AN OVERVIEW OF NAMIBIA’S ENVIRONMENTAL LEGISLATION

NAMIBIA does not as yet have a coherent and comprehensive environmental law framework. The constitutional provisions, together with many outdated statutes, all of South African origin, and old South West African subordinate legislation provide the present legal parameters. The need for a detailed law reform process has been recognised and is currently underway with a NORAD-sponsored three year project to review and revise Namibia’s environmental legislation. The project, which is being undertaken jointly by the Ministry of Environment and Tourism and the Office of the Attorney General, aims to provide a systematic body of environmental laws.

In this article, reference is made to areas of general concern, but this overview is by no means exhaustive.

RESOURCE CONSERVATION AND EXPLOITATION

Law reform with regard to renewable resources should be premised on the resources being managed on a sustainable basis for optimum yield. In the area of water management, the Water Act (No. 54 of 1956 – of which only certain sections have been made applicable to Namibia) makes provision for the protection of river catchments, controls effluent discharge into rivers, includes legislation covering water pollution, outlines regulations which govern the optimal use of water resources, and promotes a balanced development of people and their environment. A new Water Act is presently being drafted. This builds on the existing provisions to broaden the powers of the ministry concerned to ensure the effective protection and responsible use of surface and ground water resources.

In the case of forestry, the Forest Act (No. 72 of 1968) governs the demarcation, protection and management of forests, and regulates trading in forest products. The Preservation of Trees and Forests Ordinance (No. 37 of 1952) further protects certain species of trees and provides for the clearing of firebreaks and procedures for the extinguishing of fires. According to the national forestry policy, 10 percent of Namibia’s land area will be managed as state forests. Legislative reform in this sector would probably concentrate more on integrating forestry into broader land use policy and legislation, whilst at the same time ensuring the participation and involve-
industry have accepted that, at the onset of each new mining venture an environmental management plan is established. This plan must address issues such as pollution control, performance monitoring, environmental auditing and eventual decommissioning and rehabilitation. In a broader perspective, it should strive to implement measures which effectively mitigate against environmental impacts where possible. Ideally such system should be preceded by a detailed baseline study and an environmental assessment (EA). Some of these environmental aspects have been incorporated into the Minerals (Prospecting and Mining) Act (No. 33 of 1992). New legislation in the form of the Petroleum (Exploration and Production) Act (No. 3 of 1991) contains similar stipulations on environmental protection and management in regard to natural oil and gas exploration and production on Namibian territory.

POLLUTION CONTROL AND WASTE MANAGEMENT
A further area of concern for environmental law is that of pollution control and waste management. As is well known, the Constitution in Article 95 (1) commits the State in principle to adopt policies aimed “against the dumping or recycling of foreign nuclear and toxic waste on Namibian territory”. It must, however, be emphasised that this provision is contained in a chapter dedicated to Principles of State policy and is thus not directly enforceable by the courts. Nevertheless, the clause sends a strong signal to decision-makers as to how they should act in such cases. The article refers to foreign waste and Namibia remains responsible for dealing with its own hazardous waste which fortunately makes up only a small proportion of waste generated.

As regards pollution, Namibia is not a highly industrialised country. About 70 percent of the population make a living from agriculture. With a relatively low population density there seems to be little concern about the accumulation of waste in the environment. The main concerns are accordingly harmful pesticides, herbicides and toxins used to control malarial mosquitoes, tsetse fly, locust outbreaks and the use of poisons by farmers to control predators.

As regards the mining industry, the Minerals Act referred to earlier provides for the incorporation of certain conditions in prospecting and mining licenses including those relating to pollution and waste. More generally, the mining and other industries are governed by the Atmospheric Pollution Prevention Ordinance (11 of 1976) and the Hazardous Substances Ordinance (14 of 1974). The use of pesticides and other harmful substances is controlled by the Fertilizers, Farm Feeds, Agricultural Remedies and Stock Remedies Act (36 of 1947) and the Agricultural Pests Act (3 of 1973).

Present legislation controlling hazardous waste management is inadequate and needs to be co-ordinated and rationalised into comprehensive pollution and waste management provisions so that the implementation of such legislation falls on one administrative body rather than many different departments of government.

