

DECLARATION

I, the undersigned, hereby declare that this thesis is my own work and that I have not previously submitted it in whole or in part at any university for a degree. This work has been completed by myself, with the comment, advice, and support of my supervisor and other staff of the university. The thesis is based on the information as cited. I have drawn upon my personal experience in drafting legislation as a legislative drafter for the National Treasury, for example with the draft provisions that are included in the Appendix to the thesis.

JEANNINE BEDNAR-GIYOSE Johannesburg, 21 September 2018

ACKNOWLEDGEMENTS

I would like to express special appreciation to Professor Cora Hoexter, my supervisor, for all of the guidance, support, and incredibly constructive advice that she has provided during the completion of this work, and for her immense patience and understanding with my very erratic progress.

I would like to thank the University, and in particular, the School of Law and staff for their invaluable assistance and support.

I would like to express appreciation to Judge Clive Plasket, who I had the privilege of working with and studying under for my LLM degree, and who inspired my interest in constitutional and administrative law, and with whom I gained my first exposure to the PAJA.

I would like to thank Adv Empie Van Schoor, for all of her support, understanding and encouragement.

I would like to thank my husband, Nkosana Giyose for all of his love, patience, understanding and immense support throughout this lengthy journey. I also would like to thank my family, in particular my parents, Larry and Pam Bednar, for all of their love and support over the years, and in particular, during the completion of this research.

I am most grateful for the various colleagues in the legislative drafting community who I have had the privilege of meeting and working with over the years, they have been an inspiration and have ignited my love of legislative drafting.

LIST OF ABBREVIATIONS

ADCJ	Acting Deputy Chief Justice
AJ	Acting Judge / Justice
AJA	Acting Judge of Appeal
CEA	Currency and Exchanges Act 9 of 1933
cf	compare
CJ	Chief Justice
Constitution	Constitution of the Republic of South Africa, 1996
CPA	Consumer Protection Act 89 of 1998
DA	Democratic Alliance
DCJ	Deputy Chief Justice
DPME	Department of Planning, Monitoring and Evaluation
ed(s)	editor(s), edition
EFF	Economic Freedom Fighters
et al	and others
et seq	and the following
EU	European Union
FAIS	Financial Advisory and Intermediary Services Act 37 of 2002
FATF	Financial Action Task Force
ff	and following pages
FICA	Financial Intelligence Centre Act 38 of 2001
FICAA	Financial Intelligence Centre Amendment Act 1 of 2017
FSAP	Financial Stability Assessment Programme
FSCA	Financial Sector Conduct Authority
FSRA	Financial Sector Regulation Act 9 of 2017
G20	Group of 20 major economies
GG	Government Gazette
GN	Government Notice
GSSLA	Gauteng Scrutiny of Subordinate Legislation Act 5 of 2008
IA	Insurance Act 18 of 2017 (in chapter 4 of the thesis)
IA	Interpretation Act 33 of 1957 (in chapter 5 of the thesis)
IAIS	International Organization of Insurance Supervisors
Ibid	the same as the footnote immediately above
IMF	International Monetary Fund
Interim Constitution	Constitution of the Republic of South Africa, Act 200 of 1993
IOSCO	International Organization of Securities Commissions
J	Judge, Justice
JA	Judge of Appeal
LIA	Legislative Instruments Act 139 of 2003 (Australia)
MEC	Member of the Executive Council
NCA	National Credit Act 34 of 2005
NCR	National Credit Regulator
NDPP	National Director of Public Prosecutions
NPAA	National Prosecuting Authority Act
NRF	National Revenue Fund

NT Policy Document	National Treasury <i>A Safer Financial Sector to Serve South Africa Better</i> (2011)
OCSLA	Office of the Chief State Law Adviser
OECD	Organization for Economic Co-operation and Development
PA	Prudential Authority
PAA	Public Audit Act 25 of 2004
PAJA	Promotion of Administrative Justice Act 3 of 2000
PAMA	Public Administration Management Act
para(s)	paragraph(s)
PDA	The Protected Disclosures Act 26 of 2000
PFMA	Public Finance Management Act 1 of 1999
PIIPPLA	Powers and Immunities of Parliament and Provincial Legislatures Act 4 of 2004
Proc	Proclamation
PSA	Public Service Act Proclamation 103 of 1994
reg(s)	regulation(s)
RSA	Republic of South Africa
s(s)	section(s)
SA	South Africa
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal
SALRC	South African Law Reform Commission
SA Public Law	South African or Southern African Public Law, depending on the date
SARB	South African Reserve Bank
SCoF	Standing Committee on Finance
SEIA	Socio-economic Impact Assessmt
subsec(s)	subsection(s)
TAA	Tax Administration Act 28 of 2011
The Seidmans and/& Abeyesekere	Ann Seidman, Robert Seidman and Nalin Abeyesekere
UNESCO	United Nations Economic, Scientific and Social Organization

ABSTRACT

This research explores and discusses how the discipline of legislative drafting can and should be applied in order to provide for the appropriate delineation of administrative power in legislation. This inquiry is situated at the intersection of administrative law and legislative drafting. The important role of legislation as a primary source of administrative law has been recognized in the literature. However, the application of the discipline of legislative drafting and its role in the development of administrative law has not yet been considered. This thesis provides an approach for how drafters can approach their discipline so that legislation is developed that it is consistent with, and to the extent necessary, is incorporated within, an integrated system of administrative law.

