



**NATIONAL  
DEMOCRATIC  
INSTITUTE**  
FOR INTERNATIONAL AFFAIRS

## ANALYSING LEGISLATION

How to Read Bills Critically

# **ANALYSING LEGISLATION:**

## **How to Read Bills Critically**

The National Democratic Institute for International Affairs  
(NDI)

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## The National Democratic Institute for International Affairs

The National Democratic Institute for International Affairs (NDI) is a non-profit organisation working to strengthen and expand democracy worldwide. Calling on a global network of volunteer experts, NDI provides practical assistance to civic and political leaders advancing democratic values, practices and institutions. NDI works with democrats in every region of the world to build political and civic organisations, safeguard elections, and promote citizen participation, openness and accountability in government.

NDI has worked in Namibia since 1989 and conducted a variety of programs to support the consolidation of its parliamentary democracy. NDI has been involved in voter education, electoral administration, parliamentary development, political party training and NGO capacity building. Under a grant from the US Agency for International Development, NDI is currently working in partnership with the elected and staff leadership of the National Assembly and National Council to strengthen the operations of Parliament.

NDI

85 Bülow Street, Windhoek, Namibia  
P.O. Box 11713, Klein Windhoek, Namibia  
Tel: (264)(61) 231-334  
Fax: (264)(61) 245-285  
E-mail: [office@ndi.org.na](mailto:office@ndi.org.na)

Parliamentarians and staff often indicate that the task of analysing bills is both technical and challenging. Outlined in this handbook are simple techniques to better understand proposed legislation. In particular, these methods focus on determining the major issues of policy contained in a bill; identifying the problems or issues a bill addresses; and analysing the solutions it proposes.

This handbook was drafted by the NDI staff following a series of workshops on bill analysis conducted by NDI for the Parliament of the Republic of Namibia. NDI appreciates the contributions made by Prof Matthew Chaskalson, University of Witwatersrand, South Africa; Clinton Light, Legal Assistance Centre, Namibia; Adv Vicky Erenstein Ya Toivo, Office of the Attorney-General; and the Members and staff of the Namibian Parliament.

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## GETTING STARTED

- ❑ It is important to have a factual and legal understanding of the issues to be addressed by a bill. Start by determining the problem the bill seeks to resolve?
  
- ❑ All bills should be read carefully. But, before reading a bill in detail, review the headings of different parts of a bill. This will help develop a clear sense of its structure.
  
- ❑ Also look at the section and subsection headings of a bill before reading it in detail. Try to determine how a section or a series of sections fits within the whole bill, and their relationship.
  
- ❑ The key to thoroughly understanding a bill is to look at it carefully, systematically and methodically. This requires that a piece of legislation is read more than once. With every reading, a comprehensive and more accurate understanding of a bill's strengths and weaknesses will be gained.
  
- ❑ It is important to produce an outline of a bill in order to understand its logic. An outline can be drafted by skimming the bill prior to reading it in detail. The outline should be written and referred to when the bill is read in detail.

- ❑ Not all words in bills have ordinary dictionary meanings. Therefore, it is important to read the definition section of a bill before reading the full text. Later, when reading a bill in detail, always refer to the definition section to seek clarification on terms and references that might be vague or ambiguous.
  
- ❑ Always keep in mind that legislation is intended to become law. Therefore provisions of a bill must be drafted to co-exist with other provisions of that law and/or with other existing laws. As necessary locate and generally understand the relevant existing law to be amended.



