

CHAPTER 4

DRAFTING OF ORIGINAL LEGISLATION

4.1 INTRODUCTION

This chapter applies the theoretical approach that was developed in chapter 3 to the drafting of original legislation. Part 4.2 considers the importance of background work and intensive accompanying work that must form the foundation of the drafting process to develop effective legislation that gives effect to the rights to just administrative action. Parts 4.3 to 4.6 examine the four pillars of effectiveness of legislation identified by Mousmouti: the structure of legislation, the object of the legislation, the substantive content of the legislation, and assessing the effect of legislation. Part 4.7 notes the importance of adopting an integrated approach to drafting legislation. In part 4.8, drawing upon the work of the Seidmans and Abeyesekere on drafting to combat corruption and maladministration, the South African legislative context is considered, and considerations for the drafting of new legislation, and the strengthening of the existing legislative framework, are proposed. In part 4.9, it is examined how the principles relating to the public administration in s 195 of the Constitution are sought to be given effect to in the legislation that regulates the public service. This part also considers how a culture of exercising administrative power in a lawful, reasonable, procedurally fair, and constitutionally compliant manner may be promoted in the public service and in public enterprises. In part 4.10, the important role of public consultation processes is noted.

4.2 BACKGROUND AND ACCOMPANYING WORK FOR DEVELOPING LEGISLATION

(a) Legislative proposals and legislative reports

Xanthaki, Mousmouti, and the Seidmans and Abeyesekere all highlight that substantial preparatory work by the drafting team is required, prior to the actual commencement of drafting legislation. They also strongly advocate preparing a substantial report to accompany the draft legislation that is prepared.¹ Drafters need to adopt consistently the practice of preparing an agreed legislative proposal that sets out the matters that will be addressed in the legislation, and how the problem identified in the legislation will be addressed. A detailed legislative

¹ See chapter 3.2(c) and 3.4(c).

report should also be prepared. In the report, the choices which have been incorporated in the draft legislation should be assessed and justified, using a problem-solving approach based on reason informed by experience.

At present this is not consistent practice in South Africa, and this is a serious shortcoming of current drafting practice. Drafting processes vary significantly between government departments, and departments apply their own development processes, which may even vary depending upon the specific legislation being developed and the individual drafters involved. Sometimes a process timetable or a plan might be developed, but not necessarily. Sometimes a policy document is prepared that precedes drafting of legislation, but sometimes the policy document and the legislation may be developed concurrently. Occasionally, a more detailed explanatory memorandum may be prepared in addition to the mandatory, brief, memorandum on the objects of the legislation.²

At a minimum, drafters should develop their own practice and templates along the lines suggested by Xanthaki and the Seidmans and Abeyesekere. Drafters in departments might engage with drafters in the Office of the Chief State Law Adviser and the Department of Performance, Monitoring and Evaluation to develop common, integrated approaches for the drafting process. Committees in Parliament may insist that they be provided with a detailed legislative report along with legislation that is referred for them for processing, to enable them to understand the context in which the legislation was developed, the problems that the legislation seeks to address, and the choices that informed the finalization of the legislation that has been tabled in Parliament. A thorough and detailed legislative approach may promote meaningful public consultation processes both before legislation is tabled in Parliament, and while the legislation is being considered in Parliament. This is an area in which substantial

² See, for example, National Treasury *Explanatory Clause -by-Clause Memorandum prepared for the Financial Services Laws General Amendment Bill B-29 2012*, last accessed from http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/121114%20Clause%20by%20Clause%20amendments_0.pdf on 23 August 2018, and compare with National Treasury and Office of the Chief State Law Adviser *Memorandum on the Objects of the Financial Services Laws General Amendment Bill B-29 2012*, last accessed from http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/121114%20Memo%20on%20Objects_0.pdf on 23 August 2018. With the Financial Sector Regulation Act 9 of 2017, an initial policy document was published that set out the envisaged regulatory approach to be reflected in legislation, but no detailed explanation of the envisaged legislation establishing the regulatory framework was provided, and a detailed explanatory memorandum was not published with the two draft versions of the Financial Sector Regulation Bill that were subsequently published. Nor was one prepared when the Bill was tabled in Parliament. See National Treasury *A Safer Financial Sector to Serve South Africa Better* (2011) last accessed from <http://www.treasury.gov.za/twinpeaks/20131211%20-%20Item%202%20A%20safer%20financial%20sector%20to%20serve%20South%20Africa%20better.pdf> on 23 August 2018 ('NT Policy Document').

work needs to be undertaken by drafters to improve drafting processes, and the effectiveness of legislation that is developed. A brief Memorandum on the Objects of the Bill does not provide a meaningful briefing to committees in Parliament, and inevitably needs to be supplemented by additional briefings, presentations, and lengthy explanations provided in parliamentary deliberations.

Even where a legislative plan, or an explanatory memorandum is prepared for a Bill, the realization of the rights to just administrative action is never referred to as an object of the Bill, or extensively discussed in a report or memorandum. Addressing the rights to just administrative action is often considered in a limited manner during the development of legislation, and is provided for only to the extent that is necessary. It is not addressed as a core component of the objective and purpose of legislation. This approach must be transformed. If the realization of the rights to just administrative action are not consistently identified a matter that needs to be addressed in a legislative plan or legislative report, it will not be seriously considered during the development of legislation, and potentially the rights to just administrative action will not be realized through the implementation of the legislation.

(b) Regulatory approach

Fundamental to the development of a legislative proposal and the legislative report, and the basis on which the structure of the legislation is developed, is a consideration of the regulatory approach that will inform the basis of the legislation. This involves a consideration of the area of activity in which the legislation will be applied, and the context within which those who will be subject to the legislation are operating.

The regulatory approach that is incorporated in legislation may be significantly impacted upon by global regulatory regimes, which have been proliferating with the globalization of various areas of activity, prime examples of which are trade and financial markets. A range of intergovernmental or transgovernmental regulatory networks, formal international organisations, and other private or hybrid bodies promote co-ordination and develop common standards and practices.³ Drafters need to familiarise themselves with the type of global administrative law arrangements which may be present in the area of activity that their legislation relates to, and determine how appropriately to integrate or relate the legislation to that international administrative context. Interesting questions arise in relation to

³ Stefano Battini 'The Proliferation of Global Regulatory Regimes' in Sabino Cassese (ed) *Research Handbook on Global Administrative Law* (2016) 45.

the ability of individual countries, in particular developing countries such as South Africa, to influence the development of administrative processes at the international level in a manner that is consistent with fundamental rights, including the rights to just administrative action.⁴ Tensions may arise between adhering to international standards developed by bodies that South Africa is a member of and participates in, and constitutional requirements and the realisation of certain fundamental rights, or other important policy objectives such as financial inclusion and transformation.⁵ Drafters would need to develop an approach to address the tensions. In some areas of law, domestic legislation may contribute to a complex global governance framework, and the forces of globalization may have a significant impact upon approaches incorporated in domestic legislation.⁶

An example that demonstrates the considerations that may arise, and the range of factors that may impact upon the development of a regulatory approach underpinning legislation, is in the financial sector legislative reform process that is currently being undertaken in South Africa. The impetus for the comprehensive reform was the financial crisis of 2007-2008, which prompted many countries to examine their regulatory frameworks thoroughly, and to undertake substantial regulatory reforms. In South Africa, following extensive research, a policy document was published by the National Treasury in 2011,⁷ which outlined lessons from the financial crisis and identified areas where the regulatory framework should be strengthened.⁸ It also highlighted other policy objectives that are important in the context of South Africa's financial sector, which are the protection of financial customers and pensioners, and promoting the financial inclusion of people who previously have been excluded from or not enjoyed full access to the financial sector.⁹ Combatting financial crime and corruption was identified as another key policy objective.¹⁰ South Africa undertook an examination of regulatory regimes in other countries, including the United Kingdom, Australia and the Netherlands. It was proposed, based on international and South Africa's experience, that the most suitable model for South Africa would be to move to a 'twin peaks' approach of

⁴ Dennis Davis & Hugh Corder 'Globalisation, National Democratic Institutions and the Impact of Global Regulatory Governance on Developing Countries' in Hugh Corder (ed) *Global Administrative Law: Development and Innovation* (2009) 72-77.

⁵ Ibid, 81-84.

⁶ Dennis M Davis 'Global Challenges Facing Developing Countries' in Laurence Boule (ed) *Globalisation and Governance* (2011) 43; Trevor Manuel 'Global Economic Governance: The Search for Economic Justice in a Globalised World' in Boule 43; Mark A Chinen 'Governing Complexity' in Boule 55.

⁷ NT Policy Document (note 2 above).

⁸ Ibid chaps 2 and 3.

⁹ Ibid chaps 4-6.

¹⁰ Ibid chap 7.

having two financial sector regulators, one for prudential regulation, and one for market conduct regulation, similar to what had been developed in Australia, Canada and the Netherlands. The model would, however, be adapted to the South African context and with appropriate mechanisms to ensure co-operation and co-ordination between the regulators, and also with the South African Reserve Bank in its role to ensure financial stability in South Africa's financial system.¹¹ It is notable that compliance with constitutional requirements, and in particular, the rights to just administrative action, did not feature in the consideration of the regulatory approach. As is generally the case, the consideration of the regulatory approach did not define the regulatory objective as including compliance with the rights to just administrative action.

The institutional form and the independence, accountability, integrity and robustness of the regulators to be established were identified as important considerations,¹² which are aspects that should form the foundation of the development of all regulatory institutions. Considering models and experiences from other countries may provide inspiration for developing a model for an institution that will be established.¹³ Insight may be gained regarding which approaches have worked well, which may not have been very successful, and what practical issues may arise that need to be addressed.

When defining the regulatory approach that will be incorporated in legislation, it is necessary to consider any relevant international regulatory framework that may be in existence, the nature of that framework and how it operates, and what international instruments or principles may be in place or have been developed that should be or would need to be implemented in domestic regulation.

In relation to the Financial Sector Regulation Act 9 of 2017 ('the FSRA'), which is the legislation that has established the new financial sector regulatory framework in South Africa, the international architecture is comprised of standard setting bodies, headed by the G20 and its Financial Stability Board. These bodies then give direction to subordinate standard-setting bodies that address different areas of financial sector regulation, for example the Basel Committees relating to banking regulation, the International Organization of Securities Commissions ('IOSCO') that sets standards in relation to securities and the financial markets,

¹¹ Ibid 28-35.

¹² Ibid 30-31.

¹³ See, for example, Eilís Ferran 'Institutional Design: The Choices for National Systems' in Niamh Maloney, Eilís Ferran & Jennifer Payne (eds) *The Oxford Handbook of Financial Regulation* (2015) 97.

the Financial Action Task Force ('FATF') that sets standards in relation to counter-terrorism and anti-money laundering, and the International Association of Insurance Supervisors ('IAIS'), which sets standards in relation to insurance. The International Monetary Fund ('IMF') and the World Bank play a monitoring role, through the Financial Stability Assessment Programme ('FSAP'), which members of the World Bank and IMF are required to undergo to assess the soundness of their financial sector regulation. Strengths and weaknesses are identified in the FSAP reports for various countries, and where there are gaps with compliance with international standards, these are highlighted, and countries are expected to implement measures, including introducing legislative amendments.¹⁴ This international architecture operates primarily through the use of 'soft law' standards, rather than through formal agreements and institutional mechanisms as is the case with the World Trade Organisation and the General Agreement on Tariffs and Trade system, and other formal regional trade arrangements that operate internationally in the international trade environment, where there is a formal treaty infrastructure and prescriptive regulatory requirements.¹⁵

However, these 'soft law' international standards may have significant practical implications for countries, especially for smaller and emerging market countries such as South Africa, who wish to participate fully in the international financial system. Non-compliance with standards may result in South African financial institutions not being able to properly access certain major areas of the financial system, such as the European Union and the United States. This creates a major incentive to implement international standards in domestic legislation. An example of this occurred in relation to legislative requirements set by the FATF, that were required to be implemented in domestic anti-corruption and anti-money laundering legislation. Amendments needed to be made to the Financial Intelligence Centre Act 38 of 2001 ('FICA'), to address shortcomings in South Africa's anti-corruption and anti-money laundering legislation. The Financial Intelligence Centre Amendment Act 1 of 2017 ('FICAA') was necessary to implement the current FATF requirements. Serious delays were encountered in enacting the FICAA, which resulted in serious risk that FATF would place South Africa on a list of countries who were not making sufficient progress in addressing identified shortcomings with FATF standards. That would have had serious implications for South African banks being able to enter into transactions with banks in other countries. Fortunately, South Africa was

¹⁴ Chris Brummer & Matt Smallcomb 'Institutional Design: The International Architecture' in Maloney, Ferran & Payne (note 13 above) 129 at 145-146.

¹⁵ Ibid at 147-149.

able to persuade FATF that the parliamentary process was proceeding as expeditiously as possible, FATF did not ultimately place South Africa on the ‘grey list’, and the legislation was finally enacted and brought into operation after a tortuous process in Parliament.¹⁶

Legislation may address a range of matters that require differing regulatory approaches. For example, addressing financial stability may need a different approach and a different suite of regulatory powers than what would be required to provide for effective consumer protection.¹⁷ Regulatory and supervisory strategies adopted in certain areas of activity may evolve over time in response to changing conditions and experience.¹⁸ Empowering regulators to adopt an appropriate enforcement strategy, including a range of appropriate sanctions, is an important component of an effective regulatory framework.¹⁹

There is a variety of tools that government may utilize to implement policy,²⁰ which range from flexible performance-based and incentive approaches, to co-regulatory and self-regulatory approaches, incentive and market-based approaches such as tax breaks and incentive schemes, and information approaches.²¹ Traditional regulatory approaches focused solely on the economic rationales for regulation. Mousmouti²² and Feintuck²³ have highlighted the importance of regulatory approaches considering interests that go beyond traditional ‘economic’ interests, including the consideration of fundamental rights. When the objective of the constitutional legal framework is the rule of law, transformation and good governance, the

¹⁶ Linda Ensor ‘Reprieve for SA on Financial Intelligence Centre Amendment Bill’ *Businesslive* 27 February 2017, last accessed from <https://www.businesslive.co.za/bd/national/2017-02-27-reprieve-for-sa-on-financial-intelligence-centre-amendment-bill/> on 23 August 2018.

¹⁷ See Rosa M Lastra ‘Systemic Risk and Macro-Prudential Supervision’ in Maloney, Ferran & Payne (note 13 above) 309; Dimity Kingsford Smith & Olivia Dixon ‘The Consumer Interest and the Financial Markets’ Supervision’ in Maloney, Ferran, & Payne (note 13 above) 695; Mads Andenas & Iris H-Y Chiu *The Foundations and Future of Financial Regulation: Governance for Responsibility* (2014).

¹⁸ See Julia Black ‘Regulatory Styles and Supervisory Strategies’ in Maloney, Ferran & Payne (note 13 above) 217.

¹⁹ See Iain MacNeil ‘Enforcement and Sanctioning’ in Maloney, Ferran & Payne (note 13 above) 281.

²⁰ See Better Regulation Task Force ‘Routes to Better Regulation: A Guide to Alternatives to Classic Regulation’ (December 2005) last accessed from https://www.eesc.europa.eu/sites/default/files/resources/docs/routes_to_better_regulation.pdf on 23 August 2018.

²¹ See OECD Report ‘Alternatives to Traditional Regulation’ (2002), last accessed from <http://www.oecd.org/gov/regulatory-policy/42245468.pdf> on 23 August 2018; OECD ‘Regulatory Policies in OECD Countries: From Intervention to Regulatory Governance’ (2002), last accessed from <http://www.oecd.org/gov/regulatory-policy/regulatorypoliciesinoecdcountriesfrominterventionismto regulatorygovernance.htm> on 23 August 2018.

²² Maria Mousmouti *The ‘Effectiveness Test’ as a Measure of Legislative Quality: Equality in Law, Inequality in Practice, and Quality in Legislation* (unpublished PhD Thesis, Institute of Advanced Legal Studies, University of London 2013) 34–36.