The primary question that is explored in this research is how legislative drafting can be applied to achieve the objective of producing ‘effective’ or ‘quality’ legislation that delineates administrative power appropriately. To address this question, the research first examines the relationship that exists between legislative drafting and administrative law. Then a theoretical framework is developed that can be applied by legislative drafters to guide and form the basis for an assessment of the delineation of administrative power in legislation, both during the development of legislation, and after the legislation’s enactment. Finally, this thesis explores how the theoretical framework that has been constructed can be applied to the development and ongoing assessment of both principal and delegated legislation. In this regard, reference is made to a range of existing legislation, and specific proposals are provided for improving the drafting of types of legislative provisions that are important in relation to the control and delineation of administrative power.

Table of Contents

Declaration	i
Acknowledgements	ii
List of Abbreviations	iii
Abstract	v
Table of Contents	vi

CHAPTER 1

INTRODUCTION

1.1 NATURE AND SCOPE OF THESIS	1
1.2 SIGNIFICANCE AND ORIGINALITY OF RESEARCH	3
1.3 RESEARCH QUESTION AND ENQUIRY	8
1.4 METHODOLOGY	9
1.5 LEGISLATIVE DRAFTING AND ADMINISTRATIVE LAW	10
(a) Transformation and administrative law	10
(b) The relationship between legislation and administrative law, and the importance of the delineation of administrative power in legislation	13
(c) Legislative drafting, development and transformation	16
(d) Effectiveness and quality of legislation	18
1.6 CHAPTER OUTLINE	21
(a) Chapter 1: Introduction	21
(b) Chapter 2: The context for the delineation of administrative power	21
(c) Chapter 3: A theoretical framework	22
(d) Chapter 4: Original legislation	24
(e) Chapter 5: Delegated legislation	25
(f) Chapter 6: Recommendations and conclusion	26

CHAPTER 2

THE DELINEATION OF ADMINISTRATIVE POWER

2.1 INTRODUCTION	27
2.2 THE DELINEATION AND CONTROL OF ADMINISTRATIVE POWER	28
(a) The Constitution	28
(b) The rights to just administrative action	31
(c) The PAJA	32
(i) Purpose, role in the administrative-law framework, and relationship with the constitution	32

(ii) <i>Balancing the rights to lawful, reasonable and procedurally fair administrative action with the need for an effective and efficient administration</i>	33
(iii) <i>Drafting other legislation to integrate with the PAJA</i>	34
(iv) <i>Challenging violations of the rights to just administrative action</i>	39
(v) <i>Particularities of drafting with the PAJA</i>	41
(d) <i>Original and delegated legislation</i>	49
2.3 FUNDAMENTAL PRINCIPLES OF ADMINISTRATIVE LAW: LAWFULNESS, REASONABLENESS, PROCEDURAL FAIRNESS	49
(a) <i>Lawfulness</i>	49
(i) <i>Authority</i>	51
(ii) <i>Jurisdiction</i>	57
(iii) <i>Abuse of discretion</i>	61
(b) <i>Reasonableness</i>	67
(c) <i>Procedural fairness</i>	79
2.4 THE RIGHT TO REASONS	85
2.5 JUDICIAL REVIEW	88
2.6 CONCLUSION	90

CHAPTER 3

A THEORETICAL FRAMEWORK FOR THE DELINEATION OF ADMINISTRATIVE POWER IN LEGISLATION

3.1 INTRODUCTION	91
3.2 XANTHAKI'S CONSIDERATION OF 'QUALITY', 'EFFECTIVENESS' AND 'EFFICACY' IN LEGISLATION	91
(a) <i>Quality and effectiveness</i>	91
(b) <i>Tools for achieving effectiveness</i>	93
(i) <i>Clarity, precision and unambiguity</i>	94
(ii) <i>Gender-neutral language</i>	95
(iii) <i>Plain language</i>	96
(c) <i>The drafting process</i>	99
(i) <i>The drafting proposal or drafting instructions</i>	100
(ii) <i>The legislative plan</i>	101
(iii) <i>Determining the most appropriate legislative solution</i>	103
(iv) <i>Designing the legislation— structure</i>	104
3.3 MOUSMOUTI'S CONSIDERATION OF 'QUALITY' AND 'EFFECTIVENESS' IN LEGISLATION	105
(a) <i>'Effectiveness', 'quality' and the 'effectiveness test'</i>	105
(b) <i>Overarching structure</i>	109
(c) <i>The purpose of legislation</i>	111