LAND USE PLANNING AND DEVELOPMENT
A feature of land use law in Namibia is the distinction between communal and commercial lands. Decline in productivity as a result of bush encroachment, desertification and other processes is evident in both areas, but degradation is more pronounced on communal land which is generally considered to have lower agricultural potential.

In order to address past inequalities, the government held a land conference in June 1991, which reached a measure of consensus on the issue of redistribution of land, on the compensatory “willing seller - willing buyer” basis as required by the Constitution. Since then the government has taken some steps to purchase farms for the resettlement of farmers from the communal areas in accordance with the Agriculture (Commercial) Land Reform Act (6 of 1995). Despite provisions entitling the State to buy or expropriate “under-utilised” and “excessive” land and
allot it to formerly disadvantaged Namibians, the options for real land reform are limited, particularly because the State does not have the resources to acquire large tracts of land. Land hunger and consequent degradation in communal areas are thus a reality for the future.

The Ministry of Lands, Resettlement and Rehabilitation is presently drafting a Bill on communal lands, the details of which have not yet been officially made public. However, legislative attention is being given to facilitating other forms of land use, such as diversifying production along ecologically sustainable lines including wildlife management and different forms of tourism as part of a general policy of encouraging community based natural resource management.

The legislative process is assisted by the publication of a policy document on land tenure on communal state land, private commercial farm land, proclaimed state land, urban areas and wetland systems, including catchments, by the Ministry of Environment and Tourism in May 1994.

The occupation and development of land in communal areas is governed by the Permission to Occupy (PTO) system which has its origins in the pre-independence Bantu Areas Land Regulations (R 188 of 1969) passed by the South African Bantu Administration Act of 1927, which is overdue for revision. Development in the urban environment is governed by the 1963 Township and Division of Land Ordinance as amended by the Township and Division of Land Amendment Act of 1992.

Ideally, all policies, programmes and projects, including formal land use activities which may have a significant impact on the environment, should be assessed by means of an Environmental Assessment or EA (see article on page 135). Namibia already has a Cabinet-approved EA policy and this will be passed into law in the near future. Sectoral legislation, for example the Foreign Investment Act (No 96 of 1990) makes provision for environmental assessments where such investments may cause adverse environmental impacts.

**THE WORKPLACE**

For many people, environmental awareness starts at the workplace. Their concern is for health and safety, particularly where workers and their families live in the vicinity of the workplace. Workers need assurances that steps are being taken to combat noxious emissions and the safe disposal of toxic substances.

The Labour Act (No. 6 of 1992) has a comprehensive section on the general duties of employers to make and keep safe workplaces, work processes, equipment and machinery, work environment and access to and from work. These provisions include the right of employees to leave their work stations where conditions are considered to be unsafe. These rights include the requirement that the employer provide information and protective equipment for the handling of dangerous objects. Unfortunately these provisions on health and safety have yet to be put into operation, as the Ministry of Labour and Human Resources Development has still to complete the regulations to be promulgated under this section.

At present the most important legislation covering this area is the Workmen’s Compensation Act (No. 39 of 1941), and the outdated Factories, Machinery and Building Work Ordinance (No. 34 of 1952), the Mines, Works and Minerals Ordinance (No. 20 of 1968) and the Occupational Diseases in Mines and Works Act (No. 76 of 1973).

**FACTORS AFFECTING INADEQUATE ENFORCEMENT**

Whilst Namibia has on the statute books a myriad of laws pertaining to the environment, the existing legislation is not effectively enforced for a number of reasons. Reference will be made to various inadequacies in the present legislation which require attention in developing a new framework.
LOW PRIORITY OF ENVIRONMENT PROTECTION

Our legal system gives low priority to environmental protection and the enforcement agencies (i.e., government inspectors, the police and the courts) are inadequately equipped to enforce legislation. There are only a few inspectors for a large country, while the police and courts are largely ignorant of environmental legislation. Consideration should be given to training of justice officials in environmental law, while line ministries should employ lawyers dedicated to the application and enforcement of the appropriate environmental legislation. Consideration could also be given to alternative dispute resolution mechanisms, particularly when it comes to disputes over access to resources.

