



LIMPOPO

PROVINCIAL GOVERNMENT
REPUBLIC OF SOUTH AFRICA

DEPARTMENT OF AGRICULTURE

POLICY ON LEGAL SERVICES

**Guidelines on drafting contracts, legal opinions and
management of litigation**

Ref:2/7/P

2015 Edition

Date approved: ... 10 July 2015 ...

Recommended by:

.....

Head of Department

(Maisela, RJ)

2015-06-24
.....

Date

Approved by:

.....

Hon MEC for Agriculture

(Matshoge, BAJ)

10/7/2015
.....

Date

TABLE OF CONTENTS		PAGE
1.	Legal mandate	1
1.1	Legislation	1
1.2	Court rules	1
1.3	Objectives	1
2.	Agreements/ Contracts	2
2.1	Problem statement	2
2.2	Introduction	2
2.3	Purpose	3
2.4	Definitions	3
2.5	Basis of agreement	4
2.6	Contract essentials	4
2.7	Legal requirements for a valid contract	5
2.7.1	Consensus	5
2.7.2	Capacity	6
2.7.3	Performance	6
2.8	Drafting process	6
2.9	Procedure for approval of contracts	9
2.10	Breach of contract	9
2.10.1	Remedies for breach	10
2.11	Amendment of contracts	10

11	2.12	Need to procure
12	2.13	Procurement of Services
13	2.14	Checking and editing of contracts
14	2.15	Different types of agreements entered into by LDA
14	2.15.1	Lease agreement
15	2.15.2	Memorandum of Understanding
16	2.15.3	Service Level Agreement
17	2.15.4	Cession
18	2.15.5	Supply Chain Management Contracts
19	3.	Litigation
19	3.1	Purpose
19	3.2	Applicability
19	3.3	Introduction
20	3.4	General
23	3.5	Claims against the State
23	3.6	Claims on behalf of the State
24	4.	Legal Opinion
24	4.1	Introduction
24	4.2	Definition
25	4.3	Purpose
25	4.4	Procedure of requesting a legal opinion
26	4.5	Preparation of a legal opinion

27	4.6	Time frame
28	4.7	Request to the State Attorney or Counsel
29	4.8	Request to the office of the State Law Advisors
	4.9	Obtain legal opinion from Counsel versus obtaining from Chief State Law Advisor
31	4.10	Challenges
31	4.11	Instructions
32	4.12	Format of legal opinion
32	4.12.1	Purpose
32	4.12.2	Background
33	4.13	Finalisation of legal opinion
33	5. Inception date	
33	6. Enquiries	

1 LEGAL MANDATE

1.1 Legislation

- 1.1.1 Constitution of the Republic of South Africa
- 1.1.2 Public Finance Management Act 1 of 1999
- 1.1.3 State Attorneys Act 56 of 1957
- 1.1.4 Labour Relations Act 66 of 1995
- 1.1.5 State Liability Act 20 of 1957

1.2 Court Rules

- 1.2.1 High court rules
- 1.2.2 Magistrate court rules

1.3 Objective

The Sub-branch: Legal Services aims to provide legal support of the highest quality to clients and staff. This can only be achieved if the sections and officials give their full co-operation and submissions, instructions and subsequent assistance to the Sub-branch: Legal Services promptly and as fully as possible.

2 AGREEMENTS / CONTRACTS

2.1 Problem Statement

- (a) Delay in giving instructions and approvals
- (b) Insufficient information in giving instructions
- (c) Lack of uniformity in dealing with development of contracts

According to the transversal service standards of the Province the time frame for drafting the contract is seven working days of full instructions but, generally the Sub-branch: Legal Services does not comply due to challenges that are often encountered i.e.

- (a) Drafting the contract after approval of the Bid
- (b) Delays in submission of information by the relevant demand Manager to Legal Services;
- (c) The unavailability of the Demand Manager when needed for consultation and;
- (d) Demand Manager not forthcoming with information; and
- (e) Delays in Legal Services caused by "all urgent instructions"

2.2 Introduction

LDA regularly enters into various kinds of contracts in its day to day functioning; as such these guidelines are important to LDA officials. An LDA

functionary seeking to enter into a contract on behalf of LDA has to request the Sub-branch: Legal Services to draft the contract or have it vetted if it was drafted by that functionary or the other party to the contract.