## BILL IDENTIFICATION

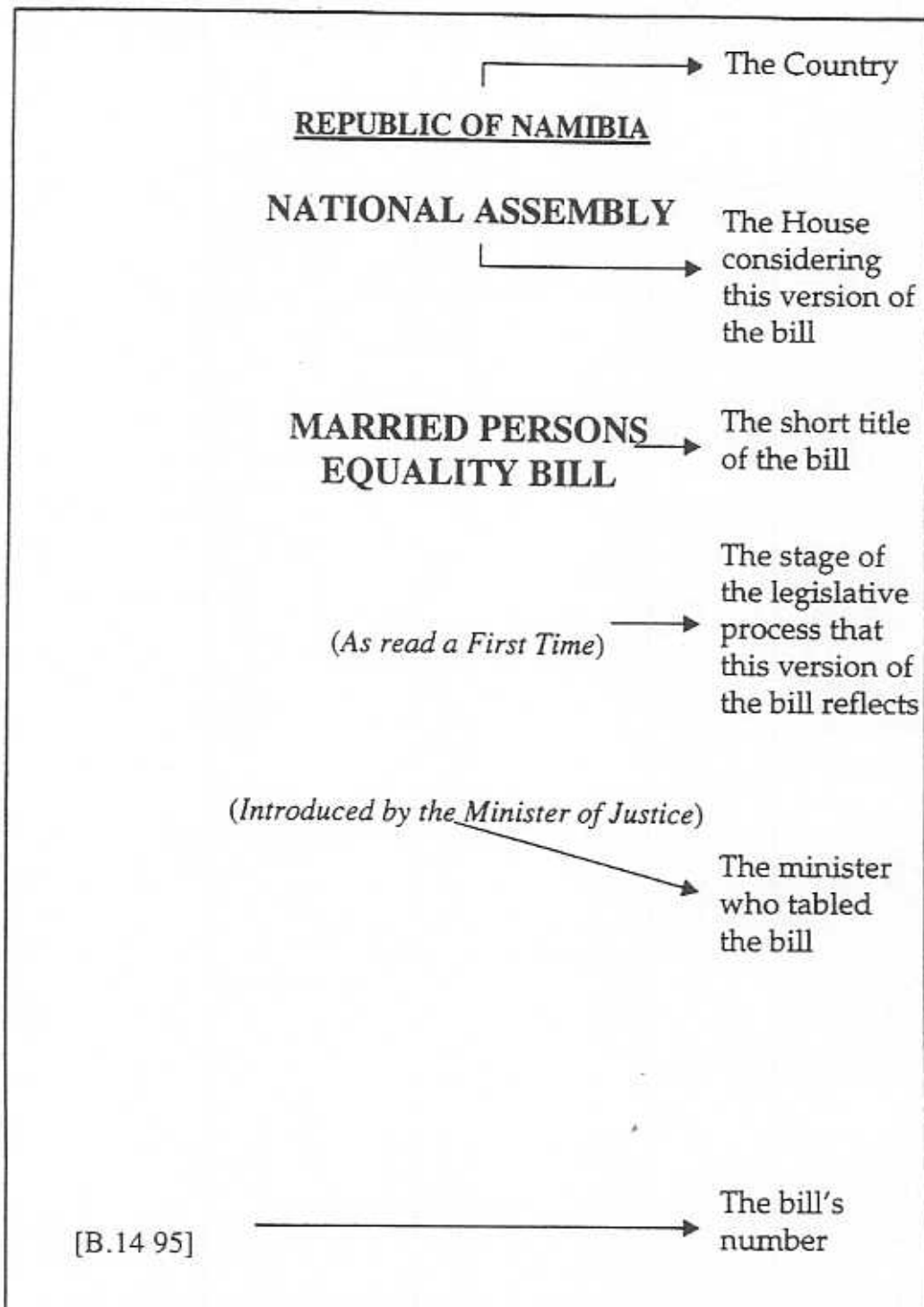
Every legislative institution should have a clear system for classifying, documenting and recording the bills it considers and enacts into law. It is important to have mechanisms that permit the legislative history of a country to be retraced. Courts, in particular, require knowledge of the evolution of all legal provisions in order to understand the intentions of its drafters.

Ideally, the cover page of a bill should contain the following information:

- the name of the country;
- the name of the individual who introduced or tabled the bill;
- the bill's number and short title;
- the name of the House considering the bill; and
- the stage of the legislative process that this version of the bill reflects (for example "As read a First Time" or "As passed by the National Assembly").



## SAMPLE OF A BILL COVER PAGE



## SHORT AND LONG TITLE

- **The short title briefly yet clearly states the subject matter of a bill.**

As noted in the last section, the short title appears on a bill's cover page. The short title should be brief and allow the reader to easily understand the issue under consideration. Bills are typically referred to and cited by their short title.

For lobbying and advocacy purposes, a short title can promote the ways in which the bill will benefit the public and improve the quality of life in a country. It can be used to demonstrate that, in spite of the obligations imposed by a law upon citizens, the public interest still remains the main concern of the legislator.

**Example:** Giving a bill the short title of "Clean Water Act" rather than "Act to Regulate the Control of the Water Resources in Namibia."

- **The long title, commonly called the preamble, specifies the objectives of the sponsor(s) of a bill.**

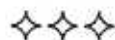
A long title should explain the context that led a legislator to decide to amend a law or create a new one. By referring to the problems a bill tries to address and

the solutions it proposes, the legislator defines his/her intentions. The long title stipulates the object and the scope of the legislation, its objectives, the people targeted, the territorial components, etc. The long title generally appears at the very beginning of the bill and starts with the word "To".