²³ Mike Feintuck ‘Regulatory Rationales Beyond the Economic: In Search of the Public Interest’ in Robert Baldwin, Martin Cave & Martin Lodge (eds) *The Oxford Handbook of Regulation* (2010) 39.

it is vital to expand the scope of interests that are considered in the regulatory approach. More recently, a wider range of enforcement and compliance strategies have been developing, including flexible strategies such as ‘responsive regulation’, ‘smart regulation’ and self- or meta-regulation, which have been applied in regulatory schemes.²⁴ The technique of ‘principles-based’ regulation has gained some currency in financial sector regulation. This type of regulation seeks to reduce reliance on prescribed rules, which may result in a ‘tick-box’ approach to compliance with legislation, and rather focuses on the achievement of broader principles and objectives. Principles-based regulation necessitates a substantial shift in mindset from the traditional approach of both regulators and those subject to regulation, and quite a high degree of trust between regulators and regulated entities is required to successfully implement.²⁵ ‘Risk-based’ approaches correlate the intensity of requirements and regulatory supervision with the degree of risk that a particular regulated entity poses to the regulatory system and the achievement of the regulatory objectives (for example, the risk that the failure of a financial institution would pose to the stability of the financial system).²⁶

To capacitate regulators and administrators to effectively implement the regulation in a manner that gives effect to the rights to just administrative action, a ‘regulatory toolkit’ of powers may be provided in legislation, that may be drawn upon to effectively address specific circumstances and take decisions in a lawful, reasonable, and procedurally fair manner. This approach is consistent with proportionality as an aspect of reasonableness, and enables administrators to find the ‘reasonable equilibrium’²⁷ that needs to be struck in complex circumstances that entail polycentric decision-making.

Drafters, along with the departmental officials who comprise the drafting team, need to venture and explore the literature on regulation, and conduct comparative research in relation to specific areas of regulation that they may be dealing with,²⁸ and develop a regulatory approach and ensure that the appropriate quite of regulatory tools are included in the legislation, to enable the regulator to effectively administer the regulation and fulfil its regulatory and

²⁴ Neil Gunningham ‘Enforcement and Compliance Strategies’ in Baldwin, Cave & Lodge (note 23 above) 120; Cary Coglianese & Evan Mendelson ‘Meta-Regulation and Self-Regulation’ in Baldwin, Cave & Lodge (note 23 above) 146; Ian Ayres & John Braithwaite *Responsive Regulation: Transcending the Deregulation Debate* (1992).

²⁵ Julia Black ‘Forms and Paradoxes of Principles Based Regulation’ *LSE Law, Society and Economy Working Papers 13/2008* London School of Economics and Political Science Law Department, last accessed from <http://ssrn.com/abstract=1267722> on 29 December 2017.

²⁶ Julia Black ‘The Role of Risk in Regulatory Processes’ in Baldwin, Cave & Lodge (note 23 above) 304.

²⁷ *Bato Star Fishing v Minister of Environmental Affairs and Tourism* 2004 (4) SA 490 (CC) paras 49-54.

²⁸ See Francesca Bignami & David Zaring (eds) *Comparative Law and Regulations: Understanding the Global Regulatory Process – Research Handbooks in Comparative Law* (2016).

supervisory mandate in a manner that is constitutionally compliant.

4.3 STRUCTURE OF LEGISLATION

Drafters need to be aware of both the internal structure of legislation, to ensure accessibility of the legislation to users, as well as the overarching integration of the legislation within the overall legislative framework.

(a) Internal structure

Thornton notes that there is in many jurisdictions long-standing practice regarding structure of legislation, but encourages drafters not to be discouraged to develop and ‘try out new techniques whose benefits may outweigh the short-term imbalance of the transitional period between the old and new techniques coming into force.’²⁹ Drafters need to consider the prevailing ‘house style’, and in South Africa, the Office of the Chief State Law Adviser (‘OCSLA’) must certify in its opinion that is submitted to Cabinet when legislation is submitted for tabling, and to Parliament when legislation is tabled, that the legislation conforms to the OCSLA’s drafting standards. It may require some explaining and persuading by a departmental drafter to obtain agreement from the OCSLA for proposed innovations in the structure of legislation, and some proposed innovations may not be agreed to. Hopefully some of these innovations may be adopted, and the general practice regarding the structure of legislation may evolve.

In chapter 3.2(c)(iv), Xanthaki’s discussion of structure, her proposed ‘layered’ approach to legislative structure,³⁰ and Lord Thring’s principles for structuring legislation³¹ were considered. Legislation should be structured so that it communicates effectively with all users. In respect of the delineation of administrative power, legislation should be structured so that it is accessible to and communicates effectively with the administrators who are administering legislation. Lord Thring’s principle that administrative provisions should be separated from substantive provisions may facilitate communication to administrators, by consolidating provisions that are relevant for administrators in part of the legislation. The

²⁹ Helen Xanthaki *Thornton’s Legislative Drafting* 5 ed (2013).

³⁰ Helen Xanthaki *Drafting Legislation— Art and Technology of Rules for Regulation* (2014) 56-61 and 76-78.

³¹ Lord Thring *Practical Legislation, the Composition and Language of Acts of Parliament and Business Documents* (1877) 9-13.

principle of separating procedural matters in delegated legislation may facilitate the clarity and accessibility of the original legislation, and it is also responsive to the need in modern states to delegate legislative making authority, subject to compliance with the constitutional separation of powers and the provision of sufficient guidance in the original legislation.³² As studies regarding who are the users of legislation³³ and how readers comprehend legislation³⁴ have provided useful insights that assist the development and refinement of approaches to the structuring of legislation, further investigations particularly of how administrators comprehend and use legislation might provide insights that would assist legislators to tailor legislation that effectively communicates both to administrators and other users of legislation. While parts of legislation may be more ‘regulator’ or ‘administrator’ facing, they still need to be reasonably accessible to the public. The public must be able to understand what administrator’s powers, functions, and duties are, and what requirements may apply to the exercise of power by an administrator. Then, if there is a contravention by an administrator of those requirements or the PAJA, an aggrieved person may utilize complaints or dispute resolution mechanisms, or apply for judicial review or other available redress. The accessibility of legislation promotes the accountability of administrators.

While there is the generally accepted format for the structure of legislation, and certain provisions may be placed at typical locations in the legislation (for example the definitions, object or purpose, and short title and commencement), the best structure for much of the content of the legislation should be finalized based on the substance that will be addressed in the legislation, and to whom the legislation is addressed. Seeking to communicate the main regulatory message of the legislation as near to the front of the legislation, certainly has merit. Separating content that is ‘public facing’ from that which is ‘regulator facing’ may assist the

³² This is dealt with further in chapter 5.

³³ See user profiles that have been identified by the Good Law Initiative in the United Kingdom, available on the Gov.uk Good Law Guidance website, last accessed from <https://www.gov.uk/guidance/good-law> on 19 August 2018; see also Alison Bertlin ‘What Works Best for the Reader? A Study on Drafting and Presenting Legislation’ *The Loophole* May 2014 (Issue No 2 of 2014) 25, last accessed from <http://www.calc.ngo/sites/default/files/loophole/may-2014.pdf> on 19 August 2018; Duncan Berry ‘Audience Analysis in the Legislative Drafting Process’ June 2000 *The Loophole* 61, last accessed from <http://www.calc.ngo/sites/default/files/loophole/jun-2000.pdf> on 19 August 2018; David Salter ‘Towards a Parliamentary Procedure for the Tax Law Rewrite’ (1998) 19 *Statute Law Review* 65, at 68; Inland Revenue, ‘The Tax Law Rewrite: The Way Forward’, last accessed from <http://webarchive.nationalarchives.gov.uk/+/http://www.hmrc.gov.uk/rewrite/wayforward/menu.htm> on 19 August 2018.

³⁴ See Phil Knight ‘Clearly Better Drafting: Testing Two Versions of the South African Human Rights Commission Act, 1995’ *Clarity* No 38, Jan 1997 at 15, last accessed from <http://www.clarity-international.net/wp-content/uploads/2015/05/Clarity-no-38-bookmarked.pdf> on 20 August 2018.

legislation to communicate effectively to administrators and other users.³⁵

(b) *Integration within the legislative framework*

In chapter 2, the necessity of integrating legislation within an integrated constitutional and administrative law framework was highlighted and discussed. Legislation needs to integrate with the PAJA, and the considerations highlighted in chapter 2.2(c)(iii) on drafting to integrate with the PAJA are relevant to bear in mind. It is also necessary for drafters to also integrate their legislation with the legislative framework which is applicable to the sector of activity that they may be addressing. This may include aligning the legislation with the other existing sector-specific legislation, as well as general cross-cutting legislation and constitutionally mandated legislation that is applicable, such as the Promotion of Access to Information Act 2 of 2000. Drafting is also informed by the general application of the Interpretation Act 33 of 1957. Meticulous research and analysis must be undertaken to ensure that all issues relevant to the integration of the legislation into the overall legislative framework are identified and properly addressed.

4.4 OBJECTS AND PURPOSE OF LEGISLATION

Mousmouti emphasizes as one of the key pillars of the ‘effectiveness test’ the clear expression of the object and purpose of legislation in promoting the effectiveness of legislation.³⁶ This is very relevant for the delineation of administrative power, as the powers granted to a regulator under legislation must be applied in accordance with the purpose of the legislation. In chapter 2.3(a), lack of jurisdiction, lack of authority and abuse of discretion were identified as the main categories of unlawful administrative action. Clearly establishing the purpose of legislation is an important mechanism for defining the scope of jurisdiction and authority, and the ambit of discretion. The likelihood of unlawful administrative action may be reduced, and the ability to review unlawful administrative action may be enhanced when the purpose of legislation is clearly expressed. If the purpose or object clause is crafted carefully, and provides for specific, measurable objectives that might assist in the assessment of the effectiveness of the legislation, the purpose or object clause might play an important and beneficial role in conveying the regulatory message of the legislation, and a measure for assessing the effectiveness of the

³⁵ See also Ann Seidman, Robert B Seidman & Nalin Abeysekere *Legislative drafting for Democratic Social Change* (2001) chapter 8 (‘The Seidmans & Abeysekere’), which also sets out factors which might be relevant for organising the structure of legislation in different circumstances.

³⁶ Mousmouti (note 22 above) 57-59.

legislation.³⁷

An object or purpose clause should clearly set out the scope of the legislation, provide limits on the exercise of administrative power, and provide a basis on which to assess the effectiveness of legislation (including whether the exercise of administrative power is constitutionally compliant). Much older legislation and even some more recent legislation does not contain an object or purpose clause. The Pension Funds Act 24 of 1956, and the Friendly Societies Act 26 of 1956, for example, provide for the establishment and regulation of certain types of financial institutions, but there is no purpose explained to guide the exercise of regulatory powers in relation to those types of financial institutions. The Inspection of Financial Institutions Act 80 of 1998 provides various powers for regulatory inspections of financial institutions, but does not provide guidance to the regulators as to what purpose the powers are being granted.

Some objects clauses set out a list of objects of the Act, and provide some indication, although not necessarily in substantial detail, of how the legislation will achieve these objectives. An example is s 3 of the Insurance Act 18 of 2017 ('the IA'), which also specifically requires that the objective of the Act must be achieved in a manner consistent with the Constitution. Section 3 of the National Credit Act 34 of 2005 ('the NCA') sets out objectives of the Act, and indicates in quite a bit of detail how the Act will achieve those objectives.³⁸

Where there is no object or purpose clause, it is difficult to assess whether the legislation is likely to achieve, or is achieving its objective, because the regulatory objective is not clearly stated. Where only regulatory structures are established, powers are granted, and requirements are imposed, no clear guidance is provided regarding the purpose for which the powers are intended to be exercised. Where there are explicitly stated objectives, and it is indicated in some detail how the legislation seeks to achieve the objectives,³⁹ then it is possible to formulate measures to assess the prospective likelihood of the objectives being achieved, and during the implementation of the legislation, to assess whether those objectives are being achieved. Effort should be made to develop detailed objectives clauses that both set out the objectives of the legislation, and how it is envisaged that the legislation will achieve those objectives. An explicit reference to the constitutionally compliant exercise of administrative power might be included in an objectives clause, as in the wording of s 3 of the IA referred to above. As there

³⁷ Xanthaki, (note 30 above) 68-69.

³⁸ Ibid.

³⁹ See s 3 of the NCA.

may be multiple objects that may be set out in an objects clause, some of which may be in tension with one another (as was noted in *Bato Star*),⁴⁰ it may be appropriate to recognise explicitly in an objects or purpose clause, that a regulator or administrator who is implementing legislation may need to seek to achieve a reasonable balance between the achievement of those objectives which are in tension in the context of taking a particular decision. A provision might be included to the effect that ‘[r]ecognising that in certain instances it may not be possible fully to realise the relevant objectives set out in subsection [X], when exercising powers and performing functions in terms of this Act, the [name of the relevant regulator or administrator] must seek to achieve an appropriate balance between those various objectives’. This would signal the necessity and appropriateness of the regulator or administrator exercising discretion regarding the realisation of potentially competing objectives in a specific context, and give some guidance for the exercise of that discretion. This type of wording might also promote the adoption by regulators and administrators of reasonableness and proportionality as an aspect of reasonableness in the achievement of the objects of the legislation, and the exercise of powers to achieve those objectives.

4.5 SUBSTANCE OF LEGISLATION

(a) Definitions

Definitions are important in determining the content, scope and application of legislation, and defining the scope of administrative power. Developing definitions for key complex concepts may be challenging, and definitions may need to be refined multiple times during the development of legislation.

An example is in the FSRA, where the definition of ‘financial product’ in s 2 is fundamental for understanding the scope of the authority of the Prudential Authority (‘the PA’), which is defined by its objective in s 33 of the Act. The authority of the PA is primarily in relation to financial institutions that provide financial products, securities services providers, and market infrastructures as defined in the Act. The South African Reserve Bank is given an important role and substantial powers in relation to ‘financial stability’, the scope of which is determined by the definition of ‘financial stability’ in s 4. The scope of authority of the Financial Sector Conduct Authority (‘the FSCA’) is determined by its object in s 57 of the Act,

⁴⁰ *Bato Star* (note 27 above) paras 32, 49-54.

which particularly focuses on the protection of ‘financial customers’. The definition of ‘financial customer’ in s 1(1) of the Act, therefore, is involved in the delineation of the scope of administrative power of the FSCA. The authority of the FSCA is also closely related with the definition of ‘financial services’ in s 3 of the FSRA. Definitions, therefore, are critical for defining the scope of jurisdiction and application of the Act, and of the regulatory authorities in terms of the Act. These definitions delineate the exercise of administrative powers by the regulators.

While some definitions may be expressed in clear and comprehensible terms,⁴¹ others are crafted in complex and very technical terms that are difficult for a user of legislation to read and understand.⁴² Sometimes the difficulty is attributable to the technical nature of the matter being defined, where the need for precision may trump the objective of clarity.⁴³ In other instances, the lack of clarity is owing to the drafting style employed, which may particularly be apparent in older legislation.⁴⁴

Examples of complex definitions are the definitions of ‘financial product’ and ‘financial service’ in ss 2 and 3 of the FSRA, which contain extensive lists of what constitutes a ‘financial product’ and a ‘financial service’, as well as additional definitions of terms used in the section. The sections also provide a mechanism for the Minister to designate additional ‘financial products’ and ‘financial services’. The provision for a process of designation is the result of a need for the definitions to be able to accommodate new types of financial products and financial services (as they are being developed all the time), and a desire to be able to bring the financial institutions who are providing new unlisted types of financial products and financial services within the scope of the regulatory framework.

These definitions are clear examples where the need for precision trumped the objectives of clarity, unambiguity and accessibility. Even with the effort that was made in developing those definitions, the definitions likely will need to be refined in forthcoming legislation, as the implications of the application of those definitions are now becoming apparent on implementation. Rather than have convoluted provisions to define these terms, it might have been preferable to define ‘financial product’ as those financial products listed in a schedule to the Act. Similarly, with the definition of ‘financial services’, the list of activities

⁴¹ For example: “‘Minister’ means the Minister of Finance;”.

⁴² See in s 1 of the Friendly Societies Act 26 of 1956, the definition of ‘market value’.