A contract is an agreement between two or more people entered into with an intention of creating rights and obligations. Where people have a contractual relationship, one party has the right to performance by the other and the other party is under a duty or obligation to render that performance. In short, a contract can be defined as a legally valid, binding and enforceable agreement which create rights and obligations between the parties.

Due to the importance of the results of the contract for example the creation of rights and obligations the law has set requirements for the creation of a legally binding contract. A legally binding contract is that which can be enforced by a court of law, in other words forcing the party that failed to perform to undertake action that will make good his/her failure to perform. The contract must be legal in order to be enforceable in law.

2.3 Purpose

The purpose of this guideline is to outline the general contractual principles such as the formalities of entering into a legally valid, binding and enforceable contract, the capacity to bind LDA in a contract, and what happens when one of the parties to the contract is in breach or fails to fulfill their duties towards the other party.

2.4 Definitions

Contract: Offer by a party and acceptance by the other.
Client: A demand manager (Internal or External)

2.5 Basis of an Agreement:

Consent forms the foundation of an agreement, for the agreement to be valid there must be consensus. The intention of the parties must be combined.

A person cannot enter into an agreement alone but each party must act in a different capacity on each side of the agreement to achieve a common purpose.

There must be consent between two or more parties to connect their intentions in order to achieve a specific purpose in a formal or informal manner.

2.6 Contract Essentials

- a. Parties
- b. Price
- c. Product / Performance must be possible; a contract which is impossible is unenforceable.
- d. Parties could be natural or juristic persons

- (a) Have a common understanding of the rights and obligations they wish to create;
- (b) Have a common understanding that each party intends to bind themselves legally to the other party in respect of those rights and obligations and;
- (c) Be aware of their agreement or common understanding in respect of the obligations as well as each other's intention to be bound to the other in respect of those obligations. When such awareness does not exist no contract exist between the parties.

For the parties to reach consensus, they must:

Consensus (or the meeting of the minds) forms the basis of a contract as it is an expression of the intention of the contracting parties to create rights and obligations that arise between the parties once they have entered into the contract.

2.7.1 There must be consensus between the parties

The law requires that the following requirements should be met in order for a contract to be valid. These general requirements apply to all types of contracts. If any of these requirements have not been complied with, a valid contract is not created.

2.7 Legal Requirements for the creation of a valid contract

- e. Price may be firm / fixed or subject to escalation
- f. Capacity to contract

2.7.2 Capacity to contract

The law requires the party entering into a contract to be competent to do so,

The capacity to contract has a further meaning when LDA wishes to enter into a contract namely; the person who signs a contract on behalf of LDA must be authorized to do as such. This means that the person who signs must be the Head of Department as the accounting officer in terms of the PFMA or an official who have been delegated the authority to sign.

2.7.3 Performance must be possible

Our law does not give effect to illegal contracts for example; a contract for the sale of drugs. Our law sees it as against public policy to intervene in disputes arising from illegal contracts.

Similarly, a contract which is impossible to perform is unenforceable.

2.8 Drafting Process

Before drafting a contract the following questions need to be looked into:

- (a) Why do we want to have a contract?
- (b) What is the subject matter (what need to be done)?
- (c) When is the agreement supposed to be performed?
- (d) How is it going to be done, it could be in terms of technology or machinery.

(e) Who owns the machinery, is it the Department or the Service

Provider?

(f) Who is going to do the job?

(g) At what cost?

(h) Is it a short term or long term contract?

Before the contract goes for tender a draft copy of the contract that fully incorporates the agreement between the parties must be referred to the Sub-branch: Legal Services. The referral of the contract must be done by way of a submission addressed to the Sub-branch with a detailed background of the contract.

If the contract has gone through the tender process it must be accompanied by all documentation i.e.

(a) Terms of reference,

(b) Tender work plan,

(c) Scope of work,

(d) Letter of appointment,

(e) Specification and conditions for approval by

the Bid Committee;

(f) Any other annexure that is going to be

attached to the contract

(g) Applicable policies, if any

After receipt of the contract the Sub-branch will acknowledge receipt of instructions in writing and inform the client as to who is handling the contract in the Legal Services section for liaison purposes.