**Example:** The long title of the Married Persons Equality Bill reads:

"To abolish the marital power; to amend the matrimonial property law of marriages in community of property; to provide for domicile of married women; to provide for domicile and guardianship of minor children; to further regulate the liability for household necessities of spouses married out of community of property; to amend certain laws to give effect to the abolition of marital power; and to provide for matters incidental thereto."

Courts often refer to the long title of a bill to establish the intention of the legislation. This typically occurs when the meaning of a section is unclear or ambiguous. Misunderstandings can be avoided by drafting the short title, the long title, and the contents of the bill as clear, concise and consistent as possible.



## BILL STRUCTURE

### □ The structure of a bill affects its meaning.

When reading a bill in detail always keep the bill's structure in mind. Remember that every section must be read individually. Also, each subsection does not exist on its own, but relates to the section to which it is under.

**Example:** The Extradition bill provides in Section 22, subsections (2) and (3) the following:

- "(2) Any person ordered to be returned to a country under this Act may be removed from Namibia in the custody of the person authorised to receive him or her.
- (3) Any person who is in custody in terms of this Act and who escapes or attempts to escape from such custody -
- a) may be arrested in any part of Namibia in the like manner as a person escaping from custody after being arrested for an offence under the laws of Namibia;
  - b) shall be guilty of an offence and liable on conviction to imprisonment for a period not exceeding five years."

In this situation, paragraph a) should only be read in conjunction with subsection (3). If read with subsection (2) as well, it would mean that from the moment a person is taken into custody, he/she could be found guilty of an offence and be imprisoned for up to five years.

Breaking legislation down into sections and subsections not only separates ideas and topics, but promotes clarity and precision. Subdividing lengthy, complicated, and/or technical issues makes legislation easier to follow and its contents, easier to understand. Each subsection should contain a specific distinct idea or topic that is related and integral to the overall objective of the legislation.



## POLITICAL AND LEGAL ISSUES

- What is the object and the scope of this legislation?**
  - What does the legislation say? Why does it say this? What else should it say ?
  - Who is targeted by the bill? Who benefits from the bill? Who is hurt by the bill? Are there exceptions?
  - What rights, duties and/or obligations are defined in the bill?
  - Is the procedure prescribed in the bill fair and reasonable?
  
- Are political goals achieved by this proposed law?**
  
- How will the law be implemented?**
  - Who will implement the legislation? What agency, department or ministry will administer the product, programme or activity resulting from the bill?
  - What will be the rights and obligations of political and administrative officials in the ministry(ies)?

- Do the Minister and relevant civil servants have enough power to implement the law? Is the degree of discretionary power granted to the government or an administrative official appropriate?
  - What is the political, economic and social impact of that legislation? Does the government have the financial and administrative means to control and enforce this legislation?
  - What is the enforcement process? What penalties and sanctions (civil and criminal) should be included in the bill to promote compliance with the bill?
  - Can citizens appeal against the decisions made by the government (e.g. is a tribunal established)?
- **What is the funding mechanism for service, activities, or programmes created by the bill?**
- Are specific financial expenditures and allocations identified in the legislation?
  - Where will financial resources for the activities called for by the bill come from?
  - How are financial resources to be obtained to cover the expenses of enacting the legislation?

❑ Will there be public consultations before the adoption of the bill?

- Who has been consulted so far?
- Who else should be offered an opportunity to express an opinion:

Other ministries?

The business community?

NGOs?

Unions?

Churches?

Members of the public?

Other experts?

- What can be done to make sure that the law will reflect the views of the majority?
- Does the bill achieve the best compromise between a variety of potential solutions?
- If a procedure of consultation is held or outside input is authorised, when, how, where should it take place? What happens if this is not done?

❑ What is the period of application of the law?

- When will the law come into operation? What is the effective date of enactment? Can anything delay the effective dates of the bill? Is the bill effective retroactively (meaning that its effective date is prior to the date that the bill was enacted)?