⁴³ See the definitions of ‘actuarial surplus’ and ‘fund return’ in s 1(1) of the Pension Funds Act.

⁴⁴ See the definition of ‘trader’ in the Insolvency Act 24 of 1936.

might be included a schedule. A separate clause might provide for a process for the Minister to be able to amend the schedule after following a process for designation of a new financial product or financial service.⁴⁵ This would be a clearer approach to convey the same information to the users of the legislation.

(b) *Application clauses*

An application clause is not always included in legislation, but a clearly crafted application clause may aid users of legislation to understand whether the legislation applies to them, and ensure that administrators who are responsible for implementing the legislation understand the scope of application of the legislation.⁴⁶ That may reduce the likelihood of a regulator or administrator misconstruing the scope of their jurisdiction or authority, and acting unlawfully. It may be a helpful consistent practice to include an application clause in legislation. In some legislation, it may require reading various provisions and definitions to determine if the legislation is applicable in a certain situation, and that is not helpful for administrators or other users of legislation.⁴⁷ Where there is not sufficient clarity regarding the application of legislation, the potential for the scope of authority and jurisdiction of regulators and administrators to be misconstrued and unlawful administrative action to result arises.

(c) *Integration with other legislation and co-ordination*

Legislation must be integrated with the Constitution and the PAJA, as well as with other legislation that also applies to the area of law or activity that the legislation addresses. If there are conflicts with other legislation, then administrative power cannot be appropriately delineated and regulated. There is then potential for authority and jurisdiction to be misconstrued and exceeded or improperly exercised.⁴⁸ The implementation of legislation in a lawful, reasonable, and procedurally fair manner may be undermined. An analysis must be undertaken of what other legislation may potentially conflict with, must be integrated with, or must be amended to avoid or remove conflicts with the legislation that is being drafted. Necessary consequential amendments must be prepared. Where legislation that is administered by another Minister needs to be amended, it would be necessary to discuss the proposed

⁴⁵ An example of this type of provision is included in the Appendix.

⁴⁶ See s 5 of the CPA.

⁴⁷ Consider the almost indecipherable National Payment System Act 78 of 1998, which regulates ‘the payment system’, but does not provide any clear indication of what constitutes ‘the payment system’.

⁴⁸ A regulator or administrator may fail to exercise jurisdiction or authority when they should, because they might consider that another regulator or administrator has that jurisdiction or authority.

amendments with the relevant department, to obtain agreement on amendments that will be made. Committees in Parliament seek confirmation that a consequential amendment to legislation that is under the auspices of another department has been agreed to by the responsible Minister. Where more than one piece of legislation that regulates similar subject matter, meetings and discussions between departments are essential to ensure that there is clarity regarding the scope of application of the various legislation.

An example of overlap occurs amongst the legislation that is administered by the National Treasury, and legislation administered by the Department of Trade and Industry. The NCA, for example, provides for the regulation of credit to financial customers in terms of credit agreements, and the National Credit Regulator ('the NCR') is responsible for the administration of the NCA. The NCA also regulates credit insurance that is provided in relation to products that are purchased in terms of a credit agreement.⁴⁹ In terms of the FSRA, the FSCA is given responsibility to oversee the provision of financial services, to ensure the protection of financial customers.⁵⁰ The provision of insurance is regulated by the IA, the Long-term Insurance Act 52 of 1998, and the Short-term Insurance Act 53 of 1998.

The Consumer Protection Act 89 of 1998 ('the CPA') generally sets requirements in respect of consumer transactions to provide for the protection of consumers, and that Act is administered by the National Consumer Commission. The objective of the CPA and the jurisdiction of the National Consumer Commission overlaps with the scope of the FSRA and the mandate of the FSCA.

To address the potential conflicts between the FSRA and the NCA, following extensive discussions with the Department of Trade and Industry, the powers of the FSCA to regulate in relation to credit agreements was carefully defined, so as not to conflict with the jurisdiction of the NCR. The power of the FSCA to make standards in relation to the provision of credit agreements was narrowly circumscribed.⁵¹ Section 10 of the FSRA addresses these potential conflicts, by providing that the CPA does not apply to the financial sector. Owing to the exclusion of the application of the CPA in the financial sector, s 83 of the FSRA provides for the establishment of an Inter-Ministerial Council comprised of the Ministers of Finance, Trade and Industry, Economic Development and Health. In terms of s 85, the Inter-Ministerial Council

⁴⁹ See s 106 of the National Credit Act 34 of 2005.

⁵⁰ See s 57(b) of the Financial Sector Regulation Act 9 of 2017.

⁵¹ See s 2(1)(g), 58(2) and 106(5) of the FSRA.

may be requested to consider whether primary or delegated legislation (and proposed legislation) that falls (or will fall) within the regulatory framework established by the FSRA, provides a level of protection for consumers at least as stringent as that provided in terms of the CPA and the NCA. If the Inter-Ministerial Council considers that an equivalent degree of protection for consumers is not provided, it may recommend that amendments be made to the legislation or proposed legislation.⁵²

The overlap and potential conflict between legislation may be challenging to address. In the past, potential conflicts were addressed by ‘blanket override’ clauses such as s 3(4) of the Public Finance Management Act 1 of 1999 (‘the PFMA’). However, this approach has become frowned upon by the State Law Advisers, as when two pieces of conflicting legislation both contain blanket override clauses, it becomes necessary to apply principles of statutory interpretation to determine which legislation prevails, and a determination may even require adjudication. To address potential conflicts between legislation, the department that is developing legislation should discuss and try to reach agreement with the department responsible for the other legislation with which there may be an actual or potential conflict, as to how any conflict should be resolved in legislation.⁵³ Limited override clauses that address specific legislative conflicts, and consequential amendments to existing legislation to ensure that identified potential conflicts are avoided, are preferred approaches to address legislative conflicts. There may be limited circumstances where it may be appropriate to permit the inclusion of a blanket override clause, where the legislature views the legislation and the requirements that it provides for as being of such central importance, that the potential for other legislation to undermine those requirements must be restricted.

The approach of circulating legislation that is intended to serve before Cabinet to other departments prior to the Cabinet Committee and Cabinet meetings provides an opportunity for other departments to examine draft legislation and identify potential conflicts between proposed legislation and other legislation that is administered by other departments. Cabinet would not approve legislation for publication for comment or tabling in Parliament if a department raises a concern that proposed legislation raises a legal or jurisdictional conflict

⁵² See s 85(2) of the FSRA.

⁵³ This is what occurred during the development of the FSRA, where discussions between the National Treasury and the Department of Trade and Industry took place regarding the appropriate relationship between the NCA, the CPA took place, and also in relation to s 251 of the FSRA, which deals with the sharing of information between regulators, discussions took place between the National Treasury and the Department of Justice and Constitutional Development took place to ensure that the information sharing provisions related appropriately with the requirements of the Protection of Personal Information Act 4 of 2013.

with existing legislation that is administered by that department, or creates a constitutional conflict.

Where more than one regulator may have jurisdiction in relation to a subject matter or a regulated person, the scope of jurisdiction of the various regulators must be specified clearly, to avoid uncertainty regarding the extent of jurisdiction and authority of the regulators. Including mechanisms to promote constructive interactions between regulators is beneficial to avoid disputes arising between regulators, confusion, and regulatory arbitrage by regulated persons who seek to avoid the application of legislation that they view as being unfavourable. Chapter 5 of the FSRA addresses co-operation, co-ordination and collaboration between the regulators that are established in terms of the Act, as well as with other regulators with jurisdiction in relation to the financial sector, most notably the South African Reserve Bank ('the SARB') (which has responsibilities in relation to financial stability in terms of the Act), the NCR and the Financial Intelligence Centre. They are explicitly required to co-operate and support each other in the exercise of their functions,⁵⁴ and they must enter into Memoranda of Understanding setting out how they will effectively co-ordinate the exercise of their functions.⁵⁵ Other organs of state are expected, to the extent that is reasonably practicable, to consult with the financial sector regulators that are established in terms of the FSRA when exercising their supervisory and regulatory powers in relation to financial institutions. The financial sector regulators may request information from other regulators.⁵⁶ Drafters should be innovative and develop new measures to promote co-ordination between regulators in relation to matters that are common to their mandates and jurisdiction.

Another mechanism for promoting co-ordination between Ministers or regulators is to provide that making rules or regulations, or taking other decisions or actions in relation to certain matters must be made 'in consultation with', 'with the concurrence of', or 'after consultation' with the other Minister or regulatory body.⁵⁷ An assessment of proposed legislation to identify which types of actions or decisions should be made with the concurrence of another Minister or regulatory body, may facilitate the inclusion of necessary consultation requirements in legislation. It may be stipulated which other parties must be consulted prior to taking action or a decision, by requiring that the action or decision must be taken 'after

⁵⁴ Section 76 of the FSRA.

⁵⁵ Section 77 of the FSRA.

⁵⁶ Section 78 of the FSRA.

⁵⁷ See s 106(8) of the CPA that requires the Minister of Trade and Industry to make regulations in relation to credit insurance in consultation with the Minister of Finance.

consultation’ or ‘after having consulted’ the identified parties. The establishment of co-ordinating fora to facilitate discussion and engagement between departments and regulatory bodies may assist in the effective implementation of legislation in an integrated and coherent manner. It is not common for these types of bodies to be established in legislation, but it is worth considering, particularly in areas of activity where there is regulation by various regulators.⁵⁸

When legislation addresses the interaction of a regulator established in terms of the legislation with other regulators, in the complex and interconnected regulatory environment which many regulators established in terms of legislation must operate, it is critical for drafters to ensure that co-ordination and co-operation mechanisms are provided for in legislation.⁵⁹ Innovation and development of legislative provisions to provide for necessary co-ordination and to ensure the effective integration and application of legislation will benefit the development of future effective legislation, and promote the exercise of administrative power by regulators and administrators in a lawful, reasonable, and procedurally fair manner.

(d) Establishment of regulatory institutions

A component of effective legislation, and the constitutionally compliant delineation of administrative power as a basis for effective legislation, is correctly providing for the establishment of institutions that are required for the implementation of the legislation. The Seidmans and Abeyesekere highlight the importance of establishing effective regulatory institutions with institutional cultures that promote good governance.⁶⁰ The formal establishment of the institution and providing for its legal form and status is essential. If, for example, the institution will be a public entity in terms of the PFMA, that must be indicated in the legislation, and the entity must be listed under the appropriate schedule of the PFMA. The legal form, such as the establishment of an institution as a public entity, or a company (or both), may mean that the entity is subject to governance and financial accounting and reporting requirements in terms of the PFMA or the Companies Act 71 of 2008 that may to some extent, promote good governance and mitigate against corruption and maladministration. That is, however, not a guarantee, as evidenced by current inquiries into corruption at some public

⁵⁸ See the Financial System Council of Regulators established by part 2 of chapter 5 of the FSRA.

⁵⁹ See s. 17 of the NCA and Chapter 5 of the FSRA.

⁶⁰ The Seidmans & Abeyesekere (note 35 above) 38-50.

entities.⁶¹

It is uncommon in legislation for institutions to be explicitly provided with a clearly expressed objective or mandate. Often the regulatory body is established, the functions of the regulatory body are provided, and the regulator is provided with powers to perform those functions. The FSRA specifies an objective for the PA and the FSCA which are established to implement that Act. Section 57 provides for the objective of the FSCA, and that objective relates to aspects of the object of the Act in s 7. Providing an objective for a regulator may provide guidance for the exercise of the regulator's powers and functions. The usefulness of an objective clause for the assessment of legislation, both pre-and post-enactment, may be enhanced by linking general statements in the objective clause, with more specific detail of how the aspects of the objective will be implemented through the exercise of powers and the performance of functions. In the above example, it might be indicated how the FSCA will perform its functions and exercise its powers in a manner that will promote the fair treatment of financial customers. Section 57(b)(ii) is quite a specific objective that includes an indication of how the objective would be achieved by the FSCA.

Section 58 of the FSRA in turn provides a linkage between the objective of the FSRA, and the exercise of its functions. In respect of the formulations of functions s 58(1), many of the functions are framed in general terms, and for the purposes of assessing the legislation, it is not obvious how the performance of those functions would be assessed. Ideally, a stronger linkage might be provided between the objective or mandate of an institution and the performance of functions and exercise of powers in the execution of that mandate.

A slightly different approach is adopted in the NCA. The NCR is not provided with a specific objective in terms of the Act, but it is specifically enjoined in s. 12(3)(a) of the NCA to 'carry out the functions in sections 12 to 18'. Those sections then in detail specify how certain functions should be carried out, starting with the development of an accessible credit market (s 13), registration functions (s 14), enforcement functions (s 15), research and public information (s 16), relations with other regulatory authorities (s 17), and reporting requirements

⁶¹ See the Portfolio Committee on Public Enterprises *Minutes of the Meeting of 22 November 2017* 'Eskom Inquiry: Minister Lynne Brown', last accessed from <https://pmg.org.za/committee-meeting/25675/> on 22 August 2018; Portfolio Committee on Transport *Minutes of the Meeting of 24 November 2017* 'PRASA Interim Board on Annual Report late tabling & State Capture allegations', last accessed from <https://pmg.org.za/committee-meeting/25588/> on 22 August 2018; Standing Committee on Public Accounts, *Minutes of the Meeting of 24 October 2017* 'SASSA progress in procurement of alternative payment services: hearing', last accessed from <https://pmg.org.za/committee-meeting/25323> on 22 August 2018.

(s 18). Specifying in some detail in legislation how certain functions should be performed, may provide a basis for developing assessment mechanisms to assess the performance of those functions by the regulator. Those assessment mechanisms would be a significant component of the assessment of the effectiveness of the Act.

Although it is currently not common, it would be helpful in legislation for the exercise of certain powers to be clearly linked to the achievement of certain objectives. An example where this has been done is in ss 105(2) and 106(2) of the FSRA, where the exercise of powers by the regulators to make standards is linked to the objectives of the PA and the FSCA, respectively, through reference to aspects of their objectives as set out in ss 33 and 57, respectively.

Drafters may gain inspiration from drafting approaches adopted in other domestic and international legislation which has adopted innovative approaches regarding how objects, regulatory mandates, functions, and the exercise of powers are specified. Drafters may draw on these ideas to craft these types of provisions in a manner that will provide guidance to the regulator and administrators, and they may develop assessment mechanisms that examine the exercise of administrative power in terms of the legislation. Creating a thread between the Constitution and the PAJA, the object of the Act, the objective or mandate of a regulator, and the exercise of powers and the performance of functions may promote the delineation of administrative power in a constitutionally compliant manner.

(e) Governance

Central to the establishment of a regulatory institution that will exercise administrative power in a manner that is constitutionally compliant and promotes good governance and transformation, are the requirements provided in legislation relating to the governance of the institution. If a regulatory institution is established as a public entity in terms of the PFMA, then the requirements relating to financial management by public entities apply to that institution. Sound financial management and the mitigation of corruption are an essential component of good governance. Although the framework established by the PFMA is certainly not perfect, linking to that framework provides some basis for promoting good governance in the institution.

The FSRA expressly stipulates a governance objective for the FSCA in s 59. Providing for a governance objective in legislation may enable the establishment of a positive governance

culture in a regulator. However, while s 59 of the FSRA addresses governance in a general way, additional detail may be provided in legislation regarding the governance systems and processes that must be put in place. It should be specified that the governance processes must ensure that powers exercised by a regulator or administrators in terms of the legislation must be exercised in a lawful, reasonable, and procedurally fair manner. It should be required that a regulator must have a system of delegation in place for the exercise of powers in terms of the legislation that it is responsible to administer,⁶² which sets out in detail who is authorized to exercise which powers in terms of the legislation, and sets out the lines of authority and accountability in the institution. This would force a regulator to carefully examine the legislation and clearly identify who is authorised to exercise powers and take decisions. The regulator should be required to submit this delegation of authority to the responsible Minister, include the system of delegation as part of its annual report to Parliament, and publish the system of delegation on the regulator's website, so that it is clear and ascertainable by Parliament and the public who is empowered to take what actions in terms of legislation, and the lines of accountability that are in place. This may also reduce the likelihood that an administrator may take a decision in terms of legislation for which they are not properly authorized and therefore lack jurisdiction.

