

DRAFT POLICY DOCUMENT

GUIDELINES FOR ACCESSING LEGAL SERVICES AND BRIEFING THE CHIEF DIRECTORATE: STATE LAW ADVISORY SERVICES

It has become necessary to establish policy guidelines for accessing legal services in the Province and for briefing the Chief Directorate: State Law Advisory Services in the Department of the Premier.

A. BROAD PRINCIPLES

1. These draft policy guidelines recognise the following broad principles in relation to *provincial line function Departments*:

- (a) that each provincial line function Department is responsible for *administering* the laws falling within its sphere of responsibility;
- (b) that each provincial line function Department has the responsibility to appoint a legal team headed by an officer at the level of Director to handle departmental legal matters;
- (c) that each provincial line function Department is responsible for the planning and detail of *proposed legislation* (Bills, Acts, regulations, proclamations and government notices) within its sphere of responsibility;
- (d) that each provincial line function Department is responsible for handling *litigation* instituted on behalf of or against the Department; and
- (e) that each provincial line function Department is responsible for the negotiation and drafting of *contracts* to which the Department is a party or signatory.

2. These draft policy guidelines recognise the following principles in relation to the *Chief Directorate: State Law Advisory Services* (the CD: SLAS) in the Department of the Premier:

- (a) that the CD: SLAS is responsible for providing a comprehensive, professional, inter-departmental, transversal state law advisory service to the respective provincial line function Departments protecting the interests of the entire Province;
- (b) that the CD: SLAS is responsible for co-ordinating the legislative initiatives of the respective provincial Departments; and

- (c) that the CD: SLAS is responsible for ensuring that legislation promoted by the respective provincial Departments comply with the Constitution of the Republic of South Africa, 1996, any other relevant legislation, as well as parliamentary precepts and format.

B. THE CD: SLAS IN PERSPECTIVE

The relevant *Key Responsibility Areas* of the CD: SLAS may be summarised as follows:

1. Legislative drafting (*legal editing and certification of draft Bills*): To establish or adapt the existing legal framework within which the respective provincial Departments are to fulfil their functions under current changed circumstances; to assist provincial Departments in piloting legislation through the Provincial Legislature and appearing before the Standing Committees and Portfolio Committees of the Provincial Legislature to give evidence on legal aspects and formulation of legislation; to ensure that subordinate legislation (regulations) drafted by provincial Departments comply with enabling legislation and the Constitution, 1996; providing a drafting service of proposed legislation to those provincial Departments lacking capacity.

2. Furnishing legal opinions and advice: To render legal advice in relation to the interpretation and implementation of the laws administered by the respective provincial Departments when such requests are submitted by the line function provincial Departments.

3. Drafting and legally editing international memoranda of understanding: To assist in drafting and editing international memoranda of understanding to which the Province, or provincial Department or a municipality in the Province is a party or signatory.

4. Managing the Rationalisation of Laws: To implement and manage the envisaged programme of Rationalisation of Laws (*pre* and *post* 1994 legislation) in the Province (subject to sufficient and appropriate human, financial and other resources being allocated to the programme).

5. Ensuring compliance with the Constitution and other empowering legislation: To ensure that all administrative action taken by the political and administrative heads of the Department and other provincial departmental functionaries are in accordance with the Constitution, 1996, key national legislation and other applicable empowering legislation.

6. Liaising with: the Legal Administration sections of the respective provincial Departments and key national Departments, the Legal Advisors to the Provincial Legislature, State Law Advisors in other Provinces and the State Law Advisors at national level.

In respect of the Office of the State Attorney or private sector attorneys, the CD: SLAS will, in the normal course of events, not liaise with the Office of the State Attorney or private sector attorneys. In matters pertaining to legal editing and approval of contracts and handling of litigation in which individual provincial Departments are involved, the legal administration sections of the respective Departments will liaise with the Office of the State Attorney or private sector attorneys.

The ***professional and ethical norms and standards*** applied by the CD: SLAS in fulfilling the Key Responsibility Areas shall be those found in private legal practice adapted to the needs of the public service.

C. GUIDELINES FOR BRIEFING THE CHIEF DIRECTORATE: STATE LAW ADVISORY SERVICES

1. With resources and capacity at a premium, members of the CD: SLAS (Chief Directorate: State Law Advisory Services), who are legally qualified, should not have to be burdened with unnecessary clerical and administrative work such as locating relevant documentation or arranging file documentation in chronological order in order to collate information or sifting through files and other documentation to retrieve background information which should, in the first instance, be collated, summarised and provided by the instructing Department. The CD: SLAS, therefore, appeal to line function Departments to assist the CD: SLAS (and themselves by eliminating delays otherwise created) so that the CD: SLAS may concentrate on legal issues (its core

business) and thereby to provide an optimal service by utilising its resources optimally. Members of the CD: SLAS should not end up doing line function work of legal administration or other officers of line function Departments briefing the CD: SLAS; this would not only be a duplication of resources used, and time expended, in a particular matter, but would reflect adversely on the efficiency of both the CD: SLAS and that of the briefing Department.

2. In relation to Departments requesting **legal opinions** from the CD: SLAS, it is imperative that the CD: SLAS receives **full and proper instructions** from line function Departments to obviate unnecessary misunderstandings and delays which may, in the end, embarrass the Province. Any liaison with the CD: SLAS, the Office of the State Attorney or private sector attorneys must preferably take place through the legal administration section of the relevant provincial Department. The legal administration sections in the respective Departments, in these circumstances, provide a facilitating role whilst the primary responsibility will always remain with the instructing Department to provide all documents and information on a timely basis and in orderly fashion as required.

In this respect it is also imperative that both the legal administration officers and other line function officials attend consultations with the CD: SLAS or other legal counsel (the State Attorney, private sector attorneys and advocates) acting on behalf of the Department when they are requested to do so for purposes of briefing and providing information.

3. It is also important to note that matters should not as a matter of course be referred to the CD: SLAS merely because some or other law or legal issue is involved. Any matter arising within a line function Department, even if such matter has or may have legal consequences or implications, remains the full responsibility of the line function Department.

The CD: SLAS will advise on legal and factual issues arising when approached in the manner set out below. Advice given by the CD: SLAS will be based upon information, documents and instructions received from the instructing Department. This implies that any new information, document or subsequent change in the factual situation may materially impact upon the advice given and must therefore immediately be conveyed

to the CD: SLAS.

4. As officers of line function Departments are specialists in their fields and have intimate knowledge and experience in relation to their functions and duties, it is essential that where any legal question is referred to the CD: SLAS, the **briefing** be in writing and contain full particulars of the problem together with all relevant background information and facts, details as to legal provisions which may be applicable (where the line function Departments are responsible for the administration of certain laws), and copies of any relevant documentation, properly collated, including the assessment of the problem by the legal administration section of the line function Department concerned and the motivated view and considered opinion of the legal administration section of the line function Department. Ideally, any referrals of this nature should be done by and under signature of the head of the provincial Department concerned and be addressed to the Provincial Chief State Law Advisor.

5. Each line function Department is primarily responsible for the planning and detail of **proposed legislation** (Bills, Acts, regulations, proclamations and government notices) within its sphere of responsibility. The CD: SLAS should, ideally, only be involved in the legal editing and certification of final drafts, but is prepared to get involved at earlier stages provided that the necessary information and meaningful inputs are forthcoming from the line function Departments. The line function Departments should always bear in mind that they will have to implement and administer any new law or any new amendment to existing laws they administer so that their considered inputs are vital and imperative to future smooth administration and enhanced delivery.

Councils, boards, parastatals and other bodies or institutions under the political control or supervision of the Premier or an MEC must submit proposals for legislation through the Department of the Premier or the relevant Provincial Department, as the case may be. The relevant line function Department must then handle the draft legislation as envisaged in the preceding paragraph.

In order to allow the CD: SLAS, which is responsible for legal editing and certification of legislation before introduction in the Provincial Legislature, to plan its work programme, and to allow the Provincial Legislature to plan its programme, it would be helpful for Provincial Departments to submit details of their proposed Legislative

Programme for any given year, to the CD: SLAS by **31 January**. This proposed Legislative Programme should contain a list of draft Bills which the responsible MEC intends introducing in the Provincial Legislature in the **session of the Legislature** commencing in **February** of any given year. The list should also contain details of the **dates** on which Provincial Departments intend formally referring the Bills listed to the CD: SLAS for legal editing.

The **legal editing** process may, depending upon the length and complexity of a Bill, take from 21 - 30 days before certification.

After **certification**, the Bill must be **translated** into *isiZulu* and Afrikaans. Departments should budget 21 - 30 days for translation.

After certification and translation, Bills must be submitted by the line function Department/ MEC to the Speaker of the Provincial Legislature. The Bill must then be **published for comment** for 30 days before referral to the relevant Portfolio Committee of the Provincial Legislature.

It could, therefore, in any given case take up to 3 months for a Bill to be referred to the Portfolio Committee of the Legislature after formal referral to the CD: State Law Advisory Services for legal editing and certification. Provincial Departments should be aware of this and plan their Legislative Programmes accordingly, bearing in mind recesses and adjournments of the Provincial Legislature.

Departments should please refrain from submitting Bills which have not yet been certified to the Executive Council (Cabinet) even for so-called "in principle approval". Only **certified** legislation should be submitted to the Executive Council.

The Rationalisation of Laws Project will also, of necessity, impact on the Legislative Programmes of Provincial Departments.

6. The relevant and appropriate line function Department is responsible for negotiating the contents of any **agreement** or **contract** entered into on behalf of the Department with suppliers, developers, consultants, service providers and the like. The contents of

any contract cannot be left solely to the legal administration or legal services section in a Department simply because it is a "legal" matter. Legal administration sections of Departments are usually not party to preparatory negotiations culminating in an agreement or the drafting of tender documents and therefore need the inputs of the line function Directorates. Clarity, well-defined and categorised responsibilities of both parties to a contract are central to the ultimate success of any contract. Vagueness will inevitably lead to confusion, non-performance and, possibly, litigation. The legal administration sections of Departments must legally edit all tender documents and contracts.

Where agreements are entered into with successful tenderers or private sector parties (for example large companies) the practise is for such parties to brief their attorneys to draft a proposed agreement which will be legally edited by the Department through the departmental legal administration sections before the Department may sign.

The CD: SLAS will, therefore, as a matter of course not usually be involved in the legal editing or vetting of agreements entered into, or contracts concluded by, provincial Departments.

D. CONCLUDING REMARKS

The above-mentioned guidelines may be revisited and refined in future, but it is hoped that they will initially serve to promote and strengthen a partnership approach between the Office of the Premier and the other line function Departments in the Province.

These guidelines may also be used as a basis or point of reference for Departments in providing inputs to assist the Office of the Premier in improving the level of service in the area of transversal state law advisory services.

It is hoped that the implementation of the above-mentioned guidelines will be a positive step forward.

It would also be helpful for heads of Department to distribute the contents of this document to the legal administration sections and each Directorate within their respective Departments to ensure a common understanding of the role and function of

the CD: SLAS and the uniform implementation of the proposed guidelines for Departments when engaging the services of, or briefing, the CD: SLAS.