The client should give clear instructions and must be available for consultation in order to be able to clarify issues. The interaction is not only limited to client and the Sub-branch, but also includes the engagement of the Service Provider and Supply Chain Management.

The contract will be scrutinized and analyzed with the assistance of client until the process is completed and the contract is signed by both parties. After signature of the contract the contract must be enforced and managed to ensure compliance.

A general contract should, *inter alia* have the following standard clauses;

- (a) Purpose
- (b) Definitions
- (c) Costing, Payment and Invoicing
- (d) Performance
- (e) Duration
- (f) Dispute Resolution
- (g) Breach and Termination
- (h) Variations, Amendments and Omissions
- (i) *Domicilium Citandi Executandi*(this is only for judicial purposes not for correspondence between the parties)
- (j) Applicable Law
- (k) Insurance
- (l) Warranties
- (m)Indemnities and limitation of Liability
- (n) Waiver
- (o) Force Majeure
- (p) Assignment and Cession

2.9 Procedure of Approval of the contract

The process is initiated by a demand manager, approved by his/her General Manager prior referral to the Sub-branch: Legal Services, in brief the instructions must be done through the GM.

Legal Services will draft, vet or edit the contract then refer it back to the demand manager. Due to financial implications that accompanies the contracts it is recommended that the contract should be recommended by the General Manager of the relevant component and referred to the Chief Financial Officer and then to the Head of Department for approval.

2.10 Breach of Contract

A breach of contract occurs when a person who is a party to a contract fails to do what she/he promised to do in the contract. A breach of contract is also committed if part of the contract takes place, but other obligations are not carried out.

In the case of a contract for rendering of services it may be difficult to prove a breach especially if the service is partially rendered. It is extremely important to set out the deliverables in a contract in greater detail. The

2.11 Amendment of contracts

This means that the court will order the person who committed the breach to do what he/she promised in the contract.

Sometimes the court will not order specific performance, this will happen in these cases:

- (a) If it is impossible for the person who committed the breach to fulfill his/her promise;
- (b) If paying money is a better way of compensating the innocent party; or
- (c) If it would be unreasonable or unjust to make the guilty party carry out the contract.

The law will help the innocent person if a contract is breached by providing one or more of the following corrective actions:

- (a) Specific performance;
- (b) Interdict;
- (c) Damages; and
- (d) Cancellation of contract

2.10.1 Remedies for breach

quality standards that the deliverable must comply with must also be circumscribed as far as possible.

It is possible to amend or effect some changes to a contract after it has been entered into. A common way of amending a written contract is by a written amendment signed by both parties.

Most contracts have a provision that stipulates that any amendment to the contract must be in writing and signed by or behalf of both parties. This implies that any verbal amendments discussed and agreed to will have no effect, unless they are reduced to writing and signed.

There are many types of contracts that could be entered into based on the intention the parties to the contract would like to achieve. All contracts regardless of the type of the contract have to comply with the legal requirements of a contract.

2.12 Need to procure

The demand manager must identify the need, resources required to meet the needs, how to procure, and the cost of resources, link the resources to the available budget.

The extent of service to be rendered and the manner in which those services are to be delivered must be clearly defined.

The demand manager must then develop the terms of reference and determine the deliverable indicators. Section 19 of the Constitution provides that when an organ of state contracts for goods or services it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost effective.

2.13 Procurement of Service

With due consideration of predetermined financial limits, the Procurement Delegations are granted in order to expedite the process to obtain goods and services.

When the Department chooses one bid or offer out of all suppliers and informs the supplier that services should be rendered, the Department is then accepting the offer made by the supplier subject to the contract.

An agreement / contract comes into existence between the Department and the supplier and must stipulate what services to be rendered, when should it be rendered, how should it be rendered and what the purchase price should be as stipulated in the terms of reference or specifications. The contract must be signed by the authorized delegated personnel being the Head of Department in his /her capacity as the Accounting Officer.

The Public Finance Management Act, 1999, Treasury Regulations 2000 issued in terms of the said Act, Provincial Tender Board Act, 1994 its conditions and procedures must be complied with in all cases.