The governance structure of the institution must be carefully considered and indicated in legislation, for example whether there may be a board or commission that ultimately oversees the institution's operations. The size and composition of the governing structure should be indicated, and the membership of that structure. The power to appoint the governing structure, the process for appointing the governing structure, the required experience, expertise and qualities of persons who may be appointed, and powers of removal of members or dismissal of the board should be expressed. Similar considerations apply for the appointment of the most senior management of institutions. It should be indicated what qualifications for expertise and experience are necessary, as well as what criteria disqualify a person from appointment to a governing structure or as a senior manager.⁶³ In some instances, it may be appropriate for there to be parliamentary involvement in the appointments of persons to key positions. Parliamentary oversight of certain appointments is provided for in terms of s 193 of the Constitution in relation to the appointment of the Public Protector and appointments in relation

⁶² See s 79(1)(a) of the Local Government: Municipal Finance Management Act 56 of 2003.

⁶³ Section 1(1) of the FSRA contains quite a detailed definition of 'disqualified person', and s 4 and 5 of the South African Reserve Bank Act 90 of 1989 provides a procedure for the appointment Directors, Governor and Deputy Governors of the SARB.

to the other Chapter 9 institutions supporting constitutional democracy. Mechanisms with parliamentary involvement in appointments may provide oversight over appointment processes, which is not present if an appointment is left to the discretion of the President or a Minister. However, parliamentary involvement in a process is not a guarantee that a suitable and effective person will be appointed to a position. Providing for inputs into appointment processes by the public or relevant stakeholders may provide transparency and accountability in an appointment process (for example, by permitting the public to make nominations of persons for appointment and make submissions regarding candidates who may be shortlisted for appointment, or in respect of the governing structure of an institution, allowing certain stakeholders to appoint representatives). Requiring reporting of the outcome of an appointment process to Parliament, along with providing reasons justifying an appointment, might also be a mechanism for providing accountability and transparency.

Providing mechanisms and grounds for removal of appointees to positions is also necessary. If they are not provided for, it may prove difficult to remove a person when a person becomes disqualified from holding the position, or may be guilty of poor work performance or maladministration. PAJA would apply, but owing to the nature of positions on boards or other governing structures, and those of the most senior management, it is worthwhile for a procedure to be specified, so that when a situation arises where a person needs to be removed from a position, a process for doing so in a fair manner, that is also reasonably efficient, is available.

Issues and complications relating to the appointment to and removal of key persons from positions of significant responsibility have been considered by the courts, for example, in cases addressing the removal of board members,⁶⁴ a decision by the President to terminate the appointment of the Director-General of Intelligence,⁶⁵ the appointment by the President of a person who is not fit and proper to hold office as National Director of Public Prosecutions. (‘NDPP’).⁶⁶ Most recently, the Constitutional Court found that the manner in which the previous NDPP had been removed from office was constitutionally invalid, and the appointment of the current NDPP was, therefore, also invalid.⁶⁷ Section 12(4) of the National Prosecuting Authority Act 32 of 1998 (‘NPAA’) was held to be unconstitutional, as the potential for the President to extend the term of office of the NDPP beyond the age of 65 may

⁶⁴ *Minister of Defence and Military Veterans v Motau* 2014 (5) SA 69 (CC).

⁶⁵ *Masetlha v President of the Republic of South Africa* 2008 (1) SA 566 (CC).

⁶⁶ *Democratic Alliance v President of South Africa* 2013 (1) SA 248 (DA v President of SA).

⁶⁷ *Corruption Watch v President of the Republic of South Africa* 2018 (10) BCLR 1179 (CC) paras 31-35 (*Corruption Watch*).

permit the conduct of the NDPP to be influenced by the potential for the term of office to be extended.⁶⁸ Section 12(6) of the NPAA Act was held to be unconstitutional to the extent that it empowered the President to suspend the NDPP without pay.⁶⁹ These cases illustrate the complexities that arise when seeking to strike the appropriate balance between accountability and independence in the appointment and dismissal of key officials. They highlight abuses that may arise when substantial powers of appointment and dismissal are granted without any oversight. Powers relating to appointments, terms of office, and suspension and dismissal must be suitably addressed in legislation. The jurisprudence provides fruitful examples and insight to assist in the development of appropriate provisions.

The role and functions of the governing structure of the institution should be spelled out, and ideally should be linked to the mandate of the institution. It must be clear which powers may be delegated, and whether they may be subdelegated in accordance with a system of delegation. If an institution is a public entity in terms of the PFMA,⁷⁰ the governing structure of the body is the ‘accounting authority’ for that institution, and has financial management responsibilities as a result.⁷¹ The responsible Minister for the public entity is the ‘executive authority’ for accountability purposes in terms of the PFMA.⁷²

While the PFMA provides mechanisms for financial accountability by departments and public entities, it is essential that other legislation expands upon that basis and addresses accountability in relation to non-financial aspects that impact on the effectiveness of implementation of legislation, including the constitutionally compliant, lawful, reasonable, and procedurally fair implementation of the legislation. The current reporting and accountability mechanisms in terms of the PFMA should also be built upon, as those requirements warrant further strengthening.

The relationship between the responsible Minister and the institution that is responsible for the implementation of the legislation should be clearly defined, to ensure that there is both adequate accountability and appropriate independence of the institution. The potential for situations to arise where a Minister may exercise undue influence or become inappropriately

⁶⁸ Ibid paras 42-44, citing also *Helen Suzman Foundation v President of the Republic of South Africa* 2015 (2) SA 1 (CC) para 81 (*Suzman*); *Justice Alliance of South Africa v President of the Republic of South Africa* 2011 (5) SA 388 (CC) para 75.

⁶⁹ *Corruption Watch* (note 67 above) paras 45-48, citing *McBride v Minister of Police* 2016 (2) SACR 585 (CC) para 43(*McBride*) and *Suzman* ibid para 85.

⁷⁰ Section 49 of the PFMA.

⁷¹ Sections 50 and 51 of the PFMA.

⁷² Section 1 of the PFMA.

involved in a governing structure's or institution's functions should be avoided as far as possible. However, the institution must be able to be held accountable by the responsible Minister and to Parliament when the institution is contravening financial management or other legislative requirements, or is failing to fulfil its mandate and functions. Where a member of a governing structure or a member of senior management has contravened legal requirements, is involved in corruption or maladministration, or is failing to fulfil mandated responsibilities, it must be possible to remove them from office.⁷³ One aspect that has not been addressed in legislation, which should be addressed, is a situation where a Minister, or the governing structure of an institution, fails to take steps to investigate or remove members of a governing structure or senior executives who are alleged or subsequently found to be involved in or responsible for corruption or maladministration. Parliamentary oversight may be inadequate if there is, for whatever reason, a lack of will or interest in Parliament to exercise oversight and investigate and hold responsible individuals to account.

A measure which might promote the establishment of an appropriate regulatory culture in an institution, is to require the institution to develop a publicly available strategy that sets out how the institution will fulfil its mandate and carry out its functions. Section 70 of the FSRA requires the FSCA to have a regulatory strategy. This provision identifies the way the regulator will address administrative action, and how it will give effect to requirements of transparency, openness and accountability as being important requirements of the regulatory strategy. The regulatory strategy must be published and be accessible to the public, so those who are subject to the regulator, and Parliament which is involved in oversight of the regulator, may scrutinise the regulatory strategy itself, and identify where there are shortcomings in the strategy. The regulatory strategy may also provide a useful basis for the assessment of the regulator's performance, and more generally, the effectiveness of the legislation. A provision requiring the development of a strategy might additionally require that it must be indicated in the strategy how the objective or mandate of the institution will be achieved, how it will contribute to the achievement of the object of the Act, and how the rights to just administrative action will be complied with in the exercise of the institution's powers and the performance of its functions. It might also be required that the strategy be published for public consultation.

⁷³ See s 56 of the FSRA provides grounds and a process for the removal of the Commissioner or a Deputy Commissioner of the FSCA.

Provisions requiring the disclosure of interests, and potential conflicts of interests when they arise, by members of governing structures of institutions are important. These provisions must clearly indicate the implications where a person who is required to disclose interests, or the existence of a potential conflict of interest, fails to do so. The failure might render the person being disqualified from continuing hold office, or it might be designated as an offence. It might be required that the institution report instances of non-compliance with reporting requirements.⁷⁴ Guidelines may be provided to clarify what is required regarding the disclosure of interests.⁷⁵

Duties of conduct of members of governing structures of institutions and of administrators may be specified in legislation. In addition to referring to duties to act with honesty and integrity, and in good faith, and to not improperly benefit themselves, it might be provided that a breach of a provision setting out fundamental duties would constitute an offence.⁷⁶ A duty might be specified that the institution and administrators must carry out their functions in a manner that promotes the achievement of the objects of the Act and the objective and mandate of the institution whose functions they are responsible to carry out. Members of governing bodies and administrators might be required to carry out their functions in a manner that is lawful, reasonable, and procedurally fair (and additional more specific requirements relevant to the functions involved might be provided). It might be required that an institution must set out guidelines for members of governing structures and employees regarding the performance of their functions and duties in terms of the legislation. Members of governing structures and administrators may be required enter into performance agreements, and among the criteria in the performance agreements must be included requirements relating to the performance of functions in a lawful, reasonable, and procedurally fair manner.

(f) Mechanisms to promote transparency, oversight and accountability

Mechanisms to promote transparency, oversight and accountability are necessary to promote the lawful, reasonable, and procedurally fair exercise of administrative power by institutions and administrators. Requirements for regular reporting by institutions to responsible Ministers, and to Parliament, and enabling requests to be made by Parliament and responsible Ministers for relevant information, may promote oversight. While legislation sometimes addresses the

⁷⁴ See s 50(7) and (8) of the FSRA.

⁷⁵ Section 288(3) of the FSRA.

⁷⁶ See ss 46 and 265 of the FSRA.

provision of false or misleading information to a regulator,⁷⁷ legislation currently only to a very limited extent addresses circumstances where false or misleading information, or where relevant information is not provided, by an institution to a responsible Minister, or by an institution or a Minister to Parliament. It is also not addressed where there is a failure by members of a governing structure of an institution or administrators to disclose vital information to a Minister or Parliament who are responsible for oversight or ensuring accountability.⁷⁸

It is difficult for a Minister or Parliament to be held to account where they have failed to exercise their oversight responsibilities and obligations to hold institutions and administrators to account. Parliament's oversight powers arise from ss 55(2) and 56 of the Constitution. The Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act 4 of 2004 ('PPIPLA') in s 14 provides joint committees of Parliament with the power to summon witnesses, and compel a person to comply and report to Parliament or produce information. Section 15 empowers the Committee to examine witnesses. Section 17 creates an offence for failing to attend a joint Committee when summoned. Chapter 4 sets out a disciplinary procedure for holding members of Parliament in contempt of Parliament. These powers of Parliament are vitally important, but there are no mechanisms specified to address where Parliament fails to exercise its oversight powers. In the *EFF* case,⁷⁹ the Constitutional Court held that Parliament had failed in its oversight role to hold the President accountable and to give appropriate attention and ensure that the remedial action of the Public Protector was complied with.⁸⁰ The only order made by the Constitutional Court in respect of this violation, was to set aside the resolution taken by the National Assembly to absolve the President from having to comply with the remedial action.⁸¹ No other action was ordered to be taken by Parliament to address its failure to fulfil one of its core functions. The Constitutional Court had emphasized the importance of Parliament's oversight role,⁸² but the Court held that:

'It falls outside the parameters of judicial authority to prescribe to the National Assembly how to scrutinise executive action, what mechanisms to establish and which mandate to give them, for the purpose of holding the Executive accountable and fulfilling its oversight role of the Executive or organs of State in general. The mechanics of how to go about fulfilling these

⁷⁷ Section 273 of the FSRA.

⁷⁸ See the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act 4 of 2004.

⁷⁹ *Economic Freedom Fighters v Speaker of the National Assembly* 2016 (3) SA 580 (CC) ('the EFF case').

⁸⁰ *Ibid* para 104.

⁸¹ *Ibid* para 105.

⁸² *Ibid* para 22.

constitutional obligations is a discretionary matter best left to the National Assembly.’⁸³

The Constitutional Court identified the challenge of holding Parliament accountable for its oversight role, when it asked the following question:

‘Is holding the Executive accountable a primary and undefined obligation imposed on the National Assembly? Yes! For the Constitution neither gives details on how the National Assembly is to discharge the duty to hold the Executive accountable nor are the mechanisms for doing so outlined or a hint given as to their nature and operation. To determine whether the National Assembly has fulfilled or breached its obligations will therefore entail a resolution of very crucial political issues. And it is an exercise that trenches sensitive areas of separation of powers. It could at times border on second-guessing the National Assembly’s constitutional power or discretion.’⁸⁴

The PPIPPLA must be amended to place obligations on Parliament regarding the exercise of its oversight activities, and put in place mechanisms for members of the public to lodge a complaint and seek a review of a process where there has been a failure by Parliament to exercise sufficient oversight. Alternatively, it might be required that a complaints mechanism be provided in the rules of Parliament, or an ombud office might be established in Parliament to handle complaints made by members of the public in relation to parliamentary processes and how matters are handled. There are instances where it seems that Parliament is reluctant to exercise some of its oversight powers, for example to summons people to appear.⁸⁵ If Members of Parliament fail to utilise their powers, the only mechanism currently available is to approach the courts regarding a specific failure by Parliament to fulfil one of its constitutional obligations,⁸⁶ which may be a lengthy, expensive, and time-consuming process.

Legislation sets out requirements that institutions and administrators must comply with, and may empower the head of an institution or a Minister to take certain steps when there is non-compliance with a requirement. However, there generally is not a positive requirement that action be taken, and there are not direct, explicit consequences stipulated for a failure to act. An example is with the PFMA, where accounting officers and accounting authorities who

⁸³ Ibid para 93.

⁸⁴ Ibid para 43.

⁸⁵ See Lindsay Dentlinger ‘Myeni Given Deadline to Explain Why She Can’t Testify at Eskom Inquiry’ *Eyewitness News* 7 March 2018, last accessed from <http://ewn.co.za/2018/03/07/dudu-myeni-given-deadline-to-explain-why-she-can-t-testify-at-eskom-inquiry> on 24 August 2018.

⁸⁶ See *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (12) 2006 (6) SA 416 (CC) (*Doctors for Life*).

make or permit unauthorized, fruitless and wasteful expenditure are specified to be guilty of financial misconduct.⁸⁷ They must take appropriate disciplinary measures in relation to officials who contravene the Act or make or permit unauthorized, irregular, or fruitless and wasteful expenditure and report the matter to the relevant treasury.⁸⁸ It is also required that it be reported to Parliament in the annual report steps that have been taken in relation to instances of fruitless and wasteful expenditure.⁸⁹ However, cases may not be properly investigated, they may drag on for a long time before they are finalized, and ultimately, sometimes no significant action may be taken. While a failure to act constitutes an offence in terms of ss 81 and 83 of the PFMA, generally consequences do not result from a failure to act. The PFMA requires significant strengthening, and this is discussed further in part 4.8 below discussing drafting to combat corruption and maladministration.

(g) Measures specifically addressing administrative action

Where a regulator or other organ of state is established that will be responsible for taking a significant volume and range of administrative decisions, it may assist the governing structure of the regulator to have a committee that may provide advice on an approach to administrative action, and which might be designated as being responsible for taking specific types of administrative actions. Part 1 of chapter 6 of the FSRA, for example, empowers the financial sector regulators to establish an administrative action committee. Public entities are required to establish audit committees and financial management and risk management systems in terms of s 51 of the PFMA, and they should be required in terms of legislation to establish an administrative action committee. They might also be required to put in place administrative action procedures, which set out how the institution will handle various types of administrative action that it will be expected to address in terms of legislation. If the procedures are published and accessible, this might assist the public to understand the processes for taking administrative action that may affect them. The public might be given an opportunity to comment upon and raise concerns about any aspects of procedures that may be unfair or inconsistent with the PAJA and the requirements of lawful, reasonable, and procedurally fair administrative action. Part 2 of chapter 6 of the FSRA empowers, but does not require, administrative action procedures to be made by the financial sector regulators. It is submitted that all government departments and

⁸⁷ See ss 81 and 82 of the PFMA.