(d) <i>The substantive content of legislation</i>	112
(e) <i>Capturing the results of legislation</i>	115
3.4 THE WORK OF THE SEIDMANS AND ABEYESEKERE ON DRAFTING FOR TRANSFORMATION AND GOOD GOVERNANCE	
(a) <i>The role of the drafter</i>	117
(b) <i>Drafting to promote transformation and good governance</i>	120
(c) <i>The research report</i>	123
(d) <i>Problem-solving methodology</i>	125
(e) <i>Developing the legislative solution to promote conformity</i>	126
(f) <i>Impact assessment</i>	128
(g) <i>Drafting to promote effective legislation and non-arbitrary decision-making</i>	129
3.5 A THEORETICAL FRAMEWORK TO PROMOTE THE CONSTITUTIONALLY COMPLIANT EXERCISE OF ADMINISTRATIVE POWER	
(a) <i>The role of the legislative drafter</i>	139
(b) <i>Drafting to promote transformation and good governance</i>	140
(c) <i>Quality, efficacy and effectiveness</i>	141
(d) <i>The effectiveness test</i>	143
(e) <i>Tools for achieving effectiveness</i>	144
(f) <i>The drafting process</i>	144
(i) <i>The drafting proposal or drafting instructions</i>	145
(ii) <i>The legislative plan</i>	146
(iii) <i>Legislative report</i>	147
(iv) <i>Problem-solving methodology</i>	148
(v) <i>Determining the most appropriate legislative solution</i>	148
(g) <i>The structure of legislation- internal and overarching</i>	150
(h) <i>The object or purpose of legislation</i>	152
(i) <i>The substantive content of legislation</i>	152
(j) <i>Assessment of legislation</i>	153
(k) <i>Drafting to promote effective legislation and non-arbitrary decision-making</i>	154
3.6 CONCLUSION	154

CHAPTER 4

DRAFTING OF ORIGINAL LEGISLATION

4.1 INTRODUCTION	156
4.2 BACKGROUND AND ACCOMPANYING WORK FOR DEVELOPING LEGISLATION	156
(a) <i>Legislative proposals and legislative reports</i>	156
(b) <i>Regulatory approach</i>	158

4.3 STRUCTURE OF LEGISLATION	164
(a) <i>Internal structure</i>	164
(b) <i>Integration within the legislative framework</i>	166
4.4 OBJECT AND PURPOSE OF LEGISLATION	167
4.5 SUBSTANCE OF LEGISLATION	168
(a) <i>Definitions</i>	168
(b) <i>Application clauses</i>	170
(c) <i>Integration with other legislation and co-ordination</i>	170
(d) <i>Establishment of regulatory institutions</i>	174
(e) <i>Governance</i>	176
(f) <i>Mechanisms to promote transparency, oversight and accountability</i>	181
(g) <i>Measures specifically addressing administrative action</i>	184
(h) <i>Decision-making processes</i>	185
(i) <i>Lawfulness, reasonableness, procedural fairness and proportionality</i>	186
(j) <i>Supervisory and enforcement mechanisms</i>	187
(k) <i>Information</i>	188
(l) <i>Applying drafting tools to achieve effectiveness</i>	190
4.6 EFFECTS OF LEGISLATION	194
4.7 A HOLISTIC, INTEGRATED APPROACH TO DRAFTING.....	199
4.8 DRAFTING DEFENSIVELY AGAINST MALADMINISTRATION AND CORRUPTION	200
4.9 PROMOTING A CULTURE OF GOOD GOVERNANCE IN THE PUBLIC SECTOR AND PUBLIC ENTERPRISES	208
4.10 PUBLIC CONSULTATION PROCESSES	210
4.11 CONCLUSION.....	212

CHAPTER 5

DRAFTING OF DELEGATED LEGISLATION

5.1 INTRODUCTION.....	213
5.2 SCOPE OF DELEGATION OF LEGISLATIVE POWER	213
5.3 ACCOUNTABILITY AND OVERSIGHT	225
5.4 EMPOWERING PROVISIONS	230
5.5 INTEGRATION AND ALIGNMENT	234
5.6 IMPLEMENTING THE THEORETICAL FRAMEWORK	237
(a) <i>The drafter of delegated legislation and quality assurance</i>	237
(b) <i>Drafting process</i>	239
(c) <i>Structure</i>	239
(d) <i>Assessment and review of delegated legislation</i>	240

5.7 CONCLUSION	240
-----------------------------	------------

CHAPTER 6

CONCLUSION

6.1 THE RESEARCH UNDERTAKEN	242
<i>(a) Nature and scope of thesis</i>	<i>242</i>
<i>(b) Research question and inquiry</i>	<i>244</i>
6.2 THE CONTEXT OF THE DELINEATION OF ADMINISTRATIVE POWER	245
6.3 A THEORETICAL FRAMEWORK TO ASSIST WITH PROVIDING FOR AND ASSESSING THE DELINEATION OF ADMINISTRATIVE POWER IN LEGISLATION	246
6.4 THE APPLICATION OF THE THEORETICAL FRAMEWORK TO THE DRAFTING OF LEGISLATION	249
6.5 CONCLUSION.....	250
ANNEXURE	252
BIBLIOGRAPHY	257
TABLE OF CASES.....	278
TABLE OF LEGISLATION.....	290