Once a supplier or a service provider has been identified and approved in line with the prescribed supply chain management requirements, a supply chain management contract is signed with the supplier or service provider. A supply chain management contract is normally made up of the following components:

- (a) Ensuring that the contract to be entered into is necessary, justifiable and funds are available.
- (b) Complying with the applicable legal framework and

The client remains responsible for the following:

The client should submit the proposed contract in the form of a draft and indicate the objective in detail. The Sub-branch: Legal Services will ensure that the form of contract is correct according to law and that the intentions of the parties are clear and if necessary Legal Services will reword or redraft the contract.

2.14 Checking and Editing of Contracts

- (a) a proposal of the bidding entity—this normally constitutes an offer;
- (b) the terms of reference issued by the LDA in respect of the relevant bid;
- (c) The LDA's acceptance letter of the offer;
- (d) The General Conditions of contract (GCC) issued by the National Treasury which contains general conditions relating to bids, for example, the requirement that a tender may not be issued to an entity whose tax matters are not in order and that an original tax certificate of a bidding entity issued by the Receiver of Revenue is required prior to a bid being awarded. The GCC applies to all bids invited and awarded by government entities.
- (e) Special conditions of contract entered into between the LDA and the bidding entity. These are agreed to between the LDA and the entity to which a tender is awarded and are specific conditions to the contract entered into.

(c) Ensuring the necessary liaison with Supply Chain Management for approval of the Bid.

When an agreement must be entered into, a draft agreement must be drawn up by the functionary, recommended by the official responsible for the budget and under cover of a memorandum, in which all relevant information is provided, be submitted to the Legal Services component. If problems are experienced with the drawing up of a draft agreement, Legal Services component may be approached for guidance and assistance in this regard.

The official in the Sub-branch: Legal Services component that would have been allocated the file will check the legalities and edit the contract and submit the draft agreement to the Senior Manager for legal editing and approval.

Legal Services shall ensure that components are fully involved in the consultations with Service Providers and other stakeholders.

2.15 Different agreements entered into by LDA

2.15.1 Contract of lease

A lease is a contract in terms of which one party (referred to as the lessor), agrees to give to the other party (referred to as the lessee), temporary use and enjoyment of a thing in return for the payment of rental.

Contracts of lease have the following essential elements:

(a) the lessee must only use the thing let to him/her temporarily

- (b) the lessee may not keep it permanently or dispose of it
- (c) it mentions the duration of the lease
- (d) it stipulates the conditions for the lease

2.15.2 Memorandum of Understanding

A memorandum of understanding (Mou) is normally entered into between parties who seek to cooperatively work together on an agreed upon project or meet an agreed upon objective.

It also serves as a written understanding of the agreement between parties in relation to a project they seek to cooperate on and defines the expectations, terms and conditions of working relationship between two parties.

It is often entered into as a precursor to a formal contract, however unlike a memorandum of agreement it does not contain binding provisions. The provisions of a Mou are only morally binding.

Parties to a Mou normally fulfill the promises made in a Mou to the other party in the interests of good collaborative relations. Agreements between organs of state are often in the form of a Mou, since organs of state may not litigate against each other and there is therefore no point in entering into formal contracts.

A Mou contains the following provisions:

- (a) The names of the parties;
- (b) The reason for entering into the Mou;

2.15.3 Service Level Agreement

- (c) A description of the project for which the Mou is entered into;
- (d) The objective of the project and planned results;
- (e) The duties of each party to the Mou;
- (f) A description of the activities which will be undertaken to achieve the objectives and planned results of the project;
- (g) The establishment of a collaborative structure that will govern the project and representation of each party on such structure;
- (h) How disputes arising between the parties will be resolved;
- (i) The duration of the project or the collaborative agreement; and
- (j) Other relevant provisions.

A service level agreement (SLA) bears all the characteristics of an ordinary contract. This contract is often secured through tender in order to create a binding relationship between the parties, and must be referred to the Sub-branch: Legal Services before evaluation by the bid committee.

It is normally entered into where the object of the contract is the provision of services, as its main objective is to set service standards with a view to providing a threshold against which good service would be measured.

An SLA is fully binding on the parties and may be concluded as a standalone contract or as an addendum to a principal contract.