⁸⁸ See ss 38 and 51 of the PFMA.

⁸⁹ See ss 40 and 55 of the PFMA.

public entities should be required to establish and publish administrative action procedures, similar to how they are required to prepare access to information manuals in terms of ss 14 and 51 of the Promotion of Access to Information Act 2 of 2000.

Providing for internal appeal and other mechanisms such as tribunals and ombuds to review or reconsider administrative decisions may be an important component of the regulatory regime. The Tax Administration Act 28 of 2011 ('TAA') consolidates administrative provisions applicable to much of the tax legislation into a single Act that is devoted to administration. Much of the Act provides substantial powers to the South African Revenue Service (which is certainly common with tax regulatory regimes), but the Act is notable for the establishment by s 14 and part F of chapter 2 of a Tax Ombud to receive and consider individual complaints, as well as—

‘to identify and review systemic and emerging issues related to service matters or the application of the provisions of this Act or procedural or administrative provisions of a tax Act that impact negatively on taxpayers’.⁹⁰

This is a welcome innovation that might be included in legislation for other sectors. Chapter 9 of the TAA addresses dispute resolution, and provides for objections to and appeals of assessments (part B), appeals to a tax board (part C), specialized tax courts with the status of the High Court (part D), and further appeals to the Supreme Court of Appeal (part E). A dispute settlement procedure is also established (part F). The Competition Act 89 of 1998 provides for a similar comprehensive dispute resolution mechanism, with the Competition Tribunal (part B of chapter 4) and the Competition Appeal Court (part C of chapter 4) serving as specialized fora for the appeal of decisions. Particularly where there is the likelihood of a significant volume of reviews or appeals of decisions that may arise, it would be necessary to provide for the establishment of comprehensive dispute resolution mechanisms.

(h) Decision-making processes

If a department or a regulator may be involved in handling a substantial volume of a specific type of administrative decision, for example, applications for licences or permits, or approvals for certain activities, it may be helpful to set out certain aspects of the process in legislation, which makes it clear both to applicants, and to administrators handling applications, what the important applicable requirements are, and how the process should proceed. A timeframe

⁹⁰ Section 16(2)(f) of the TAA.

should be specified within which an application must be decided upon by the decision-maker, to avoid applications falling into administrative limbo and failing to be finalized. Even though s 3 of the PAJA would arguably apply in any event, it is helpful, and tends to be welcomed by stakeholders, if it is clarified that a notice and comment procedure applies prior to taking a decision that would have a substantial impact upon a person, such as the suspension or withdrawal of a licence or authorisation,⁹¹ a disbarment from performing certain activities associated with a person's work,⁹² taking a decision which may have a substantial impact on the operations of a business, such as imposing a designation on an institution that would render it subject to additional regulatory requirements,⁹³ or in certain instances prior to the proposed refusal of an application.⁹⁴

To guide the decision-making process by administrators, it may be helpful to specify relevant factors that should be taken into consideration when making the decision, or conditions which must be satisfied before a decision is taken.⁹⁵

(i) Lawfulness, reasonableness, procedural fairness and proportionality

When addressing administrative powers and functions in legislation, drafters may promote lawful, reasonable, and procedurally fair administrative action and proportionality through implementing techniques discussed in chapter 2.3. Regarding lawfulness, consistently applying the drafting tools of clarity, precision and unambiguity, and plain-language drafting, may define the scope of jurisdiction and authority, and reduce the likelihood that errors of authority and jurisdiction will arise, as well as mistake of fact and errors of law. Including provisions to provide guidance and detail regarding the exercise of powers and functions as proposed in chapter 2.3(a) may promote their exercise in a lawful and reasonable manner. Enabling and mandating the exercise of powers in a proportionate manner may encourage reasonable administrative action, as suggested in chapter 2.3(b). The foundation for procedurally fair

⁹¹ See s 9 of the Financial Advisory and Intermediary Services Act 37 of 2002 ('FAIS Act').

⁹² See ss 153 and 154 of the FSRA.

⁹³ See s 29 of the FSRA, that deals with the designation by the Governor of the South African Reserve Bank of a financial institution as a systemically important financial institution that would render it subject to additional requirements by the Reserve Bank to ensure the maintenance of financial stability, and s 160 of the FSRA, which empowers the Prudential Authority to designate entities as being part of a financial conglomerate, upon which can be imposed additional regulatory standards to ensure the appropriate regulation of that complex financial entity.

⁹⁴ See s 166 of the FSRA, regarding the approval of the acquisition or disposal of assets by a financial conglomerate.

⁹⁵ See s 9(3) of the Long-term Insurance Act 52 of 1998, prior to its recent amendment by the FSRA and the IA, which sets out conditions in which the Registrar of Insurance may not grant an application for an insurance licence, including if granting a licence would be contrary to the public interest. Section 9 of the FAIS Act sets out circumstances in which an authorization may be suspended or withdrawn.

administrative action set out in ss 3 and 4 of the PAJA may be expanded upon in other legislation to ensure that procedurally fair administrative action is provided in the context of that legislation, as discussed in chapter 2.3(c). As the rights to lawful, reasonable and procedurally fair administrative action are so context specific, the extent that the rights are given effect to in the PAJA must be examined, and then it must be ensured that in legislation necessary provisions are included and guidance and support are provided to enable regulators and administrators to realize the rights to just administrative action when implementing the legislation.

(j) *Supervisory and enforcement mechanisms*

Where legislation regulates an area of activity or a sector of the economy, adequate supervisory and enforcement mechanisms must be available to empower those responsible for implementing and administering the legislation to fulfil their mandate and promote the achievement of the objective of the legislation, in a manner that is lawful, reasonable, and procedurally fair. The nature of the supervisory and enforcement mechanisms that are included in legislation must be guided by the regulatory approach that is identified as being suitable to achieve the objective of the legislation. The choice of enforcement mechanisms that are included must be informed by a detailed assessment and understanding of the environment within which the actors who are subject to the legislation function.⁹⁶ The supervisory and enforcement mechanisms must be consistent with the rights to just administrative action, and be premised on proportionality as an aspect of reasonableness.

A suite of supervisory and enforcement tools empowers must be provided to regulators and administrators to take proportionate action that is tailored to address the actors and the circumstances. Designating serious contraventions of legislation that may have a serious negative impact as offences is necessary and appropriate, but for a wide range of contraventions, attaching a criminal sanction would not be proportionate. Recently, a range of supervisory and enforcement tools have been developed to promote compliance with legislation. The power to impose administrative fines and penalties has become an increasingly common administrative sanction, and it may be required that the level of the fine imposed is proportionate in the circumstances of the matter, as is provided by section 112(3) of the CPA.

⁹⁶ The Seidmans & Abeyesekere (note 35 above) 15-17.

Other examples of enforcement tools include: enforceable undertakings, where a person who has been contravening legislation enters into a binding agreement with a regulator that they will in future comply with the legislation;⁹⁷ empowering the regulator to seek an appropriate court order to enforce compliance with the legislation;⁹⁸ the withdrawal or suspension of a licence or authorisation; the imposition or variation of conditions on a licence or authorisation; debarment from holding certain positions or performing certain activities;⁹⁹ leniency agreements, in terms of which a person who has been contravening legislation agrees to co-operate with a regulator in an investigation, while the regulator agrees not to impose an administrative fine or penalty if the person co-operates;¹⁰⁰ and issuing directives to specified persons to take certain action, or refrain from taking specified action, in order to ensure compliance or prevent non-compliance with legislation.¹⁰¹

The issuing of guidance notices¹⁰² or circulars on the interpretation of legislation, which are referred to as advance rulings in chapter 7 of the TAA, or interpretation rulings in s 143 of the FSRA, are means to promote clarity and consistency in the interpretation and application of the legislation. Guidance notices may be beneficial both for those who are subject to the legislation, and administrators who are applying the legislation. An advance ruling or an interpretation ruling is an indication of how the regulator will interpret and apply the legislation, which may ultimately be tested in court if a person disagrees with the ruling. If there is significant disagreement or uncertainty regarding the interpretation of a legislative provision, quite likely the legislation should be amended to provide clarity. However, guidance notes and advance rulings may provide some clarity regarding the interpretation of certain concepts in practice, and assist compliance with the legislation.

(k) Information

Information is an important consideration in a regulatory environment. Regulators need to be able to obtain information that is necessary for them to be able to understand what is going on

⁹⁷ See s 151 of the FSRA.

⁹⁸ See s 6 of the Financial Institutions (Protection of Funds) Act 28 of 2001.

⁹⁹ See ss 14 and 14A of FAIS.

¹⁰⁰ See s 156 of the FSRA.

¹⁰¹ See s 4(3) of the Long-term Insurance Act 52 of 1998, prior to its recent amendment by the FSRA and the IA.

¹⁰² See s 141 of the FSRA.

in the regulatory environment, identify issues that are arising and non-compliance with legislation that is occurring, and then to be able to act to address the issues and non-compliance. Including reporting requirements and enabling regulators to request information or conduct inspections or investigations to obtain information from regulated persons in legislation is important in this regard. The powers to search and seize relevant information touches upon the constitutional right to privacy, and provisions granting these types of powers require careful attention.¹⁰³ The sharing of information with other regulators, both domestic and international, is important to address possible contraventions of legislation in the financial sector, and for initiatives to combat corruption and money laundering and ensure tax compliance. The sharing of information must be consistent with the Protection of Personal Information Act 4 of 2013, which regulates the right to privacy in relation to personal information. An example of how the sharing of information has been addressed in this context is s 251 of the FSRA.

Ensuring that regulators and administrators have complete and accurate information when exercising powers and performing functions promotes lawful, reasonable, and procedurally fair administrative action, because then decisions may be taken based on all relevant information, and there would not be a failure to take into account relevant considerations. As lawfulness, reasonableness, and procedural fairness are all context-specific, if a regulator or administrator has all relevant information available, the process followed, the decision or action taken, or the sanction that might be imposed, will more likely be lawful, reasonable, and proportionate.

To facilitate the effective implementation of legislation, and to ensure the exercise of administrative power in a lawful, reasonable, and procedurally fair manner, persons who are subject to and affected by legislation must be able to access easily up-to-date versions of primary and delegated legislation, and also important decisions taken by regulators (such as

¹⁰³ After initial enactment of the FICAA, which provided for amendments to the inspection powers in s 45B of the FICA, the FICAA was referred back to Parliament by the President, based on concerns about the constitutionality of the amendments to s 45B of the FICA. Parliament effected certain revisions to the provisions of concern, and Parliament enacted a revised version of the FICAA, which was subsequently assented to. Similar provisions providing for inspections and investigations in chapter 9 of the FSRA, which was also being processed by the Standing Committee on Finance (SCoF) at that time, were reviewed, and certain amendments were made to that chapter, to ensure constitutional compliance. See the SCoF Reports on the Financial Intelligence Centre Amendment Bill adopted 21 February 2017; ATC170221: *Report of the Standing Committee on Finance (SCoF) on the referral of the Financial Intelligence Centre Amendment Bill [B 33B–2015]* 21 February 2017, and the Financial Sector Regulation Bill adopted on 7 June 2017, ATC170607: *Report of the Standing Committee on Finance (SCoF) on the Financial Sector Regulation Bill [B 34B–2015]* 7 June 2017; and ATC170621: *Report of the Standing Committee on Finance (SCoF) on the Financial Sector Regulation Bill [B 34B–2015]* 21 June 2017, last accessed from <https://pmg.org.za/committee/24/?filter=2017>, under tabled reports, on 24 June 2018.

the withdrawal or suspension of licences, the granting of exemptions from the application of certain provisions of legislation, and guidance notes and circulars that are issued to assist with the interpretation of legislation). Traditionally, publication for legal purposes has been done in the *Government Gazette*, but in terms of practical access for people, that may not be adequate, and so requiring information to be published on websites and other suitable and accessible media is increasingly common. Ideally, the South African government should publish consolidated copies of all primary and secondary legislation, as free access to up-to-date consolidated legislation currently is extremely limited, and has been declining.¹⁰⁴ Some websites do contain copies of legislation, but the legislation published may not be up-to-date. Accessibility of legislation and administrative decisions must be promoted, as the rights to just administrative action cannot be realized where access to the law and administrative decisions are impeded. Part 2 of chapter 17 of the FSRA provides for the establishment of an on-line Register that will be required to contain up-to-date consolidated versions of primary and delegated financial sector legislation, as well as a record of specified types of decisions made by the financial sector regulators.

(l) Applying drafting tools to achieve effectiveness

Chapter 3.2 (b) considered the fundamental drafting tools of clarity, precision and unambiguity, and plain language and gender-neutral language, and noted the importance of the application of these tools in drafting effective legislation. These also form the basis for drafting legislation that promotes lawful, reasonable and procedurally fair administrative action. Ultimately, it is through graft and the meticulous honing of various drafts of legislation through the meticulous, unremitting application of these techniques, that provisions and ultimately legislation may result that will effectively delineate and control the exercise of administrative power in line with the rights to just administrative action.

The implementation of plain language techniques and focusing on the objectives of clarity, precision, and unambiguity are especially important in promoting lawful administrative action in legislation. Watson-Brown describes plain language as follows:

‘Plain English in writing legal documents is the style of writing in the English language that best

¹⁰⁴ For example, the Acts Online website, last accessed from <https://www.acts.co.za> on 26 August 2018, which previously used to publish reasonably up-to-date consolidated legislation, has since the beginning of 2018, become a subscription website. The University of Pretoria Laws of South Africa consolidated legislation website, last accessed from www.lawsouthafrica.co.za on 26 August 2018, is currently pretty almost the only free website offering consolidated legislation, and it is fairly, but not completely, up-to-date.

conveys to the reader who is to do (or not to do) what and when to create the rights, privileges and powers and the corresponding obligations that the law gives rise to as the author requires. The concepts of ‘who, what and when’ may be supplemented by ‘where’ to indicate location or jurisdiction and ‘how’ to supply the mechanism necessary to give effect to the desired result.’¹⁰⁵

The most critical objectives of a legislative sentence are to state clearly ‘Who’ is the legal subject of the provision, and ‘What’ is the legal action that the legal subject is doing or may or may not do. The sentence may also, especially when a function or power is addressed, describe the ‘Case’ to which the legal action is limited, and the ‘Conditions’ in which the legal action may take place.¹⁰⁶ Focusing on ensuring that these elements are clearly stated, in a manner that is comprehensible by the legal subject, may assist with developing legislative provisions that are clear, unambiguous and accessible.

The above are key elements to express in legislative provisions to promote lawful administrative action, and failures in clear expression of these elements, which form the ambit of authority and jurisdiction, may result in unlawful administrative action owing to lack of jurisdiction, exceeding the scope of authority, and mistakes of fact and errors of law.

The unfortunately limited number of user testing and audience surveys that have been undertaken in the United Kingdom and Canada in chapter 3.2(b)(iii) highlight the need to increase awareness of the composition of the audience of legislation and how they comprehend and use legislation. It would be helpful for the discipline of legislative drafting in general, and for the application of the discipline in South Africa, for extensive research to be conducted in this area. To meaningfully give effect to the rights to just administrative action, legislation must communicate successfully with administrators who are responsible for implementing the legislation, and the various segments of persons who are subject to the legislation. Relevant research might be undertaken to examine how administrators understand and use the legislation that they are mandated to implement.

In South Africa, the nature of administrators is diverse, in terms of their backgrounds, skills, and qualification, which may significantly influence their understanding and use of legislation. For many of them, English is a second or even a third language, and this highlights

¹⁰⁵ Anthony Watson-Brown, ‘In Search of Plain English- The Holy Grail or Mythical Excalibur of Legislative Drafting’ (2011) 33 *Statute Law Review* 7 at 22-23; Xanthaki (note 30 above) 112.

