund.
- (6) Where there is a special fund created by legislation as described in paragraph 73, any credit balance remaining in the banking account of the fund at the end of its financial year remains in the account.

## **69. Taxation legislation**

- (1) The courts have emphasised several times the need for clear and unambiguous language in all taxing legislation, and the best-known words are probably those of Rowlatt, J:

*“In a taxing Act one has to look at what is clearly said. There is no room for any intendment. There is equity about a tax. There is no presumption as to a tax. Nothing is to be read in. Nothing is to be implied. One can only look fairly at the language used” (Cape Brandy v IRC (1921) 2K.B 403).*

- (2) Little can be said here about the drafting of legislation in respect of the familiar major taxes such as income tax, stamp duty, transfer duty, land tax, customs duty and excise duty. Legislation imposing these taxes, although generally well established, is likely to be frequently amended. In drafting such amendments, the drafter must first try to gain a comprehensive understanding of the particular tax and its administration.
- (3) An Act of Parliament or a member of the Executive branch of government through subordinate legislation if authorised by Parliament may impose a tax.

### **Example:**

Amendments to the Agricultural (Commercial Land) Reform, 1995 (Act No. 6 of 1995) empowers the Minister of lands to impose a land tax on agricultural land which he did through

the Land Valuation and Taxation Regulations published under Government Notice No. 285 of 1 November 2018.

- (4) A legislative drafter may apply the following checklist for legislation imposing tax or levies or authorising the imposition of levies –
- (a) identification of subject of tax (person, object, transaction, activity process) and imposition of tax;
  - (b) identification of person obliged to pay (owner, possessor, occupiers, vendor, user, person performing an action);
  - (c) fixing point in time when liability is to accrue;
  - (d) rate of tax-variation of rate;
  - (e) time for payment;
  - (f) extension of time-payment by instalments;
  - (g) appointment of the collection agent(s);
  - (h) issuance of receipts;
  - (i) recovery of tax;
  - (j) evidence in recovery suits;
  - (k) recovery from third parties (e.g. creditors of taxpayer);
  - (l) disposal of tax by recipient (where it is not to be paid into the state revenue fund);
  - (m) effect of non-payment of tax (e.g. liability to additional or penal tax);
  - (n) relief in cases of hardship;
  - (o) exemptions from liability and provision for further exemptions;

- (p) refunds or rebates;
- (q) appointment of officers responsible for the administration of the tax or levy;
- (r) delegation of functions of appointed persons;
- (s) registration system for persons liable to pay tax;
- (t) returns;
- (u) further returns, information and attendance to answer questions;
- (v) duty to keep, preserve and produce books of account and records;
- (w) power of entry and search;
- (x) assessment and notice of assessment;
- (y) default or estimated assessment;
- (z) additional assessment;
- (aa) withdrawal or cancellation of assessment;
- (ab) objections to assessment;
- (ac) review of assessment;
- (ad) appeal against assessment;
- (ae) secrecy and non-disclosure of information;
- (af) service and substituted service;
- (ag) priority of tax in bankruptcy (insolvency or liquidation); and
- (ah) the power to take samples.

## **70. Direct and indirect taxation**

- (1) Direct taxation is payable directly by the person liable to pay the tax (income tax) and it occurs where the law stipulates –
  - (a) the amount and scale of the proposed tax on income or property;
  - (b) the method for assessment and collection;
  - (c) the person to be taxed and the time the tax becomes payable.
- (2) Direct taxation provides details of any tax exemption and the method of enforcement.
- (3) Indirect taxation is tax collected by an intermediary from the person who bears the ultimate economic burden such as a consumer.

### **Example:**

<i>Value Added Tax Act, 2000 (Act No.10 of 2000) and value added tax (VAT).</i>
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The providers of services and goods and the retailers collect the value-added tax, and pay it over to the Namibia Revenue Agency (NamRA).

## **71. Tax exemption, waiver and variation**

- (1) An Act of Parliament may exempt payment of tax or authorise any functionary to exempt payment of tax.
- (2) Statutory exemptions apply to pensions and income of statutory bodies under certain circumstances.
- (3) The tax law may authorise the Minister of Finance to exempt a person or class of persons or an income from tax.

example is a returning citizen who has customs duty exemption.

- (4) A tax waiver occurs where there is ascertained income tax liability that is removed from the tax payer.

- (5) A tax waiver must occur with the prior approval of Parliament in the respective enactment.
- (6) Tax variation changes the tax liability of a person or an organisation by or under an Act of Parliament.
- (7) The Minister of Finance may remit, in whole or in part, additional charge imposed on a taxpayer in the event of default or omission of payment of tax due to that person. The effect is to waive or vary a person's tax liability.

## **72. Legislation imposing levies and fees**

- (1) Legislation may impose a levy for a particular purpose or authorise a statutory body or a functionary to impose a levy to raise funds for its purpose.
- (2) Legislative drafters are often not clear on the distinction and often take levies to be fees and therefore end up using the terms interchangeably.
- (3) A levy is a form of tax that is imposed on certain businesses or products with the aim to fund a specific purpose.

**Example:** section 25 of the Namibia Financial Institutions Supervisory Authority Act, 2001 (Act No. 3 of 2001) which empowers the Minister to impose levies on financial institutions which levies form part of the funds of NAMFISA reads in part as follows:

**“25. (1) The Minister must, on the recommendation of the board, impose by notice in the Gazette levies on financial institutions.**

**(2) The Minister must in the notice referred to in subsection (1) –**

**(a) determine –**

**(i) the amounts of the levies referred to in subsection (1) or the basis or manner of determining the amounts;**

**(ii) the periods in respect of which the levies referred to in subsection (1) are imposed, the dates on which or the periods within which those levies are payable, and the manner of payment;**

- (iii) *the rates of interest and the manner of calculating the interest contemplated in subsection (3);*
  - (iv) *the manner in which applications for exemptions referred to in subsection (5) must be made; and*
  - (v) *the manner in which a notice in terms of subsection (6)(b) must be served;*
- (b) *impose, in respect of different financial institutions, different categories of financial institutions and different subcategories of a specific category of financial institution –*
  - (i) *different types of levies; and*
  - (ii) *different amounts of levies;*
- (c) *determine, in respect of different financial institutions, different categories of financial institutions and different subcategories of a specific category of financial institution –*
  - (i) *the basis or manner of determining the amounts of the levies referred to in paragraph (b);*
  - (ii) *the period in respect of which the levies referred to in paragraph (b) are imposed, the dates on which or the periods within which those levies are payable, and the manner of payment;*
  - (iii) *the rates of interest and the manner of calculating the interest contemplated in subsection (3);*
  - (iv) *the manner in which applications for exemptions referred to in subsection (5) must be made; and*
  - (v) *the manner in which a notice in terms of subsection (6)(b) must be served.*



(3) *A financial institution which is under a notice referred to in subsection (1) liable for the payment of a levy and which fails to pay the levy in full within the period or on the date for payment determined in the notice must, at the rate calculated in a manner determined in the notice, pay interest on the balance of the levy outstanding and on the interest so payable but unpaid.*

(4) *A levy imposed by a notice referred to in subsection (1), and interest owed in respect thereof, shall be deemed to be a debt due to the Authority and may be recovered by the Authority by way of judicial process in a competent court.”.*

- (4) Provisions imposing levies need to be carefully drafted, in particular, there should be a requirement for public input and oversight by the Executive branch of Government. The principle is no taxation without representation. This simply means that a tax (in form of a levy) must either be authorised by an Act of Parliament or through powers delegated by Parliament to a member of the Executive as in the case of NAMFISA cited earlier. On the constitutionality of a levy regime see *Communications Regulatory Authority of Namibia v Telecom Namibia Ltd & Others 2018 (3) NR 664 (SC)* and *CRAN v MTC Ltd and Others 2024 NASC 6*.
- (5) Since a levy is a form of tax, it is required to be made by notice in the *Gazette*, if not imposed and determined by primary legislation.

**Example** of legislation authorising the imposition of levies:

*“The Minister, after consultation with the advisory council, and with the approval of the Minister responsible for finance, by notice in the Gazette, may impose levies in respect of harvesting any marine resource to be paid into the Marine Resources Fund referred to in section 45 for the purposes of the Fund.”.* (Section 44(3) of the Marine Sources Act, 2000 (Act No. 27 of 2000)).

- (6) On the other hand, fees are not a form of taxation because they are linked to the provision of services or the membership of statutory bodies.

**Example 1:** When you apply for an entry permit you pay the application fee which is an administrative fee for the service rendered and not a tax. (Immigration Regulations, Government Notice No. 134 of 29 July 1994).

**Example 2:** When applying for a licence to conduct banking business, one pays application fees for the administrative service rendered. However, the conducting of banking business

requires one to pay annual fees to the Bank of Namibia the regulator for being a member of authorised banking institutions and as a company one pays an annual duty to BIPA. The annual fees or duties are some forms of levy, thus a tax which the entity pays in order to finance the regulatory functions of the respective regulators. See section 22(1) of the Banking Institutions Act, 2023 (Act No. 13 of 2023) and section 9(3) of the Business and Intellectual Property Authority Act, 2016 (Act No. 8 of 2016).

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## PART 6 SPECIAL FUNDS

### 73. Drafting of legislation creating special funds

- (1) Article 125(2) of the Namibian Constitution provides as follows:

*“All income accruing to the central Government shall be deposited in the State Revenue Fund and the authority to dispose thereof shall vest in the Government of Namibia.”.*

- (2) Article 125(3) provides as follows:

*“Nothing contained in Sub-Art (2) hereof shall preclude the enactment of any law or the application of any law which provides that:*

- (a) the Government shall pay any particular monies accruing to it into a fund designated for a special purpose; or*
- (b) a body or institution to which any monies accruing to the State have been paid, may retain such monies or portions thereof for the purpose of defraying the expenses of such body or institution; or*
- (c) where necessary, subsidies be allocated to regional and local authorities.”.*

**Example** of how to draft a provision creating a special fund: See the *Prevention of Organised Crime Act, 2004 (Act No. 29 of 2004)*, *Tobacco Products Control Act, 2010 (Act No. 1 of 2010)*, *Veterans Act, 2008 (Act No. 2 of 2008)* and *Defence Act, 2002 (Act No. 1 of 2002)*.

**Example 1:** Extract from Prevention of Organised Crimes Act, 2004 (Act No. 29 of 2004)

***“Establishment of Criminal Assets Recovery Fund***

39. (1) *There is, as contemplated in Article 125(3) of the Namibian Constitution, established a special fund to be known as the Criminal Assets Recovery Fund.”.*

***Finances of Fund***

40. *Notwithstanding anything to the contrary contained in any other law –*

- (a) all moneys derived from the fulfillment of confiscation and forfeiture orders contemplated in Chapters 5 and 6;*
- (b) all amounts paid in terms of cost orders made in favour of the Prosecutor-General in terms of section 94;*
- (c) the balance of all moneys derived from the execution of foreign confiscation orders as defined in the International Co-operation in Criminal Matters Act, 2000 (Act No. 9 of 2000), after payments have been made to requesting States in terms of that Act;*
- (d) fines imposed by any court in terms of this Act;*
- (e) money payable to the State in terms of section 32(2) of this Act;*
- (f) any property or moneys appropriated by Parliament, or paid into, or allocated to, the Fund in terms of any other Act;*
- (g) domestic and foreign grants to the Fund;*
- (h) any property or amount of money lawfully received or acquired from any source; and*
- (i) all property or moneys transferred to the Fund in terms of this Act, must be paid into the Fund.”.*

**Example 2:** Extract from the Tobacco Products Control Fund Act, 2010 (Act No. 1 of 2010)

***“Establishment of fund for control of tobacco products***

23. *There is established a fund to be known as the Tobacco Products Control Fund.*

***Finances of the Fund***

24. *The Fund consists of -*

- (a) moneys appropriated by Parliament for purposes of the Fund;*
- (b) donations or contributions made to the Fund for the purpose of the achievement of its objectives;*
- (c) moneys accruing to and vesting in the Fund from any other source and which accrues to the Fund;*
- (d) interest and dividends derived from the investment of moneys made on behalf of the Fund; and*
- (e) relevant levies imposed by the Minister on the sale of tobacco products.”.*

***“Financial year of fund and auditing of books, accounts and balance sheets***

27. (4) *Any money of the Fund which is not required for immediate use may be invested as the Minister, with the concurrence of the Minister responsible for finance, may direct.*

(5) *Any unexpended balance in the Fund at the end of any financial year must be carried forward as a credit in the Fund to the ensuing financial year.”.*

## PART 7

### DRAFTING OF LICENSING LEGISLATION

#### **74. General requirements for licensing legislation**

- (1) Licensing legislation regulates and controls business, social and public activities.
- (2) When drafting licensing legislation, the legislative drafter must follow the practice and style of the Directorate as guided by the general requirements for the legislation set out in the following checklist –
  - (a) identify the person and activity to be regulated;
  - (b) how does a person apply for the licence;
  - (c) what is the criteria for the application for the licence;
  - (d) what representations must an applicant make;
  - (e) can people object to any application, if so how;
  - (f) the manner of dealing with the application, public hearing or personal appearance;
  - (g) who issues the licence;
  - (h) does the person issuing the licence have a discretion;
  - (i) how long does the licence last;
  - (j) can the licence be renewed;
  - (k) is there a licence fee to be paid, is the fee to go in a schedule in the text or in the annexure or in the regulations;
  - (l) what about people lawfully carrying out the act before the law, can they continue without the licence and for how long;

- (m) what happens if someone operates without a licence;
- (n) are there any persons to be exempted;
- (o) what are the consequences on the existing law;
- (p) are there other laws to be amended;
- (q) are old licences to be surrendered; and
- (r) should there be provision for the inspection of the register of licences by third persons.

#### **75. Terms and conditions of licence**

When drafting licensing legislation, the legislative drafter must ask the following questions regarding the terms and conditions of the licence –

- (a) the duration of the licence, should it be time-based period or for an indefinite period;
- (b) does the licence have to be displayed, if so, how and where in the premises;
- (c) what happens if the licence is lost or destroyed;
- (d) what happens when the licensed business is sold;
- (e) what happens when the licence holder dies; and
- (f) can the licence be revoked.

#### **76. Refusal of applications**

When drafting licensing legislation, the legislative drafter must ask what will happen if an application for a licence is refused –

- (a) can the applicant appeal, if so under what circumstances and within which period;
- (b) to whom notice of appeal should be lodged;

- (c) should there be timelines within which an appeal should be concluded;
- (d) should security for costs be given for an appeal;
- (e) what happens pending appeal;
- (f) is there a further appeal to a tribunal; and
- (g) is it a pre-existing tribunal or must a new tribunal be created.

#### **77. Transfer, suspension and cancellation of licence**

When drafting licensing legislation, the legislative drafter must also ask the following questions relating to the transfer, suspension and cancellation of the licence –

- (a) can the licence be transferred, and if so how and what are the conditions, if any;
- (b) to whom can the licence be transferred;
- (c) can the licence be suspended;
- (d) for what reason may it be suspended;
- (e) can the licence be cancelled and under what circumstances;
- (f) whether a court convicting the licensee of an offence has power to revoke a licence; and
- (g) whether the conviction automatically cancels the licence.

#### **78. Offences and penalties**

When drafting licensing legislation, the legislative drafter must also ask the following questions regarding offences and penalties –

- (a) is it a criminal offence to operate without a licence;

- (b) which court has jurisdiction;
- (c) what is the penalty;
- (d) is it an offence to make a false representation;
- (e) is it an offence for a person to obstruct an inspector while executing his or her functions.

## PART 8

### DRAFTING OF STATUTORY BODIES LEGISLATION

#### **79. Statutory bodies**

- (1) Statutory bodies are created by Acts of Parliament. Most of these bodies are listed under the repealed Public Enterprises Governance Act, 2006 (Act No. 2 of 2006), as state-owned enterprises in various categories.
- (2) Statutory bodies created by Acts of Parliament perform specific functions such as –
  - (a) regulation of an industry or a profession;
  - (b) provision of a public service; or
  - (c) conducting a business enterprise.
- (3) The following are types of statutory bodies:
  - (a) The body is a juristic person with a governance body.  
  
**Example:** *NAMFISA, Namibia Industrial Development Agency (NIDA)*
  - (b) The body itself is the juristic person and governance body.  
  
**Example:** *Social Security Commission, Accreditation Board of Namibia;*
  - (c) Fund is the juristic person with a governance body.



**Example:** *Motor Vehicle Accident Fund, Namibia Game Products Trust Fund;*

- (d) The body is created by Act but required to register with BIPA.

**Example:** *New Era Publications Ltd, Namibia Wildlife Resorts (NWR)*

- (e) The body is not created by statute but registered as a proprietary company or section 21 company.

**Example:** *Namibia Power Corporation (Proprietary) Limited (NamPower)*

- (f) Some statutory bodies are not public enterprises but regulatory bodies or service providers that are not regulated by the Public Enterprises Governance Act.

**Examples:** *Health Professions Councils, Magistrates' Commission, Law Reform and Development Commission, and the various advisory bodies under different laws.*

- (4) When drafting a Bill creating a statutory body, the legislative drafter must have regard to the Public Enterprises Governance Act, 2019 (Act No. 1 of 2019) which provides for the efficient governance of public enterprises, the monitoring of their performance and restructuring, and for the powers and functions of the Minister responsible for public enterprises in order to maintain consistency between the two pieces of legislation.

## **80. Questions to be considered**

Since a statutory body only has the powers given to it expressly by statute, the legislative drafter must answer crucial questions when creating such bodies, and these questions are —

- (a) will the body be a juristic person or not?
- (b) how will the body be funded?
- (c) what will the structure of the body be? Which organs will it have and what will be the relationship between these organs?
- (d) by which organs will decisions of the body be taken?

- (e) will the body have its own staff? If so, who will appoint the staff and who will determine their conditions of service?

## **81. Juristic personality of statutory bodies**

- (1) The first issue to be considered is whether the body must be a juristic person separate from government. The issue in this regard is whether it can own property in its name and whether it can conclude contracts on its own behalf or whether it merely acts as an organ of the State and whether or not it can sue or be sued in its name. In other words, does it have its own liabilities and assets or do they belong to the State. A legislative drafter must again consider the following matters –
  - (a) how is the body going to be funded?
  - (b) when a body is exclusively or largely funded through money appropriated by Parliament, that body must be part of the government.
- (2) A body can be self-funded either because –
  - (a) it is running a business operation such as Telecom or Nampower; or
  - (b) it is funded by levies that are usually collected from the industry that it regulates such as NAMFISA and the Electricity Control Board.
- (3) There are often reasons advanced on making a body a separate juristic person such as –
  - (a) that the body may require some degree of independence from the Government. The independence from government results in minimising political control;
  - (b) that the body may require specialised staff members that are expensive, the body must therefore be separate from the government in order to avoid the civil service bureaucracy and be able to pay competitive salaries;
  - (c) that the body requires some sort of partnership between the State and the private sector, the most common case in this regard is where a specific industry or profession is regulated by a statutory body consisting mostly of members of the specific profession such as the Law Society of Namibia.

- (4) In the end, this is a policy decision, but the legislative drafter often needs to be assertive to ensure the taking of a clear decision. Hybrid models often are proposed. In this case, it is usually better to suggest a rethinking of the policy to avoid poorly conceived hybrid models that lead to legal uncertainty. It is for example often uncertain whether the officials of the body are civil servants or not.
- (5) When the body is part of the Government, there must be very special reasons for the officials not to be civil servants. Apart from policy reasons in this regard, the problem is that the actual status of these people can become highly uncertain if the provisions are ambiguous. The problem with new and innovative models is that it is unavoidable that legislative drafters may leave a large number of important issues unattended. Given the fact that the model is new, there would not be appropriate models to draw from in order to fill the gaps in the legislation.
- (6) When it is decided that the body must be a juristic person, two models are possible –
  - (a) the body may be created by the law in question in which case every power of the body must be specified in the law or must be implied; or
  - (b) the Act may provide that the body in question will be created as a company in which case the articles, statutes and memorandum will regulate the corporate structure of the body concerned.
- (7) Section 2 of the Public Enterprises Governance Act, 2019 (Act No. 1 of 2019) is a useful source of examples of all the classes of juristic persons that may be created. Companies are usually created where the body will be engaged in some kind of business venture, for instance National Petroleum Corporation of Namibia (NAMCOR), NamPower, NamWater, etc. are created to engage in their respective businesses.
- (8) The other type of statutory bodies that are fully created by their statutes are usually bodies that have a regulatory function or that will perform some public purpose that is not in the nature of a business enterprise. The establishing Acts should have a number of standard provisions which include –
  - (a) the objects of the body, the general powers (such as concluding contracts and owning property);
  - (b) the special powers that the body requires to exercise;

- (c) the purpose for which it is being created (such as issuing licences, approving tariffs or holding disciplinary hearings);
  - (d) the funds of the body (including auditing and reporting provisions, together with any limitations or permissions that may be necessary);
  - (e) the corporate structure (including number and qualifications of board members, tenure of office, dismissal of board members, delegation of powers and various other provisions).
- (9) The corporate status of a body to be established depends on –
- (a) the object of the body and its functions;
  - (b) whether the body is to have the power to sue and be sued;
  - (c) whether the body is intended to acquire property;
  - (d) whether it is required to employ staff;
  - (e) whether the body is to be fully or partly independent of Government; or
  - (f) whether the body is to be purely advisory.
- (10) The broad guidelines for standard provisions in an Act establishing a statutory body are:
- (a) establishment;
  - (b) objectives;
  - (c) functions of the body;
  - (d) board of directors or management team;
  - (e) term of office and vacancy and filling of vacancies;
  - (f) financing and accountability;

- (g) administration: chief executive and staff;
  - (h) general.
- (11) A significant portion of Bills drafted by the Directorate has as one of its goals the creation of a statutory body. The most important issue with regard to statutory bodies is that they are creatures of statute and must therefore obtain all their powers from the statute or from other legal instruments whose creation is authorised by the statute.

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## PART 9

### DRAFTING OF LEGISLATION GIVING EFFECT TO INTERNATIONAL OBLIGATIONS

#### **82. Introduction**

- (1) Legislative drafters are often instructed to give effect to international obligations through either primary or subordinate legislation, and when doing so, the legislative drafter must have regard to Article 144 of the Namibian Constitution on the status of international law.
- (2) International obligations usually arise from treaties. The Vienna Convention on the Law of Treaties 1969 defines a treaty as:

*“an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.”*

- (3) International legal parlance uses various terms to describe treaties and these include agreement, treaty, convention, covenant or protocol. Regardless of the terminology for purposes of the Vienna Convention they are all treaties, but for purposes of this manual, we use the term “international agreement” or “agreement”.

#### **83. International agreements and Namibian Constitution**

- (1) The issue of international law in the Namibian legal system is governed by Articles 32(3)(e), 63(2)(e) and 144 of the Namibian Constitution as follow –

- (a) Article 32 empowers the President to negotiate and sign international agreements;
  - (b) Article 63 empowers the National Assembly to agree to the ratification of or accession to international agreements which have been negotiated by the President;
  - (c) Article 144 provides that *“unless otherwise provided in this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia.”*.
- (2) The reference to general rules of public international law in Article 144 is considered as a reference to the rules of customary international law which according to the common law are automatically binding and applied by the courts in Namibia without the need for legislation.
  - (3) The position regarding international agreements in Namibia is somewhat ambiguous and has generated some academic debate.
  - (4) The reference to agreements which are binding on Namibia creates ambiguity in that generally agreements are binding only after they are ratified both internally as per the Constitution and externally as per the requirements of the agreement. Thus, once an agreement has been signed or acceded to by the President or his or her representative, ratified by the National Assembly under Article 63 and then formally ratified as per the international requirements the agreement becomes binding on Namibia on the international plane.
  - (5) But the question still remains: is that agreement binding domestically such that the courts in Namibia can apply it without the need for further legislation? Opinions differ with some asserting that the agreement is binding according to Article 144 while others maintain that such agreements are automatically binding only if they are considered to be “self-executing” in which case no further legislation is required to give effect to the agreement.

#### **84. Methods of giving effect to international agreements**

- (1) Whatever the merits of each opinion, for practical purposes the position is that generally speaking many of the international agreements which confer rights or impose obligations on both States and private persons, including the so called “self-executing” agreements would require domestication when it comes to actual implementation. It is therefore necessary for the legislative drafter to be aware of the various methods used to implement international

agreements into domestic law. There are, broadly speaking, two main ways which are applied namely, the direct approach and the indirect approach.

- (2) The direct approach involves giving the agreement the force of domestic law through legislation without further ado while the indirect approach involves the passing of legislation which incorporates the substance of the agreement without necessarily referring to the agreement or endowing the agreement itself with the force of domestic law.

There is much to be said for each of these approaches, but the point to be noted is that it all depends on the nature of the agreement itself. The legislative drafter, together with relevant stakeholders, will have to decide which approach is best in each particular case.

## **85. Direct approach**

- (1) As noted above this approach involves giving the agreement the force of domestic law through legislation such that the agreement itself becomes self-executable. In most cases, however there will be a need to include supplementary provisions in the implementation of such agreements such as provisions identifying the administering authority, the courts in which the rights may be enforced and penal provisions where the agreement requires the creation of offences. In practice where this approach is adopted the agreement would be included in a schedule to the legislation.

**Example** of application of this approach:

*“The provisions of the Convention shall, so far as they relate to the rights and liabilities of carriers, passengers, consignors, consignees and other persons, and subject to the provisions of this Act, have the force of law in Namibia in relation to any carriage by air to which the Convention applies, irrespective of the nationality of the aircraft performing the carriage.”. (section 4(1) Carriage by Air Act, 1946 (Act No.17 of 1946)).*

- (2) Another example is the Geneva Conventions Act, 2003 which takes a slightly different approach by not specifically endowing the Convention with the legal effect and consequences but instead, does so indirectly in the long title and in the definitions that refer to the various Conventions and Protocols “set out in the Schedule”. This approach might create uncertainty, and it is always advisable to have specific provision giving the agreement domestic legal effect and consequences.

**Example 1:**

*“Subject to the provisions of this Act, the provisions of the Conventions which are set out in the Schedule to this Act shall be observed and shall have the force and effect of law in Namibia.”. (section 2(1) Namibia Refugee (Recognition and Control) Act, 1999 (Act No.2 of 1999)).*

**Example 2:**

*“The Patent Co-operation Treaty (hereafter “the Treaty”), the Regulations made thereunder and the Administrative Instructions made under those Regulations must be given the force of law in Namibia.”. (section 76(1) of the Industrial Property Act, 2012 (Act No. 1 of 2012)).*

**86. Indirect approach**

Under the indirect approach the agreement is not given domestic legal effect and consequences directly but substantive provisions in the legislation or references to the agreement in the law give effect to the agreement without giving it the legal effect and consequences, and there are three different ways to achieve this:

- (a) The legislation may not contain a reference to the agreement but gives effect to it by substantive provisions:

**Example:**

The Prevention of Organised Crime Act, 2004 (Act No. 29 of 2004) gives effect to the United Nations Convention against Transnational Organised Crime 2000 without directly mentioning or referring to that Convention. The substantive provisions of the Act give effect to the provisions of the Convention.

- (b) The legislation may refer to the agreement without having the text of the agreement as a Schedule, but gives effect to it by substantive provisions which may or may not use the language used in the agreement.

**Example:**

The Civil Aviation Act, 2016 gives effect to the Convention on Offences and Certain other Acts Committed on Board Aircraft; the Convention for the Suppression of Unlawful Seizure of Aircraft; and the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation.



**Note:** The long title of the Act refers to the three Conventions but the substantive provisions of the Act do not necessarily follow the language of the Conventions, but give effect to the provisions of the Conventions.

- (c) The legislation may set out the agreement in a Schedule but for information or reference purposes only.

**Note:** For purposes of better communication, the approach in paragraph (c) is the most effective in comparison to paragraph (a) or (b) in that the reader has the benefit of reading the legislation and, if necessary, referring to the agreement which is annexed to the legislation.

## 87. Purpose provision

- (1) The purpose provision may be contained in the long title of the legislation while explanatory matters may be contained in the preamble or in a specific provision of the legislation.

**Example:** the long title to the Geneva Conventions Act, 2003 reads:

*“To give effect to certain Conventions done at Geneva on 12 August 1949 and to certain Protocols additional to those Conventions done at Geneva on 10 June 1977; and to provide for matters relating thereto.”.*

- (2) Similarly, the long title to the Namibia Refugees (Recognition and Control) (Act No. 2 of 1999) reads in part:

(3) *“...to give effect to certain provisions of the United Nations Convention Relating to the Status of Refugees of 28 July 1951, the Protocol Relating to the Status of Refugees of 31 January 1967 and the Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa of 10 September 1969.”.*

## 88. Identification of parties

Where the identification of the parties to an agreement is necessary, the legislative drafter should provide for identification of such parties. An **example** reads as follows:

*“(2) The Minister may from time to time by notice in the Gazette declare who are the High Contracting Parties to the Convention, in respect of what territories they are respectively parties and to what extent they have availed themselves of the provisions of the Additional Protocol to the Convention, and any such notice shall, except in so far as it has been varied or superseded by a subsequent notice, be conclusive evidence of the matters so declared.”.*  
(section 4(2) of the Carriage by Air, Act, 1946 (Act No. 17 of 1946)).

## **89. Main principles of agreement**

- (1) The main principles of an agreement should ideally be contained in the primary law which is the Act passed by Parliament while technical or procedural matters may be contained in subordinate legislation. An example is the Civil Aviation Act, 2016 (Act No. 6 of 2016) which gives effect to the International Aviation Conventions and other matters and delegates power to the Minister and the Executive Director of Civil Aviation to make subordinate legislation to give effect to the Conventions.

### **Example 1: Minister**

*“3. (1) The Minister, in accordance with section 54, may issue such regulations as appear to him or her necessary for giving effect to any of the provisions of the Chicago Convention or the Transit Agreement.*

*(1) If–*

*(a) the Chicago Convention or the Transit Agreement is amended;*

*(b) Namibia enters into or becomes party to an international aviation agreement; or*

*(c) an international aviation agreement is amended,*

*the Minister may in accordance with section 54 issue such regulations as appear to him or her necessary for carrying out and for giving effect to any of the provisions of the agreement or amendment.”.* (Civil Aviation Act No. 6 of 2016)).

### **Example 2: Executive Director**

*“227. (1) The Executive Director may issue technical standards for civil aviation on such matters as may be prescribed.*

*(2) The manner in which a technical standard for civil aviation may be issued, amended or withdrawn, and the procedure to be followed in respect of any such issue, amendment or withdrawal is as prescribed.*

*(3) The Executive Director may incorporate into a technical standard any international aviation standard or any amendment, without publishing the text of such standard or amendment, by mere reference –*

*(a) to the title, number and year of issue of such standard or amendment; or*

*(b) to any other particulars by which such standard or amendment is sufficiently identified.”.*

- (2) Sometimes it may be necessary to provide for the implementation of agreements which at the time that the legislation is passed are unknown. An example of this situation is in the Environmental Management Act, 2007 (Act No. 7 of 2007)) which provides in part:

*“The Minister may introduce legislation in Parliament or make such regulations as may be necessary for giving effect to an international environmental agreement to which Namibia is a party, and such legislation and regulations may deal with the following -”. (section 48 Environmental Management Act, 2007)).*

### **90. Delegation of power to implement amendments**

Sometimes frequent amendments to an agreement may be anticipated, making it impractical to amend the Act each time the agreement is modified. It is thus necessary for the legislative drafter to provide for giving effect to subsequent amendments to be made to the agreement through subordinate legislation.

**Example 1:**

*“(1) The President may by proclamation in the Gazette make such incidental or supplementary provisions as appear to him or her necessary for carrying out the Convention or any amendment thereof or addition thereto ratified or adhered or acceded to on behalf of Namibia, and for giving due effect thereto or to any of the provisions thereof.*

*(2) For the purposes of this Act, any amendments or additions so ratified adhered or acceded to, shall, subject to any provisions so made in terms of subsection (1), be deemed to be incorporated in the Schedule to this Act.”. (section 5 of Carriage by Air Act No. 17 of 1946)).*

**Example 2:**

*(3) If any international convention or any regulations issued under an international convention to which Namibia is party is amended the Minister may, taking into account the advice of the Registrar, decide if such amendment is to be applicable for the purposes of this Act, and issue such regulations or notices as appear to him or her necessary for carrying out and for giving effect to any of the provisions of the amendment.”. (section 234(3) Industrial Property Act No. 1 of 2012)).*

**91. Inconsistency with other laws**

- (1) The issue of inconsistencies between Namibian laws and international law, be it customary or conventional, is partly governed by Article 144 of the Namibian Constitution which reads:

*“Unless otherwise provided by this Constitution or an Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia.”*

- (2) One can understand this provision to mean that international law which is binding on Namibia forms part of Namibian law unless the Constitution or an Act of Parliament provides otherwise. Essentially this means –
- (a) a constitutional provision which conflicts with international law is valid and enforceable; and
  - (b) an Act of Parliament may specifically override international law.

- (3) It may be necessary to provide specifically for inconsistencies when domesticating international obligations.
- (4) It is not common to find provisions that give priority to international law as opposed to the other scenario where national Acts of Parliament override international law. The overriding principle which can be deduced from a purposive reading of Article 144 is that Parliament through an Act can determine whether national law or international law prevails in case of an inconsistency between the two legal regimes.

**Examples:**

*“In the event of a conflict between a provision of this Act and a provision of the Immigration Control Act, the provision of this Act shall prevail.”. (Section 32 Namibia Refugees (Recognition and Control Act, 1999)).*

**Note:** The Namibia Refugees (Recognition and Control) Act, No.2 of 1999) was enacted to give effect to obligations arising from various international legal instruments noted above.

*“(4) Where the provisions of this Act conflict with those of the Treaty, the provisions of the Treaty prevail.”. (section 76(4) of the Industrial Property Act, 2012 (Act No. 1 of 2012)).*

*“(2) The Registrar must deal with international registrations in accordance with the provisions of section 128 and of the Hague Agreement and the Regulations issued thereunder; but, if there is any conflict between the provisions of the Hague Agreement or the Regulations issued thereunder and the provisions of this Act, the Hague Agreement and its Regulations prevail.”. (Section 127(2) Industrial Property Act, 2012 (Act No. 1 of 2012)).*

*“(3) If there is a conflict between the provisions of the Madrid Protocol or the Common Regulations issued thereunder and the provisions of this Act, the Madrid Protocol and the Common Regulations prevail.”. (Section 199(3) Industrial Property Act No. 1 of 2012)).*

## 92. Inconsistent language versions

- (1) The question of inconsistencies between the various language versions of an agreement is so real that sometimes it may be necessary to make provision in the legislation for such eventualities.
- (2) SADC states in particular where three official languages exist, namely English, French and Portuguese each of which is equally authentic are likely to encounter this problem.
- (3) Cases of inconsistent language versions might be resolved by resorting to Article 33 of the Vienna Convention 1969 which provides that in cases where there is difference in meaning between the language versions which cannot be resolved by applying general rules of treaty interpretation, then the language version which best reconciles the texts must be applied. However, if it is felt that the official language version of a particular state must prevail then a provision to this effect might be used.

### Example:

*“If there is any inconsistency between the English version of the Convention and any other language version the English language version prevails.”*

## 93. Meaning of words in legislation and agreements

- (1) Sometimes it is necessary in legislation to refer to terms or expressions used in the agreement without having to repeat them in the legislation.
- (2) **Example** of providing effect to this situation can be seen in the Regulations giving effect to the Kyoto Protocol made under the Environmental Management Act, 2007 (Act No. 7 of 2007) which read in part:

*“In these regulations any word or expression given a meaning or described in the Convention, the Kyoto Protocol, the Decision or the Act, bears that meaning or description and, unless the context indicates otherwise –”. (Regulation 1 of the Regulations Giving Effect to the Kyoto Protocol)).*

**Example:**

*“1. (1) In this Act unless the context indicates otherwise any word to which a meaning has been assigned by the Convention bears that meaning, and –*

*“Appendix” means the relevant appendix to the Convention;*

*“Convention” means the Convention on International Trade in Endangered Species of Wild Fauna and Flora, signed at Washington on 3 March, 1973, as amended in Bonn on 22 June 1979 and acceded to by Namibia on 18 December 1990, the text of which is set out in Schedule 2;”.*

*(Section 1 of the Controlled Wildlife Products and Trade Act, 2008 (Act No. 9 of 2008)).*

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CHAPTER 6  
DRAFTING OF AMENDMENT BILLS

**94. Drafting of amendment Bills**

- (1) An amendment Bill is a Bill amending the principal Act. An amendment legislation forms part of the amended principal legislation thus the principal Act and the Amendment Act are read as one.
- (2) When drafting amending legislation, the legislative drafter must consider the following issues –
  - (a) the legislative drafter must acquire a comprehensive acquaintance and familiarity with the whole Act that is to be amended and with other pertinent laws;
  - (b) the language and style of the amendment Bill must be consistent with that of the principal Act; and
  - (c) the effect of the proposed amendments on the provisions of the principal Act, other than those directly amended, and on other legislation must be studied and necessary consequential amendments must be made.

## 95. Long title of amendment Bills

- (1) The long title of an amendment Bill must –
  - (a) be concise and relate only to the matters being amended; and
  - (b) briefly mention all the main amendments being made.
- (2) If the Bill is making substantial amendments to another law or repealing a law, the long title should indicate the name of that other law being amended or repealed.

**Example** of long title of amendment Bill:

### ACT

*To provide for the combating of rape; to prescribe minimum sentences for rape; to provide for the abolition of the rule that a boy under the age of fourteen years is presumed incapable of sexual intercourse; to provide for the modification of certain rules of evidence applicable to offences of a sexual or indecent nature; to impose special duties on prosecutors in criminal proceedings relating to sexual offences; to impose special duties on members of the police in respect of certain bail applications; to amend the Criminal Procedure Act, 1977, so as to insert a certain definition; to make provision for the rights of a complainant of rape in bail proceedings; to further regulate the granting of bail to persons charged with rape; to further regulate the circumstances in which certain criminal proceedings shall not take place in open court; to extend the prohibition of the publication of certain information relating to certain offences; to further regulate the admissibility of evidence relating to similar offences by an accused; and to further regulate the admissibility of evidence relating to the character of a complainant of rape or an offence of an indecent nature; and to provide for matters incidental thereto.* (Combating of Rape, 2000 (Act No. 8 of 2000))

## 96. Headings for amendment Bills

- (1) Headings (head notes) for an amendment Bill must set out the section which is being amended together with the amendment history of that section.
- (2) When inserting a new section or article into the principal Act, a legislative drafter must conform to the precedent regarding headings or head notes that has been set in the law being amended. (see the examples in subparagraph (3)).



(3) A heading must be typed in bold and must briefly describe what the amending provision intends to do. Acts are amended using following words –

- (a) deletion;
- (b) repeal;
- (c) substitution;
- (d) insertion; and
- (e) addition

**Examples** of headings of amending sections are as follows:

***Amendment of section 4 of Act No. 55 of 1999 as amended by section 1 of Act No. 3 of 2003, section 5 of Act No. 10 of 2007 and section 7 of Act No. 8 of 2009***

1. *Section 4 of the Boys and Girls Act, 1999 (Act No. 55 of 1999) (in this Act referred to as “the principal Act”) is amended by the deletion of subsection (2).*

The history of section 4 of that Act indicates that the section has been previously amended in 2003, 2007 and 2009 (amended three times).

***Repeal of section 6 of Act No. 55 of 1999***

2. *The principal Act is amended by the repeal of section 6.*

The history of section 6 does not indicate any previous amendment made to the section, so it has never been amended since the enactment of the Act in 1999.

***Substitution of section 8 of Act No. 55 of 1999 as amended by section 1 of Act 3 of 2003***

3. *The principal Act is amended by the substitution for section 8 of the following section:*

“8. (1) *[Men] Boys and [women] girls must be treated equally [anywhere] at any sport or social gathering.*

(2) *A person who contravenes subsection (1) commits an offence and is on conviction liable to a fine not exceeding an amount or a period of imprisonment prescribed in section [14] 15.*”.

The history of section 8 indicates that the section was amended only once in 2003.

***Amendment of section 9 of Act No. 66 of 1965***

4. *Section 9 of the principal Act is amended by the substitution for subsection (5) of the following subsection: “(5) The deputy sheriff shall be entitled to fees taxed by the Master according to [tariff A in the Second Schedule to this Act] the prescribed tariff and [the] rules for the construction of that tariff.”.*

***Insertion of section 3B in Act No. 55 of 1999***

5. *The principal Act is amended by the insertion after section 3 of the following section:*

***“Separate accommodation for boys and girls***

***3B.*** *Boys and girls may only be accommodated in separate residences at any school hostel.”.*

***Addition of Schedule 2 to Act No. 55 of 1999***

6. *The principal Act is amended by the addition after Schedule 1 of the following Schedule:*

***“SCHEDULE 2***

***List of Common Sports (Section 10)***

***The following sports may be played by boys and girls together:***

1. *Soccer;*
2. *Volley ball;*
3. *Soft ball; and*
4. *Swimming.”.*

## 97. Numbering in amendment Bills

- (1) The numbering of clauses in the Bill are written in the same style as the numbering in principal legislation, Arabic numerals in progression (1, 2, 3, 4 etc.).
- (2) When amending legislation by addition the numbering of the chapter, part, section, subsection, paragraph, subparagraph or item that is added in the text should follow the last number in progression. (see **example** in paragraph 99(5)).
- (3) When amending legislation by insertion the new numbering of the chapter, part, section, subsection, paragraph, subparagraph or item that is inserted in the text should not disturb the existing numbering. Thus, the preceding number before the insertion is used in combination with Alphabetic capital letters in progression. (see **example** in paragraph 99(8)).
- (4) Where the letters used for a series are longer than the 26 letters of the alphabet, the series must continue with the letters (aa), (ab), (ac) et cetera, but in practice the numbering should not get this far in a provision. The legislative drafter may consider breaking up the provision unless where it is not practicable to do so.

## 98. Repealing and deleting

A whole chapter, part, subpart or section is repealed, but parts of a section (subsection, paragraph, subparagraph, word or phrase) are deleted.

### Example:

- (1) *The principal Act is amended –*
  - (a) *by the repeal of Chapter 3;*
  - (b) *by the repeal of Part 2 of Chapter 4; and*
  - (c) *by the repeal of section 20.*
- (2) *Section 19 of the principal Act is amended –*
  - (a) *by the deletion of subparagraph (ii) of paragraph (b) of subsection (5);*
  - (b) *by the deletion of paragraph (c) of subsection (5); and*
  - (c) *by the deletion of subsection (6).*

## 99. Substitution, insertion and addition

- (1) Legislation can be amended by substituting (replacing) for a word, section, subsection, paragraph, subparagraph or item or a whole or part of a chapter, part, section, subsection, paragraph, subparagraph or item.
- (2) When substituting use the phrase “substitute for” followed by the words that are being “substituted for” (replaced) in the introductory sentence. The substitution (replacement) or the insertion is underlined with a solid line.

### Example:

5. *The principal Act is amended by the substitution for subsection (2) of section 11 of the following subsection:*

*“(2) Any marriage officer who purports to solemnize a marriage which he or she is not authorized under this Act to solemnize or which to his or her knowledge is legally prohibited, [**and**] or any person not being a marriage officer who purports to solemnize a marriage or witness, promote or propagate same sex marriage, [shall be guilty of] commits an offence and is liable on conviction to a fine not exceeding [R1 000] N\$8 000 or, in default of payment, to imprisonment for a period not exceeding [12 months] two years, or to both such fine and such imprisonment.”. (original provision without amendments from Marriage Act, 1961(Act No. 25 of 1961)*

**Note:** This is an example of substituting the words in bold and in square brackets to indicate an omission, (a deletion) from the provision, while the words underlined with a solid line indicate an insertion (a substitution/newcomer) in the provision.

- (3) Legislation can also be amended by the substitution of a word or phrase in the whole legislation. If the word or phrase is used many times in the legislation the amendment may be achieved by way of a general amendment provision in the legislation. In a general amendment the word or phrase is substituted in the whole legislation by the new word or phrase.

The general amendment provision is usually placed after the enacting provision and before the provision that amends the definitions.

- (4) However, a legislative drafter must meticulously peruse all the provisions in which the word or phrase to be replaced is used. If a legislative drafter incorporates a general amendment

recklessly, it could result in unintended consequences. For example, replacing the word “Minister” with an entity such as a Commission or Council could result in awkward sentence formulations. If the Minister was required to receive applications and consider them the formulation could be “The Minister may, on submission to him or her of an application as contemplated in subsection (3), decide...” If “Minister” is replaced by “Council” without making consequential changes one can visualise the resulting challenge.

- (5) As a general rule textual amendments are a preferred method of amending and general amendments should be provided for in exceptional circumstances where the changes are numerous.

**Example:**

***BE IT ENACTED** as passed by the Parliament, and assented to by the President, of the Republic of Namibia as follows:*

***Amendment of Act No. 15 of 1993***

*1. The Stamp Duties Act, 1993 (Act No. 15 of 1993) (hereinafter referred to as the “principal Act”) is amended by the substitution for –*

*(a) the currency symbol “R” of the currency symbol “N\$”; and*

*(b) the phrase “Permanent Secretary” of the phrase “Executive Director”,*

*wherever it appears in the Act.*

- (6) Legislation can be amended by the insertion of a word, chapter, part, sections, subsections, paragraphs, subparagraphs, or items or whole part or chapter between words, sections, subsections, paragraphs, subparagraphs, or items.
- (7) When inserting an item, subparagraph, paragraph, subsection, section, part or chapter between items, subparagraphs, paragraphs, subsections, sections, parts or chapters, respectively, a legislative drafter must ensure not to disturb the existing numbering.
- (8) When numbering the new insertion (item, subparagraph, paragraph, subsection, section, part or chapter), the existing number must be used plus Alphabetic capital letters in progression.

**Example:**

*(1) The principal Act is amended –*

*(a) by the insertion after section 3 of the following section:*

So that the new section will become “section 3A”.

*(1) Section 8 of the principal Act is amended –*

*(a) by the insertion after subsection (5) of the following subsection:*

So, the new subsection will become “subsection (5A)”.

*(b) in subsection (6) by the insertion after paragraph (a) of the following paragraph:*

So the new paragraph will become “paragraph (aA)”.

*(c) in subsection (8) by the insertion after subparagraph (i) of paragraph (a) of the following subparagraph:*

So the new subparagraph will become “subparagraph (iA)”.

*(d) in subsection (9) by the insertion after item (aa) of subparagraph (ii) of paragraph (b) of the following item:*

So the new item will become “item (aaA)”.

*(e) in subsection (10) by the substitution for paragraph (a) of the following paragraph:*

*“(a) the Board of Governors;”.*

- (9) Legislation can also be amended by adding a word, item, subparagraph, paragraph, subsection, section or whole part or chapter after the last item, subparagraph, paragraph, subsection, section, part or chapter.

- (10) When amending legislation by addition, the numbering of what is added follows the progression of the existing numbering.

**Example:**

*Section 1 of the International Co-operation in Criminal Matters Act, 2000 (in this Act referred to as the “the principal Act) is amended by –*

*(a) the addition after the definition of “this Act” of the following definition:*

*““unexplained assets” means unexplained assets as defined in section 1 of the Prevention of Organised Crime Act, 2004 (Act No. 29 of 2004);”.*

*(1) The principal Act is amended by–*

*(a) by the addition after section 3 of the following section:*

*So that the new section will become “section 4”.*

*(1) Section 8 of the principal Act is amended by –*

*(a) the addition after subsection (5) of the following subsection:*

*So, the new subsection will become “subsection (6)”.*

*(1) Section 95 of the principal Act is amended*

*(a) in subsection (3) by the addition after paragraph (c) of the following paragraph:*

*So the new paragraph will become “paragraph (d)”.*

*1. Schedule III of the principal Act is amended by the –*

*(a) addition to paragraph 2 of the following subparagraph:*

*So the new subparagraph number will be a continuation of the numbering of the existing subparagraphs.*

## 100. Short titles for amendment Bills

- (1) What has been said about the short title of an ordinary Bill applies equally to the short title of an amendment Bill. (see paragraph 43)
- (2) The commencement of an amendment Bill follows the same procedure explained in relation to an original Bill. (see paragraph 44)
- (3) If an Act is amended more than once in the same year then the short title must be indicated as the second or third amendment and so forth.

**Example** of a short title for an amendment Bill is as follows:

***Short title***

**15.**     *This Act is called the Labour Amendment Act, 2008.*

***Short title and commencement***

**25.**     *This Act is called the Labour Second Amendment Act, 2008, and commences on a date determined by the Minister by notice in the Gazette.*

***Short title***

**10.**     *This Act is called the Income Tax Second Amendment Act, 2011.*

## 101. Underlining and square brackets in amendment Bills

- (1) The explanatory note on the underlining and brackets in an amendment Bill is inserted at the beginning of the printed Bill just above the title “ACT”. It does not form part of a Bill during the drafting process since it is only inserted at the time of printing the Bill for tabling in the National Assembly.

**Example** of explanatory note:

—— *Words underlined with a solid line indicate insertions in existing provisions.*

[     ] *Words in square brackets and in bold indicate deletions from existing provisions.*



- (2) The underlining and brackets are used to assist lawmakers to easily follow what the existing law is and what is being proposed at present and also to keep a little bit of history on the development of the law.

**Examples** of actual amendment of provisions (**see Annexure 10**).

## **102. Drafting of amendments during parliamentary process**

- (1) The drafting of amendments introduced during the parliamentary process (on the floor of the National Assembly or on the report of the National Council) differs slightly from the amendments embodied in the Bill. When drafting amendments proposed during the parliamentary process, the legislative drafter directs the instructions to the Secretary to the National Assembly to insert those amendments.
- (2) The legislative drafter must place each clause (section) on a separate page. (**Example** of amendments on the floor **see Annexure 11**).
- (3) The legislative drafter and Attorney-General must certify the amendments before submission to the National Assembly for tabling.
- (4) The legislative drafter only effects the insertions, additions, substitutions and re-numberings and other changes in the Bill at a later stage after the National Council has reported on the Bill.
- (5) The legislative drafter must check the cross referencing very carefully as this may be affected by the renumbering.
- (6) Amendments on the floor of the National Assembly may happen twice for the same Bill. First is when the National Assembly proposes amendments on its floor. Second is when the National Council reports on a Bill back to the National Assembly with proposed amendments. The drafter must identify clearly that it is the “second amendments on the floor of the National Assembly” to avoid confusion. (**Example** of second amendment on the floor of the National Assembly **see Annexure 11A**.)
- (7) It is important to note that the instructions to effect amendments on the floor from Parliament must be given to the legislative drafter via the responsible Ministry.

CHAPTER 7  
DRAFTING OF SUBORDINATE LEGISLATION AND ADMINISTRATIVE ACTS

**103. Subordinate legislation**

- (1) As the name indicates, subordinate legislation is subordinate to the enabling or primary legislation, be it the Namibian Constitution, an Act, Ordinance or a Proclamation (proclamation by the Governor-General of the Union of South Africa, Administrator or Administrator-General for SWA or State President of the Republic of South Africa).
- (2) Subordinate legislation often deals with administrative, technical and procedural matters relating to the implementation of the primary legislation.
- (3) The instruments for enacting subordinate legislation take the form of a proclamation, government notice or general notice.
- (4) The types of subordinate legislation the Directorate usually receives from offices, ministries and agencies and some statutory bodies (client) are proclamations, regulations, rules, directives, determinations and codes.

**104. Instructions for drafting subordinate legislation and administrative acts**

- (1) The Directorate receives instructions for the drafting of subordinate legislation or administrative acts from offices, ministries and agencies and some statutory bodies.
- (2) Where a statutory body with or without separate personality makes subordinate legislation or performs an administrative act –
  - (a) with the approval of;
  - (b) on the recommendation of;
  - (c) with the concurrence of;
  - (d) in consultation with;
  - (e) after consultation with;

a minister or other government functionary, the Directorate is required to scrutinise and draft the subordinate legislation or the administrative act only after compliance with subparagraph (a) - (e).

- (3) Where a statutory body with separate legal personality from the Government makes subordinate legislation, or performs an administrative act, on its own accord without the involvement of a minister or other government functionary, the Directorate is not required to draft or scrutinise the subordinate legislation or administrative act.

**Examples** of statutory bodies with separate legal personality are:

*Meat Board of Namibia, Nampower, Social Security Commission, Bank of Namibia, Communications Regulatory Authority of Namibia, Namibia Civil Aviation Authority etc.*

#### **105. Submission of instructions for scrutiny and drafting of subordinate legislation**

- (1) A client (the line office, ministry or agency or in case of a statutory body where a minister or government functionary is involved the line office, ministry or agency) submitting instructions for the scrutiny and drafting of subordinate legislation, apart from complying with the procedure set out in paragraph 21 in respect of submitting of Bills, must comply with the requirement of the enabling provision of the Act by submitting proof of compliance with such requirement in this case the letter signed by such minister, such functionary or the head of that body.
- (2) Where subordinate legislation is to be made with the involvement of a minister or other functionary or body, the enabling provisions are usually introduced by phrases such as –
  - (a) after consultation with;
  - (b) in consultation with (should be avoided see paragraph 179);
  - (c) on the recommendation of;
  - (d) with the approval of;
  - (e) after the approval of;

- (f) with the concurrence of;

such minister or such other functionary or body.

#### **106. Receiving of instructions for scrutiny and drafting of subordinate legislation**

The procedure for receiving instructions from client for the scrutiny and drafting of subordinate legislation is the same as the receiving of instructions for the scrutiny and drafting of Bills as set out in paragraph 21, but without the involvement of the Cabinet Committee on Legislation and Cabinet.

#### **107. Responsibilities of legislative drafter regarding consultations**

If a legislative drafter to whom instructions are assigned for the scrutiny and drafting of subordinate legislation notices that the instructions are incomplete or not clear, the legislative drafter must raise the same legal and administrative concerns as mentioned in paragraph 22 regarding consultations on scrutiny and drafting of Bills.

#### **108. Responsibilities of client regarding consultations**

The client, through its contact person, has a vital role to play in making sure that the subordinate legislation is drafted in such a way that it responds to the needs and requirements of the client, therefore the contact person has a duty to –

- (a) explain instructions and promptly respond to queries by the legislative drafter and do the same things as set out in paragraph 23 relating to Bills;
- (b) ensure that the final document certified by the legislative drafter is signed by the functionary and hand-delivered to the *Gazette* Office for publication; and
- (c) in the case of local authority council regulations, advice the Minister to table the regulations in the National Assembly as required by section 94(5) of the Local Authorities Act, 1992 (Act No. 23 of 1992) and Article 115 of the Namibian Constitution.

**109. Matters to be considered before drafting of subordinate legislation and administrative acts**

Before drafting subordinate legislation or an administrative act a legislative drafter must consider the following matters –

- (a) is the proposed subordinate legislation or administrative act authorised by the enabling legislation?
- (b) have all the formalities required by the enabling legislation been complied with, such as written proof of required consultation or approval?
- (c) is the proposed subordinate legislation or administrative act consistent with the enabling legislation or any other legislation?
- (d) are the obligations to be imposed under the subordinate legislation or administrative act authorised, clear and understandable?
- (e) does the proposed subordinate legislation or administrative act have an element of retrospectivity? As a general rule subordinate legislation should not apply retrospectively unless expressly authorised by the enabling legislation or by necessary implication of the wording of the enabling legislation. At this stage the legislative drafter must study all the relevant laws including case law which may have a bearing on the subject matter; and
- (f) is the enabling legislation under which the subordinate legislation or administrative act is to be made in operation? The drafter must refer to section 12(3) of the Interpretation of Laws Proclamation which authorises regulations, appointments and other things required to be in place or to be made before the Act comes into operation.

**110. Procedure after completion of subordinate legislation and administrative acts**

- (1) The legislative drafter upon completion of the first draft of a piece of subordinate legislation or an administrative act must submit the subordinate legislation or administrative act to the client by a letter requesting the client to consider whether the legislation or the act meets all their requirements.

- (2) The client may propose some changes to the subordinate legislation or administrative act which must be considered and if the changes are acceptable the legislative drafter must incorporate them in the legislation or the act and keep a record of the proposed changes for future reference.
- (3) If the client is satisfied with the correctness of subordinate legislation or administrative act, the client must furnish the legislative drafter with a letter of satisfaction.
- (4) After receipt of the letter of satisfaction, the drafter must certify the instrument and send it
  - (a) to the client for signature; or
  - (b) to the Attorney-General for certification, if it is a proclamation, before it is signed by the President.
- (5) After –
  - (a) the client has signed the instrument, the client must hand-deliver the instrument to the *Gazette* Office for printing;
  - (b) printing, the legislative drafter as well as the client must proofread the instrument to ensure accuracy; and
  - (c) proofreading, the instrument is published in the *Gazette* and distributed to the client, stakeholders and the public.

## **111. Proclamations**

- (1) The President has the authority to make subordinate legislation, for instance the President has the authority to make regulations relating to a state of emergency under Article 26 of the Namibian Constitution.
- (2) The instrument by which the President makes subordinate legislation, effects administrative acts or notifies actions taken under the Namibian Constitution or any legislation is “by proclamation.”

- (3) When the President exercises or performs his or her prerogative powers or functions in terms of the Namibian Constitution or legislation and that exercise of power or performance of a function –
- (a) is done by proclamation; and
  - (b) is not done in consultation with Cabinet such as the announcement of appointment of persons under the Namibian Constitution,

the President signs the proclamation as “President” and does not add “*By Order of the President-in-Cabinet*” because the President performs the act alone.

**Example** of a proclamation by the President announcing conferment of certain honours under Article 32(8) of the Namibian Constitution:

**PROCLAMATION**

*by the*

**PRESIDENT OF THE REPUBLIC OF NAMIBIA**

No.

2025

**ANNOUNCEMENT OF CONFERMENT OF CERTAIN HONOURS ON THE LATE DR.  
SAM SHAFIISHUNA NUJOMA: NAMIBIAN CONSTITUTION**

*In terms of Sub-Article (8) of Article 32 of the Namibian Constitution, following the death of the First President of the Republic of Namibia and Founding Father of the Namibian Nation, His Excellency Dr. Sam Shafiishuna Nujoma, I announce that I have, under the powers vested in me by Sub-Article (3)(h) of that Article read with sections 3 and 4 of the Conferment of National Honours Act, 2012 (Act No. 11 of 2012) -*

- (a) conferred the honour of a State Funeral on the late national hero Dr. Sam Shafiishuna Nujoma, who was born on 12 May 1929 at Etunda, Ongandjera, Omusati Region in the Republic of Namibia, and who died on 8 February 2025;*
- (b) directed that 9 February 2025 until 1 March 2025 be a period of national mourning;*
- (c) directed that all flags be flown at half-mast in Namibia and at Namibian Missions around the world with effect from 9 February 2025 until 1 March 2025 and*
- (d) directed that the remains of the late Dr. Sam Shafiishuna Nujoma be interred at the National Heroes Acre in the Khomas Region on 1 March 2025.*

*Given under my Hand and the Seal of the Republic of Namibia at Windhoek this      day of February, Two Thousand and Twenty-Five.*

**NANGOLO MBUMBA**

**President**

**BY ORDER OF THE PRESIDENT,**

*Windhoek*

2025



- (4) When the President exercises or performs his or her powers or functions in terms of the Namibia Constitution or legislation and that exercise of power or performance of a function–
- (a) is done by proclamation; and
  - (b) is done in consultation with Cabinet as contemplated by Article 27(3) of the Namibian Constitution such as the making of subordinate legislation,

the President signs the proclamation as “President” and adds “By Order of the President-in-Cabinet” because the President exercises the power in consultation with Cabinet.

**Example** of a proclamation for making of subordinate legislation by the President is as follow

<b><i>PROCLAMATION</i></b>	
<b><i>THE PRESIDENT OF THE REPUBLIC OF NAMIBIA</i></b>	
<i>No. 24</i>	<i>1999</i>
<b><i>EMERGENCY REGULATIONS APPLICABLE TO THE CAPRIVI REGION:</i></b>	
<b><i>ARTICLE 26 OF THE NAMIBIAN CONSTITUTION</i></b>	
<i>Under the powers vested in me by Article 26(5) of the Namibian Constitution I hereby make the regulations set out in the Schedule, which shall be applicable in, and with respect to, the Caprivi Region in which the existence of a state of emergency has been declared under Proclamation No. 23 of 2 August 1999.</i>	
<i>Given under My Hand and the Seal of the Republic of Namibia at Windhoek on this 3<sup>rd</sup> day of August, One Thousand Nine Hundred and Ninety-nine.</i>	
<b><i>SAM NUJOMA</i></b>	
<b><i>PRESIDENT</i></b>	
<b><i>BY ORDER OF THE PRESIDENT-IN-CABINET</i></b>	

Kindly note the use of the phrase “BY ORDER OF THE PRESIDENT-IN-CABINET” has been done away with. It should read as “BY ORDER OF THE PRESIDENT”

- (5) The President has the authority to take certain administrative actions and appoint certain persons and announce such appointments by proclamation in terms of Article 32 of the Namibian Constitution.

## 112. Government Notices

- (1) A legislative drafter drafts this type of notice under the instrument “Government Notice” in instances where the functionary is a minister or other functionary, office or agency.
- (2) When a functionary makes subordinate legislation or an administrative notice, the functionary is obliged to cite the enabling provision to indicate the source from which the functionary derives the power.

**Example** of government notice by a minister:

The enabling provision of section 91 of the Road Traffic and Transport Act, 1999 (Act No. 22 of 1999), states as follows:

“(1) The Minister may make regulations relating to ....”.

<b><i>GOVERNMENT NOTICE</i></b>		
<b><i>MINISTRY OF WORKS AND TRANSPORT</i></b>		
<i>No.</i>		<i>2006</i>
 <b><i>TRAFFIC REGULATIONS:</i></b> <b><i>ROAD TRAFFIC AND TRANSPORT ACT, 1999</i></b>  		
<i>Under section 91 of the Road Traffic and Transport Act, 1999 (Act No. 22 of 1999), I have made the regulations set out in the Schedule.</i>		
 <b><i>E Nghimtina</i></b> <b><i>Minister of Works and Transport</i></b>		
	<i>Windhoek,</i>	<i>2006</i>
 <b><i>SCHEDULE</i></b>		

## 113. General Notices

- (1) A legislative drafter drafts subordinate legislation or administrative acts under the instrument “General Notice” in instances where the functionary is a person or body (with separate

legal personality such as a regional council, local authority council, public enterprise, and other persons and bodies) other than a minister or person or body representing any central government office, ministry or agency.

- (2) The requirements set out in paragraph 112 for the drafting of notices under the heading “Government Notice” apply with the necessary changes required by the context to the drafting of notices under the heading of “General Notice” under this paragraph.

**Example** of a general notice, where the legislation requires a local authority council to consult the Minister before the making of the notice is as follows:

The enabling provision of section 94 of the Local Authorities Act, 1992 (Act No. 23 of 1992) states as follows:

*“(1) A local authority council may, after consultation with the Minister, make regulations by notice in the Gazette in relation to -”*

<b>GENERAL NOTICE</b>		
<i>MUNICIPALITY OF SWAKOPMUND</i>		
No.		2006
<b>BUSINESS REGISTRATION REGULATIONS:</b> <b>LOCAL AUTHORITIES ACT, 1992 1992</b>		
<i>Under section 94 of the Local Authorities Act 1992 (Act No. 23 of 1992), the Council of the Municipality of Swakopmund, after consultation with the Minister of Regional and Local Government, Housing and Rural Development, has made the regulations set out in the Schedule.</i>		
<b>Vero Kauko</b> <b>Chairperson</b> <b>By Order of the Council</b>		
	Swakopmund,	2006
<b>SCHEDULE</b>		

- (3) Whether a local authority is governed by a municipal, town or village council the general notice is drafted in the same manner and form.

#### **114. Grounds for invalidation of subordinate legislation and administrative acts**

- (1) Aggrieved persons often challenge the validity of subordinate legislation in court, thus the legislative drafter must draft subordinate legislation within the scope of the enabling legislation and ensure compliance with all the legal requirements, such as consulting certain bodies or offices or receiving recommendations from certain bodies or offices.
- (2) Subordinate legislation may be challenged in a court of law on any of the following grounds:
- (a) failure to comply with legal requirements set out in the primary legislation authorising the making of the subordinate legislation;
  - (b) the subordinate legislation is not authorised by the empowering provision;
  - (c) the subordinate legislation is made under an unlawful sub-delegation where the functionary to whom the power to make subordinate legislation is conferred has delegated his or her power to another person without being authorised to do so by the enabling legislation;
  - (d) the subordinate legislation is inconsistent with the enabling legislation or any other primary legislation;
  - (e) the subordinate legislation is vague or uncertain in its application;
  - (f) a provision of the subordinate legislation is unreasonable;
  - (g) a provision of the subordinate legislation has retrospective application which is not authorised by the enabling legislation.

#### **115. Form and structure of subordinate legislation**

- (1) Subordinate legislation is usually structured as follows –
- (a) name of instrument;

- (b) name of institution or functionary making the legislation;
- (c) number of instrument;
- (d) title of subordinate legislation and short title of enabling legislation;
- (e) enacting provision (formula);
- (f) name of functionary and designation and the date the instrument was signed;
- (g) schedule, (the text of the subordinate legislation is usually contained in a schedule);
- (h) definitions;
- (i) main provisions;
- (j) general provisions; and
- (k) tables and annexures. When tables or annexures are more than one they are numbered in Arabic numerals.

**Example** of numbering of tables and annexures: *“Table 1” and “Table 2” or “Annexure 1” and “Annexure 2”, etc.*

- (2) Not all subordinate legislation follows the above structure since the structure differs from one to the other. However, all subordinate legislation must start with the structural format as described in the ensuing paragraphs.

## **116. Instruments for subordinate legislation**

The instrument for subordinate legislation has seven components –

- (a) the name of instrument under which the subordinate legislation is published, in capital letters and in bold;
- (b) the name of the institution, in capital letters and not in bold, under which the instrument is made; (in the centre on top)

- (c) the instrument number and the year of the making of the subordinate legislation in small letters and not in bold; (on the far right);
- (d) the title of the subordinate legislation and the short title of the enabling legislation under which it is made, in capital letters but not in bold;
- (e) the enacting provision (formula), the authority under which the subordinate legislation is made;
- (f) the name and title or designation of the maker, the place where and the date when it is made, each word capitalised and the signature of the maker; and
- (g) the schedule in capital letters not in bold under which the provisions of the subordinate legislation are presented.

**Example** of the name of the instrument, name of the institution (maker), number and year of proclamation or notice (government notice/general notice):

<b><i>PROCLAMATION</i></b>	
<i>by the</i>	
<b><i>PRESIDENT OF THE REPUBLIC OF NAMIBIA</i></b>	
<i>No.</i>	<i>2025</i>

<b><i>GOVERNMENT NOTICE</i></b>	
<b><i>MINISTRY OF URBAN AND RURAL DEVELOPMENT</i></b>	
<i>No.</i>	<i>2025</i>

<b><i>GENERAL NOTICE</i></b>	
<b><i>TOWN OF OSHAKATI</i></b>	
<i>No.</i>	<i>2025</i>

## 117. Title

The title of subordinate legislation consists of two components –

- (a) the short description of the content of the instrument, and
- (b) the title of the primary legislation under which it is made.

### Example:

<p style="text-align: center;"><i>RULES OF HIGH COURT OF NAMIBIA:</i></p> <p style="text-align: center;"><i>HIGH COURT ACT, 1990</i></p>
--

## 118. Enacting provision (formula)

- (1) The enacting provision follows the title and its wording must follow as closely as possible the wording of the empowering provision and must recite –
  - (a) the empowering provision of the primary legislation under which the subordinate legislation is made;
  - (b) the person or body that has made the recommendation or the person or body that has been consulted or has given consent or concurred to the making; and
  - (c) the commencement date, if the subordinate legislation is to come into operation on a date other than the date of its publication in the *Gazette*.
- (2) The empowering provision in most of the legislation, if not all, for the making of regulations or other subordinate legislation by a minister or other functionary does not require the regulations or other subordinate legislation to be made by notice in the *Gazette*. However, they need to be published as required by the Interpretation of Laws Proclamation which provides in section 14 as follows:

*“When any bye-law, regulation, rule or order is authorised by any law to be made by the Governor- General, Administrator, or by any local authority, public body, or person, with the approval of the Governor-General or the Administrator, such bye-law, regulation, rule, or order, shall, subject to the provisions relative to the force and effect thereof in any law, be published in the Gazette and production of a copy of the Gazette containing a notice of the making or approval (as the case may be) of the bye-law, regulation, rule, or order by the Governor-General or Administrator shall be sufficient evidence of such making or approval.”.*

- (3) In other words, unless expressly provided in any primary legislation, regulations or rules are not necessarily made by notice in the *Gazette*, but are published in the *Gazette* as evidence of the making or approval of such regulation or rule by the functionary.

**Example** of the enacting provision for the making of regulations under the old practice is as follows:

*The Minister of Works and Transport under section 91 of the Road Traffic and Transport Act, 1999 (Act No. 22 of 1999), has made the Regulations set out in the Schedule.*

#### *SCHEDULE*

- (4) The above notice is impersonal and does not provide the name of the functionary, the space for and date of signature by the functionary, so the only evidence of the making of the regulations is the publication in the *Gazette* and the reference to the Minister in the enacting provision. But there is no clear evidence that the Minister has actually seen the regulations and approved them since provision is not made for his or her signature.
- (5) Many a time, there were instances where subordinate legislation was published in the *Gazette* without the knowledge of the functionary, hence the introduction of the new practice that requires every enacting provision to be personal and not impersonal. The full first name and surname of the functionary must be cited in the subordinate legislation. If the functionary has a middle name, then the initial of the middle name must follow the full name and when the functionary is a Doctor then the title “Dr.” must precede the name.

**Example** of an enacting provision for the making of regulations under the new practice is as follows:



<i>Under section 91 of the Road, Traffic and Transport Act, 1999 (Act No.22 of 1999), I have made the Regulations set out in the Schedule.</i>		
<b><i>Helmut Angula</i></b> <b><i>Minister of Works and Transport</i></b>	<i>Windhoek,</i>	<i>2010</i>
<i>SCHEDULE</i>		

(6) The new enactment provision –

- (a) is personal where the functionary himself or herself speaks to the world;
- (b) provides the name of the functionary, the space for the signature of the functionary and the date the subordinate legislation instrument is signed; and
- (c) demonstrates a clear authenticity of the source and the making of the subordinate legislation, because it is the functionary that tells the world that the functionary has made that subordinate legislation signified by his or her name and signature and not by an unknown person as the old practice presents through the impersonal notice.

## **119. Content of subordinate legislation**

The content of subordinate legislation is usually presented in a “Schedule”.

## **120. Arrangement of subordinate legislation**

Arrangement of subordinate legislation takes the same form as that of primary legislation.

## **121. Numbering and paragraphing of subordinate legislation**

- (1) Subordinate legislation is numbered using Arabic numerals, Alphabetic letters and Roman numerals. The units for subordinate legislation are in consecutive ordinary Arabic numerals, for example 1, 2, 3 etc., and they are subdivided into subunits that are Arabic numerals in brackets, for example (1), (2), (3) etc.
- (2) Where the subunits are further subdivided, the Alphabetic letters in brackets are used as paragraphs, for example (a), (b), (c) etc.

- (3) Where the paragraphs are further subdivided, the Roman numerals are used as subparagraphs, for example (i), (ii), (iii) etc.
- (4) Where the subparagraphs are further subdivided, the Alphabetic double letters in brackets are used as items, for example (aa), (bb), (cc) etc
- (5) The same form and style as in numbering of Bills applies to the numbering of subordinate legislation.
- (6) In subordinate legislation the basic units are as follows:

**Regulations:** the units are regulations, subregulations, paragraphs, subparagraphs and items.

**Rules:** the units are rules, subrules, paragraphs, subparagraphs and items.

**Codes:** the units are paragraphs, subparagraphs and items.

**Determinations/directives:** the units are paragraphs, subparagraphs and items

**Annexures:** the units are paragraphs, subparagraphs and items.

**Tables:** the units are items and subitems.

- (7) Where there are five or more regulations, there should be an arrangement of regulations at the beginning just after the “*Schedule*”.
- (8) Where there are things that need to be annexed to the regulations, they must be placed in an Annexure rather than in a Schedule to avoid confusion since the regulations or rules themselves are set out in a Schedule.

## **122. Drafting definitions in subordinate legislation**

- (1) A legislative drafter should place the definitions provision in subordinate legislation first in the Schedule such as in regulation 1 or rule 1.
- (2) Since the authority to make subordinate legislation derives from the enabling legislation and therefore an extension of the provisions of the enabling legislation, the definitions contained in

the enabling legislation have the same meaning in the subordinate legislation and a legislative drafter should not redefine the word or phrase so defined, unless the contrary is intended.

- (3) In subordinate legislation such as regulations, codes, rules and determinations definitions have an introductory sentence that read as follows:

*“In these regulations/rules/ or this code/determination a word or an expression to which a meaning has been assigned in the Act has that meaning and, unless the context otherwise indicates –*

*“the Act” means the Local Authorities Act, 1992 (Act No. 23 of 1992);”.*

- (4) There are other words and expressions in a subordinate legislation that a legislative drafter may need to define but such words or expressions should be within the scope of the enabling legislation.

### **123. Main provisions**

- (1) The main provisions of the subordinate legislation follow the definitions provision.
- (2) The main provisions contain the matters authorised to be provided by means of subordinate legislation such as procedures, fees, provisions relating to applications and forms.

### **124. General provisions**

- (1) The general provisions of subordinate legislation may cover matters connected to the main provisions such as savings and transitional provisions, offences and penalties.
- (2) A legislative drafter must bear in mind that offences and penalties created in subordinate legislation must be authorised and be within the scope of the primary legislation.

**Example** of authority to create offences and penalties by regulation is as follows:

*“(4) A regulation may prescribe offences and penalties not exceeding a fine of N\$5 000 or imprisonment for a period not exceeding 12 months or both such fine and such imprisonment for any contravention of or failure to comply with the regulation.”.*

## 125. Commencement of subordinate legislation

- (1) In terms of the Interpretation of Laws Proclamation, subordinate legislation commences on the date of its publication in the *Gazette*, unless the subordinate legislation provides for a specific date.

Section 12 of the interpretation of laws Proclamation provides as follows:

*“(1) The expressions “commencement” and “taking effect” when used in any law in reference thereto, shall mean the day on which that law comes or came into operation, and that day shall subject to the provisions of subsection (2) of this section and unless some other day is fixed by or under the law for the coming into operation thereof, be the day when the law was first published in the Gazette as a law.*

*(2) Where any law, or any order, warrant, scheme, rules, regulations, or bye-laws made, granted, or issued under the authority of a law, is expressed to come into operation on a particular day, the same shall be construed as coming into operation immediately on the expiration of the previous day.”.*

- (2) If any other date for commencement of subordinate legislation is intended, the commencement (or effective date) provision for this must be contained in the enacting provision of the subordinate legislation right at the end of the provision or as closely as possible to it.

**Example** of commencement or effective date for subordinate legislation:

*HOSPITAL AND HEALTH FACILITIES REGULATIONS: HOSPITAL  
AND HEALTH FACILITIES ACT, 1994*

*Under section 38 of the Hospitals and Health Facilities Act, 1994 (Act No. 36 of 1994),  
read with sections 2(2) and 19 of that Act, I have -*

- (a) *made the regulations set out in the Schedule; and*
- (b) *repealed the regulations published under Government Notices Nos. 43 of 1 May 1993, 199 of 30 April 1995 and 12 of 25 June 2001,*

*with effect from 01 April 2010.*

***Dr Richard Nchabi Kamwi***

***Minister of Health and Social Services***

*Windhoek,*

*2010*

***SCHEDULE***

***ROAD TRAFFIC AND TRANSPORT REGULATIONS: ROAD  
TRAFFIC AND TRANSPORT ACT, 1999***

*Under section 91 of the Road Traffic and Transport Act, 1999 (Act 22 of 1999), I have made the regulations set out in the Schedule.*

***Option One:***

*I have made the regulations set out in the Schedule.*

***Option Two:***

*I have made the regulations set out in the Schedule that come into operation on the date of publication of this notice in the Gazette.*

***Erkki Nghimtina***

***Minister of Works, Transport and Communication***

*Windhoek,*

*2012*

***SCHEDULE***

Options one and two have the same commencement date that is the “*date of publication in the Gazette*”.

**126. Drafting of amending subordinate legislation**

- (1) The drafting of amending subordinate legislation generally follows the same style as the drafting of amending primary legislation.

**Example 1:** Enactment provision of amending subordinate legislation:

<i>ROAD TRAFFIC AND TRANSPORT AMENDMENT REGULATIONS: ROAD TRAFFIC AND TRANSPORT ACT, 1999</i>		
<i>Under section 91 of the Road Traffic and Transport Act, 1999 (Act 22 of 1999), I have amended the Regulations set out in the Schedule with effect from 1 April 2012.</i>		
<i><b>Erkki Nghimtina</b></i>		
<i><b>Minister of Works, Transport and Communication,</b></i>	<i>Windhoek</i>	<i>2012</i>
<i>SCHEDULE</i>		

**Example 2:**

<i>ROAD TRAFFIC AND TRANSPORT AMENDMENT REGULATIONS: ROAD TRAFFIC AND TRANSPORT ACT, 1999</i>		
<i>Under section 91 of the Road Traffic and Transport Act, 1999 (Act 22 of 1999), I have amended the Regulations set out in the Schedule.</i>		
<i><b>Erkki Nghimtina</b></i>		
<i><b>Minister of Works, Transport and Communication,</b></i>	<i>Windhoek</i>	<i>2012</i>
<i>SCHEDULE</i>		

- (2) The Directorate has since moved away from drafting in the manner as shown in the above-mentioned examples. In amending subordinate legislation the instrument being amended should be identified in the enacting provision as well as the definitions of the subordinate legislation as demonstrated below:

**Example:**

*AMENDMENT OF ELECTRICITY REGULATIONS: ADMINISTRATIVE:  
ELECTRICITY ACT, 2007*

*Under section 43 of the Electricity Act, 2007 (Act No. 4 of 2007), I have amended the Electricity Regulations: Administrative published under Government Notice No. 13 of 16 February 2011 as set out in the Schedule.*

*T. ALWEENDO*

**MINISTER OF MINES AND ENERGY**

*Windhoek,*

2025

## SCHEDULE

## Definitions

*1. In these regulations “the Regulations” means the Electricity Regulations: Administrative published under Government Notice No. 13 of 16 February 2011, as amended by Government Notice No. 158 of 22 July 2020.*

- (3) The language and the wording of an amending subordinate legislation should be the same as the language and the wording used by both the enabling legislation and the principal subordinate legislation.
- (4) Where subordinate legislation needs extensive amendments or where a considerable number of previous amendments were made to it, the legislative drafter must consider whether the meaning of the provisions of the subordinate legislation can be well clarified –
  - (a) by the further amendment; or
  - (b) by the repeal and re-enactment of the whole subordinate legislation, and in the case of a repeal the legislative drafter must also consider possible saving of existing rights and obligations.
- (5) There is always a need to define the subordinate legislation being amended for purposes of identification and usually the first regulation defines the regulations that are being amended.

- (6) When the “Regulations” are defined in the amending regulations its historical amendments are also set out in chronological order.

**Example** of definition provision in the amending regulations:

**Definitions**

*1. In these regulations “the Regulations” means the Regulations under the Departure from Namibia Regulation Act, 1955 published under Government Notice No. 136 of 29 July 1994, as amended by Government Notice No. 243 of 16 September 2013 and Government Notice No. 7 of 21 January 2020.*

- (7) When amending subordinate legislation, the amendments follow the same principles and style as amendments of primary legislation, except that the square bracketing and bolding of deleted words and phrases and the block-lining and underlining of the new insertions are not used in amending of subordinate legislation.

**127. Numbering for amendments to subordinate legislation**

- (1) The original numbering may not be disturbed when amending subordinate legislation and must follow that of amending primary legislation. (See paragraph 97).
- (2) Where letters are used for series longer than the 26 letters of the alphabet, the series must continue with the letters (aa), (ab), (ac) etc., hence the rule applies to the numbering of both primary and subordinate legislation applies.

**128. Headings for amendments to subordinate legislation**

- (1) In the same manner as primary legislation, amending subordinate legislation needs a heading typed in bold for each provision, which briefly describes what the amending provision intends to do. However, unlike primary legislation, there is no need to recite the amendment history of the provision of the subordinate legislation being amended.
- (2) Subordinate legislation is amended using the following expressions. (For further discussion of individual expressions see the discussion of amendment Bills in paragraphs 96 to 98).
- (a) deletion;



- (b) repeal;
- (c) substitution;
- (d) insertion; and
- (e) addition.

**Examples** of headings of amending subordinate legislation:

<i><b>Definitions</b></i>
1. ....
<i><b>Amendment of regulation 4 of Regulations</b></i>
2. ....
<i><b>Repeal of regulation 6 of Regulations</b></i>
3. ....
<i><b>Substitution of regulation 5 of Regulations</b></i>
4. ....
<i><b>Insertion of regulation 5B in Regulations</b></i>
5. ....
<i><b>Addition of regulation 10 to Regulations</b></i>
6. ....

## 129. Administrative acts

- (1) Certain administrative acts are required to be done by proclamation or notice in the *Gazette*.

In this instance the performance of the act by proclamation or notice is mandatory for validity purposes, thus the act is only valid from the date of publication of the proclamation or notice or any effective date determined in the proclamation or notice, normally a date after the publication of the proclamation or notice.

- (2) Certain administrative acts need to be announced or notified by proclamation or notice in the *Gazette* after they have been performed. In this instance the announcement or notification by proclamation or notice is not for validity purposes but for information and future proof.

(3) When drafting these types of proclamations or notices a legislative drafter must follow the wording of the Act as closely as possible.

(4) Take note that –

(a) if the President exercises a power by proclamation the introductory sentence should read:

*“Under the powers vested in me by section 25 of the Correctional Services Act, 2022 (Act No. 100 of 2022) I have declared Wednesday, 20<sup>th</sup> May 2022 as a casual day for prisoners.”;*

(b) if the President performs an obligation by proclamation the introductory sentence should read:

*“In terms of Sub-Article (8) Article 32 of the Namibian Constitution I announce that I have, under the powers vested in me by Sub-Article (3)(i)(aa) of that Article, appointed Rejoice Shageya as Vice-President of the Republic of Namibia with effect from 21 March 2026.”.*

(c) if it is another functionary other than the President the word “vested” need not be used. The words used for other functionaries are either “Under section 25 of the Girls and Boys Act, 2022 (Act No. 99 of 2022) when exercising a power; or “in terms of section 30 of the Girls and Boys Act, 2022 (Act No. 99 of 2022)” when performing an obligation.

**Example 1**

Appointment by the President by proclamation in terms of the Electoral (Act, No. 24 of 1992):

<b><i>PROCLAMATION</i></b>	
<i>by the</i>	
<b><i>PRESIDENT OF THE REPUBLIC OF NAMIBIA</i></b>	
No.	2025
<b><i>APPOINTMENT OF MOSES NDJARAKANA AS DIRECTOR OF ELECTIONS: ELECTORAL ACT, 1992</i></b>	
<i>Under the powers vested in me by section 11(2) of the Electoral Act, 1992 (Act No. 24 of 1992), on the recommendation of the Electoral Commission, I appoint Moses Ndjarakana as Director of Elections with effect from 1 August 2008 to 31 July 2013.</i>	
<i>Given under my Hand and the Seal of the Republic of Namibia at Windhoek this 24th day of July, Two Thousand and Eight.</i>	
<b><i>Hifikepunye Pohamba</i></b>	
<b><i>President</i></b>	
<b><i>BY ORDER OF THE PRESIDENT</i></b>	

**Example 2:**

<b><i>PROCLAMATION</i></b>	
<i>by the</i>	
<b><i>PRESIDENT OF THE REPUBLIC OF NAMIBIA</i></b>	
<i>No.</i>	<i>2009</i>
<b><i>ANNOUNCEMENT OF APPOINTMENT OF P T DAMASEB AS MEMBER OF JUDICIAL SERVICE COMMISSION: NAMIBIAN CONSTITUTION</i></b>	
<i>In terms of Article 32(8) of the Namibian Constitution, I announce that, I have under Article 85(1) appointed Judge President, P T Damaseb as a member of the Judicial Service Commission for the period 01 December 2007 to 31 November 2010.</i>	
<i>Given under my Hand and the Seal of the Republic of Namibia at Windhoek this ..... day of April, Two Thousand and Nine.</i>	
<b><i>Hifikepunye Pohamba</i></b>	
<b><i>BY ORDER OF THE PRESIDENT</i></b>	

Announcement of appointment by the President by proclamation in terms of the Namibian Constitution:

**Example 3:**

Announcement of actions taken and appointment various office-bearers by the President by proclamation in terms of the Namibian Constitution:

<p style="text-align: center;"><b><i>PROCLAMATION</i></b></p> <p style="text-align: center;"><i>by the</i></p> <p style="text-align: center;"><b><i>PRESIDENT OF THE REPUBLIC OF NAMIBIA</i></b></p>	
<i>No. 18</i>	<i>2017</i>
<p style="text-align: center;"><b><i>ANNOUNCEMENT OF ESTABLISHMENT AND DISSOLUTION OF MINISTRIES, APPOINTMENT OF MINISTERS, DEPUTY-MINISTERS AND OTHER OFFICE BEARERS: NAMIBIAN CONSTITUTION</i></b></p>	
<p><i>In terms of Article 32(8) of the Namibian Constitution, I announce that with effect from 21 March 2015, I have -</i></p>	
<p><i>(a) under Sub-Article (3)(g) of Article 32, dissolved the Ministries specified in Schedule 1;</i></p>	
<p><i>(b) under Sub-Article (3)(g) of Article 32, established the Ministries specified in Schedule 2;</i></p>	
<p><i>(c) under Sub-Article(3)(i) of Article 32, appointed persons whose names appear in Column 2 of Schedule 3 with the corresponding titles in Column 1 of that Schedule; and</i></p>	
<p><i>(d) withdrawn the announcement issued under Proclamation No. 34 of 4 November 2015.</i></p>	
<p><i>Given under my Hand and Seal of the Republic of Namibia at Windhoek this 11th day of July Two Thousand and Seventeen.</i></p>	
<p><b><i>HAGE G. GEINGOB</i></b> <b><i>President</i></b> <b><i>BY ORDER OF THE PRESIDENT</i></b></p>	

**Example 5:**

Notice for Notification of appointment by the Minister under the Engineering Professions Act, 1986 (Act No. 18 of 1986)

<b>GOVERNMENT NOTICE</b>		
<i>MINISTRY OF WORKS AND TRANSPORT</i>		
No.	2009	
<i>NOTIFICATION OF APPOINTMENT OF MEMBERS OF ENGINEERING COUNCIL: ENGINEERING PROFESSIONS ACT, 1986</i>		
<i>In terms of subsection (5) of section 3 of the Engineering Professions Act, 1986 (Act No. 18 of 1986), I give notice that I have, under subsection (1) of that section, appointed with effect from 1 March 2009 and for a period of 4 years the following persons as members of the Engineering Council of Namibia:</i>		
<i>F. Kooper;</i>		
<i>E. Gonteb; and</i>		
<i>P. Nekwaya</i>		
 <i><b>Helmuth Angula</b></i>		
<i><b>Minister of Works and Transport</b></i>		<i>Windhoek, 2009</i>

**Example 6:**

A declaration by the Minister under the Nature Conservation Ordinance, 1975:

<b>GOVERNMENT NOTICE</b>		
<i>MINISTRY OF ENVIRONMENT AND TOURISM</i>		
<i>NATURE CONSERVATION ORDINANCE, 1975</i>		
No.		2008
<i>DECLARATION OF AREA AS OTJAMBANGU CONSERVANCY:</i>		
<i>In terms of section 24A(2)(ii) of the Nature Conservation Ordinance, 1975 (Ordinance 4 of 1975), I declare the area of which the geographic boundaries are set out in the Schedule as Otjambangu Conservancy.</i>		
<i>A map of the conservancy and other relevant documents required in terms of section 24A(1) (a) to (d) of the Ordinance lie open for inspection by the public during office hours at the offices of the Directorate: Parks and Wildlife Management, Independence Avenue, Capital Centre, 5<sup>th</sup> Floor, Room No 14, Windhoek.</i>		
<i><b>Netumbo Nandi-Ndaitwa</b></i>		
<i><b>Minister of Environment and Tourism</b></i>	<i>Windhoek,</i>	<i>2008</i>

- (d) When two acts are done under one provision but under different subdivisions of the provision it is advisable to start the paragraph/sentence with the subdivision rather than the main provision to avoid the repetition of the main provision.

**Example** of performing two acts under one section but different subsections:

*In terms of subsection (5) of section 3 of the Engineering Professions Act, 1986 (Act No. 18 of 1986), I give notice that I have, under subsection (1) of that section, appointed with effect from 1 March 2009 and for a period of 4 years the following persons as members of the Engineering Council of Namibia:*

### **130. Correction notices**

- (1) Legislative drafters must work diligently and conduct thorough research on any assignment and produce a piece of work, after several revisions, which is perfect in its legality, spelling, grammar and user-friendliness.
- (2) Most of the times legislative drafters work under severe pressure and errors do unfortunately occur, some in the form of major errors and others in the form of mere typos.
- (3) The Directorate has issued few correction notices that do not differ in form and content from proper amendments, except that they are called correction notices.
- (4) The origin of a correction notice is unknown by many in legislative drafting apart from being confusing and at worst undeterminable and posing difficulties to a legislative drafter to make a choice whether to correct or to amend.
- (5) Whether an error in a subordinate legislation or administrative act is a typo or misspelling of a name or otherwise correction notices should be used in exceptional cases where no other method of rectifying the error is possible, but the rectification is absolutely necessary.
- (6) Correction notices are thus undesirable and discouraged as a form of amending subordinate legislation and administrative acts.

### **131. Withdrawal of published legal instruments**

- (1) A legislative drafter may withdraw a legal instrument which has been published in the *Gazette* if an obvious error has occurred which could render the instrument itself invalid if retained on the statute book.
- (2) A legislative drafter may withdraw a legal instrument under which a subordinate legislation or administrative act is published in the *Gazette* if –
  - (a) an error occurred and the instrument is published twice, but in this case the last published instrument is to be withdrawn;



- (b) the instrument is erroneously published (was not supposed to have been published) and withdrawal depends on the period it has been published, otherwise rights and obligations may have accrued and legal consequences may have arisen;
  - (c) the instrument is not authorised by the enabling provision;
  - (d) the instrument is published while the enabling Act is not yet operational; or
  - (e) the instrument is not signed or sanctioned by the authorised functionary.
- (3) In essence the withdrawal of a legal instrument happens when the instrument cannot be legally implemented therefore no legal consequences will arise.
- (4) An amendment of subordinate legislation as opposed to a withdrawal has the same consequences as that of primary legislation, hence a legislative drafter must consider the savings and transitional provisions to preserve the current situation or assist in transition to the new situation.

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## CHAPTER 8

### LEGISLATIVE DRAFTING RULES AND LANGUAGE

#### PART 1

#### LEGISLATIVE DRAFTING RULES AND TOOLS OF GRAMMAR

#### **132. Punctuation marks**

- (1) Legislative drafters use punctuation to assist the reader of the legislation to understand the text easily. A legislative drafter must read **Thornton** for more details on this topic.
- (2) The general rules on punctuation are as follows:
- (a) *Punctuate sparingly and with purpose.* Unnecessary punctuation can be very distracting, so the legislative drafter must ensure that a punctuation mark serves a purpose.

- (b) *Punctuate for structure and not for sound.* A legislation drafter must test every punctuation mark to see whether it assists in explaining the structure of the sentence.
- (c) *Be conventional.* While most other forms of prose writing admit a measure of individuality, legislative drafting does not. The legislative drafter must adhere to the conventional use of punctuation marks.
- (d) *Be consistent.* Inconsistency is the most common error in the area of punctuation. A haphazard use of punctuation marks, especially the comma, can easily destroy the value of punctuation or distort the meaning of the sentence.

### 133. Comma (,)

Commas serve two distinct but related purposes, to separate and to enclose.

### 134. Separating commas

- (1) A comma may be used in the following circumstances –

- (a) to separate items in a series of words, phrases or clauses;

#### **Example:**

*“Livestock” means cattle, horses, goats, sheep and pigs.*

- (b) to separate long and independent clauses joined by a coordinating conjunction such as and, but, for, or.

#### **Example:**

*The chairperson and managing director are responsible to the Board for the executing of the policy laid down by the Board and for the control and management of the Bank, and the general manager is responsible to the chairperson and managing director.*

- (c) to separate words or numbers in order to aid communication.

**Example:**

*In 2005, Namibia sold one hundred chicks to Japan.*

- (2) The use of coordinating conjunctions (subparagraph (1)(b) above) is a permissive, not a mandatory rule. Coordinate clauses should not be separated by a comma if –
- (a) the clauses are short;
  - (b) separation is undesirable in the interests of clarity; or
  - (c) the two clauses have the same subject and are reasonably short.

**Examples:**

*She finished the project on time and on budget.*

“and” is the coordinating conjunction in this case and there is no comma before the word.

*The shop assistant did not give a refund, nor would she exchange the item.*

“nor” is the coordinating conjunction in this case and there is a comma before the word.

- (3) A comma may separate an introductory modifying clause or phrase from what follows.

**Example:**

*When the amount of compensation payable is determined, the Minister must issue a certificate...*

**135. Enclosing commas**

- (1) Enclosing commas only operate in pairs. If one is omitted, the other is at best useless and at worst misleading.

**Example:**

*A period of office referred to in subsection (2) may, subject to subsection (3), be extended at the expiry thereof for a further period or successive periods as contemplated in that subsection.*

- (2) Commas may enclose non-restrictive (non-defining or commenting) modifying phrases and clauses.
- (3) Non-restrictive clauses are usually separated from the independent clause with commas. A non-restrictive clause can be removed from the sentence without changing the meaning of the sentence.
- (4) A restrictive clause introduces information that is necessary to the meaning of the sentence. A restrictive clause requires no punctuation.

**Example:***Non-restrictive*

- (a) *Kapya, who turned sixteen years of age last year, bought a car of his own.*
- (b) *All the assets of the banks to which this Act applies, which banks are listed in Schedule 2, are on the commencement of this Act to be returned to the shareholders. [the non-restrictive clause provides the information (comments), so the enclosing commas are desirable]*

*Restrictive*

- (a) *The participants [who wrote a test] all qualify for oral interviews.*
- (b) *A person [who attends an inquiry to give evidence or produce a document] is entitled to be paid reasonable expenses.*

In these two examples the restrictive clause is essential to the core meaning, so enclosing commas would be erroneous.

- (5) Commas may enclose parenthetical expressions interpolated as interruptions to the main stream of communication in the sentence.

**Example:**

*The President or the Prime Minister may exercise the power as if the President or the Prime Minister, as the case may be, had been present at the meeting. (Examples of categories of expression are “however”, “as the case may be”, “if any”, “therefore” and “for Example”)*

- (6) Commas may enclose modifying phrases and clauses if the enclosure appears to illuminate the structure of the sentence.

**Example:**

*The Minister, by notice in the Gazette, may amend Schedule 1.*

- (7) Commas may enclose nouns in apposition so long as they are not defining in character.
- (8) An apposition occurs when two words or phrases are placed beside each other in a sentence so that one describes or defines the other.

**Example:**

- (a) *I went hunting with my dog Gamena in the valley.*

In this case “my dog” is in apposition with the name “Gamena”.

So, to illustrate the enclosing of nouns in apposition by commas it reads as follows:

*I went hunting with my dog, Gamena, in the valley.*

- (b) *An applicant for a bursary must give notice of application to the Chairperson of the Bursaries Committee, the Director of Social Welfare, not later than 1 April in each year.*

In this case, the Director of Social Welfare describes the other noun which is the Chairperson of the Bursaries Committee.

### 136. Undesirable commas

- (1) A comma should not separate subject and verb, verb and object, verb and complement, verb and preposition and object and unless words between them require enclosure by commas.

**Examples** of undesirable commas that must be removed from the provisions:

- (a) *The Director, may allow it or direct otherwise;*  
(an example of subject and verb)
- (b) *The principal closes, the office at 10h00 pm;*  
(an example of verb and object)
- (c) *The Minister must conduct, marriage ceremonies in church.*  
(an example of verb and complement)
- (d) *Section 7 of the principal Act is amended, by the deletion of subsection (3);*  
(an example of verb and preposition)
- (e) *The chairperson must table his report on conjugal rights before, the Board;*  
(an example of preposition and object)
- (f) *All deeds and other instruments requiring the seal of the Society, must be signed and sealed in the presence of two witnesses.*  
(an example of object and verb)

- (2) A comma should not separate parallel words, phrases or clauses joined by coordinating conjunctions except in the manner described in paragraph 134(1)(b) under separating commas.

**Example** of undesirable commas which must be removed from the provisions:

- (a) *A taxpayer must file a return, and pay tax by 30 June in each year.*
  - (b) *A taxpayer must, before 30 June in each year, pay provisional tax, and final tax.*
- (3) Commas may not set off restrictive or defining phrases or clauses.

**Examples** of undesirable commas that must be removed from the provisions:

- (a) *A person, who is registered as an optometrist, must obey the code of practice issued by the Council.*
- (b) *Every copy of the judgment, that is sealed by the court, is as valid as the original judgment.*
- (c) *All the assets of the banks, which are scheduled assets subsisting upon the effective date, vest in the Corporation on the effective date.*

- (4) A single comma is awkward if the context permits either enclosing commas or no commas.

**Example** (either add a comma after the ‘Registrar’ or remove the comma after ‘refused’)

*The Principal Registrar on the application of a person whose application for a licence has been refused, must inform the person of the reasons for the refusal.*

- (5) A comma should not coordinate two related sentences concerning the same subject.

**Example:**

- (a) *Strict compliance with the forms in Schedule 2 is not required, substantial compliance is sufficient. (the comma is inappropriate)*
- (b) *Strict compliance with the forms in Schedule 2 is not required, but substantial compliance is sufficient. (A comma before a coordinating conjunction connecting two independent clauses is appropriate)*

### 137. Colon (:)

- (1) Generally, a colon is placed after an expression that introduces a series of items but only where the word “*following*” or as “*follows*” is used or where a proviso is provided.
- (2) Use a colon (:) –
  - (a) at the end of a sentence introducing series of items that are nouns (**Example 1**);

- (b) at the end of an amending sentence introducing the actual amendment in an amending legislation (**Example 2**); and
- (c) at the end of an enacting formula (**Example 3**)

**Example 1:**

*I give notice that I have, under subsection (1) of that section, appointed with effect from 1 March 2009 and for a period of 4 years the following persons as members of the Engineering Council of Namibia:*

*Masisi Mutwa;  
Gabriel Gonteb; and  
Chico Mukela.*

**Example 2:**

*The principal Act is amended by the insertion of the following section after section 10:*

**Example 3:**

***BE IT ENACTED*** as passed by the Parliament, and assented to by the President, of the Republic of Namibia as follows:

- (3) Whether the word “following” or “follows” is used, if the series of items relate to paragraphing, things that are related or any other things, apart from the exceptions mentioned above, the legislative drafter must use a dash.

**138. Dash (–)**

- (1) A legislative drafter should use a dash as an introducer of something related that follows and places it after an expression that introduces a series of items.
- (2) A dash is longer than a hyphen.

**Example:** “vehicle” includes –



- (a) *a goods vehicle;*
- (b) *an omnibus;*
- (c) *a motor cycle; or*
- (d) *an invalid carriage.*

In 2024, the Directorate resolved to use the dash (–), instead of using either the colon (:) or the dash (–), depending on the purposes of each mark as explained in paragraphs 137 and 138.

### 139. Colon and dash (: –)

Either mark is permissible but a legislative drafter should not use a colon and a dash together (colon dash : –) as in the following example:

#### Examples:

*“The following expressions shall, unless the context otherwise requires or unless in the case of any law it is otherwise provided therein, have the meanings hereby respectively assigned to them, namely: –” (Section 2 of the Interpretation of Laws Proclamation)*

*“**BE IT ENACTED** as passed by the Parliament of the Republic of Namibia as follows:-” (old construction of an enacting formula with “colon dash”).*

Even though the practice has been to use the “colon dash” after the enacting formula, we no longer add a dash after the colon.

#### Example:

*“**BE IT ENACTED** as passed by the Parliament, and assented to by the President, of the Republic of Namibia as follows:”*

### 140. Semi-colon (;)

The semi-colon is used to co-ordinate a series of paragraphs, subparagraphs or items. The function of the semi-colon is to show a relationship between elements of a sentence which a complete break into separate sentences may obscure.

**Example:**

*“The Commission is the coordinating agency for the enforcement of –*

*(a) the Anti-Corruption Act;*

*(b) the Prevention of Organised Crime Act; and*

*(c) any other law related to economic and financial matters.”.*

**141. Hyphen (-)**

- (1) A legislative drafter should generally only use a hyphen when the word in its proper spelling includes a hyphen.

**Example:** *Attorney-General*

- (2) The following are exceptions to this rule:

- (a) hyphenate if the second element of the word is capitalised or a figure;

**Example,** *Anti-Corruption, pre-1990*

- (b) hyphenate to distinguish certain words spelt like others but with a different meaning;

**Example,** *re-cover in sense of cover again.*

- (c) hyphenate if the second element has more than one word;

**Example,** *pre-colonial era, non-English speaking people*

- (d) hyphenate where the last letter of the prefix is the same as the first letter of the following words;

**Example,** *semi-independent, non-native*

- (e) use hyphens in compound numbers and fractions; or

**Example,** *thirty-three, one-half*

- (f) use hyphens in dates representing periods extending over more than one year.

**Example,** *2007-2009; 12-15 August 2010*

This is not advisable in legislation, you rather use “to” or “up to”, except in some tables.

## 142. Apostrophes (’)

- (1) An apostrophe is used to form possessive nouns.

**Example:**

*Penda’s book (indicating singular possessive form);*

*Boys’ shirts (indicating plural possessive forms)*

- (2) An apostrophe can be used to indicate the omission of letters or numbers but a legislative drafter is advised against using this formulation, rather write the incomplete or shortened words in full.

**Example:** *Meme Jutta can’t (cannot) ignore him; She’s (is) a risk to children.*

(Contraction, omission of letters)

*Peter was baptized on 10 Feb. ’22 (February 2022).*

(Contraction, omission of numbers)

- (3) In our jurisdiction, it is not advisable to use possessive apostrophe when indicating possession.

**Example:** Do not write: *Betty was at fault “in the court’s opinion”.*

Write: *Betty was at fault “in the opinion of the court”.*

- (4) Some possessive nouns have been legislatively legalised and must be used and remain as they are in our statutes.

**Example:** *Children's court, Farmers' Co-operative Association etc.*

### 143. Capitalisation

- (1) The legislative drafter must use capital letters sparingly.
- (2) Capital letters are used for proper names or titles.

**Examples:** *Namibia, Windhoek, Gabriel, President, Attorney-General, Executive Director, etc.*

- (3) If a legislation creates a statutory body, a legislative drafter should capitalise the main organs and important officials of the body.

**Example:**

*The President, the Minister, the Government, the State, Nampower, Red Cross Society of Namibia, Law Society of Namibia, (the Board, the Commission, the Council when defined in the text)*

- (4) Titles of Acts must be capitalised, except prepositions and conjunctions.

**Example:** *Dissolution of Marriage on Presumption of Death Act, 1993 ( Act No. 31 of 1993).*

### 144. Categories and exceptions

- (1) A legislative drafter must state a rule or category directly rather than describing the rule or category by starting with exceptions.

**Example:**

- (a) Do not write: *All persons except those 18 years or older...*
- (b) Write: *All persons aged 18 years or above ...*

- (2) When exceptions are used, a legislative drafter should state the rule or category first before the exception.
- (a) Do not write: *With the exception of Windhoek and Swakopmund, all municipalities must upgrade their sewerage systems.*
  - (b) Write: *All municipalities must upgrade their sewerage systems, except Windhoek and Swakopmund.*

#### 145. Nouns (singular and plural)

- (1) The singular includes the plural and the plural includes the singular (section 6(b) of the Interpretation of Laws Proclamation).
- (2) Use a singular noun instead of a plural noun. This will avoid the problem of whether the rule applies to each member of a class or to the class as a whole.

##### **Example:**

- (a) Do not write: *The doctor must treat patients suffering from typhoid fever and malaria fever.*
- (b) Write: *The doctor must treat each patient suffering from typhoid fever and each patient suffering from malaria fever.*
- (3) If the plural must be used in a compound word, the significant word takes the plural:

##### **Example:**

Do not write:

Write:

(a) *Attorney-Generals*

*Attorneys-General*

(b) *Notary publics*

*Notaries public*

(c) *Director-Generals*

*Directors-General*

(d) *Prosecutor-Generals*

*Prosecutors-General*

#### **146. Abbreviations**

- (1) The legislative drafter must avoid abbreviations and acronyms.
- (2) An abbreviation is a short form of a word or phrase, made by leaving out some of the letters or by using only the first letter of each word (*Mr. Jan. SA, USA, NGO, DNA etc.*).
- (3) An “acronym” is an abbreviation formed from the initial letters of other words and which are pronounced as a word (*AIDS, NATO, NASA, NAPWU, etc.*)

##### **Example:**

*“NGO”- this abbreviation should be written in full as non-governmental organisation that can be shortened in the definitions section to: “organisation” means the non-governmental organisation.*

- (4) The exception is where the abbreviation or acronym has become familiar to the public.

##### **Examples:**

(a) *AIDS rather than acquired immune deficiency syndrome.*

(b) *DNA rather than deoxyribonucleic acid.*

- (5) Another exception is where the abbreviation or acronym has been given legal status in terms of legislation.

##### **Examples:**

*CRAN, NAMFISA, BIPA etc. can in terms of their respective enabling legislation be used as an alternative to the full name of the entity*

PART 2  
LEGISLATIVE LANGUAGE

**147. Legislative sentence and sentence structure**

- (1) The legislative sentence is the means that the legislative drafter uses to translate policy into law. A legislative drafter must draft according to syntactical rules and practices accepted for formal communication. An ability to understand and analyse the elements of a sentence will facilitate the birth of a well-formed sentence.
- (2) The core of all sentences is a subject-predicate relationship and a legislative drafter must try and establish this relationship:
  - (a) Subject – what is the sentence about?
  - (b) Predicate – statement about the subject or the subject's actions, experience or state of being.
- (3) A legislative drafter must take note that not all sentences have a subject-predicate relationship, and in some complex sentences the subject is not always clear. The subject-predicate relationship is important for the legislative drafter as the structure of a sentence invariably exhibits the following features –
  - (a) legal subject – the person to whom the law applies
  - (b) legal action – the law which is to apply, and
  - (c) the circumstances – in which the law is to apply.
- (4) The legislative sentence is an arrangement of words to express a command or state a prohibition. It states –
  - (a) how – the manner in which the law is to operate;
  - (b) what – the nature of the legal action;
  - (c) when – the conditions under which the law is to operate;

- (d) where – the circumstances in which the law will operate;
- (e) who – the legal subject, the person given responsibility or on whom is placed an obligation or prohibition; and
- (f) why – the policy considerations of the law.

**Note:** For more detailed discussion on this subject please consult Thornton.

- (5) When drafting a legislative sentence, a legislative drafter must use –
- (a) short familiar words and phrases;
  - (b) short sentences which state a single idea;
  - (c) the same word to express one meaning;
  - (d) consistent spelling (use United Kingdom English, unless amending a law which uses different spellings); and
  - (e) the standard form of language used in the legislative drafting office.

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### PART 3

#### PLAIN LANGUAGE DRAFTING

#### 148. Positive writing

The legislative drafter must write positively, if an idea can be expressed either positively or negatively, it must be expressed positively.

**Example:**

- (a) Do not write: *The panel may not consider candidates other than those with second-class upper degrees.*



- (b) Write: *The panel may only consider candidates with second-class upper degrees.*
- (c) Do not write: *The Board must take into consideration/account...*
- (d) Write: *The Board must consider...*

#### **149. Tenses and active and passive voice**

- (1) Laws are meant to be of continuing application and must be written in the present tense. This is intended to avoid complicated and awkward verb forms.

##### **Example:**

Do not write: *A person who has contravened this Act will be committing an offence.*

Write: *A person who contravenes a provision of this Act commits an offence.*

- (2) The active voice must be used instead of the passive voice.
- (3) The use of the active voice names the person in the sentence before completion. It states who does the action described by the verb.
- (4) In the active voice, the person who performs the action is the subject of the sentence.
- (5) In the passive voice, the person or thing to whom the action is done is the subject.

##### **Example:**

Do not write: *The regulations must be made by the Minister* (passive voice).

Write: *The Minister must make the regulations* (active voice).

- (6) A sentence in the passive voice may be complete and grammatically correct even though the person doing the thing is not mentioned in the sentence.

**Example:**

*The regulations referred to in subsection (1) must be made within 30 days after the commencement of the Act.*

- (7) The use of the passive voice must be avoided because –
- (a) a sentence in the passive voice often does not assign responsibility clearly;

**Example:**

Do not write: *Dogs are not allowed in the park*; [passive voice]

Write: *A person may not bring a dog into the park*; [active voice]

- (b) the passive voice places the receiver of the action before the main person (the maker) and
- (c) sentence construction is confusing when the passive voice is used in legislation.
- (8) The passive voice may however be used when the person to carry out the act is unknown, unimportant or obvious.

**Example:**

- (a) *Where a contract has been entered into in contravention of this Act, the contract is void.*
- (b) *The regulations made in terms of subsection (3).*
- (9) One of the few instances where a legislative drafter may use the passive voice as an exception is when placing old or repeated information at the beginning of a sentence and new information at the end of the sentence to stand out.

**Example:**

(1) *The Minister may make regulations relating to –*

(a) .....

(b) .....

(c) .....

(2) *The regulations made in terms of subsection (1) may incorporate section 7 of the Finance Act, 1991.*

**Note 1:** “*The regulations made in terms of subsection (1)*” is an example of placing old or repeated information at the beginning of the sentence.

**Note 2:** “*may incorporate section 7 of the Finance Act, 1991*” is an example of placing new information at the end of the sentence that needs to stand out.

**150. Simple sentences**

- (1) A legislative drafter should avoid verbosity and legal language must be as direct as possible.
- (2) An Act of Parliament is divided into sections which generally contain one idea each.
- (3) The minimum content of a section is a single sentence.
- (4) Where an idea can be conveyed, or would be more clearly conveyed, in two or more sentences, a section is usually broken down into subsections, each consisting of one sentence.
- (5) Where the section or subsection is long, it is best to divide it into paragraphs which create a full sentence when read with the introductory words and possible concluding words.

**Example:**

*“(2) An act contemplated in section 2 and committed outside Namibia on board any aircraft in flight, other than a Namibian aircraft, and an act of violence against passengers or crew committed on such aircraft by a person in connection with an act contemplated in section 2(1)(a)(i), is -*

- (a) if such aircraft lands in Namibia with the person who committed such act, still on board;*
- (b) if such aircraft is leased without crew to a lessee who has his or her principal place of business or, if he or she has no such place of business, his or her has permanent residence, in Namibia; or*
- (c) if that person is present in Namibia,*

*deemed to have been committed also in Namibia.”.*

**151. Provisos**

- (1) Phrases with the words “provided that” must be avoided because they can create ambiguity.
- (2) Provisos can often be removed or substituted by the words “if”, “but”, or “except that”.
- (3) Provisos can also be avoided by creating separate provisions.

**Example:**

- (a) Do not write: *Provided that the fee is paid.*
- (b) Write: *If the fee is paid.*

**152. Paragraphs**

- (1) Lengthy, complex or technical provisions must be split into a series of related paragraphs.

**Example:**

*“3. (1) BIPA may, for the purposes of enforcing the provisions of this Act, designate such number of staff members of BIPA or appoint such other number of persons, as may be necessary as inspectors and must issue to them, in writing or in such form as may be prescribed, certificates of authority to act as such inspectors.”. (Business and Intellectual Authority Act, 2016 (Act No. 8 of 2016)).*

- (2) This sentence could be complete even if the sentence is split into paragraphs.

**Example:**

*“3. (1) BIPA, for the purposes of enforcing the provisions of this Act, may -*

*(a) designate such number of staff members of BIPA; or*

*(b) appoint such other number of persons,*

*as may be necessary as inspectors and must issue to them, in writing or in such form as may be prescribed, certificates of authority to act as such inspectors.”.*

- (3) Short paragraphs improve the clarity of a provision.
- (4) Each paragraph must deal with a single subject matter or idea.
- (5) A paragraph must be able to form a complete sentence when it is read together with the introductory sentence and concluding sentence, if any, with the exclusion of other paragraphs.

**Example:**

*“(1) Subject to the provisions of this Act, every -*

*(a) state hospital; and*

*(b) state health facility,*

*is under the responsibility and control of the Minister.”.*

If either paragraph (a) or (b) is read as a stand alone provision it would read as follows:

*“(1) Subject to the provisions of this Act, every state hospital/ state health facility is under the responsibility and control of the Minister.”*

### **153. Couplets/tautology**

This is where words have the same effect or the meaning of one word includes the other. The legislative drafter must avoid using word pairs that have the same effect or meaning. Word pairs may be used only if the second adds something.

#### **Example:**

Do not write:

Write either:

*order and direct*

*“order” or “direct”*

*authorise and direct*

*“authorise” or “direct”*

*each and every*

*“each” or “every”*

*null and void*

*“null” or “void”*

*full and complete*

*“full” or “complete”*

### **154. Archaic words**

- (1) Legalese (formal and technical legal language) and archaic words must be avoided as they tend to mystify the draft.
- (2) Herein, heretofore, said, same, aforesaid, before-mentioned, herein before-mentioned, under-mentioned, whatever, whatsoever, whomsoever or other similar words may not be used.

**Note:** See Alternative Use of Words in **Annexure 12**.

### **155. Latin expressions**

- (1) A legislative drafter should avoid Latin expressions at all costs. However, there are those that are accepted because they have become terms of art in our law. Words such as “*prima facie*”, “*ex officio*”, “*actus reus*” or “*mens rea*” are expressions that seem unavoidable since their direct translation into English makes little sense.
- (2) A legislative drafter can overcome the other Latin expressions and does not need to use them at all in drafting legislation.

**Note:** For other Latin expressions that one can overcome. (see **Annexure 12**)

### **156. Words and expressions to be used with great care**

- (1) In legislative drafting words are not just picked and used but are carefully chosen for a purpose.
- (2) There are certain words that are chosen for reasons of being plain or ordinary in their meaning, formal or official, unequivocal or clear.
- (3) There are certain words that are not chosen for the reason of being alien or foreign, informal or casual, ambiguous or uncertain, legalese or jargon and so on. (see **Annexure 12**)

### **157. Shall and shall not**

- (1) “Shall” is used to impose an obligation.
- (2) “Shall” is used in mostly legislation enacted before 2001. From early 2001 our jurisdiction moved away from the use of “shall” because it has been interpreted by the courts in such manner that it is capable of having more than one meaning. This in turn confuses –
  - (a) legislative drafters in the drafting of legislation;
  - (b) laypersons in trying to understand statutory provisions; and
  - (c) lawyers and judges in trying to interpret the meaning of statutory provisions, in advising clients and in making judicial decisions, respectively.

- (3) Do not use “*shall*” when drafting legislation. Use “*must*” or “*is*” or the present tense of the verb depending on the context.
- (4) “Shall” or “shall not” may be used when drafting an amendment to legislation which uses “shall”.
- (5) When drafting new subordinate legislation use “must” even though the primary legislation uses “shall”.
- (6) “Shall not” denotes prohibition and like “shall” it has been used in most, if not all, of our legislation enacted until early 2001.
- (7) Since we have done away with the use of “shall” in drafting legislation, we have equally done away with the use of “shall not” in legislation, thus our jurisdiction prefers the use of “may not”. (see paragraphs 158 to 161).

#### **158. Must**

“Must” is used to impose an obligation.

##### **Example:**

- (a) *The Minister must keep a record of licences issued under this Act.*
- (b) *The Minister must issue a licence to a successful applicant.*
- (c) *The Executive Director must destroy records of disciplinary proceedings after five years.*

#### **159. Must not**

“Must not” denotes a prohibition but it is not preferred in our jurisdiction for some reasons including logic in the choice of words, thus “may not” is the preferred choice (see paragraph 161).



## 160. May

“May” is used to confer a discretion (power) to a person or body to do anything by choice (the choice to act or not to act). In other words, it is used where permission, a benefit, right or privilege is to be given.

### Example:

Do not write: *It shall be lawful for the Commissioner to ...*

This creates a false imperative.

Write: *The Commissioner may ...*

## 161. May not

- (1) “May not” denotes a prohibition. When we in the Directorate dropped the use of “*shall*” and adopted the use of “*must*” to impose an obligation as from 2001, we also adopted the use of “*may not*” instead of “*shall not*” to denote a prohibition.
- (2) When you use the word “may” to confer a power or an entitlement (to permit/allow/authorise), as a matter of logic you must as well prohibit (disempower/disallow/unauthorise) by using the same word in negative form “may not” rather than using other phrase such as “shall not” or “must not” that has no correlation with the conferring of a power or an entitlement, permission or authority, otherwise you may confuse the reader.

### Example

Do not write: *No person may...*

Write: *A person may not...*

## 162. Will

- (1) “Will” should be used in legislation with caution, and should not be used to denote an obligation.

- (2) “Will” indicates a future action, and when used in legislation it must be strictly used in that sense.

**Example:**

*If the Minister is of the opinion that there will be a dispute regarding the wages determined under a collective agreement...*

- (3) “Will” may not be used as a command word in legislative sentence.

**163. And, or**

- (1) “And” is usually construed conjunctively and connotes togetherness while “or” is construed disjunctively and suggests a choice between two or more options.
- (2) A legislative drafter must use “and” to connect two or more phrases, conditions or events, all of which must occur.
- (3) A legislative drafter must use “or” to connect two or more phrases, events, conditions, when only one or more but not all need to occur.

**Example** for use of “and” –

*To qualify for a grant a person must –*

- (a) *be a Namibian citizen;*
- (b) *be previously disadvantaged; and*
- (c) *be 18 years of age or older.*

**Example** of “or” –

*A person applying for a driving licence must produce –*

- (a) *an identification card; or*
- (b) *a valid passport.*

#### 164. And/or

- (1) The symbol “and/or” should not be used in legislative sentence rather use “A or B or both”.
- (2) The symbol “and/or” is not precise and it is likely to lead to confusion, if not ambiguity

#### Example:

Do not write: *In their sole discretion, to allow any beneficiary, or their parents and/or their guardians and/or the Founders and/or his or her spouse, free of charge or at an agreed charge, to occupy or use any immovable property forming part of the Trust assets.*

Write: *In their sole discretion, to allow any beneficiary, or their parents or their guardians or the Founder or his or her spouse, free of charge or at an agreed charge, to occupy or use any immovable property forming part of the Trust assets.*

- (3) The symbol “and/or” is not part of the English language and its meaning is unclear thus should be avoided.

#### 165. A, an, the

- (1) “A” is used as an indefinite article in legislative drafting to denote the singular, often as part of a general statement.
- (2) “An” is used before a vowel for example “an apple” or “an orange” and before a consonant that is not pronounced for instance “an hour”, “an honest man” “an honorary degree”.
- (3) “The” is used as the definitive article. It is placed before a noun or to denote a person or a thing.
- (4) “The” when used in legislative drafting means that a person or a thing has already been identified, referred to or mentioned.

**Example:**

- (a) *There is established a service to be known as the Youth Service.*
- (b) *The Service recruits Namibian youth younger than 35 years.*
- (c) *The Manager of the Service must be a registered female engineer.*

**166. Any**

- (1) “Any” means one or some. It is often misused in a legislative sentence when one person or thing is being referred to.
- (2) Avoid using “any”, if “a” or “an” can be used.

**Examples:**

*Any member of the Parliament may introduce a private member’s Bill by way of a written notice addressed to the Speaker.*

*A member of Parliament must on the first day of commencement of a session of Parliament after a general election subscribe to the oath or affirmation set out in the third Schedule to this Constitution.*

**Example:**

Do not write: *Any person who contravenes section 2 commits an offence.*

Write: *A person who contravenes section 2 commits an offence.*

**167. Each/every**

“Each” refers to two or more in a numerical context where there has been a previous identification.

**Example:**

*Each board referred to in subsection (1) must submit an annual report.*

“Every” refers to a class.

**Example:**

*Every member of the Board must declare his or her personal interest.*

As there is seldom a reference to numbers in legislation, it is better to use “each” instead of “every”.

**168. All**

- (1) The word “all” is an unnecessary form of emphasis and generally should not be used.
- (2) The word may however be appropriate where the intention is to refer to all the numbers of a group collectively.

**Example:**

*A person must meet all the requirements of the Act.*

**169. Such, same**

- (1) “Such” is misused in legislation and creates ambiguity, so it must be replaced with the word “the”, “a” or “that”.
- (2) It must only be used when “a”, “the” or “that” will not be desirable.

**Example:**

*A person who contravenes section 10 commits an offence and on conviction is liable to a fine not exceeding N\$20 000 or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment.*

- (3) “Same” is used as a substitute for a preceding noun or phrase in legal jargon and does not add any value to a legislative sentence, hence it may not be used as it creates ambiguity. The word “it” or “them” can be used as a substitute.

**Examples:**

Do not write: *A dog must be vaccinated unless the same is allergic to the vaccine.*

Write: *A dog must be vaccinated unless the dog (it) is allergic to the vaccine.*

If same really means “same” then use same.

Write: *If a dog is seen twice in the same field, it may be shot.*

#### **170. Where, if**

- (1) “Where” tends to be a technical term in legislative drafting.
- (2) “Where” normally conveys the equivalent of general circumstances or a description of a factual situation.

##### **Example:**

*Where dogs are running at large...*

*Where in a community...*

*Where an aggravating circumstance is not a defence...*

- (3) The use of “where” is indicative of frequent occurrences of the event contemplated.
- (4) “If” tends to be a technical term in legislation.
- (5) “If” is frequently used to introduce a condition or attach a condition to the operation of the law expressed by the legislative sentence.
- (6) “If” should be used to state a condition. Care is therefore needed in its use in the legislative sentence in order to avoid ambiguity or absurdity.

##### **Example:**

*If the liquidator sells property in the exercise of a power of sale, the liquidator must account to the owner of the property for any surplus that remains after satisfying the claims of the creditors.*

- (7) “Where” and “if” should not be overused at the beginning of sections and subsections.
- (8) The use of “where” and “if” can be avoided by rearranging the material in a particular provision.

#### **171. When**

- (1) The use of “when” in legislative drafting is to indicate a single or rare occurrence of a contemplated event.
- (2) “When” connotes a time when something happens. Thus, it has a time reference and is not intended to deal with circumstances.

##### **Example:**

*When a child is born prematurely ...*

*When a person is committed to prison ...*

*When the fee has been paid ...*

*When a woman dies ...*

*When the Minister appoints an inspector, the Minister must issue a certificate of appointment to the inspector”.*

#### **172. Which, that**

- (1) “Which” is non-restrictive, “that” is restrictive. (see discussion on restrictive and non-restrictive clauses and enclosed commas in paragraph 135)
- (2) If the insertion of a comma in the phrase does not change the meaning use “which”, otherwise use “that”.
- (3) A non-restrictive clause can be omitted or placed between brackets without changing the meaning of a sentence or phrase and is generally set off by commas.

**Example:**

*Section 10, which was amended in 1956, was repealed in 1966.*

A restrictive clause does not need to be set-off by commas.

**Example:**

*An entity that is required to be licensed must submit an application to the Commissioner.*

**173. Deem**

The word “deem” should only be used to create a legal fiction. It can also be used to provide for the retroactive or retrospective operation of an Act.

**Examples:**

*Regulations made under the repealed Act are deemed to have been made under a corresponding provision of this Act.*

*This Act is deemed to have come into operation on 1 August 2006.*

To avoid legalese, “consider” or “think” can be used instead of “deem” in situations where a legal fiction is not being created.

**Example:**

(a) *Do not write: A doctor must be registered to practice medicine if the Registrar deems the doctor to be qualified.*

(b) *Write: A doctor must be registered to practice medicine if the Registrar considers the doctor to be qualified.*

**174. Before, after**

The words “before” and “after” exclude the specified day. The word “after” is better than the word “from” because “from” is equivocal.



**Example:**

*After 13 March, excludes March 13. From 13 March creates doubt.*

*The phrase “on and after (date)” must be used when the specified day is to be included.  
(See: Interpretation of Laws Proclamation)*

*Use “after” when the specified date is to be excluded.*

**175. Between, and**

The use of the words “between”, and “and” in a sentence especially in reference to a period is often confusing and is in most cases ambiguous.

**Examples:**

*The phrase: between 1 January and 1 March is ambiguous.*

*Rather write: After 1 January and before 1 March is preferable.*

*From 1 January up to 1 March (both 1 Jan and 1 March are included)*

**176. By/until/till**

- (1) Where action is to be taken *by a stated date or until or till a date*, it is better to say “on or before” to include the date.
- (2) Use before to exclude the date. “Not later than” is not preferred because it is difficult to understand, rather use “within 30 days”.

**177. In terms of/under**

- (1) Where a provision in any legislation states a legal proposition or imposes an obligation or gives a command and there is a need of effecting that provision, the legislative drafter must use the phrase “in terms of” to introduce the action that is being carried out through the performance of the obligation or duty.

This is illustrated in proclamations by the President announcing appointments and actions taken in terms of Article 32(8) of the Namibian Constitution. That Article obliges the President to announce by proclamation in the *Gazette* all the appointments made and actions taken by the President under that Article. (See **examples** in paragraph 111).

- (2) Where a provision in legislation confers a power or discretion and there is a need for effecting that provision, the word “under” is used to introduce the action that is being carried out through the exercising of the power or discretion.

This can be illustrated in the proclamation for the making of subordinate legislation by the President under Article 26(5) of the Namibian Constitution. That Article confers a power or gives discretion to the President to make regulations during the state of emergency. (See **examples** in paragraph 111).

#### **178. Contemplated in/referred to in**

- (1) The phrase “contemplated in” is usually used to illustrate that the matters or issues that are contemplated in the provision being cited are not specifically named, identified or specified but rather are to be so named, identified or specified by further action which may or may not be taken in the future.

##### **Example:**

*“(1) The categories of registration in the teaching profession in which a person may register are to be prescribed.*

*(2) A person may practice in any of the categories contemplated in subsection (1) if the person is registered in that category.”*

In this example the person may only register in the category of registration only when that category has been prescribed hence the use of the word “contemplated” category.

- (2) The phrase “referred to in” is usually used to illustrate that the matters or issues that are referred to in the provision being cited are specifically named, identified or specified in that provision.

### Example:

*“Agribank” means Agribank referred to in section 3;*

**“3.**     *The juristic person known as the Agricultural Bank of Namibia continues to exist under the name Agribank.”* (sections 1 and 3 of Agriculture Bank of Namibia Act, 2003 (Act No. 5 of 2005))

### 179. After consultation with/in consultation with

- (1) The phrase “after consultation with” is used when a functionary (person or body) is given a duty to do something only after consultation with another named person or body. After A (the owner of action) has thoroughly considered the views of B (consulted person or body) on matters being discussed, A can then act with or without B’s agreement. In other words, A is obliged to consult B and discuss matters in good faith, but is not required to agree with B to complete his or her action. (*The Central Procurement Board v Nangolo N.O* (HC-MD-CIV-MOT-REV 441 of 2017) [2018] NAHCMD 357.)
- (2) The phrase “in consultation with” is used when a functionary (person or body) is given a duty to do something only in consultation with another named person or body. A (the owner of action) must thoroughly discuss matters with B (consulted person or body), and the two must agree (reach consensus) on the matters being discussed to effect the action. In other words, A is obliged to consult B, and is required to agree (reach consensus) with B on issues under discussion. So, both A and B must agree (reach consensus) for A to complete his or her action. (*The Central Procurement Board v Nangolo N.O* (HC-MD-CIV-MOT-REV 441 of 2017) [2018] NAHCMD 357.)
- (3) “In consultation with” is no longer used in our legislation since its meaning is unclear and difficult to establish. In addition, unlike “after consultation with”, the phrase “in consultation with” has far reaching consequences if the agreement required is lacking. We can now use “with the concurrence of”, “with the consent of” “in agreement with” to avoid the unknown consequences of the use of “in consultation with”.

### 180. Verbs associated with particular nouns

A legislative drafter must use these formulations for the following standard phrases:

- (a) confer a power;
- (b) discharge a duty;
- (c) exercise a power;
- (d) impose a function or duty;
- (e) perform a function;
- (f) delegate a power; and
- (g) assign a function.

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## PART 4

### GENDER NEUTRAL LANGUAGE

#### 181. Drafting in gender neutral language

- (1) The use of gender-neutral language is best practice in modern legislative drafting.
- (2) Although the Interpretation of Laws Proclamation states otherwise in section 6(b), the reflection of male dominance in the legislative sentence must be avoided.
- (3) Modern legislation should therefore be drafted in gender neutral language, and, where possible or practical, a legislative drafter should recast a sentence to omit a gender-specific pronoun.

**Example:** *The average student may end up spending too much of his money on software.*

**Becomes:** *The average student may end up spending too much money on software.*

- (4) The replacement of a third-person pronoun with a second-person pronoun avoids gender insensitivity.

**Example:** *He or she must clean up the conference room at the end of each meeting.*

**Becomes:** *You must clean up the conference room at the end of each meeting.*

- (5) The replacement of a third-person pronoun with an indefinite article (a, an) or a definite article (the) also avoids gender insensitivity.

**Example:** *The Commissioner must issue his or her recommendations...*

**Becomes:** *The Commissioner must issue recommendations...*

- (6) The use of plurals avoids gender insensitivity –

**Example:** *The modern plumber knows that he cannot neglect the paperwork if his business is to thrive.*

**Becomes:** *Modern plumbers know that they cannot neglect the paperwork if their businesses are to thrive.*

Though the use of plurals avoids the gender insensitive language in legislation, legislative drafters should avoid the use of plurals in legislation as stated earlier.

- (7) The repetition of a noun or a pronoun can help to create gender sensitive language:

**Example:** *The builder will find the traditional lines of nails and screws, now in metric or SI. In fact, in converting from imperial measures, we have taken the opportunity to expand the product range, giving him or her more, not fewer, resources.*

**Becomes:** *The builder will find the traditional lines of nails and screws, now in metric or SI. In fact, in converting from imperial measures, we have taken the opportunity to expand the product range, giving the builder more, not fewer, resources.*

**Example:** *A person may seek office if he has taken the action necessary to qualify for the ballot.*

**Becomes:** *A person may seek office if the person has taken the action necessary to qualify for the ballot.*

- (8) Change the second person pronoun to a generic pronoun, although this can appear pompous and should be used sparingly.

**Example:** *She will need to consider her position on this matter.*

**Becomes:** *One would need to consider one's position on this matter.*

- (9) Change a nominal to a verbal expression.

**Example:** *A person who has in his possession prohibited substances will in fact have broken the law.*

**Becomes:** *A person who possesses prohibited substances will in fact have broken the law.*

- (10) Repeat the name of the actor.

**Example:** *A person is entitled to a licence if he or she has an approved application.*

**Becomes:** *A person is entitled to a licence if that person has an approved application.*

- (11) Recasting names, titles and roles creates gender neutrality.

- |     |                 |   |   |
|-----|-----------------|---|---|
| (a) | chairman        | — | chair, chairperson, president, convenor, moderator; |
| (b) | manpower        | — | human resources, workforce;                         |
| (c) | woman           | — | person;   |
| (d) | him/her         | — | the person;   |
| (e) | his/her         | — | the person's;                                       |
| (f) | workman         | — | worker;   |
| (g) | husband or wife | — | spouse;   |

- (h) foreman — supervisor, team leader;
  - (i) salesman — salesperson
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## CHAPTER 9

### PARLIAMENTARY PROCEDURE AND ENACTMENT PROCESS

#### 182. Procedure for passage of Bills

- (1) Once the steps set out in the Administrative Directive No. 1 of 5 February 1993 have been complied with, the first stage in the Parliamentary process is that the minister responsible for the Bill has to read out the short title of the Bill in the National Assembly. This is called the *first reading*, and no debate occurs at this stage. Once the short title of the Bill is read out the Bill is tabled and becomes a public document and must be made available to any person who requests a copy of it or otherwise distributed to the public.
- (2) The next stage in the process is the *second reading*. The minister reads out the short title of the Bill again and presents the introductory speech on the Bill explaining why it is needed. The National Assembly then discusses the principle ideas contained in the Bill.
- (3) At this stage –
  - (a) the National Assembly can approve the Bill by a majority of the members of the National Assembly present and submit the Bill to the *Committee Stage*; or
  - (b) if the National Assembly decides that the Bill may not be submitted to the *Committee Stage* in the form in which it was presented, the Bill can be sent back to the sponsoring ministry and in that case the Bill is considered “off the table”. The sponsoring ministry can re-introduce the Bill after 30 days either in the same form or with some changes made to it.
- (4) After the *second reading* and after approval of the principles of the Bill by the majority of the members, the Bill is examined in detail and this is called the *Committee Stage*.

- (5) The National Assembly has the power to establish various committees to consider different aspects raised by a Bill. These committees are made up of persons with special knowledge of the subject matter and comprises of members of the National Assembly. The committees may hold public hearings, giving the general public a chance to discuss the Bill.
- (6) The National Assembly does not often resort to separate committees and usually discusses the Bill as a committee of the whole National Assembly i.e. Committee of the Whole House.
- (7) At the *Committee Stage*, the National Assembly sitting as a committee scrutinises the Bill provision by provision and any member of the committee can propose amendments to the Bill.
- (8) A member of the public who would like to propose a change to the Bill can request a member of the National Assembly to propose the change on behalf of that member of the public. However, any change made must be consistent with the principles agreed upon after the *second reading*.
- (9) Once the Committee of the Whole House has concluded its scrutiny, it presents the Bill again to the National Assembly sitting as itself and not as a committee. Any amendments approved at the *Committee Stage* are reported to the National Assembly and this is the last chance for members of the National Assembly to propose changes to, or to oppose, the Bill.
- (10) The final stage is called the third reading and at this stage the minister reads out the short title of the Bill for a third time. After the *third reading*, no further debates on the Bill may take place and the Bill is considered passed by the National Assembly.
- (11) Once the National Assembly passes the Bill, the Bill is sent to the National Council for consideration and recommendation to the National Assembly. The procedure in the National Council is similar to the one followed by the National Assembly, and the National Council may –
  - (a) approve the Bill, which is called “confirming” the Bill;
  - (b) make suggestions for changes to the Bill and send the Bill back to the National Assembly and, although the National Assembly does not have to agree with the changes or suggestions of the National Council, it must again vote on the Bill; or



- (c) object to the principles of the Bill and return it to the National Assembly in which case the National Assembly must vote on the principles of the Bill, and if –
  - (i) two-thirds of the members of the National Assembly vote in approval, the Bill can go forward;
  - (ii) the Bill does not secure the two-thirds majority of the members of the National Assembly, then the Bill cannot go forward.
- (12) The procedures outlined in subparagraph (11)(c) do not apply to Bills dealing with taxes or appropriation bills (money bills) which will pass despite objections by the National Council.

### **183. Role of legislative drafter during parliamentary process**

- (1) During the parliamentary process, the legislative drafter, upon request, may explain or clarify matters relating to the Bill or draft amendments adopted during the parliamentary process on the floor of the National Assembly or on the advice of the National Council.
- (2) If –
  - (a) the minister is convinced of the need to make certain amendments to the Bill and those amendments are adopted during the *Committee Stage*; or
  - (b) the National Assembly proposes and adopts some amendments to the Bill during the *Committee Stage*,

the Secretary to the National Assembly must insert those amendments and other editorial changes to the Bill after having complied with subparagraph (3).

- (3) The procedure is that the sponsoring minister gives written instructions to the legislative drafter concerned to prepare the proposed amendments and transmit them to the Attorney-General for certification and further transmission to the Secretary to the National Assembly.
- (4) Where the National Council recommends to the Speaker that the Bill be passed subject to proposed amendments, the sponsoring minister is given the report and proposed amendments for consideration.

- (5) If the minister accepts some or all of the proposed amendments, the minister may also propose new amendments together with those proposed by the National Council and table them in the National Assembly for adoption. The procedure is the same as in subparagraph (3).
- (6) When Parliament passes a Bill, the Secretary must send the Bill to the legislative drafter for proofreading before submission to the President for assent.

***Note:** The reader must compare the procedure laid down in this paragraph together with latest version of the respective rules of the National Assembly or the National Council to ensure consistency.*

#### **184. Assent to Bills**

After Parliament passes a Bill, the Speaker must send the Bill to the President for assent (signature and publication in the *Gazette*) in order for the Bill to become an Act of Parliament. Three situations may occur at this stage –

- (a) where a Bill is passed by two-thirds majority of the members of the National Assembly and confirmed by the National Council, the President is obliged to sign;
- (b) where a Bill is passed by a majority of members of the National Assembly which is less than two-thirds of all the members and confirmed by the National Council, the President may sign the Bill or decline to sign. If the President declines to assent the President must communicate such dissent to the Speaker. If the National Assembly again passes the Bill with a majority of less than two-thirds, the President may again decline to sign;
- (c) where the President declines to sign the Bill into law for reasons of conflicting with the Namibian Constitution, the Attorney-General may ask the court to decide on the issue, and if the court decides that the Bill is –
  - (i) in conflict with a provision of the Namibian Constitution, the President is not required to assent to the Bill and the Bill lapses; or
  - (ii) in line with the Namibian Constitution, the President must sign if it was passed by the National Assembly by a two-thirds majority of all its members, but if

the Bill was not passed with such majority, the President may withhold his or her assent to the Bill.

**185. Publication of Acts**

- (1) The final stage of the law-making process is the publication of the Act in the *Gazette* after the Bill has been signed by the President, and upon publication, the Bill acquires the status of an Act of Parliament.
- (2) In terms of the Interpretation of Laws Proclamation, a law comes into force on the date of its publication in the *Gazette*, unless otherwise stated in the law.

**186. Enrolment of Acts**

On publication of an Act of Parliament in the *Gazette*, the Secretary to the National Assembly must promptly cause two fair copies of the Act in the English language to be enrolled in the office of the Registrar of the Supreme Court and such copies are conclusive evidence of the provisions of the Act.

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## ANNEXURES

### ANNEXURE 1

#### Research Material (Paragraphs 3, 14 and 17)

Commonwealth Secretariat, *Commonwealth Legislative Drafting Manual* (2017)  
Commonwealth Secretariat, *Changing the Law, A Practical Guide to law Reform* (2017)  
Commonwealth Association of Legislative Counsel, *Loopholes*  
Xanthaki, Thornton's *Legislative Drafting* (5<sup>th</sup> ed. 2022)  
VCRAC Crabbe Crabbe on *Legislative Drafting 2<sup>nd</sup> Edition* (2008)  
Mousmouti M, *Designing Effective Legislation*, (2019)  
Salembier, *Legal and Legislative Drafting* (2<sup>nd</sup> Edition, 2018)  
Devenish G. E *Interpretation of Statutes* (1992)  
Du Plessis L Re *Interpretation of Statutes* (2011)  
Namlex - Index to Namibian Laws  
NamibLII - Namibia Legal Information Institute  
E-Justice (Namibia Electronic Justice System)  
Namibia Superior Courts Case Website  
SAFLII-Southern African Legal Information Institute  
Standing Rules and Orders of the National Assembly/National Council of Namibia

## ANNEXURE 2

### Transfer of Executive Powers Proclamations (Paragraph 9)

Name	Number, Date and Year	Gazette Number
Executive Powers (Water Affairs and Others) Transfer Proclamation, 1977	AG. 3 of 28 September 1977	3651
Executive Powers (Prisons) Transfer Proclamation, 1977	AG. 6 of 31 October 1977	3663
Executive Powers Transfer (General Provisions) Proclamation, 1977	AG. 7 of 15 November 1977	3668
Executive Powers (Social Welfare and Pension) Transfer Proclamation, 1977	AG. 11 of 30 November 1977	3675
Executive Powers (Agriculture, Credit and Land Tenure) Transfer Proclamation, 1977	AG. 13 of 18 November 1977	3669
Executive Powers (Health) Transfer Proclamation, 1977	AG. 14 of 1 December 1977	3676
Executive Powers (Statistics) Transfer Proclamation, 1977	AG. 15 of 1 December 1977	3677
Executive Powers (Forestry) Transfer Proclamation, 1977	AG. 16 of 1 December 1977	3678
Executive Powers (Labour) Transfer Proclamation, 1977	AG.17 of 20 December 1977	3680
Executive Powers (Agricultural Economics and Marketing) Transfer Proclamation, 1977	AG. 18 of 20 December 1977	3681
Executive Powers (National Education) Transfer Proclamation, 1978	AG. 1 of 11 January 1978	3687
Executive Powers (Mines) Transfer Proclamation, 1978	AG. 4 of 30 January 1978	3696
Executive Powers (Industries) Transfer Proclamation, 1978	AG. 5 of 30 January 1978	3697
Executive Powers (Information) Transfer Proclamation, 1978	AG.7 of 10 February 1978	3702
Executive Powers (Community Development) Transfer Proclamation, 1978	AG. 8 of 10 February 1978	3703
Executive Powers (Immigration) Transfer Proclamation, 1978	AG. 9 of 10 February 1978	3704

Executive Powers (Agricultural Technical Services) Transfer Proclamation, 1978	AG. 11 of 2 March 1978	3713
Executive Powers (Post and Telecommunications) Transfer Proclamation, 1978	AG. 12 of 2 March 1978	3714
Executive Powers (Transport) Transfer Proclamation, 1978	AG. 14 of 15 March 1978	3717
Executive Powers (Planning and Environment) Transfer Proclamation, 1978	AG. 15 of 20 March 1978	3719
Executive Powers (Public Works) Transfer Proclamation, 1978	AG. 16 of 30 March 1978	3720
Executive Powers (Interior) Transfer Proclamation, 1978	AG. 17 of 30 March 1978	3721
Executive Powers (Inland Revenue) Transfer Proclamation, 1978	AG. 18 of 30 March 1978	3722
Executive Powers (Commerce) Transfer Proclamation, 1978	AG. 28 of 28 April 1978	3743
Executive Powers (Justice) Transfer Proclamation, 1979	AG. 33 of 12 November 1979	4038
Executive Powers (Police) Transfer Proclamation, 1980	AG. 169 of 29 August 1980	7207

### **ANNEXURE 3**

Administrative Directive No. 1 of 5 February 1993

(Paragraph 12)

Administrative Directive (Published under Government Notice No. 16 of 26 January 1993)

#### **1. Government Forms**

It has been brought to the notice of the Office of the Prime Minister that a number of Offices and Ministries continue to use forms that were in use prior to independence in spite of the fact that the Cabinet at its 33rd meeting held on 29 September 1992 had resolved that the use of such forms two and half years after independence is unacceptable. The Cabinet had also ruled that the excuse of using up forms “in stock” is no longer acceptable.

All Offices/Ministries should therefore ensure that the use of such forms ceases and new forms in *English only* are available no later than 1 March 1993.

#### **2. Language of Official Communication**

Article 3(1) of the Constitution stipulates that English is the official language of Namibia. However, many civil servants continue to use Afrikaans in their official communications. Many of the switchboard operators and secretaries respond in Afrikaans, and some Offices/Ministries continue to use Afrikaans and Afrikaans-English forms and stamps. The Cabinet, at its 33rd meeting held on 29 September 1992 had also ruled that the use of any language other than English in official communications should cease. All Public Servants are reminded that compliance with the Directives of the Cabinet are not optional. They must be complied with.

The Cabinet has also ruled that Offices/Ministries receiving official communications from other Offices/Ministries still written in Afrikaans have the right to return them to the sender.

#### **3. Efficient Implementation of Cabinet Decisions**

One of the responsibilities of the Cabinet Office is to monitor progress in the implementation of Cabinet decisions forwarded by the Secretary to Cabinet to Offices/Ministries for implementation. This monitoring may take the form of the Secretary to Cabinet’s written enquiries or interviews with the Permanent Secretaries and their staff.

In order to facilitate efficient monitoring, each ministry should identify a senior official in the ministry, not below the rank of Chief Control Officer, who will be the Cabinet Office's contact with regard to the implementation of Cabinet decisions. Naturally, such an officer would have access to most of the Cabinet decisions except the ones that are sensitive and therefore must be handled by the Permanent Secretary personally.

Ministries should therefore always be ready to report on the progress of implementation when requested or approached by the Secretary to Cabinet who will in turn brief the Prime Minister about the state of implementation of Cabinet decisions.

#### **4. Procedures to be Followed With Regard to Envisaged Legislation**

The Cabinet recently considered the procedures with regard to envisaged legislation and resolved to effect certain changes. As a result, the following procedure should be adhered to:

- a. Consultation with the Office of the Attorney-General.* When a ministry considers the enactment of new legislation or amendment of existing legislation, it must first consult the Office of the Attorney-General to ensure that the measures to be effected by the proposed legislation are in line with the provisions of the Constitution, and to determine whether the envisaged measures could not be effected through administrative or any other means.
- b. Preparation of a Memorandum to the Cabinet Committee on Legislation.* After having consulted the Office of the Attorney General, if the ministry is satisfied as to the need of new or amending legislation, it must prepare a memorandum to the Cabinet Committee on Legislation (CCL). This memorandum should be as comprehensive as possible under the circumstances of the particular case, and should clearly state the problem and background, refer to any existing legislation in that regard, and point out where and what the existing legislation is found wanting. The memorandum should also refer to any consultations with other ministries concerned, especially the Treasury and Public Service Commission, and outline their responses. Further, as far as possible, a layman's draft or comprehensive policy directives should accompany the memorandum at this stage.
- c. Forwarding the Memorandum to the CCL.* The original of the memorandum, signed by the Minister concerned, plus six copies must be forwarded to the Secretary of the CCL (First Floor, Justitia Building, Independence Avenue, Windhoek. Tel: 38110 Ext. 233).



- d. *CCL Meeting on the Memorandum.* On receipt of the memorandum, the Secretary of the CCL will arrange for a meeting of the CCL and will invite the Minister concerned to attend this meeting. The Minister may bring along with him/her any ministry officials that he or she deems necessary. The Minister may choose to delegate the responsibility of attending the meeting to his Deputy Minister or Permanent Secretary together with other officials.

At this meeting, the CCL will consider the specific circumstances of each case, e.g. whether the matter can be submitted to the Cabinet and what aspects should be highlighted to the Cabinet, whether further legal advice is necessary, whether further consultations with other ministries must take place, etc.

- e. *CCL Certificate.* Once CCL is satisfied that the matter can be submitted to the Cabinet, the Secretary of the CCL will provide the sponsoring ministry with a certificate to this effect.

- f. *Submission to the Cabinet for Approval in Principle.* Having received the CCL certificate, the ministry must submit the whole matter to the Cabinet in accordance with what has been decided at the CCL meeting. In the Cabinet Memorandum, the ministry must request the Cabinet to grant approval in principle for the drafting of the particular bill.

- g. *Drafting of the Bill.* Once the Cabinet has granted approval in principle which shall be confirmed in writing by the Secretary to Cabinet to the sponsoring ministry and the Ministry of Justice, the sponsoring ministry must confirm the receipt of the approval to the Permanent Secretary for Justice within seven days of the Cabinet's decision. This confirmation from the sponsoring ministry must be accompanied by all the relevant documents, such as, the memorandum to Cabinet and Cabinet's resolution, the layman's draft, or detailed drafting instructions if so accepted. At the same time, the name and rank of a contact person in the sponsoring ministry should be communicated in writing to the Permanent Secretary for Justice. Such person should be readily available for consultation by the legal drafters and should preferably be not lower in rank than the Deputy Director and not higher than Under Secretary.

- h. *Sponsoring Ministry's Response to the Bill.* Once the legal drafters have produced the bill, the Secretary of the CCL will cause it to be hand-delivered to the contact person of the sponsoring ministry with copies of his or her accompanying letter to that ministry's Permanent Secretary and Minister.

The sponsoring ministry must then respond within fourteen days of receipt of the bill. This response may either confirm that the bill meets the ministry's requirements, or it may convey its comments via

the Secretary of the CCL to the legal drafters. The sponsoring ministry may during this stage want to discuss aspects of the bill with the legal drafters. A final response is, however, necessary to enable the Secretary of the CCL to proceed to the further stages.

- i. *Certification by the Attorney-General.* Once the sponsoring ministry is satisfied with the bill, it will be submitted by the Secretary of the CCL to the CCL for consideration. The Secretary will once again invite, via the contact person in the sponsoring ministry, a representative of that ministry to attend the meeting of the CCL. At this stage, it might once again be necessary for the legal drafters to effect amendments required by the CCL and such amendments may be considered again during a further meeting of the CCL.

Finally, after consideration of the bill by the CCL it will be submitted by the Secretary of the CCL to the Attorney-General for certification.

- j. *Arrangements for the introduction of the Bill at the National Assembly.* The Attorney-General will, after his certification thereof, forward the bill to the Secretary of the National Assembly for printing and further arrangements with regard to its introduction. At the same time, the sponsoring ministry must prepare the Second Reading speech.
- k. *Priority Treatment.* Any request for priority treatment on the basis that a bill is an emergency piece of legislation must be addressed to the CCL via its Secretary with a comprehensive motivation.

It is essential that all ministries strictly comply with these procedures with regard to envisaged legislation.

As far as the bills already delivered to the legal drafters are concerned, the procedures in force prior to this Administrative Directive must be followed. It may, however, be necessary in some cases to have consultations between the CCL and a sponsoring ministry to facilitate progress.

The officials concerned should also note that the time needed for scrutiny by the legal drafters, consideration by the CCL, certification by the Attorney-General and printing for the National Assembly is often underestimated by the various ministries. It will therefore be necessary for the CCL, as mandated by the Cabinet, to continuously monitor the processes.

#### **ANNEXURE 4**

**Interpretation of Laws Proclamation 37 of 1920 (From Namlex Update)**  
**(Paragraphs 14, 37 and 52)**

came into force on date of publication: 1 September 1920; extended to the Rehoboth Gebiet by  
Proc. 28/1923 (OG 118) with effect from 1 October 1923 (section 6 of Proc. 28/1923)

**as amended by**

**Interpretation of Laws Amendment Proclamation 11 of 1926 (OG 205)**

**came into force on date of publication: 16 August 1926**

**South West Africa Native Affairs Administration Ordinance 4 of 1955 (OG 1899)**

**came into force on 1 April 1955 (section 5 of Ord. 4 of 1955)**

**Interpretation of Laws Proclamation, 1920, Amendment Ordinance 19 of 1961 (OG 2320)**

**came into force on date of publication: 30 June 1961**

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#### **PROCLAMATION**

BY HIS HONOUR SIR EDMOND HOWARD LACAM GORGES, KNIGHT COMMANDER  
OF THE MOST DISTINGUISHED ORDER OF SAINT MICHAEL AND SAINT GEORGE,  
A MEMBER OF THE ROYAL VICTORIAN ORDER, ADMINISTRATOR OF THE  
PROTECTORATE OF SOUTH WEST AFRICA IN MILITARY OCCUPATION OF  
THE UNION FORCES

WHEREAS it is desirable to interpret and shorten the language of Laws now or hereafter in  
force in this Protectorate.

NOW THEREFORE under and by virtue of the powers in me vested I do hereby declare  
proclaim and make known as follows:-

1. In the interpretation of every law (as in this Proclamation defined) now or hereafter  
in force in the Protectorate or in any portion thereof, and in the interpretation of all bye-laws, rules,  
regulations, or orders made under the authority of any such law, the definitions and other provisions  
in this Proclamation contained shall, unless there be something in the language or context of the law,  
bye-law, rule, regulation or order, repugnant to such definitions or provisions, or unless the contrary  
intention therein appear, be adopted and applied.

2. The following expressions shall, unless the context otherwise requires or unless in the case of any law it is otherwise provided therein, have the meanings hereby respectively assigned to them, namely:-

“christian name” shall mean any name prefixed to the surname, whether received at Christian baptism or not;

“district” shall mean the area subject to the jurisdiction of the court of any magistrate;

“Gazette” shall mean the Official *Gazette* of the Protectorate;

“Governor-General” shall mean the officer for the time being administering the government of the Union of South Africa acting by and with the advice of the Executive Council thereof;

“law” shall mean and include any law, proclamation or other enactment having the force of law;

“month” shall mean a calendar month;

“oath” and “affidavit” shall, in the case of persons allowed by law to affirm or declare instead of swearing, include affirmation and declaration, and the expression “swear” shall, in the like case, include “affirm” and “declare”;

“Parliament” shall mean the Parliament of the Union of South Africa;

“person” shall include -

- (a) municipal council, or like authority; or
- (b) any company incorporated or registered as such under any law; or
- (c) any body of persons corporate or unincorporate;

“Province” shall mean a Province of the Union of South Africa;

“The Protectorate” shall mean the territory of South-West Africa lately under the Sovereignty of Germany and at present under the administration of the Government of the Union of South Africa;

“The Union” shall mean the territorial limits of the Union of South Africa as constituted for the time being in accordance with the South Africa Act, 1909, or any amendment thereof.

**[Section 1 of Proc. 11 of 1926 provides some independent rules  
of interpretation, in addition to amending Proc. 37 of 1920:**

“1. In the interpretation of every proclamation of the Administrator or ordinance made by the Legislative Assembly now or hereafter in force in the Territory or in any portion thereof, and in the interpretation of all bye-laws, rules, regulations or orders made under the authority of any such proclamation or ordinance, the following expressions shall have the meanings hereby respectively assigned to them, unless there be something in the language or context of the proclamation, ordinance, bye-law, rule, regulation or order, repugnant to such meanings, or unless the contrary intention therein appear-

‘The Administration’ or ‘This Administration’ shall mean the Administration of the Mandated Territory of South West Africa;

‘Administrator’, when used in relation to the administration of those matters in respect of which it is for the time being competent for the Legislative Assembly for the Territory to make ordinances, shall mean the Administrator of the Territory-in-Executive Committee, and when used in relation to the administration of any other matters, shall mean the Administrator of the Territory;

‘The Territory’ or ‘This Territory’ shall mean the Mandated Territory of South West Africa.”]

3. In every law, expressions relating to writing shall, unless the contrary intention appears, be construed as including also references to typewriting, lithography, photography, and all other modes of representing or reproducing words in a visible form.

4. When any particular number of days is prescribed for the doing of any act, or for any other purpose, the same shall be reckoned exclusively of the first and inclusively of the last day, unless the last day shall happen to fall on a Sunday or on any other day appointed by or under the authority of a law as a public holiday, in which case the time shall be reckoned exclusively of the first day and exclusively also of every such Sunday or public holiday.

5. In the measurement of any distance for the purpose of any law, that distance shall, unless the contrary intention appears, be measured in a straight line on a horizontal plane.

6. In every law, unless the contrary intention appears

(a) words importing the masculine gender shall include females; and

(b) words in the singular number shall include the plural, and words in the plural number shall include the singular.

7. Where any law authorizes or requires any document to be served by post, whether the expression “serve” or “give” or “send”, or any other expression is used, then, unless the contrary intention appears, the service shall be deemed to be effected by properly addressing, prepaying, and posting a registered letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.

8. In every law unless the contrary intention appears, the expression “rules of court”, when used in relation to any court, shall mean rules made by the authority having for the time being power to make rules or orders regulating the practice and procedure of that court.

The powers of the said authority to make rules of court, as above defined, shall include a power to make rules of court for the purpose of any law directing or authorizing anything to be done by rules of court.

### **Criminal proceedings may be instituted in the name of the State**

**8bis.** Any criminal proceedings given as instituted in the name of the State shall for all purposes be deemed to have been instituted in the name of the Republic of South Africa.

9. (1) When a law confers a power or imposes a duty then, unless the contrary intention appears, the power may be exercised and the duty shall be performed from time to time as occasion requires.

(2) Where a law confers a power, jurisdiction, or right, or imposes a duty on the holder of an office as such, then, unless the contrary intention appears, the power, jurisdiction or right may be exercised and the duty shall be performed from time to time by the holder for the time being of the office, or by the person lawfully acting in the capacity of such holder.

(3) Where a law confers a power to make rules, regulations, or bye-laws, the power shall, unless the contrary intention appears, be construed as including a power exercisable in like manner

and subject to the like consent and conditions (if any) to rescind, revoke, amend, or vary the rules, regulations, or bye-laws.

**10.** Where an act or omission constitutes an offence under two or more statutes or is an offence against a statute and at common law, the offender shall, unless the contrary intention appears, be liable to be prosecuted, and punished under either statute, or (as the case may be) under the statute or the common law, but he shall not be liable to more than one punishment for the act or omission constituting the offence.

**11.** (1) Where a law repeals and re-enacts, with or without modifications, any provisions of a former law, references in any other law to the provisions so repealed shall, unless the contrary intention appears, be construed as references to the provisions so re-enacted.

(2) Where a law repeals any other law, then, unless the contrary intention appears, the repeal shall not -

- (a) revive anything not in force or existing at the time at which the repeal takes effect; or
- (b) affect the previous operation of any law so repealed or anything duly done or suffered under the law so repealed; or
- (c) affect any right, privilege, obligation, or liability acquired, accrued, or incurred under any law so repealed; or
- (d) affect any penalty, forfeiture, or punishment incurred in respect of any offence committed against any law so repealed; or
- (e) affect any investigation, legal proceeding, or remedy in respect of any such right, privilege, obligation, liability, forfeiture, or punishment as is in this sub-section mentioned;

and any such investigation, legal proceedings, or remedy may be instituted, continued, or enforced, and any such penalty forfeiture, or punishment may be imposed, as if the repealing law had not been passed.

(3) When a law repeals wholly or partially any former law and substitutes provisions for the law so repealed, the repealed law shall remain in force until the substituted provisions come into operation.

**12.** (1) The expressions “commencement” and “taking effect” when used in any law in reference thereto, shall mean the day on which that law comes or came into operation, and that day shall subject to the provisions of sub-section (2) of this section and unless some other day is fixed by or under the law for the coming into operation thereof, be the day when the law was first published in the Gazette as a law.

(2) Where any law, or any order, warrant, scheme, rules, regulations, or bye-laws made, granted, or issued under the authority of a law, is expressed to come into operation on a particular day, the same shall be construed as coming into operation immediately on the expiration of the previous day.

(3) Where a law confers a power

(a) to make any appointment; or

(b) to make, grant, or issue any instrument, order, warrant, scheme, rules, regulations, or bye-laws; or

(c) to give notices; or

(d) to prescribe forms; or

(e) to do any other act or thing for the purpose of the law,

that power may, unless the contrary intention appears, be exercised at any time after the passing of the law so far as may be necessary for the purpose of bringing the law into operation at the commencement thereof, subject to this restriction that any instrument, order, warrant, scheme, rules, regulations, or bye-laws, made, granted, or issued under the power shall not, unless the contrary intention appears in the law or the contrary is necessary for bringing the law into operation, come into operation until the law comes into operation.



13. When any act, matter or thing is by law directed or authorised to be done by the Governor-General, the Minister or by the Administrator, or by any public officer, the notification that such act, matter, or thing has been done, may unless a specified instrument or method is by that law prescribed for the notification, be by notice in the Gazette.

14. When any bye-law, regulation, rule or order is authorised by any law to be made by the Governor-General, the Minister, the Administrator, or by any local authority, public body, or person, with the approval of the Governor-General, the Minister, or the Administrator, such bye-law, regulation, rule, or order, shall, subject to the provisions relative to the force and effect thereof in any law, be published in the Gazette and production of a copy of the Gazette containing a notice of the making or approval (as the case may be) of the bye-law, regulation, rule, or order by the Governor-General, the Minister, or the Administrator shall be sufficient evidence of such making or approval.

This Proclamation may be cited for all purposes as “The Interpretation of Laws Proclamation, 1920”.

GOD SAVE THE KING.

Given under my hand at Windhuk this 7th day of August 1920.

E. H. L. GORGES  
Administrator.

## **ANNEXURE 5**

### **Matters to be Considered After Receipt of Drafting Instructions (Paragraph 22)**

1. Has every requirement considered necessary to effect the proposals been considered? For example, if self-regulation is possible without need for legislation.
2. Where administrative provisions are required, the level at which statutory functions are to be performed and any provision for delegation.
3. Reference to any useful legislative precedents, relevant cases whether they agree with the views of the sponsors or not.
4. The relative gravity of proposed offences.
5. The nature of penalties or sanctions desired.
6. Any preference for a particular form of legislation.
7. Reference or copies of known legal decisions and opinion.
8. Whether regulation-making powers are required.
9. References or copies of relevant committee reports.
10. Particular commencement of the proposed legislation if unusual, particularly if it is to be implemented in phases.
11. If persons or property are to be affected, whether compensation and appeals, if any, are provided for.
12. Whether the State is to be bound.
13. Existing legislation and whether amendments are required.
14. The form of instructions for consequential amendments and whether there are existing provisions which require amendment.

15. Whether consultation with interested parties has occurred, including internal legal advisors.
16. Transitional and savings provisions.
17. Retroactive and retrospective provisions required.
18. Whether the rules of statutory interpretation have been considered.
19. If the Interpretation of Laws Proclamation has been considered.
20. If there are international obligations and standards relevant to the legislation.
21. If there is a need for alternative dispute resolution mechanisms to be included.
22. The expected timeline for the proposed legislation.
23. Have Articles 21 and 22 of the Namibian Constitution-limitation of fundamental rights and freedoms been considered if there are to be limitations on fundamental rights or freedoms.
24. Any special provisions that concern evidence and the onus of proof.

**ANNEXURE 6**  
**General Proofreading Guidelines**  
**(Paragraph 25)**

Proof reading of a Bill should be done by at least two members of each respective drafting team members. When proofreading you must do the following:

1. Check that changes in the head notes and headings of group of clauses or sections are reflected in the arrangement of sections/clauses.
2. Check that all cross references are correct, especially where new clauses or sections were inserted.
3. Check that references in the Schedule are to the correct clause or section.
4. Check punctuation.
5. Check that definitions are in alphabetical order.
6. Check for spelling consistency.
7. Check for misuse of capitalisation.
8. Check for indentation.
9. Check that all amendments made during Parliamentary process have been incorporated.
10. Check that the legislation reads well from the first provision to the last.

**ANNEXURE 7**  
**Family Tree of Subdivisions of Legislative Instruments**  
(Paragraphs 29, 32 and 35)

<b>Parent</b>	<b>Child</b>	<b>Grandchild</b>	<b>Great Grandchild</b>	<b>Great-Great Grandchild</b>	<b>Great-Great Great Grandchild</b>
<b>Namibian Constitution</b>	Article	Sub-Article	paragraph	subparagraph	none
<b>Act</b>	section	subsection	paragraph	subparagraph	item
<b>Bill</b>	clause	subclause	paragraph	Subparagraph	item
<b>Regulations</b>	regulation	subregulation	paragraph	Subparagraph	item
<b>Rules</b>	rule	subrule	paragraph	Subparagraph	item
<b>Code</b>	paragraph	subparagraph	item	none	none
<b>Determinations</b>	paragraph	subparagraph	item	none	none
<b>Directives</b>	paragraph	subparagraph	item	none	none
<b>Schedules</b>	paragraph	subparagraph	item	none	none
<b>Annexure</b>	paragraph	subparagraph	item	none	none

**ANNEXURE 8**  
Arrangement of Act with Chapters and Parts  
(Paragraph 31)

*ARRANGEMENT OF ACT*

*CHAPTER 1*  
*PRELIMINARY PROVISIONS*

*Section*

1. *Definitions and interpretation*
2. *Application of Act*

*CHAPTER 2*  
*FUNDAMENTAL RIGHTS AND PROTECTIONS*

3. *Prohibition and restriction of child labour*
4. *Prohibition of forced labour*

*CHAPTER 3*  
*BASIC CONDITIONS OF EMPLOYMENT*

*PART 1*

5. *Definitions relating to basic conditions of employment*
6. *Basic conditions*

*PART 2*  
*REMUNERATION*

7. *Calculation of remuneration and basic wages*
8. *Payment of remuneration*

*PART 4*

*LEAVE*

11. *Annual leave*

12. *Sick leave*

*PART 5*

*ACCOMMODATION*

13. *Provision of accommodation*

*PART 6*

*TERMINATION OF EMPLOYMENT*

14. *Period of employment*

15. *Termination of employment on notice*

*PART 7*

*DISPUTES CONCERNING THIS CHAPTER*

16. *Disputes concerning this Chapter*

*CHAPTER 4*

*HEALTH, SAFETY AND WELFARE OF EMPLOYEES*

*PART 1*

*RIGHTS AND DUTIES OF EMPLOYERS AND EMPLOYEES*

17. *Employer duties to employees*

18. *Employer duties to persons other than employees*

*PART 2*

*HEALTH AND SAFETY REPRESENTATIVES AND COMMITTEES*

19. *Election of health and safety representatives*

20. *Rights and powers of a health and safety representative*

*CHAPTER 5*  
*UNFAIR LABOUR PRACTICES*

- 21. *Unfair disciplinary action*
- 22. *Employee and trade union unfair labour practices*

*CHAPTER 6*  
*TRADE UNIONS AND EMPLOYERS' ORGANISATIONS*

*PART 1*  
*ESTABLISHMENT AND WINDING UP OF TRADE UNIONS*  
*AND EMPLOYERS' ORGANISATIONS*

- 23. *Definitions relating to this Chapter*
- 24. *Constitutions of trade union or employers' organisation*

*PART 2*  
*REGISTRATION OF TRADE UNIONS AND EMPLOYERS' ORGANISATIONS*

- 25. *Requirements for registration*
- 26. *Effect of registration of trade union or employers' organisation*

*PART 3*  
*RECOGNITION AND ORGANISATIONAL RIGHTS OF REGISTERED TRADE UNIONS*

- 27. *Recognition as exclusive bargaining agent of employees*
- 28. *Trade union access to the premises of the employer*

*PART 4*  
*COLLECTIVE AGREEMENTS*

- 29. *Legal effect of collective agreements*
- 30. *Extension of collective agreements to non-parties*



*CHAPTER 7*  
*STRIKES AND LOCKOUTS*

- 31. *Right to strike or lockout*
- 32. *Prohibition of certain strikes and lockouts*

*CHAPTER 8*  
*PREVENTION AND RESOLUTION OF DISPUTES*

*PART 1*  
*DISPUTES AFFECTING THE NATIONAL INTEREST*

- 33. *Disputes affecting the national interest*

*PART 2*  
*CONCILIATION OF DISPUTES*

- 34. *Definitions*
- 35. *Resolution of disputes through conciliation*

*PART 3*  
*ARBITRATION OF DISPUTES*

- 36. *Definitions*
- 37. *Arbitration*

*PART 4*  
*PRIVATE ARBITRATION*

- 38. *Private arbitration*

*CHAPTER 9*  
*LABOUR INSTITUTIONS*

*PART 1*  
*LABOUR ADVISORY COUNCIL*

- 39. *Continuation of Labour Advisory Council*
- 40. *Functions of Labour Advisory Council*

*PART 2*  
*COMMITTEE FOR DISPUTE PREVENTION AND RESOLUTION*  
*AND ESSENTIAL SERVICES COMMITTEE*

- 41. *Functions of Committee for Dispute Prevention and Resolution*
- 42. *Composition of Committee for Dispute Prevention and Resolution*

*PART C*  
*WAGES COMMISSION*

- 43. *Continuation of Wages Commission*
- 44. *Functions of Commission*

*PART 4*  
*LABOUR COURT*

- 45. *Continuation and powers of Labour Court*
- 46. *Assignment of judges of Labour Court*

*PART 5*  
*THE LABOUR COMMISSIONER*

- 47. *Appointment of Labour Commissioner and Deputy Labour Commissioner*
- 48. *Powers and functions of the Labour Commissioner*

*PART 6*  
*LABOUR INSPECTORATE*

- 49. *Interpretation*
- 50. *Appointment of inspectors*

*CHAPTER 10*  
*GENERAL PROVISIONS*

- 51. *Prohibition of labour hire*
- 52. *Service of documents*

**ANNEXURE 8A**  
Arrangement of Act without Chapters and Parts  
(Paragraph 31)

*ARRANGEMENT OF SECTIONS*

1. *Definitions*
2. *The Engineering Council of Namibia*
3. *Constitution of council and first meeting*
4. *Qualifications of members of council and circumstances under which they vacate office*
5. *Term of office of members of council*
6. *President and vice-president of council*
7. *General powers of Council and powers of Minister in regard to certain matters in respect of which Council has made recommendations*
8. *Funds of council and the keeping and auditing of books*
9. *Reports to the Minister*
10. *Committees of council*
11. *Registration of professional engineers and engineers in training*
12. *Amendment of Schedule I*
13. *Circumstances under which certificates of registration shall be returned to registrar*
14. *Prohibition on use of title of professional engineer and other engineering titles by unregistered person*
15. *Prohibition on use of title of incorporated engineer and engineering technician and related titles*
16. *Improper conduct*
17. *Regulations*
18. *Rules*

- |     |   |
|-----|---|
| 19. | <i>Procedure and evidence</i>                                 |
| 20. | <i>Rectification of errors</i>                                |
| 21. | <i>Restriction of liability</i>                               |
| 22. | <i>Delegation of powers</i>                                   |
| 23. | <i>Exemption from operation of provisions of Act</i>          |
| 24. | <i>Repeal of Act 81 of 1968</i>                               |
| 25. | <i>Short title and commencement Schedule 1<br/>Schedule 2</i> |

**ANNEXURE 9**  
**Appropriation Bill**  
**(Paragraph 68)**

**“BILL**

**To appropriate amounts of money to meet the financial requirements of the State during the financial year ending 31 March 2023.**

*(Introduced by the Minister of Finance)*

**BE IT ENACTED** as passed by the Parliament, and assented to by the President, of the Republic of Namibia as follows:

**Appropriation of amounts of money for financial requirements of State**

**1.** Subject to the State Finance Act, 1991 (Act No. 31 of 1991), the amounts of money shown in the Schedule are appropriated for the financial requirements of the State during the financial year ending 31 March 2023 as a charge to the State Revenue Fund.

**Short title**

**2.** This Act is called the Appropriation Act, 2022.”.

## ANNEXURE 10

### Amendment Bill

(Paragraph 101)

#### **“BILL**

**To amend the Airports Company Act, 1998, so as to substitute the definition of aerodrome charge and to empower the Company to collect solidarity levy on air tickets; and to provide for incidental matters.**

(Introduced by the Minister of Works and Transport)

**BE IT ENACTED** as passed by the Parliament, and assented to by the President, of the Republic of Namibia as follows:

**Amendment of section 1 of Act No. 25 of 1998, as amended by item 18(a) of Schedule 2 to Act No. 2 of 2006**

**1.** Section 1 of the Airports Company Act, 1998 (in this Act referred to as the principal Act) is amended by substituting the following definition for the definition of “aerodrome charge”:

“‘aerodrome charge’ means an amount levied by the Company under section 10A, and includes solidarity levy;”.

**Insertion of section 10A in Act No. 25 of 1998**

**2.** The principal Act is amended by the insertion of the following section after section 10:

**“Aerodrome charges**

**10A.** Subject to section 5(1)(e) and (f), and for national developmental purposes, the Company may levy an amount -

- (a) on an operator of an aircraft in connection with the arrival, parking or departure of such aircraft at a Company aerodrome, including an amount determined with reference to the number of passengers on board an aircraft;

- (b) on aircraft passenger in connection with their arrival at or departure from a Company aerodrome by means of an aircraft;
- (c) on aircraft passenger as solidarity levy on air ticket for the use of a Company aerodrome.”.

**Short title**

- 3.** This Act is called the Airports Company Amendment Act, 2010.

## **ANNEXURE 11**

### **Proposed Amendments on Floor of National Assembly**

(Paragraph 102)

#### **AMENDMENTS TO THE NATIONAL YOUTH COUNCIL BILL [BILL NO. 6 OF 2008]**

##### **THAT:**

- 1. In clause 1**, substitute the following definition for the definition of “youth”:  
“youth” means a young person aged from 16 to 35 years.”;
- 2. In clause 13**, insert the following paragraph after paragraph (e) of subclause (1), renumber the rest of the paragraphs:  
  
“(f) to grant such leave of absence to the employees of the Council;” and
- 3. In clause 14**,
  - (a) delete paragraph (b) of subclause (1), and renumber the rest of the paragraphs; and
  - (b) substitute the following paragraph for paragraph (d) of subclause (1):  
  
“(d) two persons nominated by the Ministry.”; and
- 4. In the Bill**, delete clause 7 and renumber the rest of the clauses.”.

#### **AMENDMENTS TO THE APPROPRIATION BILL [BILL NO. 4 OF 2009]**

##### **THAT:**

- 1. In the Schedule**,
  - (a) substitute the following amount for the amount 234 077 000 of vote 02 Prime Minister:  
“293 477 000”; and



- (b) substitute the following amount for the amount 2 488 965 000 of vote 09 Finance: “2 417 665 000”

## **ANNEXURE 11A**

### **Proposed Second Amendments on Floor of National Assembly (Paragraph 102)**

#### **SECOND AMENDMENTS TO THE NATIONAL YOUTH COUNCIL BILL [BILL NO. 6 OF 2008]**

#### **THAT:**

1. **In clause 6**, substitute the following paragraph for paragraph (b):

“(b) to review the activities of the Board and the Representative Council;”.

2. **In clause 9**, substitute the following paragraph for paragraph (b):

“(b) to review and direct the activities of the Executive Chairperson and the Board;”.

3. **In clause 11 -**

- (a) substitute the following subclause for subclause (2):

“(2) Members of the Representative Council must at their first meeting elect one of their members to serve on part-time basis as Chairperson of the Council, and such member –

- (a) must have an understanding of the development, politics and aspirations of the youth in general;
  - (b) may not be a member of the Board;
  - (c) is elected for a term of four years, and is eligible for re-election at the expiry of that term, subject to a maximum of two terms of office;
  - (d) convenes and presides over meetings of the Council; and
  - (e) is, with the necessary changes, subject to the application of sections 28 and 29.”;
- (b) delete the word “Executive” in subclause (4); and

(c) Add the following subclause:

“(6) Subject to this Act, if the Chairperson of the Representative Council becomes older than 35 years the Chairperson continues until his or her term of office expires.”.

4. **In the Bill**, delete clause 15, and renumber the rest of the clauses accordingly.

5. **In clause 17**, add the following subclause:

“(4) Subject to this Act, if a member becomes older than 35 years such member continues until his or her term of office expires.”.

6. **In clause 19**, delete the word “Executive” in subclause (2).

7. **In clause 27**, substitute the following subclause for subclause (3):

“(3) Apart from being the Chairperson of the Board, the Executive Chairperson presides over meetings of the General Assembly.”.

## ANNEXURE 12

### Alternative Use of Words in Legislation (Paragraphs 154,155 and 156)

Do not use	Rather use
a licence fee shall be paid	the applicant must pay the licence fee
as may be approved by	approved by
as the Board may determine	determined by the Board
coming in force	commencement
deem	believe, consider, think, find
due to the fact	due to, since
for the purposes of	for, to
forthwith	immediately
however	but
in accordance with	under
in many cases	often
in lieu of	instead of
is applicable to	applies to
it is the duty	must
it shall be lawful to	may
manpower	workforce, personnel, staff, workers
notwithstanding	despite
on or before	not later than
per annum	per year
per centum	percent
policeman	police officer
provision of law	law
pursuant to	under
remainder	rest
representation if any to the Board	representations to the Board
said, some, such	the, this, that
shall have	has
show cause why	give reasons for
sources of money of the Council	funds of the Council
subject to the provisions of this Act	subject to this Act
until such time	until

Latin Expressions	
ad hoc ad valorem bona fide de novo ex officio modus operandi onus per sine die status quo ultra vires vice versa	for that purpose according to the value in good faith start afresh by virtue of office plan of working burden by means of, according to, indefinitely the same state as now beyond one's legal powers the position being reversed