An SLA normally has the following characteristics:

- (a) It may be the only contract signed between the parties or may be an annexure to another contract

- (b) It is fully binding on both parties and enforceable like any other contract in the event of breach.
- (c) In the event of breach of contract by the service provider, LDA is entitled to enforce the contract in a court of law.
- ## 2.15.4 Cession

A cession is a contract in terms of which one person transfers his/her rights to another person.

Cedent: a person who transfers his/her rights to another person by means of a contract of cession.

Cessionary: a person whom rights are transferred by means of a contract of cession.

As already mentioned above that contract creates rights and obligations in favour of and against parties to the contract.

It is possible for such rights and duties to be transferred to another person who was not party to the initial contract. Such a transfer is referred to as cession. The cession does not create new rights and obligations but merely transfers the existing rights and duties to a specified third party.

A person ceding the right or obligation is known as the cedent while the person to whom the right or obligation is ceded is the cessionary.

Once a cession agreement exist:

The rights and duties being ceded are now held by the person to whom they are ceded and the previous holder of the right or duty is relieved from them; If the cedent only ceded his/her right and not he obligations created by the same contract, he/she remains liable for those obligations even though he/she no longer has enjoyment of the rights in question; and

The cessionary acquires the same rights as those enjoyed by the cedent and not better rights.

For a cession must comply with the following requirements:

- (a) The cedent must be the holder of a right or duty which is being ceded;
- (b) The right or obligation must exist and must be capable of being ceded;
- (c) The cedent must have an intention to cede the right and the cessionary must have the intention to acquire it; and
- (d) The cession must be lawful.

2.15.5 Supply chain management contracts

Supply chain Management is a systematic and customer focused process used for sourcing goods and services.

It provides for a systematic and transparent approach to the management of the flow of goods and services and related information through a constant chain encapsulating all role players.

Section 38(1) of the PFMA requires Directors –General to ensure that their department have and maintain an appropriate procurement and

provisioning system which is fair, equitable, transparent and cost effective and must comply with the Preferential Procurement Policy Framework Act, 5 of 2000.

3 LITIGATION

3.1 Purpose

To provide for procedure in the:

Management and coordination of litigation;

Approval of mandates in handling litigation.

3.2 The policy applies to:

(a) Litigation against the Department;

(b) Litigation by the Department;

(c) Requests for legal representation by employees

3.3 Introduction

3.3.1 LDA is constantly involved in litigation, either as the party instituting proceedings or the party against whom legal proceedings are instituted.

3.3.2 The MEC and the Head of Department are normally cited when litigation is instituted on behalf of or against the department as nominal respondent or defendant.

3.3.3 The State Attorney acts on behalf of all government departments (including officials of the state in respect of cases arising from the performance of their state duties) in all cases instituted by or against them, unless the State Attorney has given consent for a private Attorney to represent a government department or the official.

3.3.4 The Sub-branch: Legal Services is the primary point of contact between the State Attorney and the department in respect of all cases instituted by or against LDA and its officials in respect of cases arising from the performance of their duties.

3.3.5 After the formal litigation process has started, for example after the summons has been served and the instruction given to Legal Services to brief the State Attorney, LDA officials should not communicate with the party that has instituted proceedings against the department, or the party against whom the department has instituted legal proceedings without the involvement of the State Attorney.

3.3.6 Any departmental official involved in the case may also not attend any interview with or furnish any information to Attorneys or Counsel representing the other party to the case. Any such requests for interviews or information should be submitted to Legal Services for submission to the State Attorney. The State Attorney will respond to

such requests and will normally attend such interviews with the official concerned, if the State Attorney is of the opinion that it is in the interest of the department for the official to submit to an interview.

3.4 General

3.4.1 In all cases where the Department or its subsidiaries is involved in any litigious matter where a unit or person in their official capacity is served with a letter of demand or summons, then the relevant unit or sub branch should forthwith send such a letter or summons to the Legal Services for attention either to respond to the letter of demand or enter a notice of intention to defend through the office of the State Attorney.

3.4.2 In terms of the State Attorney's Act it has been mandated to provide legal representation on all litigious matters on behalf of all government organs. This also includes the State Attorney engaging the services of Counsel (advocates) to represent the Department depending on the complexities of the matter involved.