- What considerations should be taken into account before the law is enacted? Is there a period when the law gradually comes into effect? Are any transitional dates clearly spelled out in the bill?
  - Is there an expiration date for the application of the law? If so, does this date make sense?
- Does the bill include any provisions for oversight?
- Can this bill pass all tests of legality?
- Do experts consider all aspects of this bill to be consistent with the Namibian Constitution?
  - Is it consistent with the international covenants and treaties to which Namibia is a party?
  - Is it consistent with other existing legislation (statutes/acts)?
  - Is it consistent with existing case law from the courts and administrative tribunals (national and international) and common law?
  - Is it consistent with legal authorities and local culture?

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## SEMANTIC ISSUES

- Is the bill understandable? Is it precise?
- Is it consistent in its use of language?

If words are not used accurately and consistently, then the result is confusion regarding their interpretation. It is important to refer to the definitions section of a bill and to make sure that key terms used throughout the text have a similar meaning unless otherwise stipulated. The definition section should always appear at the front of a bill. Consistency is one of the most important characteristics of a well written bill. Definitions should also apply to any regulations that will be created once a bill becomes law.

- Does the bill eliminate bias against classes of people? Does it use discriminatory language? Is the bill gender sensitive?
- Is every word selected carefully?

Always check what the choice of a specific word implies. Each word is meant to have a specific meaning. If the definition of a term used in the bill is complete, the meaning of the term may be strictly limited to the definition of the term.

**Example:** All citizens are entitled to the following rights or benefits ...

A question to ask is "Would non-citizens be adversely affected by being deprived of those rights or benefits?"

**Example:** The term "Bill" means a piece of legislation under consideration while, the term "Act" is reserved for legislation that has actually been enacted into law. In Namibia, a bill becomes an act typically only after it has been approved by Parliament, signed by the President, and finally published in the Government Gazette. In a bill, references made to laws and statutes are always made using the term act.



## KEY TERMS

The presence or the absence of a specific word or expression can have a major impact on the life of the people who will apply the law and the ones who will be subject to it. The following are terms and expressions to which you should give particular attention:

### And/Or

Does the legislator want all conditions and propositions in the sentence to be fulfilled? Or would only one of them be sufficient? Using "and" implies that all of the propositions must be fulfilled while "or" means that only one condition must be met.

**Example:** A foreign corporation shall receive a business visa if it complies with the procedure hereby described and if at least 50% of its staff are Namibian citizens.

If the legislator had used the term "or" instead of "and", only one of the propositions would have been required for the company to receive its business visa.

### Shall/May

If the term "shall" is used, it means that the legislator decided that what is prescribed in the bill is an

obligation. If the term “may” is employed instead, then it is up to the person or organisation targeted by the bill to decide whether or not to comply with the provision of the bill. The provision is discretionary rather than compulsory.

**Example:** The Ministry of Trade and Commerce **shall** issue a business visa to any company registered in one of the countries mentioned in Annex A that submitted accordingly to the procedure mentioned in Schedule 1 request to becoming foreign investor in Namibia.

The meaning above would be different if “may” had been used. It would then become optional for the government to issue business visas. If too much discretion is given then it will then be difficult for MPs to control the regulatory power of civil servants.

#### ❑ Including/Such As

When words like “including” or “such as” are used it is necessary to check what else the legislator wishes to include in the provision. These terms imply that a list does not include all of possibilities. What are the consequences of not providing an exhaustive list?

**Example:** Persons **including** those who have committed a crime can be arrested and extradited to their country of origin.

This wording means that the law does not apply exclusively to persons who commit a crime. Public officials may also extradite persons for other reasons that are not specifically listed.

**Example:** Section 3 of the Married Persons Equality Bill stipulates:

“Subject to this Act, the effect of Section 2(1) is

- (a) to remove the restrictions which the marital power places on the legal capacity of a wife to contract and litigate, including, but not limited to, the restrictions on her capacity -
  - (i) to register immovable property in her name;
  - (ii) to act as an executrix of a deceased estate;
  - (iii) to act as a trustee of an insolvent estate;
  - (iv) to act as a director of a company; and
  - (v) to bind herself as surety; and
  
- (b) that the common law position of the husband as head of the family is abolished.”

This provision means that the effect of the abolition of the marital power will include some of the consequences included in subsections 3(a)(i), (ii), (iii), (iv) and (v). However the scheme will not be limited to those consequences. The effects described in those subsections constitute circumstances where there will be no restriction on the capacity of a spouse to litigate or to contract. The Ministry responsible for the implementation of this Act or the Court who would be asked to interpret this section could easily extend it to other circumstances.

## □ Numbers

Always examine why the legislator chooses a specific number in the bill. Why has one number been selected as opposed some other number?