¹⁰⁶ The Seidmans & Abeyesekere (note 35 above) 243, citing George Coode ‘On Legislative Expression; or the Language of the Written Law’ *House of Commons Papers* (1843) vol xx., quoted in Elmer A Dreidger ‘Legislative Drafting’ (1949) 27 *Canadian Bar Review* 291 at 301.

the need to draft in plain language to the extent possible, and to focus intensively on the objectives of clarity, precision and unambiguity throughout the drafting process. It must certainly be avoided that administrators are not able to properly understand the legislation that they are expected to administer, and unfortunately, the potential for that to occur certainly arises. There is not a generic ‘reasonable administrator’ at whom legislation may be confidently pitched. To successfully pitch legislation to communicate effectively with the administrators that will be implementing it, it might be helpful to gain a more detailed sense of who the people are who will be implementing the legislation. If legislation is envisaged to guide the behaviour of administrators, and promote lawful, reasonable and procedurally fair administrative action, they must perceive the legislation as accessible and welcoming, otherwise they may avoid referring to it directly, and may choose to rely upon second-hand advice or information about the content of the information and the nature of the requirements that they must adhere to. Of course, facilitating, encouraging or even requiring the preparation of guidance documents may promote understanding of and compliance with legislation, and promote lawful, reasonable, and procedurally fair administrative action. However, the more directly accessible the legislation is to administrators, the more likely that they will consult it, understand it, and implement it.

In order for the rights to just administrative action to be realized, it is also necessary for those subject to legislation to be able to understand what regulators and administrators are required to do, so that if an administrator contravenes legislation, or violates one of the rights to just administrative action, the affected person is aware of that contravention and violation, and of the remedies available to them, and may take steps to receive redress and hold the regulator or administrator to account. If an affected person is not able to understand the legislation and must rely on the administrator or regulator’s explanation of the content of the legislation (which quite likely would exonerate the administrator or regulator), that may provide some shield for unlawful, unreasonable, or procedurally unfair action to escape accountability. Therefore, it is essential that even provisions that may be more ‘regulator- or administrator-facing’ are to a significant degree able to be comprehended by all of those who are subject to the legislation. Those provisions which detail rights and avenues of redress must be pitched at and able to be clearly understood by everyone with rights and who may need to seek redress.

In the absence of user testing surveys and analysis, it is helpful for drafters to work with officials who directly will be implementing the legislation. They may be very familiar with the

context within which the legislation will be implemented, and those who will be subject to the legislation. Their involvement in the drafting process and feedback on various drafts of legislation may assist in refining the draft in a manner that will hopefully communicate effectively to administrators. Circulating drafts to key stakeholders may obtain helpful inputs, and highlight aspects that need refinement and clarification. If terminology is used that is unfamiliar or unclear, this may be noted, and clarification sought. During public consultation processes that are held prior to a Bill being tabled in Parliament, as well as during the parliamentary process, commentators and Parliamentarians may highlight provisions which may be vague or confusing, and may request and propose refinements to the legislation.

Plain-language drafting is context-specific, there are not general rules that may be applied in all circumstances. There are numerous helpful tips that have been gleaned from shortcoming that have been identified. Solutions have been proposed to assist drafters to avoid common pitfalls, which may assist in the development of a plain language text.¹⁰⁷ Drafters need to meticulously scrutinize each legislative sentence, and assess how the sentence might be expressed more clearly and convey the message to users more effectively. If any tension arises between using plain language and effectiveness, effectiveness must take precedence.¹⁰⁸ Focusing consistently on balancing the objectives of clarity, precision and unambiguity, and drawing upon the analysis and suggestions in the plain-language drafting literature, is a practical approach to develop effective legislation that is suited to the needs of the context and provides for the constitutionally compliant delineation and control of administrative power.

There has been a positive evolution in drafting style in South Africa in the constitutional era, and the application of plain-language drafting and gender-neutral language has had a positive impact on the clarity and accessibility of legislation.¹⁰⁹ However, substantial further work needs to be done to promote the consistent application of this drafting approach. The application of this approach consistently in legislative development may contribute to the realization of the transformative objective of the Constitution. Accessible and inclusive legislation conveys a clear intention of equality and fairness in the law, and assists previously disadvantaged persons to fully enjoy their constitutional rights and participate meaningfully in all areas of society. These qualities in legislation are essential for the development of the

¹⁰⁷ Xanthaki (note 30 above) 116-125.

¹⁰⁸ Ibid 131.

¹⁰⁹ Compare, for an example, the Insolvency Act 24 of 1936, which epitomizes an archaic style that is the antithesis of plain-language drafting with more recent legislation such as the CPA.

constitutional and administrative law framework and the general legal framework under the auspices of constitutional supremacy and the Bill of Rights.

4.6 EFFECTS OF LEGISLATION

To develop and on an ongoing basis refine a regulatory and legislative approach that may be effective in the context that is proposed to be regulated, it is beneficial for drafters to draw upon insights from a range of regulatory approaches and proposals. Regulatory approaches and assessments of legislative quality have been considered in some depth over a lengthy period in the European Union ('EU').¹¹⁰ The EU approach to quality regulation in its initial incarnation highlighted the application of principles of good governance, such as 'openness, participation, accountability, effectiveness and coherence'.¹¹¹ Problems that needed to be addressed were identified as arising from legislative complexity, ineffective, weak, slow or late implementation of legislation, and lack of credibility.¹¹² This linkage between legislation and governance is similarly highlighted by the Seidmans and Abeyesekere. More recently, however, a narrower, more market-based focus for the consideration of quality of legislation has developed, through the 'better regulation' approach,¹¹³ and the 'smart regulation' approach.¹¹⁴ Smart regulation

¹¹⁰ Mousmouti (note 22 above) 31. See the European Council 'The Internal Market After 1992: Meeting the Challenge. Report to the EEC Commission by the High Level Group on the Operation of the Internal Market, presided over by Peter Sutherland' SEC (92) 2044, last accessed from <https://core.ac.uk/download/pdf/5074500.pdf> on 25 August 2018; European Council 'Lisbon European Council 23 and 24 March 2000- Presidency Conclusions', last accessed from http://www.europarl.europa.eu/summits/lis1_en.htm#b on 25 August 2018; European Council 'Council Resolution of 8 June 1993 on the quality of drafting of Community Legislation' *Official Journal of the European Communities (OJEC)* 17.06.1993 n° C 166. [s.l.], last accessed from https://www.cvce.eu/content/publication/2006/11/8/dda1c4d8-c5a2-4536-b554-a08a4b0bf5a6/publishable_en.pdf on 25 August 2018; European Parliament, European Council & European Commission 'Interinstitutional Agreement of 22 December 1998 on common guidelines for the quality of drafting of Community legislation [1999] OJEC 17.03.99 C73/1 0001 – 0004, last accessed from [http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31999Y0317\(01\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31999Y0317(01)&from=EN); European Commission, 'European Governance- A White Paper' COM/2001/0428 final, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52001DC0428> on 25 August 2018.

¹¹¹ Mousmouti (note 22 above) 31.

¹¹² Ibid.

¹¹³ Ibid 31-32; see European Commission 'Better Regulation for Growth and Jobs in the European Union' COM (2005) 97 final, last accessed from http://aei.pitt.edu/43023/1/com2005_0097.pdf on 25 August 2018.

¹¹⁴ Mousmouti (note 22 above) 32; See European Commission 'Europe 2020- a strategy for smart, sustainable inclusive growth' COM (2010) 2020, last accessed from <http://ec.europa.eu/eu2020/pdf/COMPLET%20EN%20BARROSO%20%20%20007%20-%20Europe%202020%20-%20EN%20version.pdf> on 25 August 2018; European Commission 'Smart Regulation in the European Union' COM(2010) 543 final, last accessed from <http://ec.europa.eu/eu2020/pdf/COMPLET%20EN%20BARROSO%20%20%20007%20-%20Europe%202020%20-%20EN%20version.pdf> on 25 August 2018.

considers the complete policy cycle, and emphasizes post-implementation evaluation and assessment of the ‘fitness’ of legislation.¹¹⁵

The Mandelkern Group Report on Better Regulation¹¹⁶ identified that, in addition to clarity, the principles of ‘necessity, proportionality, subsidiarity, transparency, accountability, accessibility, comprehensibility and simplicity’ are quality standards for legislation.¹¹⁷ The better regulation approach proposes the implementation of tools such as pre-and post-enactment evaluation and impact assessments of legislation, the assessment and consideration of various policy options, consultation, the simplification and streamlining of current legislation, and promoting access to legislation.¹¹⁸

Mousmouti argues that a significant weakness of the ‘better regulation’ approach is that it focuses on regulatory quality and the practical effects of the legislation, rather than legislative quality. Effectiveness may only be assessed by whether the procedures prescribed in the legislation have been followed, specified targets have been achieved, and that standards of legislative quality have been incorporated in the legislation.¹¹⁹ Better regulation may also not be able to introduce easily other less rigid potential approaches than the traditional ‘command and control’ regulatory approach. It is also heavily reliant on impact assessments, when it would be beneficial to focus on assessing whether the regulatory framework is in fact effective, and what revisions or refinements should be made for the regulatory framework to continue to be effective.¹²⁰

The Organisation for Economic Co-operation and Development (‘OECD’) has also done significant work on quality of regulation and developing appropriate tools. Its 1995 Recommendations for Improving the Quality of Government Regulation set out principles for

¹¹⁵ Mousmouti, (note 22 above) 32.

¹¹⁶ European Commission ‘Mandelkern Group on Better Regulation’ Final Report (13 November 2001), last accessed from http://ec.europa.eu/smart-regulation/better_regulation/documents/mandelkern_report.pdf on 25 August 2018; European Commission ‘European Governance: Better Lawmaking’ COM (2002) 275 final, last accessed from http://www.osservatorioair.it/documenti/e_ue/documenti%20commissione/better_lawmaking_giu_02.pdf on 25 August 2018; European Parliament, European Council & European Commission ‘Interinstitutional Agreement on better law-making’ [2003] OJEC (2003/C 321/01), last accessed from [http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32003Q1231\(01\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32003Q1231(01)&from=EN) on 25 August 2018.

¹¹⁷ Mousmouti (note 22 above) 33.

¹¹⁸ Ibid.

¹¹⁹ Wim Voermans ‘Concern about the quality of EU legislation: What Kind of Problems, What kind of Standards?’ (1999) 2 *Erasmus Law Review* 59; Robert Baldwin & Martin Cave *Understanding Regulation: Theory, Strategy and Practice* (1999) 59 at 93.

¹²⁰ See R Daniel Kelemaen & Anand Menon ‘The Politics of EC Regulation’ in Stephen Weatherill (ed) *Better Regulation* (2007) 175.

quality legislation.¹²¹ The OECD approach views quality as being an ongoing, iterative process that focuses on ‘regulatory policy, regulatory institutions, and regulatory tools’.¹²² Quality standards of different types are identified. User standards focus on simplicity, clarity and accessibility. Design standards focus on consistency in the legislative rules and their application, and flexibility. Legal standards focus on structure and drafting. Analytical standards include cost-benefit analysis and cost-effectiveness assessments.¹²³ Tools that are utilized to promote quality include simplifying procedures, regulatory impact analysis to facilitate informed decision-making, transparency and communication, utilizing alternatives to regulation,¹²⁴ and ‘ensuring compliance and enforcement and accountability of regulators through administrative justice’.¹²⁵

Mousmouti notes that the EU approach to quality in legislation focuses on the impact of legislation on economic actors.¹²⁶ The well-being of the people is understood to depend upon or is a goal that relates to the proper functioning of the market, or is a goal that governments must attend to. In relation to other non-market related social goals, quality is viewed as a means for those goals to be achieved in a cost-effective way.¹²⁷ The OECD’s approach primarily focuses on economic regulation, and the goal of its approach to regulatory quality is to produce a competitive market, that is not subject to unnecessary regulatory burdens or other burdens that may arise from regulation.¹²⁸ Legislation, and particularly legislation dealing with fundamental rights, affects citizens and other non-economic actors, and it is important to consider whether the tools and approaches that have been developed to address quality in the EU and the OECD may appropriately be applied to assess the realization of fundamental rights,

¹²¹ OECD ‘Recommendation of the Council on Improving Quality of Government Regulation adopted on 9 March 1995’ C(95)21/FINAL, last accessed from [https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?doclanguage=en&cote=OCDE/GD\(95\)95](https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?doclanguage=en&cote=OCDE/GD(95)95) on 25 August 2018; OECD ‘Guiding Principles for Regulatory Quality and Performance (2005), last accessed from <https://www.oecd.org/fr/reformereg/34976533.pdf> on 25 August 2018, OECD ‘Recommendation of the Council on Regulatory Policy and Governance’ (2012), last accessed from <https://www.oecd.org/governance/regulatory-policy/49990817.pdf> on 25 August 2018.

¹²² Mousmouti (note 22 above) 35.

¹²³ OECD ‘Background Note to the OECD Reference Checklist for Regulatory Decision Making’ (1995), last accessed from [https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?doclanguage=en&cote=OCDE/GD\(95\)95](https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?doclanguage=en&cote=OCDE/GD(95)95) on 25 August 2018; OECD ‘Report on Regulatory Reform: Synthesis’ (1997) last accessed from <https://www.oecd.org/gov/regulatory-policy/2391768.pdf> on 25 August 2018.

¹²⁴ Mousmouti (note 22 above) 37.

¹²⁵ OECD ‘Implementing Administrative Simplification in OECD countries: Experiences and Challenges’ 2-3, last accessed from <http://www.oecd.org/dataoecd/0/37/37026688.pdf> on 25 August 2018.

¹²⁶ Mousmouti, (note 22 above) 34 – 35.

¹²⁷ Ibid 36.

¹²⁸ OECD ‘Report on Regulatory Reform: Synthesis’ (note 123 above) 6.

and whether those tools and approaches are sufficient for that assessment.¹²⁹ Karpen also highlights the need to evaluate the effects of law on fundamental rights,¹³⁰ and Rose-Ackerman highlights the importance of looking beyond simple ‘cost-benefit’ assessments of delegation of powers and functions to administrative agencies, and ensuring the consideration of other factors such as the distribution of those costs and benefits, democratic ideals, and also the political and other factors that may impact upon decisions to delegate powers.¹³¹

In light of South Africa’s constitutional dispensation, and the critical need to promote development, transformation and good governance, the regulatory approach and assessment mechanisms that should be developed and applied in South Africa must broaden the scope of consideration in assessments beyond the traditional considerations and assessments of regulatory and legislative quality developed by the EU and the OECD. The realisation of fundamental rights, including the rights to just administrative action, must be incorporated within the structure of the regulatory framework that is established in legislation, and as a central element of assessment tools applied to legislation. Other socio-economic concerns also would be important to include in the range of concerns for assessment.

Substantial work should be undertaken to develop impact assessment mechanisms for legislation. The Department of Performance, Monitoring and Evaluation (‘DPME’) have made a start through the development of Socio-economic Impact Assessment (‘SEIA’) Templates,¹³² which promote consideration of a range of impacts of legislation during its development. The factors considered focus on socio-economic concerns, which are relevant for assessing whether the proposed legislation is likely to promote development and transformation. However, the templates are relatively cursory in their content, and the /depth of analysis expected is not substantial. The template also focuses only on the specified socio-economic policy objectives. An assessment of the full range of impacts that might arise is not required, which is what a thorough assessment should require. It is a good start for an assessment of legislation, and it is positive that a SEIA is now consistently required to be done for legislation. However, an impact assessment process must delve deeper to provide an accurate assessment of the

¹²⁹ Mousmouti, (note 22 above) 34 – 36.

¹³⁰ Ulrich Karpen ‘The obligation to evaluate the effects of laws on the on the exercise of fundamental rights’ in Ulrich Karpen (ed) *Evaluation of Legislation- Proceedings of the Fourth Congress of the European Association of Legislation (EAL) in Warsaw (Poland), June 15th-16th, 2000* (2002) 181.

¹³¹ Susan Rose-Ackerman *Economics of Administrative Law* (Cheltenham, UK: Edward Elgar, 2007) xiv.

¹³² Department of Performance Monitoring and Evaluation ‘Socio-Economic Impact Assessment System (SEIAS) Initial Template (phase 1) and Final Template (phase 2)’, last accessed from <http://www.dpme.gov.za/keyfocusareas/Socio%20Economic%20Impact%20Assessment%20System/Pages/Assessment-Templates-SEIAS.aspx> on 25 August 2018.

implications of the legislation. Departments and drafters should develop more extensive and detailed templates for assessment that include the impacts on the full range of fundamental rights, including the rights to just administrative action, and specifically assess how the rights to just administrative action will be catered for in the legislation.

There is no standard process or requirement in South Africa for the review of the implementation of legislation. This may be included as a requirement in legislation, for example providing that a review of the legislation, including an assessment of its impact and the effectiveness of its implementation must occur after every three or five years. It might be required that a detailed assessment of the legislation must be submitted to Parliament, along with proposals for revisions to legislation that might be necessary to address shortcomings in relation to the implementation of the legislation, if appropriate. It is important to note, that not all implementation issues would need to or should be addressed through legislative amendments.¹³³

The DPME is a relatively new department, and its establishment of the SEIAS has been unfolding since 2015. Their work to date has been more focused on the pre-assessment of legislation, and policy development and project management. It has not to date addressed post-implementation assessments of legislation. The DPME's scope might be expanded to include that function. The DPME has the potential to make a valuable contribution in this area, but it should be significantly capacitated and supported to realise its mandate.¹³⁴ Drafters should also take initiative to promote the development by departments of useful implementation evaluation mechanisms.

To assess the effectiveness of legislation in delineating administrative power in a manner consistent with the rights to just administrative action, it would be necessary to develop measures to assess whether the legislation is being implemented in a manner that is lawful, reasonably, and procedurally fairly. Research into decision-making processes, such as the consideration by Brady of the application of proportionality in relation to the Human Rights Act in the United Kingdom,¹³⁵ and the assessment by Ekins of the role of the legislature in

¹³³ A draft example of such a provision is included in the Appendix.

¹³⁴ Some assessment of the DPME's development so far of a performance monitoring and evaluation system so far is provided in Kathrin A Plangemann 'Strengthening Performance Monitoring and Evaluation' in Asad Alam, Renosi Mokati & Kathrin Plangemann (eds) *Making It Happen: Selected Case Studies of Institutional Reforms in South Africa (Directions in Development- Public Sector Governance)* (2016) 71, last accessed from <https://elibrary.worldbank.org/doi/book/10.1596/978-1-4648-0768-8> on 25 August 2018.

¹³⁵ Alan D P Brady *Proportionality and Deference under the UK Human Rights Act: An Institutionally Sensitive Approach* (2012).

legislating proportionately,¹³⁶ which were discussed in chapter 2.3(b) on reasonableness, provide ideas regarding the nature of research that would need to be undertaken to understand and assess decision-making processes and what factors may promote lawful, reasonable and procedurally fair decision-making. Analysing jurisprudence, studying administrators and how they carry out their functions in specific contexts, and examining dispute resolution mechanisms and their outcomes, are among the types of research that might be undertaken. Research is needed to provide insights for the development of legislation that effectively delineates and regulates administrative power in a constitutionally compliant manner, and measures for the pre-and post-implementation assessment of the achievement of that objective.

4.7 A HOLISTIC, INTEGRATED APPROACH TO DRAFTING

The work of Xanthaki, Mousmouti, and the Seidmans and Abeyesekre view the drafting process as holistic, iterative, and integrated. Examinations of regulatory quality in Europe have considered the entire regulatory and legislative development process, from the policy development phase, developing and applying a definition of ‘quality’ in regulation and legislation, through to the development of indicators and assessment mechanisms for the assessment of regulatory quality.¹³⁷ There have also been significant assessments of the benefits and shortcomings of different regulatory approaches, such as the Better Regulation approach,¹³⁸ which may provide useful resources for drafters who are developing legislative processes that specifically cater for the South African context and needs. The European Association of Legislation (now called the International Association of Legislation) has through its conferences promoted significant engagement and dialogue on all aspects of the drafting process that impact upon quality and effectiveness of legislation, drawing upon the experience in the various European jurisdictions. Assessments of quality of legislation in their proceedings have examined various challenges of defining quality in legislation,¹³⁹ the impact

¹³⁶ Richard Ekins ‘Legislating Proportionately’ in Grant Huscroft, Bradley W Miller & Gregoire Webber (eds) *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (2014) 347.

¹³⁷ See Claudio M Radaelli & Fabrizio De Francesco *Regulatory quality in Europe: Concepts, measures and policy processes* (Oxford: Manchester University Press (2007).

¹³⁸ See Stephen Weatherill (ed) *Better Regulation* (2007); Wim J M Voermans ‘Legislation and Regulation’ in Ulrich Karpen & Helen Xanthaki (eds) *Legislation in Europe: A Comprehensive Guide for Scholars and Practitioners* (2017) 17.

¹³⁹ See Helen Xanthaki ‘Quality of Legislation: an achievable universal concept or an utopia pursuit?’ in Luzius Mader & Marta Tavares de Almeida (eds) *Quality of Legislation: Principles and Instruments— Proceedings of the Ninth Congress of the International Association of Legislation (IAL) in Lisbon, June 24th-25th, 2010* (2011) 75.

of legislative procedures on the quality of legislation that is developed,¹⁴⁰ strengths and weaknesses in regulatory impact assessment processes,¹⁴¹ accessibility of legislation,¹⁴² and the importance of consultation processes and the involvement of civil society.¹⁴³ They have facilitated discussion on techniques relating to the evaluation of legislation,¹⁴⁴ and generally on the implementation and compliance with regulatory reforms.¹⁴⁵

In South Africa, the drafting process tends to be perceived as ending when the legislation is enacted, and that is viewed as the focus and objective of the process. To promote the realization of the rights to just administrative action through legislation, it is essential to view the drafting process as iterative. New major legislation is inevitably going to have some ‘teething pains’, and there will certainly be issues relating to implementation that were difficult, or nearly impossible, to foresee during the development of legislation. Post-implementation assessment and the ongoing refinement of legislation are the means ultimately to ensure that legislation achieves the objective of regulating and controlling administrative power in accordance with the Constitution. As the context within which legislation is implemented is continually evolving, ongoing refinement of legislation is essential to enable even currently effective legislation to continue to be effective.

4.8 DRAFTING DEFENSIVELY AGAINST MALADMINISTRATION AND CORRUPTION

The Seidmans and Abeyesekere propose drafting approaches to promote the rule of law and minimise the likelihood of maladministration and corruption occurring. To promote non-arbitrary decision-making, the decision-making process must ensure that relevant inputs for and feedback arising from decisions are provided to decision makers; appropriate criteria for

¹⁴⁰ See Patricia Popelier ‘Consultation on draft Regulation— Best Practices and Political Objections’ in Mader & Tavares de Almeida *ibid* 136.

¹⁴¹ See Pierre Isalys ‘Impact Assessment as a means towards Higher Quality of Legal Norms: Beware of Blind Spots’ in Mader & Tavares de Almeida (note 139 above) 208.

¹⁴² See Constantin Stefanou ‘Legislative Drafting as a Form of Communication’ in Mader & Tavares de Almeida (note 139 above) 308.

¹⁴³ Luzius Mader & Ulrich Karpen, (eds) *The Participation of Civil Society in the Legislative Process— Proceedings of the Sixth Congress of the European Association of Legislation (EAL) in Bern (Switzerland), May 13th-14th, 2004* (2005).

¹⁴⁴ Ulrich Karpen (ed) *Evaluation of Legislation— Proceedings of the Fourth Congress of the European Association of Legislation (EAL) in Warsaw (Poland), June 15th-16th, 2000* (2002).

¹⁴⁵ Luzius Mader & Sergey Kabyshev (eds) *Regulatory Reforms: Implementation and Compliance— Proceedings of the Tenth Congress of the International Association of Legislation (IAL) in Veliky Novogorod, June 28th-29th, 2012* (2014).

decision-making are specified that must be considered; decision-making processes are based on a rational methodology informed by experience; and decision-making processes are transparent and accountable.¹⁴⁶

To address maladministration and corruption, it is first necessary to identify the types of practices that frequently arise, and the factors that give rise to those practices. With corruption, for example, the types of practices that are observed include bribery, embezzlement, speculation, patronage and nepotism, and conflict of interest. Certain areas of public sector activity that seem to particularly be prone to corruption include procurement, taxation, infrastructure, and public enterprises.¹⁴⁷ This has certainly been apparent in South Africa, with the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State¹⁴⁸ and the and the Commission of Inquiry into Tax Administration and Governance by South African Revenue Service¹⁴⁹ currently underway that are investigating large-scale corruption in public entities and the tax administration. In legislation relating to these areas, it is important to address the potential for maladministration and corruption. It is important to consider the various economic, cultural and political factors that may contribute to the development of corruption.¹⁵⁰ The information coming out of these commissions of inquiry should be thoroughly examined to identify the weaknesses in legislation, organizational structure, and other factors that have contributed to corruption. Legislation may then be strengthened to address the identified weaknesses, and assessment measures for legislation focusing on preventing and addressing corruption and maladministration may be developed. South Africa's constitutional and institutional structure has certainly been 'stress-tested' over the past few years, and it is hoped that the experience may be drawn on to repair and strengthen the country's legal and institutional foundations.

Typically, maladministration and corruption has been addressed through the criminalization of specific conduct. A substantial proportion of the Prevention and Combatting of Corrupt Activities Act 12 of 2004, for example, provides for the designation of offences. Criminal sanctions, which are based upon assumptions about how individuals will assess their

¹⁴⁶ The Seidmans & Abeyesekere (note 35 above) 343-344.

¹⁴⁷ Ibid 344-345.

¹⁴⁸ Information on the Commission of Inquiry is available, last accessed from <https://www.sastatecapture.org.za/> on 26 August 2018.

¹⁴⁹ See the terms of reference for the Inquiry, published in Government Notice 612 in *Government Gazette* 41715 of 18 June 2018.

¹⁵⁰ Susan Rose-Ackerman & Bonnie J Palifka *Corruption and Government: Causes, Consequences and Reform* 2 ed (2016); Susan Rose-Ackerman (ed) *International Handbook on the Economics of Corruption* (2006).

own personal interests, alone do not effectively deter corruption.¹⁵¹ Legislation should include a range of mechanisms that may address the potential for corruption and maladministration from a variety of angles, and enable effective action to be taken in the specific circumstances.¹⁵² Facilitating the detection of maladministration and corruption is essential, and strong whistleblowing legislation may assist in this regard.

The Protected Disclosures Act 26 of 2000 ('PDA') plays a key role in the anti-maladministration and corruption framework in South Africa. This Act, however, should be considerably strengthened, and its scope expanded. The PDA currently applies only in the employer/employee context, and it primarily seeks to address possible 'occupational detriment' that is quite narrowly defined in s 1 of the PDA. 'Occupational detriment' as defined does not include forms of harassment or victimization that a person might be subjected to, other than measures such as suspension, dismissal, demotion, transfers, and refusal of promotion. The range of remedies available in s 6 to persons who have been subject to occupational detriment are essentially those available in terms of labour legislation. While in s 5 there is a duty to inform an employee who has made a protected disclosure of whether or not it has been decided to investigate the matter, there is not a requirement to provide reasons relating to the decision, nor is there any recourse or remedy available or any accountability provided if no action is taken regarding the disclosure.

The legislation should provide a framework for disclosures by any person in relation to activities by organs of state, and not just by employees. The PDA should also provide protections for activities such as harassment, threats, intimidation and violence that might be initiated by any parties related to disclosures that may have been made. Specific offences might be provided for in relation to these types of activities. There also need to be mechanisms of accountability included in the PDA, such as potential sanctions for failures to take necessary action in relation to reported activities. There should be an oversight mechanism, possibly a designated body such as a special ombud, where a whistleblower may report failures to act, or instances of detriment of all forms. In relation to organs of state, reporting requirements in the PDA might include a requirement that a department or public enterprise, as part of its reporting to Parliament, must indicate the number of whistleblowing reports which were made during each year, and actions taken. A positive duty might be placed on accounting officers,

¹⁵¹ The Seidmans & Abeyesekere (note 35 above) 345.

¹⁵² Ibid.

accounting authorities, and executive officers of departments and state-owned enterprises to act in relation to whistleblowing reports.

Political and institutional culture may influence the development and spread of corruption,¹⁵³ and ensuring that fit and proper persons are appointed to key positions is extremely important in this regard. Greater focus must be placed on defining in legislation who are fit and proper appointees to key positions, and even for appointments to all positions in organs of state, for example in terms of the Public Service Act Proclamation 103 of 1994. Requirements for characteristics of honesty, integrity and competence should be clearly spelled out. Processes for appointment, particularly of central positions, must be carefully considered. The advisability of providing for exclusive, discretionary powers of appointment to key positions, for example, the National Director of Public Prosecutions in terms of s 179 of the Constitution, should be questioned and reconsidered. General terms such as ‘fit and proper’ and ‘expertise and experience’ should be fleshed out in legislation to ensure that it is clear how those concepts must be applied in practice.¹⁵⁴

Mechanisms of transparency, oversight, and accountability in legislation may substantially reduce the opportunities for corruption and maladministration.¹⁵⁵ Limiting the scope of discretion as far as reasonably possible may limit the capacity for maladministration and corruption.¹⁵⁶ Prescribing the range of matters upon which decisions must be taken by administrators, defining who may or must be consulted regarding a proposed decision, and defining what information submissions may or may not be provided and considered in the decision making process, may provide significant guidance and delimit the scope of discretion.¹⁵⁷ Providing for decision-making procedures, the issuance of guidelines for the exercise of discretion, requiring consideration of how previous similar decisions were determined, and specifying the considerations that must or may not be taken into consideration, may guide decision-making processes.¹⁵⁸ Requiring impact assessments and reports to be provided in relation to complex, polycentric decisions, may provide information to assess the

¹⁵³ The Seidmans & Abeyesekere (note 35 above) 347-348.

¹⁵⁴ Consider *DA v President of SA* (note 66 above), where the President was held to have appointed a person who was not a fit and proper person as the NDPP; *Corruption Watch* (note 67 above) where the removal of a NDPP and the subsequent appointment of a new NDPP by the President was held to be invalid.

¹⁵⁵ The Seidmans & Abeyesekere, (note 35 above) 349-350.

¹⁵⁶ Ibid 351.

¹⁵⁷ Ibid 352-353.

¹⁵⁸ Ibid 353-354.

decision-making process.¹⁵⁹

Mechanisms of accountability and transparency are critical for promoting good governance and lawful, reasonable and procedurally fair administrative action. The PFMA and the Local Government: Municipal Finance Management Act 56 of 2003 provide the foundations for public financial accountability in South Africa. The PFMA sets out detailed requirements relating to financial management by government departments and public enterprises. Chapter 10 of the PFMA deals with financial misconduct, and ss 81 to 83 set out what constitutes financial misconduct by various officials, and provide that financial misconduct may constitute grounds for suspension or dismissal. Sections 84 and 85 address the disciplinary process that would be applicable in relation to financial misconduct. Section 86 designates certain instances of financial misconduct as offences.

Section 38(1)(h) provides that accounting officers

‘must take effective and appropriate disciplinary steps against any official in the service of the department, trading entity or constitutional institution who—

- (i) contravenes or fails to comply with a provision of this Act;
- (ii) commits an act which undermines the financial management and internal control system of the department, trading entity or constitutional institution;
- or
- (iii) makes or permits an unauthorised expenditure, irregular expenditure or fruitless and wasteful expenditure;’.

Section 40(4)(f) of the PFMA requires that the annual report of a department must indicate any material losses that have resulted from criminal conduct, any unauthorized, irregular, and fruitless and wasteful expenditure, any criminal or disciplinary steps that have been taken, any losses that have been recovered or written off, and any other prescribed matters. Similar requirements apply in relation to accounting authorities of public entities in terms of ss 51(1)(e) and 55(2)(b). In terms of s 86(1) and (2), an accounting officer who wilfully or in a grossly negligent way fails to comply with these requirements is guilty of an offence. However, concerns are being raised about failures to hold people to account for financial misconduct, and how matters are not being reported or promptly addressed.¹⁶⁰

¹⁵⁹ Ibid 355-356.

¹⁶⁰ Marianne Thamm ‘*Operation Clean Audit: Scopa Hears Directors General are not Reporting Corruption*’ Daily Maverick, 13 March 2018, last accessed from <https://www.dailymaverick.co.za/article/2018-03-13-operation-clean-audit-scopa-hears-directors-general-are-not-reporting-corruption/#.Wqi96kxuJOw>.

To shore up the effectiveness of the PFMA, the chapter on financial misconduct should be strengthened, by providing for additional measures of accountability and oversight. While parliamentary committees conduct oversight, the extent of oversight has not been sufficient to address the scope of financial misconduct that has been occurring. The oversight role of Parliament should be strengthened in the PFMA, and the reporting requirements of accounting officers and accounting authorities should be expanded upon. Requirements might be included to provide details of all instances of financial misconduct that are reported to the accounting officer or accounting authority. It might be specified that disciplinary measures must be finalized within a stipulated period, and explanations might be required where matters are not finalized within the required timeframes. An oversight body might be established in addition to parliamentary oversight, to which instances of financial misconduct may be reported (and must be reported by accounting officers and accounting authorities).

As criminalization does not seem to be effectively utilized as a deterrent, a range of other additional mechanisms to address financial misconduct by accounting officers, accounting authorities, executive authorities, and administrators need to be developed, to promote effective action being taken. Perhaps, in addition to empowering action to be taken, positive requirements to act need to be imposed in legislation. Additional accountability and oversight mechanisms need to be included, and a range of sanctions should be available to be applied for financial misconduct. Examples of other sanctions that might be included are fines and administrative penalties. Additional implications for failing to institute disciplinary measures, failing to ensure that disciplinary processes are processed and finalized efficiently might be specified, and appropriate sanctions might be provided. The range of measures that might be taken in response to contraventions of provisions of the Act should be expanded beyond criminal sanctions and disciplinary measures.

The Public Audit Act 25 of 2004 ('PAA') establishes the Auditor-General in accordance with the Constitution. A positive initiative that the Standing Committee on the Auditor-General has undertaken is reviewing the PAA and developing and introducing the Public Audit Amendment Bill,¹⁶¹ among the purposes of which is to provide for the Auditor-General to refer undesirable audit outcomes, arising from an audit performed under the Act, to an appropriate body for investigation, and also to empower the Auditor-General to take

¹⁶¹ Bill B13-2018. Information on the Bill was last accessed from <https://pmg.org.za/bill/793/> and http://pmg-assets.s3-website-eu-west-1.amazonaws.com/B13-2018_Public_Audit.pdf on 25 August 2018.

appropriate remedial action. This initiative by a parliamentary committee to strengthen oversight legislation is welcome, as is Parliament's prompt enactment of the legislation, which is currently with the President for assent. The Standing Committee on Public Accounts and the Standing Committee on Finance might consider pressing for strengthening the PFMA.

Drafters must ensure that legislation provides for various types of accountability on an ongoing basis, including providing for mechanisms for aggrieved persons to seek accountability and redress; mechanisms of public accountability such as through consultation; effective oversight by the legislature and its committees; and accountability to superior officials, internal appeal and review mechanisms, and the courts. Requiring that reasons be provided for decisions, and requiring regular assessment of the consequences of the implementation of legislation may be useful tools to promote accountability. Sunset clauses and requiring regular reviews of legislation by the legislature may be provided. A research report on legislation should thoroughly demonstrate that sufficient mechanisms of accountability are provided.¹⁶² Including public disclosure and reporting requirements in legislation are means to promote transparency.¹⁶³ Particularly in central legislation (such as the PFMA), requirements for extensive reporting and thorough periodic review should be considered.

Institutional robustness is an important characteristic for minimizing the ability of corruption to undermine critical institutions. In this regard, it is proposed that, if possible, institutional structures should avoid providing a single position in an institution with substantial authority without significant oversight, so that if a poor appointment is made to a position, whether intentionally or not, the likelihood that the effectiveness of the whole institution is undermined may be minimized.

Striking the appropriate balance between ensuring appropriate independence of critical institutions, and appropriate oversight and accountability for their functioning, is a fundamental concern. Examples of critical institutions include the National Prosecuting Authority and the vital need to ensure prosecutorial independence,¹⁶⁴ the Directorate for Priority Crimes Investigation, and the South African Revenue Service. When the Directorate for Priority Crimes Investigation was established, and the previous Directorate of Special Operations was

¹⁶² The Seidmans & Abeyesekere (note 35 above) 356-357.

¹⁶³ Ibid 357-358.

¹⁶⁴ John Hatchard *Combatting Corruption: Legal Approaches to Supporting Good Governance and Integrity in Africa* (Cheltenham, UK: Edward Elgar, 2014) 151 to 160.

disbanded, serious concerns regarding the degree of independence provided by the National Prosecuting Authority Amendment Act 56 of 2008 were raised, and the Constitutional Court in *Glenister*¹⁶⁵ found that the DPCI did not meet the constitutional requirement of adequate independence because it was insufficiently insulated from political influence in its structure and functioning. The Court granted leave to appeal, declared the impugned legislation invalid and suspended the declaration for 18 months. Subsequently, in *Suzman*,¹⁶⁶ the court held that certain provisions were unconstitutional, and that those provisions, and certain phrases within other provisions, must be deleted to address the issues relating to the independence of the DPCI. These cases highlight pertinent aspects for consideration regarding providing for the appropriate independence of institutions, particularly critical constitutionally mandated institutions.¹⁶⁷

Institutions such as the Office of the Public Protector that are intended to promote the Constitution and support good governance and integrity are fundamentally important.¹⁶⁸ The Office of the Public Protector has played a critical role, as highlighted in the *EFF* case.¹⁶⁹ The fact that a lengthy court process was undertaken to clarify the extent of the powers of the Public Protector and the effect of the remedial action, as the President and the National Assembly had argued that they were justified in not implementing the remedial action in the Public Protector's Report, raises serious concerns about the drafting of s 182(1)(c) of the Constitution. The powers of the Public Protector should be clarified through a constitutional amendment, and the Public Protector Act 23 of 1994 should be considerably expanded and strengthened. The matter also highlights that the Office of the Public Protector on its own cannot be expected to cope with all instances of corruption and maladministration in the organs of state. Multiple ombud schemes should be established for different sectors of public activity, with similar powers of investigation and powers to effectively order that binding remedial action be taken to address the maladministration or corruption. The resourcing of the Office of the Public Protector also needs to be dramatically enhanced. It is apparent that the effectiveness of the Office of the

¹⁶⁵ *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) (*Glenister*).

¹⁶⁶ *Suzman* (note 68 above); Consider also *Corruption Watch* (note 67 above) paras 45-48; *McBride* (note 69 above) para 43 and *Suzman* *ibid* para 85

¹⁶⁷ Advocate Paul Hoffman for the NGO Corruption Watch, in a letter to the *Sunday Times* 18 March 2018 20, has advocated that the anti-corruption investigating activities should be removed from the Police and the NPA and the DPCI, and be placed under the auspices of a 'Chapter 9 Integrity Commission', based on the Constitutional Court judgments in the *Glenister* and *Suzman* cases.

¹⁶⁸ John Hatchard (note 164 above) 75 and 115-121.

¹⁶⁹ *Economic Freedom Fighters v Speaker of the National Assembly and Others* 2016 (3) SA 580 (CC) ('the *EFF* case').

Public Protector, as it is currently structured, is significantly influenced by the person who holding the office. This is evidenced by the strong report and remedial action of Public Protector that were referred to in the *EFF case*, and the report of the subsequent Public Protector that has been successfully reviewed and was the subject of a scathing judgment of the North Gauteng High Court.¹⁷⁰ The Office of the Public Protector is an example of an institution that is not sufficiently robust.

4.9 PROMOTING A CULTURE OF GOOD GOVERNANCE IN THE PUBLIC SECTOR AND PUBLIC ENTERPRISES

Until recently, there has been a failure to enact national legislation to promote the values and principles governing the public administration in s 195 of the Constitution, as required by s 195(3). The Public Administration Management Act 11 of 2014 ('PAMA'), which is not yet in operation, is intended to give effect to the principles governing the public administration. Regulations are being developed to implement various aspects of the legislation. Among the objects in the Act in s 3 are to promote and give effect to the values and principles in s 195(1) of the Constitution; promote a high standard of professional ethics in the public administration; promote efficient service delivery in the public administration; facilitate the eradication and prevention of unethical practices in the public administration; and provide for the setting of minimum norms and standards to give effect to the values and principles of s 195(1) of the Constitution. Basic values for all institutions in the public administration are set out in s 4.

Section 8 prohibits employees in the public service and municipalities from conducting business with the state. Section 9 requires the disclosure by all members of the administration of their financial interests. These requirements, which are already being phased in, should assist to reduce the risk of corruption and conflicts of interest. Chapter 4 provides for measures for capacity and training, including requiring capacity development and training by institutions, and the establishment of a National School of Government in ss11 and 12. Requirements for compulsory educational standards for certain positions and transfers are enabled in 13. These measures may address issues of capacity that may impact upon the quality of administrative action and hinder the effective implementation of legislation.

¹⁷⁰ *Absa Bank Limited and Others v Public Protector and Others* [2018] 2 All SA 1 (GP).

Chapter 6 addresses ethics, integrity and discipline. An ethics unit is established in s 15, whose purpose is to provide technical assistance and support to institutions; develop norms and standards for integrity, ethics, conduct and discipline; build capacity within institutions to initiate and institute disciplinary proceedings into misconduct; strengthen government oversight of ethics, integrity and discipline, and where necessary, in cases where systemic weaknesses are identified, to intervene; and to promote and enhance good ethics and integrity. When an institution discovers an act of corruption, it must immediately be reported to the police for investigation in terms of any applicable law, including the Prevention and Combating of Corrupt Activities Act 12 of 2004. Issues of misconduct relating to criminal investigations must be reported to the Unit and the relevant head of institution for initiation and institution of disciplinary proceedings. Every institution has the responsibility to ensure that it deals with matters relating to misconduct without undue delay. The head of the institution must report to the Unit on steps taken to address those instances of misconduct. Chapter 7 (s 16) provides for setting norms and standards to address the promotion of values and principles referred to in s 195(1) of the Constitution; capacity development and training; integrity, ethics and discipline; the disclosure of financial interests; measures to improve the effectiveness and efficiency of institutions; disclosure of information relating to pending disciplinary action and concluded disciplinary proceedings where the employee was found guilty. Chapter 8 (s 17) establishes an Office of Standards and Compliance to promote compliance with norms and standards in the public administration. Section. 18 empowers regulations to be made.

The initiatives in the PAMA are very welcome for promoting the implementation of the principles in s 195 of the Constitution in the public service. However, the legislation might be significantly enhanced. For example, the Integrity and Discipline Unit might be strengthened, and a mechanism be provided for the public to report instances of administrative action that are unlawful, unreasonable or procedurally unfair. The powers in terms of the legislation to take measures in relation to misconduct might be further developed and enhanced. Implications for failures by heads of institutions to report instances of misconduct and failures to address misconduct matters promptly should be provided. Implications for failures to disclose interests should be more substantially addressed. It is also not clear what the status of the norms and standards that will be set are, and the mechanisms that will ensure their observance.

Clear linkages might be made in the PAMA and standards that will be issued in terms

of the PAMA to s 33 of the Constitution and to promoting administrative action that is lawful, reasonable and procedurally fair. The application of the PAMA and the principles in s 195 of the Constitution have been interpreted as applying only to the public service as defined in the Public Service Act Proclamation 103 of 1994 ('the PSA'). The PAMA and the principles in s 195 should be extended to be applicable to persons exercising public power in all organs of state, not just in the public service as narrowly defined.

Innovation should be employed to develop additional mechanisms to promote good administration accordance with ss 33 and 195 of the Constitution, that might be incorporated in the PAJA, the PAMA, the PSA or other legislation. An example is in the draft Bill included in the South African Law Reform Commission's *Report on Administrative Justice* of August 1999 (Project 115).¹⁷¹ In chapter 6, the establishment of an Administrative Review Council was proposed, that would enquire into: the law relating to internal complaints procedures, internal administrative appeals and judicial review; the rules and standards for administrative action by organs of state; the appropriateness of establishing independent and impartial tribunals and specialist administrative tribunals; and the appropriateness of requiring administrators from time to time to consider the continuance of standards and prescribing measures for the automatic lapsing of rules and standards. The council would make recommendations to the Minister of Justice on these matters, would formulate a code of good administrative conduct, and would also develop and provide public education on the PAJA and the constitutional provisions relevant for administrative action.¹⁷²

4.10 PUBLIC CONSULTATION PROCESSES

It is generally required that draft legislation undergo a public consultation process prior to being approved by Cabinet for tabling in Parliament. In addition to general invitations for public comment, processes for developing legislation may also include meetings and discussions with other relevant departments and key stakeholders who would have an interest in the legislation, and who may be likely to provide comments that are relevant for the finalisation of the draft legislation. The process may be quite time consuming, including working through what may be a substantial volume of comments on draft legislation, but generally these processes provide

¹⁷¹ South African Law Reform Commission *Project 115: Administrative Justice Report* (August 1999), last accessed from http://www.justice.gov.za/salrc/reports/r_prj115_aja_1999aug.pdf on 18 August 2018.

¹⁷² Ibid chapter 6, in particular clause 15.

submissions that raise relevant issues that warrant further careful consideration, Submissions also give indications of where drafting of provisions may need refinement, as the intended meaning of a provision may not be clearly conveyed to users. Unintended consequences of a provision may be identified, which refined drafting may address. An extensive public consultation process may iron out many potential issues prior to the parliamentary process, which then helps the parliamentary process to proceed more smoothly.

Parliament, in terms of ss 59(1)(a) and 76(1)(a) of the Constitution,¹⁷³ has a duty to facilitate public involvement in its legislative and other processes. The extent of public consultation and deliberations that may occur on a Bill may vary, depending upon the nature of the Bill, how extensive it is, and the degree to which issues are raised by the Bill which prompt submissions from the public. Public consultation is, however, a key component of the legislative process that might render legislation invalid if it is not adequately facilitated.¹⁷⁴ The extent of public consultation depends to some extent upon the committee in Parliament that is processing the Bill, and the degree to which it wishes to intensively examine and consider the Bill. Public consultation processes in Parliament may elicit submissions that raise pertinent issues that warrant examination by the Committee processing the Bill, and the effectiveness of the Bill may be strengthened as a result. However, drafters need to be prepared when assisting with the processing of a Bill in Parliament, that sometimes a committee may request amendments to the Bill because of submissions made on the Bill, or concerns raised by committee members themselves. Drafters may assist in preparing revisions to the Bill that are satisfactory to the committee, while not negatively impacting upon the overall objective of the Bill and the potential effectiveness of its implementation. Drafters may sometimes need to urgently develop significant amendments, perhaps even for later the same day or overnight, for the committee to consider at the next deliberations on the Bill. It may be challenging for drafters to develop well-crafted revisions, which ensure that all implications from the proposed changes are addressed correctly in the Bill, on such an urgent basis. There is a potential for unintended errors arising when revisions are made to legislation on short notice, and it is certainly a test of the drafter's skill and expertise.

¹⁷³ A similar duty is placed on provincial legislatures in s 118(1)(a) of the Constitution.

¹⁷⁴ See *Doctors for Life* (note 86 above); *Matatiele Municipality v President of the Republic of South Africa* (2) 2007 (1) BCLR 47 (CC); *Merafong Demarcation Forum v President of the Republic of South Africa* 2008 (5) SA 171 (CC).

4.11 CONCLUSION

This chapter has discussed how the theoretical approach that was developed in chapter 3 can be applied in practice to the drafting of original legislation, by considering the structure of legislation, the object of the legislation, the substantive content of the legislation, and the effect of legislation. Some considerations for the drafting of new legislation, and the strengthening of the existing legislative framework to defend against corruption and maladministration, have been proposed. It was considered how the principles relating to the public administration in s 195 of the Constitution might be better given effect to in the legislation that regulates the public service, and how a culture of exercising administrative power in a lawful, reasonable, procedurally fair, and constitutionally compliant manner might be promoted in the public service and in public enterprises.