3.4.3 In the submission of cases to the legal services component the following must be provided:

(a) A complete exposition of the facts and circumstances of the matter, contracts if it a contractual debt, all other documents pertaining to the case, complete statements by witnesses and relevant legislation, regulations and stipulations must be submitted in duplicate.

(b) The view of the head of the sub branch concerned in respect of the case must be given in a memorandum format.

(c) In matters of urgency action i.e. verbal instructions must be taken rapidly so that the necessary steps can be taken in good time.

(d) Where the State Attorney is required to act on behalf of officials the relevant undertaking to the State must be given without fail.

(e) A reference number, contact person, telephone number and room number must also be provided.

(f) The officer must be duly authorised by accounting officer to give full instructions or more specially to give instruction to settle matters.

When matters have been referred to the state attorney, they must be left in their hands. Communication between the parties is not allowed anymore with the other side at that stage. In case of matters that are in Court Attorney of record shall keep clients advised of all the progress.

This means that after the services of the state attorney have been requested in any matter no communication between the department concerned and the opposing party may be carried on in respect of the matter except with the approval of or through the intervention of the State Attorney or his or her appointed correspondent.

An exception is made in the case where a debtor wants to make payments on his/her account directly to the department.

The State Attorney handling the matter should show accountability by complying with court rules, arrange consultations, brief counsel when he see it deem fit and keep the department abreast of the progress in the matter.

3.5 Claims against the State

3.5.1 Were the Department or an official is been sued in the official capacity then such letters of demand or summons should be sent to the legal services to determine the necessary actions to be taken to avoid default judgments. It is emphasised that officials who receive summons must not keep them for more than (2) two days without sending them to Sub-branch: Legal Service to avoid default judgement.

3.5.2 The Department in terms of State organs act has 20 days to respond to engage with such summons to determine a way forward by obtaining a mandate from the Head of Department and then instruct the State Attorney to act on behalf of the Department or official.

3.5.3 The unit that has received the letter of demand or summons must provide all relevant documents and prepare a memo to legal services to assist it to give comprehensive instructions to the office of the State Attorney.

3.6 Claims on behalf of the State

3.6.1 Were the Department has suffered any loss from its clients or officials it would have a claim against such loss that it has suffered.

3.6.2 If insufficient information has been submitted then a request for the further information must be made. This should be done as soon as possible to avoid creating the impression that the Legal Advisor is dealing with the matter and to create the expectation of an early reply.

Never submit inadequate information by making assumptions, if possible arrange a meeting with the Department to clarify the issues.

3.6.3 The instructions must be in writing and it must be clear and unambiguous.

4

LEGAL OPINION

4.1 Introduction

Legal opinions arise out of line functions and relate to the determination of a legal position, or an answer to a legal question that has legal consequences. There are no strict standards according to the way a legal opinion must be written. The following are just guide lines on the mode of writing legal opinion.

The legal opinion must have headings and paragraphs and all of those must be in a numerical system to show how opinion is structured. Consideration should be

given to both the language and the content when addressing the information to a client. The language used in the opinion should be simple, clear and understandable.

4.2 Definition

A legal opinion is an advice that is provided by a legal advisor to an internal / external client on any matter that may have legal implications to the Department or other stakeholders.

4.3 Purpose

The purpose of a legal opinion is to prevent unnecessary legal implications that may result in litigation and to guide the recipient or client of the content. Legal opinions have different purposes depending on the matter. The purpose will entail whether you are advising e.g.

- (a) That the contract be signed after being scrutinised,
- (b) That the Department should settle or not with regard to a particular claim etc,

4.4 Procedure of Requesting a legal Opinion

A functionalary of LDA who requires legal advice or an opinion often does so informally by walking into the office of a Legal Administration Officer or by contacting them by telephone.

This informal approach is generally used when the legal opinion relates to a minor legal question however a more formal approach is desirable when a written opinion is required.

The functionary requiring a written legal opinion from the Sub-branch: Legal Services is required to submit a written instruction to the Senior Manager. This can be in the form of a memorandum, fax or e-mail.

