



REPUBLIC OF NAMIBIA

THE OFFICE OF THE ATTORNEY-GENERAL: A CLIENT'S GUIDE

DIRECTORATE: LEGAL ADVICE

Windhoek, Namibia

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FOREWORD BY THE ATTORNEY-GENERAL
ATTORNEY-GENERAL OF THE REPUBLIC OF NAMIBIA

The Attorney General of Namibia is appointed by the President by virtue of Article 86 of the Namibian Constitution. The powers and functions of the Attorney-General, in terms of Article 87 of the Namibian Constitution, are:

- (a) To exercise the final responsibility of the Office of the Prosecutor General;*
- (b) To be the principal legal adviser of to the President and Government;*
- (c) To take all action necessary for the protection and upholding of the Namibian Constitution;*
and
- (d) To perform all such function and duties as may be assigned to the Attorney-General by Act of Parliament.*

In the exercise of his/her functions, the Attorney-General is bound by the Constitutional duty to protect and uphold the Namibian Constitution, a duty he/she must observe as he/she exercises all other duties bestowed upon him.

As the principal legal adviser to the President and to Government, Government Offices, Ministries and Agencies are the clients of the Attorney-General. The Attorney-General is therefore there to render legal advice and legal representation to Government when called on to do so. Should the Government act without seeking legal advice and such action contravenes the Namibian Constitution, may the Attorney-General bring an action against Government or should he/she defend Government in the event that an action is brought against it by other interested parties?

Answering this question is a difficult task. Even Courts have shied away from conclusively addressing it. In the case of the **Attorney-General v His Majesty the King of Lesotho**

and Others ¹, the Court of Appeal held that the following issues or matters arise from the question of whether the Attorney-General can take judicial action against Government:²

1. Being Government's principal legal adviser, the Attorney-General would be instituting proceedings against his/her own client, the implications of which speak to the continuing relationship between the Attorney-General and Government.
2. Ministers may also advise the President on certain matters³ and if the Attorney-General's advice is not sought, and he does not render it *mero motu*, certain action(s) may be taken by the President and members of the Cabinet without the Attorney-General's legal advice.
3. The Attorney-General attends Cabinet meetings because of his/her role as principal legal adviser to the President and Government. The Attorney-General is consequently privy to confidential information that emanates from the Cabinet meetings. He/she may therefore nullify the duty of principal legal adviser if he/she decides to legally challenge the range of Government action.

The issues listed above are serious and detrimental in their manifestation. If we were presented with a scenario where the Attorney-General of the Republic of Namibia must institute proceedings against the Government, then the Government would lose its principal legal adviser.

This eventuality is avoidable, if all actions with legal and financial implications are discussed with the Attorney-General as prescribed by the law, then we can make sure that nothing done by the President and the Government is in direct contravention of the Namibian Constitution to the extent that it would leave the Attorney-General no choice but to litigate against his/her client(s).

¹ C OF A (CIV) 13/2015 or CONS/CASE/02/2015

² The issues are herein paraphrased in relation to Namibia.

³ The Prime Minister may advise the President on matters relating to the execution of Government functions in terms of Article 36 of the Namibian Constitution.

Ministers may advise the President on the state of national defence and the maintenance of law and order and to inform the National Assembly thereon as per Article 40(j) of the Namibian Constitution.

This Client's Guide is meant to assist our clients in the exercise of their functions in relation to the Attorney-General. In following this Guide, we ensure that Government continues to be legally advised, the integrity of the Office of the Attorney-General is maintained, we continue to protect and uphold the Namibian Constitution undivided and consequently maintain the rule of law.

NOTE FROM THE CHIEF: LEGAL ADVICE:

INTRODUCTION TO THE OFFICE OF THE ATTORNEY-GENERAL

The Office of the Attorney-General consists of the Directorate: Civil Litigation and the Directorate: Legal Advice, which are both housed in the Ministry of Justice. The Directorate: Civil Litigation deals with all matters emanating into litigation against and on behalf of all Government Offices/Ministries/Agencies whereas the Directorate: Legal Advice renders legal advice/opinions to the Government Offices/Ministries/Agencies.