**Example:** Section 10(4)(b) of the Extradition Act stipulates:

"Any person arrested under subsection (3) shall in accordance with Article 11 of the Namibian Constitution - ... be brought before a magistrate within 48 hours of his or her arrest ..."

Why did the legislator determine that the hearing should take place within 48 hours of the arrest. Why not 24, or 36, 72? What is the justification for the number chosen?

#### **Provided that**

The expression "provided that" implies that the propositions that follow constitute an exception to the general rule. When reading the word "provided that" you should substitute the word "but".

**Example:** Section 5(1)(a) of the Extradition Act states:

"... If it appears to the Minister ... that the offence for which such return was requested is an offence of a political nature: **Provided that** this provision shall not apply to any offence declared not to be a political offence ..."

#### **Subject to**

The phrase "subject to" makes a sentence conditional. This means that a provision of a bill will only be in effect if it does not violate some other provision. Therefore, to fully understand a bill's provision that includes the



expression "subject to," it is necessary to read the part of the bill again referred to immediately after the phrase "subject to".

**Example:** Section 2(1)(a) of the Married Persons Equality Bill reads as:

"Subject to the provisions of this Act with regard to the administration of a joint estate

- (a) the common law rule in terms of which a husband acquires the marital power of the person and the property of his wife is hereby repealed ..."

In this, case the repeal of the common law rule by which a husband acquires the marital power over his wife is conditional upon such a repeal being consistent with the administration of a joint estate as defined by the Married Persons Equality Bill. Therefore to understand this section it is necessary to also read those sections that refer to the administration of a joint estate.

#### Mutatis Mutandis

This Latin expression (translation - making the necessary changes) means that the procedure specified for one section will be exactly the same in this specific case

**Example:** The provisions of Section 32 shall apply "mutatis mutandis" to the creation of private schools under subsection 2.

The same provisions as laid out in Section 32 are applicable to this section of the bill with the necessary changes.



## ❑ Notwithstanding

The expression “notwithstanding” is used when two provisions of a bill deal with the same issue. The provision that includes the phrase “notwithstanding” acts as an exception to the other provision. To understand a provision that includes the term “notwithstanding” it is necessary to also read the provision to which it refers.

**Example:** Section 7(4) of the Married Persons Equality Bill states:

“Notwithstanding subsection 1(c), a spouse married in community of property may without the consent of the other spouse ...

a) sell listed securities on a stock exchange ...”

Subsection 7(1)(c) provides:

“Except in so far as is permitted ..., a spouse married in community of property shall not without the consent of the other spouse

c) alienate, cede or pledge any shares, stocks ...”

The expression “notwithstanding” in this case means that regardless of what is written in subsection 7(1)(c), the alienation of stocks in the context of 7(4)(a) can be performed.



## CONCLUSION

Once bills are enacted into laws they are there to stay unless amended. In order to avoid legal uncertainties that could lead to lengthy and costly litigation, it is necessary to ensure that the bills passed by Parliament are as clear and transparent as possible. This will benefit the citizens subject to the application of the law and the government leaders and civil servants charged with implementing, administering and enforcing the laws of Namibia.

To fully understand a bill's political objective and the ramifications of its adoption, it is necessary to examine and scrutinise all components of the bill without exception. Every distinct section, sub-section, and word has a particular role and meaning. In analysing a piece of legislation, one must begin by understanding the structure and basic concepts of the bill. From there, one must move on to focusing carefully on the bill's specifics. Reading bills carefully permits ambiguous areas to be clarified and reduces the need for future amendments. Through careful scrutiny of legislation, MPs gain a comprehensive knowledge of proposed legislation and become more effective in the legislative process. In addition, it places MPs in a better position to explain legislation to the public and the media.



## FOR FURTHER INFORMATION CONTACT

- Division Research, Information and Library Services  
Parliament of the Republic of Namibia  
Robert Mugabe Avenue, Windhoek, Namibia  
Private Bag 13323, Windhoek, Namibia  
Tel: (264)(61) 288-9111  
Fax: (264)(61) 226-899  
E-mail: [parliament@parliament.gov.na](mailto:parliament@parliament.gov.na)
  
- The Legal Assistance Centre (LAC)  
4 Körner Street, Windhoek, Namibia  
P.O. Box 604, Windhoek, Namibia  
Tel: (264)(61) 223-356  
Fax: (264)(61) 234-953  
E-mail: [lac@iwwn.com.na](mailto:lac@iwwn.com.na)