The instructions must contain the following information:

- (a) A detailed exposition of all the facts;
- (b) Background to the circumstances that gave rise to the need for a legal opinion;
- (c) Reference to relevant legislation provisions, policies, departmental circulars, decided cases or any other departmental or other directives that the functionary is aware of;
- (d) Reference to a legal opinion if any previously expressed on the matter;
- (e) The functionary's own point of view on the matter;
- (f) A formulation of the legal questions the requester of the opinion would like answered also referred to as the problem statement.

On receipt of the written instructions the Senior Manager: Legal Services will open a file, allocate a reference number to the file and allocate the matter to a Legal Administration Officer for his or her attention.

When allocating the request the Senior Manager will be guided by the nature of the request and the expertise the request calls for.

Send a written acknowledgement of receipt of the request, notify the requester as to who is handling the matter and notifying him/her of the reference number allocated to the matter and the contact details of the officials allocated the matter. The reference number must be quoted in all correspondence relating to the matter.

4.5 Preparation of a Legal Opinion

The official to whom the file is allocated will:

- (a) Review the request together with the supporting documents and assess the problem from the available facts;
- (b) Request further information or clarification from the requester if necessary;
- (c) Request a consultation with the requester of the legal opinion if the legal opinion required or the facts to the request are complex.

On receipt of further information the official will conduct the necessary research, write the opinion and send it to the functionary who requested it. The Sub-branch: Legal Services will respond to any reasonable and lawful request forwarded to their attention. The turnaround time for this service is largely determined by the complexity of the legal question to be determined, the amount of research required to formulate the opinion as well as the relevant official's workload.

Generally the time in which a request for a legal opinion is responded to is (7) seven working days of receipt according to the service standards of the Department.

4.6 Time Frame

Colleagues must refer matters for legal opinions in time, immediately the need to seek a legal opinion arises, to enable Legal Services ample time to research and attend to the request within the service standards.

It is important for LDA officials to follow the above procedure. Avoid making a verbal request for a legal opinion, particularly when a written legal opinion or an opinion on a complex matter is required.

Following the above procedure and furnishing all the required information when the request is made will speed up the process. It is also important to ensure that the legal question to be determined is clearly formulated.

4.7 From the State Attorney or Counsel

LDA officials requesting a legal opinion from the State Attorney do not approach the State Attorney directly but do so via Sub-branch: Legal Services.

The request is submitted to Legal Services following the procedure set out above. The Sub-branch: Legal Services may refer the request to the State Attorney under the following circumstances:

- (a) If the capacity of Legal Services is limited and the matter cannot be attended to immediately;
- (b) If the expertise required for the resolution of the matter is not available within the Legal Services;
- (c) When litigation concerning the legal question to be determined is imminent or is in progress.

Legal Services may refer the request directly to the State Attorney or draft an opinion and refer it to the State Attorney for vetting.

If the issues to be determined are complex and it is necessary for an opinion to be obtained from Counsel, the State Attorney will brief Counsel to prepare the opinion.

The choice of the Counsel to be briefed lies with the client; however if the client does not have the preferred Counsel the State Attorney decides on the choice of Counsel.

When choosing Counsel the following factors are normally taken into account:

- (a) expertise in respect of the legal question to be answered;
- (b) standing at the bar-normally Senior Counsel (identified by the letters 'SC' after their surname) is briefed in complex matters;
- (c) the need to contribute to the development of Counsel from a previously disadvantaged background. To achieve this objective, sometimes where Senior Counsel is briefed a Junior Counsel from a previously

disadvantaged background would be briefed to work with him or her to ensure the transfer of skills;

(d) the availability of the preferred Counsel. Sometimes an opinion is required on an urgent basis, but the preferred Counsel is tied up in other work. In such a case, it is best to brief another Counsel who is available.

It is important to note that not all Counsel called Junior Counsel is necessarily inexperienced. The term Junior is simply used to distinguish them from Senior Counsel, some Junior Counsels are in fact very experienced and highly skilled and can be briefed with confidence. It all depends on the nature of the matter.

Counsel may never be briefed directly. This is against their ethical rules. Counsel must always be briefed via an Attorney. Therefore when a government department wishes to brief Counsel, this must be done via the State Attorney.

4.8 From the Office of the State Law Advisers

LDA officials requesting a legal opinion from the Office of the Chief State Law Advisers in the Office of the Premier do not approach the State Law Advisers directly but do so via the Sub-branch: Legal Services.