The Office of the Prosecutor-General is part of the Office of the Attorney-General by virtue of Article 87(a) of the Namibian Constitution in terms of which the Attorney-General is to exercise final responsibility for the Office of the Prosecutor-General.

The structure of the Office of the Attorney-General is set out in the organogram attached hereto and marked Annexure “A”.

The Attorney-General performs his/her function of rendering legal advice through the Directorate: Legal Advice. The Directorate: Legal Advice, consisting of the Chief Legal Advisor, Legal Professionals and support administrative staff members, assists the Attorney-General in rendering legal advice to its clients, namely the President and the Offices, Ministries and Agencies of Government.

The process of rendering legal advice encompasses research, consultation with clients, scrutinizing relevant documents, application of the law, drafting of legal documents and legal opinions.

The Directorate of Legal Advice aims to provide quality and timely legal advice/opinions to its clients with a team of legal professionals and support administrative staff, who are qualified, vibrant, trained, motivated, intelligent, dedicated and who generally have the

interest of the Namibian Government at heart at all times. The Office of the Attorney-General

In summary, the Attorney-General's function in terms of Article 87(b) encompasses the following:

- providing legal advice to the President and Government (Ministries, Offices and Agencies hereinafter referred to as "O/M/As") on any matter;
- assisting O/M/A's in disciplinary hearings;
- assisting O/M/A's in international, regional, and local negotiations;
- scrutinizing documents including but not limited to agreements, contracts, bills and policies;
- serving as members of various intergovernmental and inter-ministerial committees; and
- providing training on various aspects of the law generally, and specifically on the application of certain (various) statutes to line ministries.

VISION, MISSION STATEMENT, VALUES AND AIMS OF THE OFFICE OF THE ATTORNEY-GENERAL

A) Vision

The Office of the Attorney-General has as its sole vision *“to be a model provider of accessible and timeous legal services for all without fear or favour”*.

B) Mission Statement

The Office of the Attorney-General aims *“to provide quality and timely legal advice/opinions to our Clients”*.

C) Values

Our core values are as follows:

- Integrity
- Transparency
- Impartiality
- Accountability
- Compassion.

1. AIMS AND PURPOSE OF THIS MANUAL

- 1.1 This Guide is designed to guide the clients, when requesting legal advice/opinion from the Attorney-General and this Guide will give relevant direction on how to request for legal advice which will in turn facilitate timely finalisation of the request.
- 1.2 When requesting legal advice/opinion, a client should, at all times, provide all information and/or all documentation relevant and/or related to the matter on which legal advice/opinion is requested. Additionally, the enquiries person dealing with the matter at OMAs must be easily identifiable and the contact details, inclusive of cellular phone details and e-mail addresses, must be indicated on the client's requesting letter for legal advice/opinion.
- 1.3 The provision of all relevant documents will not only assist the client in receiving timely advice, but it will also enable us, by having all relevant information and/or documentation readily available, to work on the requested advice upon the initial request for legal advice/opinion.
- 1.4 This Guide also seeks to assist the client in knowing and identifying the following:
 - a. when to approach the Office of the Attorney-General (OAG);
 - b. how the client's request for legal advice/opinion should be structured;
 - c. the client's dealings with the OAG;
 - d. the implications and/or consequences of not approaching the OAG; and
 - e. what the client should do when it does not agree with rendered legal advice/opinion.
- 1.5 It will also provide for the mechanism whereby the client will be required to provide feedback on the implementation of the rendered legal advice/opinions.

2. GUIDELINES

2.1 WHO MUST REQUEST LEGAL ADVICE FROM THE ATTORNEY-GENERAL?

2.1.1 The Attorney-General acts on instructions of his/her clients, and for the purpose of providing legal advice/opinions such clients include:

- (a) The President, Vice-President, Prime Minister and Deputy-Prime Minister;
- (b) All Government Offices, Ministries and Agencies (“OMAs”);
- (c) Regional Authorities and Local Authorities; and
- (d) Public Enterprises and State Owned Enterprises.⁴

2.1.2 The clients listed above should make requests for legal advice in formal letters addressed to the Attorney-General, printed on their governmental/enterprise letterheads.

2.2 ON WHICH MATTERS CAN LEGAL ADVICE/OPINION BE REQUESTED FROM THE ATTORNEY-GENERAL?

2.2.1 General

Generally, all matters which have legal implications for any of the clients must be submitted to the Office of the Attorney-General. Legal advice/opinion must, for example, be requested for:

⁴ It is important to note that Public Enterprises, Local Authorities and Regional Authorities can only request for legal advice/opinion from the Attorney-General through their line Ministry(ies).

- (a) the interpretation and application of the Namibian Constitution and general legislation;
- (b) the constitutionality of a proposed law, policy, contract or agreement (scrutinizing for the purpose of compliance with the Namibian Constitution and existing legislation);
- (c) questions regarding a conflict, or inconsistencies, between different pieces of legislation;
- (d) the nature and extent of the powers and duties of certain OMAs, Government bodies or Government officials; or
- (e) Clients and Government bodies may also request officers in the Attorney-General to:
 - (i) assist in the conduct of disciplinary hearings (as investigating officers adducing evidence or members of a disciplinary committee);
 - (ii) request for a legal persons to accompany clients to negotiations and other meetings at which legal questions may be raised;
 - (iii) request for a legal person to serve as members of committees, boards of directors and commissions of enquiries and similar bodies;
 - (iv) scrutinise policy documents.

2.2.2 Commercial Contracts

With regard to commercial contracts, the Office Attorney-General participates in the negotiation of such commercial contracts, thereafter scrutinizes and redrafts proposed contracts submitted by the client to ensure that, amongst other things:

- (a) the applicable law is observed;
- (b) the proposed contractual provisions -
 - i) reflect the intentions of the Parties;
 - ii) do not unfairly or unreasonably burden or disadvantage the client or Government body concerned;
 - iii) are clear and provide legal certainty;
 - iv) the format of the proposed contract conforms to prevailing standards; and
 - v) the agreement does not offend any constitutional provision, and if it does, it passes constitutional muster.

2.2.3 State Finance Act, 1991 (Act No. 31 of 1991) and Treasury Instructions

In terms of the Treasury Instructions made under section 24(1) of the State Finance Act, 1991, legal advice must be requested –

- (a) if a client has doubt about the interpretation of any stipulation, which may have financial implications for the State;
- (b) before a client enters into an agreement, which has financial implications for the State or for any statutory institution, which is funded, wholly or in part, through the State Revenue Fund; the Office of the Attorney-General must approve the agreement in advance;

- (c) if changes are made to a standard agreement, which has already been approved by the Office of the Attorney-General; and
- (d) before all acts required to be performed with regards to title deeds and the notarisation of documents are performed. (These acts are performed by the Directorate: Government Attorney, in the Office of the Attorney-General and not by the Directorate: Legal Advice).⁵

2.2.4. Draft Legislation

- (a) It is also required of Ministries to obtain the Attorney-General's certification or prior approval with regard to any draft legislation.
- (b) When a Ministry intends to create or amend a law, it must consult the Attorney-General, which will examine mainly whether the proposed law is constitutional, necessary and in harmony with other national laws and international law. This must be done before the proposal for a new law or an amendment is brought before Cabinet. If Cabinet approves a proposed law or an amendment, the Attorney-General must certify the draft after it has undergone the drafting process and before it is tabled in Parliament. The process *in re* the development or amendment of any law is set out in the Cabinet Handbook.

⁵ The Government Attorney is mainly responsible for -

- (a) legal action by, or against, Government bodies and officials in their official capacities;
- (b) notarial and deeds registration matters;
- (c) the defence of officials in criminal cases, if the alleged offence relates to the performance of a public function in an official capacity; and
- (d) all matters linked to, or necessary for the performance of, the work mentioned in paragraphs (a) to (c).

- (c) Clients must note that matters regarding the actual drafting of a proposed piece of legislation or an amendment are dealt with by and under the auspices of the Directorate: Legislative Drafting in the Ministry of Justice.

2.3 WHEN SHOULD LEGAL ADVICE/OPINION BE REQUESTED FROM THE ATTORNEY-GENERAL?

- (a) The Attorney-General advises clients to consult the Office at an early stage if and when an issue with legal implications arises or is foreseen or before embarking on any action which may have legal repercussions. This ensures that clients deal with problems and/or legal issues correctly from the beginning.
- (b) Examples of instances when legal advice/opinion should be requested:

2.3.1 Contracts/Agreements

As pointed out under Paragraph 2 above, in terms of the Treasury Instructions, clients have a duty to seek legal advice from the Attorney-General before they enter into an agreement that has financial implications. Clients are advised to do so as soon as a decision is taken to enter into such an agreement and detailed explanatory notes or detailed written instructions are to be forwarded, or a draft agreement is to be made available, in order to allow the Attorney-General to either influence the emerging draft agreement from its inception or scrutinise and redraft or standardise an existing draft before the anticipated date of signature.

2.3.2 Draft legislation

The Ministry concerned must approach the Attorney-General as soon as it has developed the relevant policy document or has created detailed explanatory notes or a draft bill, relating to the envisaged law or amendment.

2.3.3 Committee Meetings / Conferences / Accompanying of Government Delegations

In order to place the Attorney-General in a position to provide informed and sound legal advice/opinion, clients must engage the Office of the Attorney-General at the time at which their committees or projects are established (or as soon as a client becomes aware of meetings, conferences or other activities in which it wishes to participate and in respect of which legal advice/opinion is likely to be required).

2.4 WHERE TO SEEK LEGAL ADVICE

As previously indicated, request for legal advice/opinion should be addressed to the Attorney-General by way of a formal letter, printed on the relevant OMA's letterhead.

2.5 HOW A REQUEST FOR LEGAL ADVICE SHOULD BE MADE

When a request for legal advice/opinion is made to the Attorney-General all the necessary and/or relevant information and/or documents should be provided, including, but not limited to the following:

- (a) Where a request to scrutinize an agreement is made, an electronic copy of the agreement, any negotiation notes/report (if negotiated in the absence of a designated official from the OAG), any tender exemption, treasury approval, any previous agreement (where renewal or varying of terms sought), any Council Resolution or Cabinet Decision must be made available;
- (b) Where a request to scrutinize draft legislation is made, an electronic copy of the draft legislation, policy document, any consultation notes, must be made available;

- (c) Where a request to interpret a particular provision of law is made based on specific facts, all relevant information pertaining to such facts must be made available;
- (d) Relevant legislation and/or regulations should be indicated, and if possible, copies of such legislation and/or regulations should be provided;
- (e) A chronological summary of the facts should be identified with lettered or numbered flags; and
- (f) At least two enquiry persons must be listed with telephonic, email and mobile telephone details. These officials should be reachable at all times.

2.6 WHAT TO EXPECT AFTER YOU HAVE MADE YOUR REQUEST

Upon receipt of an instruction, the Attorney-General acknowledges receipt and notifies Client of the reference number assigned to the matter which is to be used in future correspondence as well as the contact person to whom the file was assigned to.

2.6.1 Assistance to the Attorney-General

It is the client's duty to render any assistance to the Attorney-General that may be required to conclude a matter successfully and timeously. The client should for example, at the request of the Attorney-General obtain information from experts, arrange for tests to be carried out, obtain documents which might not be in the possession of the client, and facilitate consultations with persons who have been identified by the Attorney-General as key persons who should be consulted during the process of concluding a matter referred to the Attorney-General.

2.6.2 The Attorney-General and his staff do not visit Clients

It is traditionally not the practice for an attorney to go to his/her client, therefore clients should ensure that for consultation purposes on matters, designated officials visit the Attorney-General or his/her staff members at the Attorney-General's Office. The Attorney-General may however consult out of the Office in exceptional circumstances, like when consulting the Prime Minister or Deputy-Prime Minister.

2.6.3 Drafting Legal Advice/Opinions

Drafting an Attorney-General advice/opinion involves a lengthy research and review process. The opinion request is assigned to a legal officer assisting the Attorney-General with his/her functions, who analyses the issues, conducts extensive research, and prepares a draft opinion. Each draft opinion is reviewed by a supervisor and the Attorney-General. The opinion may be revised throughout the process. The Attorney-General signs off on the opinion and it is then issued to the requesting O/M/A.

Due to the legal significance attributed to the Attorney-General's advice/opinion and the implications thereof, the advice/opinion drafting process is exhaustive and generally takes around 120 to 180 days; complex issues may take longer.

2.6.4 Request for a Legal Officer to Accompany the Client to Foreign Countries

If the client wishes to be accompanied to foreign countries by legal professionals from the Office of the Attorney General, the clients must be prepared to fund all the relevant expenses, inclusive air travel costs, of the legal professional. In the event that the client is unable to provide such funds, the client should consult the accounting officer for the OAG (currently the Permanent Secretary for the Ministry of Justice).

3. THE BINDING NATURE OF THE LEGAL ADVICE/OPINION OF THE OFFICE OF THE ATTORNEY-GENERAL

- 3.1 The Republic of Namibia is established as a sovereign, circular, democratic and unitary State founded upon the principles of democracy, the rule of law and justice for all as provided under Article 1 of the Namibian Constitution.
- 3.2 At the apex of all legislations is the Namibian Constitution which is the supreme law of the country. As expounded above, the Attorney-General derives his/her mandate from the Namibian Constitution. The powers and functions of the Attorney-General are provided for under Article 87 of the Namibian Constitution to include the following:
- (a) To be the principal legal advisor to the President and Government;
 - (b) To take all action necessary for the protection and upholding of the Namibian Constitution; and
 - (c) To perform all such functions and duties as may be assigned to the Attorney-General by an Act of Parliament.
- 3.4 By giving legal advice/opinion to the President and Government, the Attorney-General is discharging his/her constitutional duty which in turn contributes to the upholding and protection of the Namibian Constitution.
- 3.5 In respect of issues which have financial implications, the Attorney-General is discharging his/her functions and duties assigned by an Act of Parliament which is in this case the State Finance Act, 1996 and which is in turn a constitutional mandate.

- 3.6 The legal advice rendered by the Attorney-General is and remains advisory in nature. It is the choice of the client whether to conform to such legal opinion or advice, clients should however note that due consideration should be given to the implications of not following the advice of the Attorney-General lest it lead to a loss to Government.

4. THE EFFECT OF THE AG's LEGAL ADVICE/OPINION

- 4.1 The form of legal advice/opinion given by the Attorney-General ranges between, *inter alia*, essential element of agreements, legal consequences of omissions or certain acts, the constitutionality of administrative actions etc. Some acts that have financial implications as well as the role of the Attorney-General are prescribed in the State Finance Act, 1991 (Act 31 of 1991) and Treasury Instructions.
- 4.2 In hindsight, the Attorney-General is also averting potential legal suit which may be coupled with costs. The advice is also aimed at ensuring that O/M/As in the exercise of their duties and functions follow the letter of the law and completely avoid any constitutional violations.

5. THE CONSEQUENCES OF NOT ABIDING BY THE AG's LEGAL ADVICE/OPINION

- 5.1 Should the client not agree with the legal opinion of the Attorney-General, such client should approach the Office and discuss the matter. If after the discussions no agreement has been reached, the matter should be put before the Attorney-General personally who then decides either to review the opinion or to re-affirm.
- 5.2 If the Attorney-General re-affirms the legal advice/opinion, then such legal advice/opinion shall stand. Any act done contrary to the legal advice/opinion given by the Attorney-General has either legal implications or constitutional implications

which either way amounts to financial implications. That is so in the sense that it has the potential of ending up in court where either the legality/lawfulness or the constitutionality thereof is challenged. In these instances, it stands to reason that there are costs involved.

- 5.3 The client should take cognizance of the fact that failure to abide by the Attorney-General's legal advice/opinion has the potential of causing the State unauthorized expenditure or any loss or damage which has punitive measures as prescribed by the State Finance Act, 1996.

6. FEEDBACK

The Office of the Attorney-General will appreciate, at all times, to receive feedback on the implementation and incorporation of its legal advice/opinions by clients.

End.

ANNEXURE A: ORGANOGRAM FOR THE OFFICE OF THE ATTORNEY-GENERAL