FRAGMENTED LEGISLATION

Legislation is fragmented and the institutional framework to supervise, monitor and enforce legislative measures is inadequate. For example, legislation on pollution is contained in five different statutes, administered by different ministries with no uniform standards or coordination between them. Consideration could also be given to centralising the institutional framework into a body such as an environmental board or tribunal or the appointment of an Environmental Commissioner.

The functional and enforcement duties of one ministry are sometimes carried out by the same ministry. The Ministry of Agriculture, Water and Rural Development promotes agricultural production but must also control the use of harmful pesticides.

LOCUS STANDI

Namibian common law does not allow an individual to approach the courts to protect the environmental interests of the broader community. A resident of a town may, for example, not bring an anti-pollution case to court on behalf of all the residents who may be affected. A future environmental system may have to provide for a mechanism, such as the “citizen suit” clause giving the citizen the right to litigate for the protection of the wider community.

CRIMINAL SANCTIONS INADEQUATE

Criminal sanctions as a means of enforcing environmental law are inadequate because fines are an insufficient deterrent. The fine for pollution of water is only N$100. The fines deal only with the consequences of harmful environmental practices and not the need to prohibit them, i.e., the damage is done and the imposition of a fine does not clean up the environment. Accordingly consideration should be given to alternatives to criminalise undesirable behaviour, such as market incentives for more sustainable and efficient use of natural resources.

Finally, it is hoped that the process of developing the policy and legislation on the environment will be an all-inclusive approach with active encouragement of the full participation of a broad range of affected parties, not only in government, business, NGOs, trade unions and women’s organisations, but also to include those people living in rural areas where concern for the environment deeply affects their survival. It is well known that this has been the Directorate of Environmental Affairs’ approach in the past and it is hoped that this practice will continue.

KEY ENVIRONMENTAL LEGISLATION

1. Resource conservation and exploitation
   - Water Act (No. No. 54 of 1956)
   - Artesian Water Control Ordinance (No. 35 of 1955)
   - Forest Act (No. 72 of 1968)
   - Preservation of Forests and Trees Ordinance (No. 37 of 1952)
   - Nature Conservation Ordinance (No. 4 of 1975)
   - Minerals (Prospecting and Mining) Act (No. 33 of 1992)
   - Petroleum (Exploration and Production) Act (No. 3 of 1991)
   - Sea Fisheries Act (No. 29 of 1992)
   - Foreign Investment Act (No. 96 of 1990)

2. Pollution control and waste management
   - Hazardous Substances Ordinance (No. 14 of 1974)
   - Atmospheric Pollution Prevention Ordinance (No. 11 of 1976)
   - Fertilisers, Farm Feeds, Agricultural Remedies and Stock Remedies Act (No. 36 of 1947)
   - Nuclear Installations (Licensing and Security) Act (No. 43 of 1963)
   - Atomic Energy Act (No. 90 of 1967)
   - Public Health Act (No. 36 of 1919)
   - Agricultural Pests Act (No. 3 of 1973)

3. Land and marine matters
   - Territorial Sea and Exclusive Economic Zone of Namibia Act (No. 3 of 1990)
   - Sea Shore Ordinance (No. 37 of 1958)
   - Soil Conservation Act (No. 76 of 1969)
   - Mountain Catchment Areas Act (No. 6 of 1970)
   - Agriculture (Commercial) Land Reform Act (No. 6 of 1995)
   - Township and Division of Land Ordinance 11 of 1963 as amended by the Townships and Division of Land Amendment Act (No. 28 of 1992)
   - Sub-division of Agricultural Land Act (No. 70 of 1970)
   - Fencing Proclamation (No. 57 of 1921)
   - National Monuments Council Act (No. 76 of 1969)

4. Workplace
   - Labour Act (No. 6 of 1992)
   - Workmen’s Compensation Act (No. 39 of 1941)
   - Factories, Machinery and Building Work Ordinance (No. 34 of 1952)
   - Mines, Works and Minerals Ordinance (No. 20 of 1968)
   - Occupational Diseases in Mines and Works Act (No. 78 of 1973)