The request is submitted to Legal Services following the procedure set out above. The Sub-branch: Legal Services may refer the request to the State Law Advisers under the following circumstances:

(a) If the expertise required from the resolution of the matter is not available within LDA;

- (b) If the functionary requesting the opinion would like to establish a norm in the public service in relation to the legal question to be determined. Opinions issued by the Chief State Law Adviser would achieve this purpose as they are considered authoritative in the public service;
- (c) If the State Attorney has given a legal opinion and Legal Services does not agree with the opinion of the State Attorney;
- (d) If there is no litigation involved.

4.9 Obtaining Opinions from Counsel versus Obtaining Opinions from Chief State Law Adviser

There is no hard and fast rule as to when a department must use Counsel as opposed to the Chief State law Adviser or vice versa.

The following can assist to determine such a decision:

- (a) The Chief State Law Adviser does not charge a fee for this service as they are part of the public service; whereas private Counsel charges their normal daily or hourly fee;
- (b) If the matter concerned is the subject of actual or threatened litigation, it is best to brief private Counsel;
- (c) If the matter concerns a subject not directly related to litigation, it is best to brief Chief State Law Adviser

The Chief State Law Adviser is more familiar with public service rules and regulations and administrative law in general.

4.10 Challenges

The challenges often encountered are that sometimes as the Sub-branch: Legal Services we are unable to comply with the service standards because the functionary's instructions does not have full background information to the matter.

A consultation will be held to gather the full background. In other situations colleagues are not available for consultation and this may result in the delay of the finalization of the matter.

4.11 Instructions

Instructions must be clear and unambiguous. All correspondence and accompanying documents must be submitted so as to determine that the problems or issues in respect of which one is expected to offer an opinion has / have been identified with sufficient clarity.

If insufficient information has been submitted then a request for the further information must be made. This should be done as soon as possible to avoid creating the impression that the Legal Services is dealing with the matter and to create the expectation of an early reply.

4.12 Format of a Legal Opinion

4.12.1 Purpose

The purpose of any legal opinion should guide the recipient or client of the content of the document. Legal opinions have different purposes depending on the matter.

4.12.2 Background

As was already outlined above consultation with the client is vital so that one can be in position to have detailed background information. The set of facts in terms of background follows chronologically and it set out all the important facts.

(a) Legal Question

Legal Question sets out the basic legal question that the Legal Advisor must answer.

(b) Steps Taken

If there are any vital and relevant steps that the Legal Advisor took in preparation of his /her legal opinion, one may mention them as a guide to the legal opinion. Steps like consultation with relevant officials or stakeholders, internal investigation and compilation of a report.

(c) Legal Analysis

This is where the Legal Advisor applies the law to the facts. Discussion of the applicable law is the central purpose of the legal opinion. Under this heading the Legal Advisor can refer to legislation, statutes, acts, decided case law, policies etc.

(d) Conclusion

This is a summary of Legal Advisor's predictions about the state of law and its application to the case. This is where one expands on the brief answers furnished at the beginning.

(e) Recommendation

The legal Advisor recommends the best solution to the problem facing the client.

4.13 Finalizing the Legal Opinion

When the matter is finalised the Legal Admin Officer handling the matter will refer the draft of the Legal Opinion to the Senior Manager for vetting and or approval. After the Senior Manager approves the legal opinion, it can be forwarded to the client.

5. Inception date

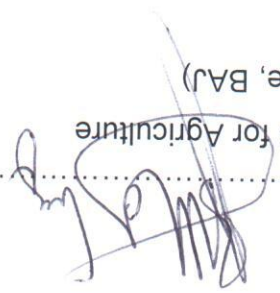
The date of approval is also the inception date of this Policy on Legal Services.

6. Enquiries

Enquiries regarding the Policy on Legal Services can be directed towards the Department of Agriculture at:

Tel: 015 294 3000
OR
Private Bag X9487
POLOKWANE
0700

Hon MEC for Agriculture
(Matshoge, BAJ)



Date

2015/06/24

APPROVED:

Head of Department
(Maisela, RJ)



Date

2015-06-24

RECOMMENDED: