

CHAPTER 3

A THEORETICAL FRAMEWORK FOR THE DELINEATION OF ADMINISTRATIVE POWER IN LEGISLATION

3.1 INTRODUCTION

This chapter addresses the second aspect of the inquiry, which is to construct a theoretical framework that can be applied to assess whether legislation delineates administrative power in a constitutionally compliant manner, and to promote the development of legislation that is constitutionally compliant and gives effect to the rule of law and the fundamental principles of lawfulness, reasonableness, and procedural fairness. How the theoretical framework can be applied to promote the appropriate delineation of administrative power in South African legislation is explored in chapters 4 and 5.

The theoretical framework draws on the approaches of Xanthaki and Mousmouti to assess and promote the development of ‘effective’ legislation, and the work of Robert and Ann Seidman and Nalin Abeyesekere (‘the Seidmans and Abeyesekere’) on the application of legislative drafting to develop legislation that promotes transformation and good governance. Part 3.2 discusses Xanthaki’s framework for considering ‘quality’, ‘effectiveness’ and ‘efficacy’ in legislation. Part 3.3 focuses on Mousmouti’s examination of ‘quality’ and ‘effectiveness’ in legislation. Part 3.4 highlights the work of the Seidmans and Abeyesekere on transformation and good governance. Part 3.5 proposes a theoretical framework for drafting to promote the constitutionally compliant delineation of administrative power.

3.2 XANTHAKI’S CONSIDERATION OF ‘QUALITY’, ‘EFFECTIVENESS’ AND ‘EFFICACY’ IN LEGISLATION

(a) Quality and effectiveness

Xanthaki’s theoretical framework describes how legislation contributes to effective regulation. While drafters frequently state that they seek to produce ‘quality’ or ‘effective’ legislation, these concepts have not been consistently defined, and it has not been considered in detail how the extent of realization of these concepts in legislation should be assessed. Her enquiry defines

processes that may be followed and tests that may be applied by legislative drafters throughout the course of the drafting process to produce ‘quality’ legislation.

Governments implement policies to achieve desired regulatory results and impact.¹ Government may utilize a variety of regulatory tools that to implement policy.² Legislation is a regulatory tool, where ‘policy becomes translated into a legal concept and then expressed as a legislative text’.³ Drafters are involved in this part of the regulatory process, by implementing the various stages of the drafting process.⁴ Drafters should not only focus on achieving ‘quality in legislation’, but must view their role as being part of a regulatory process that aims to achieve quality in regulation.⁵

To fulfil this role, drafters must understand the regulatory objective of the legislation, and the regulatory approach to achieve the objective. If legislation is part of a broader regulatory framework, it must be understood how the legislation will form part of the overall regulatory framework and promote the achievement of the regulatory objective.

The ultimate regulatory aim is ‘efficacy’, which is ‘the extent to which regulators achieve their goal’.⁶ In legislative drafting, ‘efficacy’ is ‘the capacity of a piece of legislation to achieve the regulatory aims that it set out to address’.⁷ Drafters are not by themselves able to achieve efficacy through the quality of legislative drafting. Other factors may undermine implementation. For example, policy content incorporated in legislation may not be able to achieve the regulatory objective. An inadequate regulatory impact assessment may lead to poor choices being made regarding the substantive content of the legislation. Judicial interpretation of legislation may also impact on the legislation’s effectiveness. However, drafting quality

¹ Helen Xanthaki *Drafting Legislation— Art and Technology of Rules for Regulation* (2014) 7.

² Ibid 3. See also 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/en/documents/routes-better-regulation-guide-alternatives-classic-regulation> on 19 August 2018.

³ Xanthaki (note 1 above) 3. See also Elmer A Dreidger *The Composition of Legislation- Legislative Forms and Precedents* (1976) xv. On the relationship between legislation and regulatory drafting, see Maria Mousmouti ‘Operationalising Quality of Legislation through the Effectiveness Test’ (2012) 6:2 *Legisprudence* 191; 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* 2 ed (2012).

⁴ Helen Xanthaki *Thornton’s Legislative Drafting* 5 ed (2013).

⁵ Xanthaki (note 1 above) 4. On the role of legislative drafters in the regulatory process, see Constantin Stefanou ‘Legislative Drafting as a Form of Communication’ in Luzius Mader & Marta Tavares-Almeida (eds) *Quality of Legislation— Principles and Instruments* (2011) 308; Constantin Stefanou ‘Drafters, Drafting and the Policy Process’ in Constantin Stefanou & Helen Xanthaki (eds) *Drafting Legislation: A Modern Approach* (2008) 321.

⁶ Xanthaki (note 1 above) 5.

⁷ Ibid 6. See also Neil Gunningham & Darren Sinclair ‘Designing Smart Regulation’, last accessed from www.oecd.org/dataoecd/18/39/33947759.pdf on 19 August 2018; Robert Baldwin ‘Is Better Regulation Smarter Regulation?’ (2005) *Public Law* 485 at 511.

strongly influences the ability of legislation to be effectively implemented. It also influences the extent to which legislation may be subject to judicial interpretation, and how the legislation is interpreted by the courts.⁸ Well-drafted legislation is less likely to be subject to judicial review, and if it is scrutinized by a court, the court might be more likely to interpret the legislation consistently with the intention of the legislature as expressed in the drafting.

To achieve legislative ‘efficacy’, drafters seek to produce ‘effective’ legislation.⁹ Effectiveness is ‘the ultimate measure of quality in legislation’,¹⁰ and effectiveness is ‘the extent to which the legislation manages to introduce adequate mechanisms capable of producing the desired regulatory results’.¹¹ Xanthaki refers to Mousmouti’s assessment of an ‘effective’ piece of legislation, which is discussed in part 3.3 below. An effective piece of legislation envisages the main outcomes that are sought to be achieved, and focuses on those outcomes during the drafting process.¹²

(b) Tools for achieving effectiveness

Two approaches may be applied to promote the development of effective legislation. The first approach is to seek efficiency, which entails conducting a cost-benefit analysis, and choosing the legislative approach that would incur the minimum cost to achieve the optimum benefit. This is the most financially appropriate solution,¹³ which is an important consideration for government. It may also be an important consideration for those who will be subject to the legislation, and who may be required to pay fees, levies or taxes to fund regulatory functions.¹⁴

⁸ Ibid.

⁹ Ibid.

¹⁰ Helen Xanthaki ‘On Transferability of Legal Solutions’ in Stefanou & Xanthaki (note 5 above) 1.

¹¹ Xanthaki (note 1 above) 7. See Office of the Leader of the House of Commons *Post Legislative Scrutiny – The Government’s Approach* (March 2008) para 2.4, last accessed from https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/228516/7320.pdf on 19 August 2018.

¹² Ibid 8 and n 60, citing Mousmouti (note 3 above) 202.

¹³ Ibid 8.

¹⁴ For example, during Parliament’s processing of the Financial Sector Regulation Act 9 of 2017, an important consideration raised by financial sector industry stakeholders was the potential cost of the new regulatory framework that was being established. The National Treasury made presentations to the Standing Committee on Finance regarding the costs of the regulatory regime, and submitted a draft Financial Sector Levies Bill to provide a sense to Parliament of how the funding of the regulatory regime is envisaged to operate. See the Standing Committee on Finance *Minutes of the Meeting of 21 September 2016*, last accessed from <https://pmg.org.za/committee-meeting/23340/> on 26 August 2018; Standing Committee on Finance *Minutes of the Meeting of 30 May 2017*, last accessed from <https://pmg.org.za/committee-meeting/24495/> on 26 August 2018, and Standing Committee on Finance *Minutes of the Meeting of 17 April 2018*, last accessed from <https://pmg.org.za/committee-meeting/26116/> on 26 August 2018.

The second approach is applying the techniques of legislative drafting: clarity, precision, and unambiguity.

(i) *Clarity, precision and unambiguity*

Clarity in drafting produces easily understood legislation. Precision entails exactness of expression and providing necessary detail in legislative provisions. Unambiguity is where provisions have a certain or exact meaning.¹⁵ Clarity, precision and unambiguity promote predictability in the law. Predictability is necessary for legislation to be effective, and is essential for the rule of law to be applied. The more clear, precise, and unambiguous legislation is, the less likely that users of legislation who are required to comply with the law, including administrators, will misunderstand or misinterpret legislation and obligations, and as a result, unintentionally not comply with legislation's requirements. As a result, compliance with and the effectiveness of legislation is promoted, and the rule of law.¹⁶

In some instances, a certain degree of vagueness may be necessary, for example where a legislative provision might be framed in a manner to avoid a political disagreement delaying or endangering the passage of legislation. Where it might not have been possible to develop or agree upon detailed provisions in legislation, it may be decided to provide in original legislation that the necessary detail will be addressed in delegated legislation. Further analysis and discussion on those matters might then occur.¹⁷ Some degree of discretion may be necessary regarding certain matters that need to be determined by administrators,¹⁸ and it may be appropriate to empower regulatory bodies to provide some of the detail of regulation.¹⁹ The importance of delegated legislation in the modern regulatory context in South Africa is discussed in chapter 5.

Tension may sometimes arise between achieving clarity, precision and unambiguity. It may be possible to make a provision more precise by adding additional detail, to try to ensure that all possible situations or the entire matter is addressed. This may, however, reduce the

¹⁵ Xanthaki (note 1 above) 8.

¹⁶ Ibid 8-9, 85. See Esther Majambere 'Clarity, Precision and Unambiguity: Aspects for Effective Legislative Drafting' (2011) 37 *Commonwealth Law Bulletin* 417; Bernard Bekink & Christo Botha 'Aspects of Legislative Drafting: Some South African Realities (or Plain Language is Not Always Plain Sailing)' (2011) 28 *Statute Law Review* 34 at 65. See also the discussion of the work of the Seidmans and Abeyesekere in part 3.4 below.

¹⁷ Ibid 87.

¹⁸ Ibid 88.

¹⁹ Ibid 91.

clarity of the provision, or introduce ambiguity.²⁰ The potential danger of being over-exhaustive or over-precise when trying to provide precise and well-defined terms must be avoided. This may result in the unintended exclusion of content that was intended to be included within the scope of the term, as well as redundancy, verbosity and unintended loopholes being created.²¹ A careful balance must be struck between the objectives of clarity, precision and unambiguity, although it is not always easy to determine the optimal balance.²²

Xanthaki argues that:

‘[C]larity, precision and unambiguity in the legal system offer democratic governments the tool required to achieve transformation by means of legislation: by offering clear regulatory messages with the law governments can achieve the fragmented regulatory goals of each legislative piece, which formulate the collage of regulatory goals expressing the transforming law reform. This leads to policy effectiveness and possible transformation.’²³

Clarity, precision and unambiguity enable the courts and administrators to understand and apply the law correctly, and this promotes the rule of law. Clarity of the law requires consistent and intelligible grounds for justification-based reasons.²⁴ Thoroughly and consistently applying clarity, precision and unambiguity is important for delineating legislation in a constitutionally compliant manner, mitigating through legislation the categories of unlawful administrative action discussed in the section on lawfulness in chapter 2, and achieving the transformational objectives of s 33 of the Constitution.

(ii) *Gender-neutral language*

Gender-neutral drafting promotes clarity, precision and unambiguity, and ultimately the effectiveness of legislation. Gender-neutral language seeks to include and treat all people

²⁰ Ibid 9.

²¹ Ibid 91-92 and n 47, citing the Chief Parliamentary Counsel to the Government in Ireland ‘Legislative Drafting Manual’ (unpublished, Dublin, 2001) para 4.4.

²² Xanthaki (note 1 above) 92. Sections 2 and 3 of the Financial Sector Regulation Act 9 of 2017, which define the terms ‘financial product’ and ‘financial service’, contain both extensive and detailed lists of activities that constitute financial products and services, as well as provide for the potential for additional activities to be designated by the Minister in regulation. These definitions have proven, nevertheless, to present some challenges for implementation, and will likely need to be amended in the near future. This perhaps represents a not completely successful effort to strike a balance between precision and necessary open-endedness.

²³ Ibid 86. See also Karl Klare ‘Legal Culture and Transformative Constitutionalism’ (1998) 14 *SAJHR* 1; Susan Krongold ‘Writing Laws: Making them Easier to Understand’ (1992) 24 *Ottawa Law Review* 495 at 501.

²⁴ Ibid 86. See also Tatsuo Inoue ‘The Rule of Law as Legislation’ in Luc J Witgens (ed) *Legislation in Context: Essays in Legisprudence* (2007) 55 at 71.

equally.²⁵ It is essential to make it clear to whom the law applies. Gender-neutral drafting promotes accuracy in legislation, and it ensures that equality guarantees in the Constitution are satisfied. Interpretation legislation or provisions in interpretation provisions in legislation may provide that a reference to ‘he’ or a masculine term includes a reference to ‘she’ or the feminine version of a term. However, a woman reading legislation may not be aware of the provisions of interpretation legislation, or of an interpretive provision elsewhere in the legislation. She might interpret the legislation as not applying to her. There may also be limited instances where it may be appropriate in the context to refer to only a specific gender, if a matter addressed in a legislative provision may in fact only be relevant or applicable to a particular gender. In order to comply with the requirement that legislation must be accurate and clear in expressing to whom the law applies, and to conform with constitutional guarantees of equality, it is important to use gender-neutral language.²⁶

South Africa adopted the use of gender-neutral language in 1995, and current drafting practice utilizes the use of gender-neutral pronouns and terms for offices, for example, ‘Chairperson’ instead of ‘Chairman’, and using terms such as ‘person’ or ‘individual’.²⁷ In South Africa’s constitutional dispensation founded on the values of human dignity, equality and freedom, an important aspect of the societal and legal transformation that is sought to be achieved involves promoting inclusion of those who were previously excluded and dispossessed, for example through the promotion of access to justice.. Drafting legislation in gender-neutral language emphasizes the importance of equality, dignity and inclusion to all users of legislation, including administrators.

(iii) Plain language

Plain-language drafting is a widely advocated tool for promoting clarity, precision and unambiguity in, and ultimately the effectiveness of, legislation.²⁸ Plain language is ‘the means of making a message understood and acted on by the intended audience’.²⁹ This means that

²⁵ Ibid 103-104. See also UNESCO *Guidelines on Gender-Neutral Language* (1999), last accessed from <http://unesdoc.unesco.org/images/0011/001149/114950mo.pdf> on 19 August 2018.

²⁶ Ibid 104-105. See Mary Jane Mossman ‘Use of Non-Discriminatory Language in Law’ (1995) 20 *International Legal Practice* 8.

²⁷ Ibid 105. See Sandra Petersson ‘Gender Neutral Drafting: Recent Commonwealth Developments’ (1999) 20 *Statute Law Review* 35 at 57; Christopher Williams ‘The End of the ‘Masculine Rule’? Gender-Neutral Legislative Drafting in the United Kingdom and Northern Ireland’ (2008) 29 *Statute Law Review* 139; Sandra Petersson ‘Gender Neutral Drafting: A Historical Perspective’ (1998) 19 *Statute Law Review* 93.

²⁸ See Office for Parliamentary Counsel- Australian Government *Plain English Manual*, last accessed from https://www.opc.gov.au/sites/g/files/net2056/f/plain_english_0.pdf on 19 August 2018.

²⁹ Xanthaki (note 1 above) 110.

the main regulatory message that the government wants to communicate though the legislation is understood by readers.³⁰ Elements of plain language include the words, syntax, punctuation and style of writing, as well as the structure, layout and appearance of legislation. Accessibility of legislation to the public is also an important consideration.³¹ Plain language entails using clear, straightforward, economical and direct language, that is understandable by and is accessible to the intended audience.³² The drafter must assess the information that must be provided for users of the legislation to make informed decisions, and then develop the appropriate words, sentences, and provisions to convey that information.³³ Plain language seeks to promote communication between the drafter and the user of legislation.³⁴

Two key elements of plain-language drafting are knowing your audience, and ease of communication. A clear understanding of the target audience is necessary for legislation to be developed that communicates the regulatory message effectively to users, through language that is appropriately pitched to enable easy communication with the audience. If this is not achieved, the legislation will be ineffective, because the regulatory message will not be capable of being understood and implemented by those who are intended to apply or are subject to the law.³⁵ Determining the audience for legislation may be challenging, as the range of users may be diverse.³⁶

Some efforts have been made to assess empirically the audience for legislation.³⁷ User testing surveys by Phil Knight and the Plain English Campaign on behalf of the Department of

³⁰ Ibid 111.

³¹ Ibid. See Brian Hunt 'Plain Language in Legislative Drafting: Is it Really the Answer?' (2002) 23 *Statute Law Review* 24; J Stark 'Should the Main Goal of Statutory Drafting be Accuracy or Clarity?' (1994) 15 *Statute Law Review* 207; Ruth Sullivan 'Some implications of Plain Language' (2001) 22 *Statute Law Review* 145 at 180; Irish Law Reform Commission 'Consultation Paper on Statutory Interpretation: Plain Language and the Law' (LRC CP14-1999) last accessed from

http://www.lawreform.ie/_fileupload/consultation%20papers/cpPlainLanguage.pdf on 19 August 2018; Irish Law Reform Commission, 'Statutory Drafting and Interpretation: Plain Language and the Law' (LRC 61-2000), last accessed from http://www.lawreform.ie/_fileupload/Reports/rPlainLanguage.pdf on 19 August 2018.

³² Xanthaki (note 1 above) 9; see Sullivan *ibid* at 149; Bryan A Garner *Legal Writing in Plain English* (2001) 10-13.

³³ Ibid.

³⁴ Ibid 108; see D Greenberg *Craies on Legislation- A Practitioner's Guide to the Nature, Process, Effect and Interpretation of Legislation* 9 ed (2008) 338-340.

³⁵ Ibid 114.

³⁶ Ibid 109.

³⁷ See, for example, 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; 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

Justice and Constitutional Development in South Africa examined reader comprehension of two versions of the Human Rights Commission Act 54 of 1994, one being the enacted version of the Act, and the other a plain-language version of the Act that was developed by the department. The study found that readers scored significantly higher on comprehension testing after reading the plain-language version of the Act, compared with the actual enacted legislation.³⁸ Therefore, plain language is important for promoting comprehension and enabling compliance with legislation.

The primary audience of the legislation should be determined as precisely and accurately as may be feasible in the circumstances. Departmental experience and understanding of key stakeholders in various fields of administrative action may be helpful in identifying many of the main users of legislation that is being developed. Even if the main target audience may be ‘sophisticated’, the temptation to draft legislation in technical terms or ‘legalese’ should be avoided. The rule of law requires accessibility in legislation, and legislation should use language that is accessible to all potential users of the legislation.³⁹

Once the audience has been identified, a suitable plain-language text may be developed that promotes easy communication with users, drawing upon the range of plain language techniques and principles that have been developed. If there is a tension between effectiveness and plain language, achieving effectiveness should be prioritized.⁴⁰

The application of plain language is relevant at various stages of the drafting process described in part (c) below. Plain language plays a central role when the legislative text is developed. A well drafted text ‘uses words economically and at a level that the audience may understand. Its sentence structure is tight. Its tone is welcoming and direct’.⁴¹ Clearly expressing the regulatory objective of the legislation and how it is intended to be achieved may form a sound basis for assessing the legislation’s effectiveness.

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.

³⁸ 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.

³⁹ Ibid 115-116.

⁴⁰ Ibid 116-117.

⁴¹ Ibid 112.

South Africa in the constitutional era has promoted plain-language drafting, although certainly a proportion of legislation that is still produced cannot be characterized as being in plain language. The drafting of the Constitution was directed to be in plain language, and drafters were trained in plain-language drafting.⁴² As an aid to accessibility, guides explaining the Constitution were published in all the official languages and ‘pocket’ versions of the Constitution in easily carried and readable format.⁴³

The techniques of using plain language are very important in South Africa, where challenges exist to communicate effectively through legislation to a diverse range of users, ranging from people who may have modest education and who have historically been marginalized and excluded from the legal system, to others who are technical experts in a range of fields. The realization of the transformational objectives of the Constitution and the rights to just administrative action necessitate the intensive application of plain-language drafting. Further initiatives to assess and understand the users of legislation and how legislation may best communicate to them might be very beneficial to the application of plain-language drafting. Endeavouring to use language and structuring legislation to address various users, including administrators, might promote the effectiveness of legislation. The application of plain-language drafting techniques is discussed further in chapter 4.

(c) The drafting process

Xanthaki addresses the considerations that are important for the achievement of efficacy in legislation at each stage of the drafting process,⁴⁴ which is comprised of the following five stages: (1) understanding the proposal; (2) analysing the proposal; (3) designing the law; (4) composing and developing the draft; and (5) verifying the draft.⁴⁵ Drawing upon legislative drafting literature and materials from the Commonwealth, Xanthaki describes checklists of questions and criteria that are important to consider at different stages of the drafting process. The checklists address matters that are pertinent in various commonwealth jurisdictions, including South Africa.

⁴² See Peg James ‘Drafters of South Africa’s New Constitution Adapt to Plain Language’ *Clarity* No 38, Jan 1997 13, last accessed from <http://www.clarity-international.net/wp-content/uploads/2015/05/Clarity-no-38-bookmarked.pdf> on 20 August 2018.

⁴³ last accessed from <https://www.brandsouthafrica.com/governance/constitution-sa-glance/my-constitution-my-rights-a-plain-language-guide-to-the-bill-of-rights#equality> on 20 August 2018.

⁴⁴ This drafting approach was originally described by Thornton, and has been expounded upon in the subsequent work of Xanthaki in updating Thornton’s text. See Xanthaki (note 4 above) 145.

⁴⁵ *Ibid.*

(i) *The drafting proposal or drafting instructions*

The drafting process begins when the drafter receives the ‘drafting proposal’ or ‘drafting instructions’. In many Commonwealth jurisdictions, drafters are employed in centralized drafting offices (such as the Office of the Parliamentary Counsel found in the United Kingdom and Australia), and government departments submit formal briefs to the drafting Office requesting the drafting of legislation. Xanthaki’s discussion of drafting instructions specifically addresses that type of drafting arrangement. The drafting process in South Africa differs from the model of the United Kingdom, and this is discussed further in part 3.5 below.

The legislative proposal must enable the drafter to commence drafting the legislation. The legislative problem that must be addressed must be clearly stated and understood, and the reason why the current law must be amended must be explained. The objective of the legislation must be clearly defined. The history and current problems that have led to the legislative proposal, deficiencies in existing laws, and any court judgments that have impacted on the interpretation of the law or highlighted the need for a revision of the existing law, should be identified. Sufficient background information and documentation relating to the policy decisions that have been made must be provided. The rationale for the proposed legal approach to achieve the policy objectives must be explained. How the legislation is envisaged to operate in practice, and the mechanisms and institutional structures that should be provided for in the legislation, should be clarified. Legal and administrative issues and problems should be identified, as well as the envisaged benefits. What consultation has already been undertaken with other departments, organs of state and other institutions, and stakeholders, and what consultation will need to be undertaken, should be identified. What consequential amendments may need to be made to other legislation, and what transitional arrangements would need to be provided for, should be specified.⁴⁶

The legislative proposal also assists with briefing a Minister regarding legislation that is proposed to be developed, or for which approval is sought to submit draft legislation to Cabinet for approval for public consultation or tabling in Parliament. The content of the legislative

⁴⁶ Xanthaki (note 1 above) 23 and 27-28. See also Attorney General’s Department *Drafting Instructions Handbook* Negara Brunei Darussalam (2015) para 5.3.7, last accessed from <http://www.agc.gov.bn/AGC%20Images/Publication/drafting%20instructionhandbook.pdf> on 20 August 2018;

proposal also may be incorporated in the Cabinet memorandum when Cabinet considers the draft legislation.⁴⁷

To ensure that they have received adequate drafting instructions to be able to develop appropriate legislation, drafters should consider the following questions:

- (1) What is the precise problem?
- (2) What is the nature and scale of the risk from the harm that the problem creates?
- (3) What are the various options for dealing with the problem?
- (4) What is the likely impact (positive and negative) arising from each option?
- (5) What administrative processes are required to implement each option?
- (6) What is the value of the monetary benefits that are expected to accrue from each option?
- (7) What are the estimated financial costs of each option?
- (8) How cost-effective is each option? and
- (9) What aspects relating to the constitutional order, good governance, the rule of law, fundamental rights including the rights just administrative action, and other aspects of public interest and perception are relevant and must be addressed?⁴⁸

(ii) *The legislative plan*

The second stage of the drafting process is the development of a legislative plan and designing a legislative solution. In this stage, the drafter analyses the drafting proposal received, and designs a legislative plan to implement a legislative solution. The drafter assesses all the questions noted in part 3.2 (c)(i) above that should be addressed in the drafting proposal or instructions, and seeks to answer those questions. The legal issues and policy and law reform aspects of the legislative proposal are also carefully considered. An agreed legislative plan is prepared after discussions between the drafter and the other departmental officials involved in the drafting team.⁴⁹

An agreed legislative plan helps to ensure that the legislation that is developed will be agreed to and meet the expectations of the policymakers who have requested the development

⁴⁷ Ibid 25-26; Privy Council Office, Government of Canada *Guide to Making Federal Acts and Regulations* 2 ed (2001) at 76-93, last accessed from <https://www.canada.ca/content/dam/pco-bcp/documents/pdfs/fed-acts-eng.pdf> on 20 August 2018.

⁴⁸ Xanthaki (note 1 above) 36-37.

⁴⁹ Ibid 38-39.

of the legislation.⁵⁰ A sound legislative plan that identifies all matters that must be addressed in the proposed legislation promotes a smooth and efficient drafting process. It also encourages all elements of the legislation to be identified, considered, and analyzed. It facilitates the development of a logical structure for the legislation and for a complete legislative solution to be provided.⁵¹ Aspects of the initial legislative proposal that need clarification and discussion, and additional aspects that may not have been addressed initially in the legislative proposal or drafting instruction, may be discussed and addressed appropriately in the legislative plan. The process of developing a legislative proposal promotes a thorough examination and analysis of the relevant information in a logical manner.⁵²

During the preparation of the legislative plan, an examination of the existing law must be undertaken, identifying what current law must be amended, what must be repealed, what aspects of the existing law must be preserved, and what additional matters that are not currently addressed in the existing law should be addressed in the proposed legislation.⁵³

The necessity of the legislation as a solution to the problem or social need that the proposed legislation will address must be assessed. Legislation must be a solution of last resort. If other means of regulation that do not require legislation might potentially achieve the objective, then a drafter should recommend that the proposed legislation not be developed.⁵⁴

Potential ‘danger areas’ must be identified, so that they may hopefully be avoided in the legislation. Constitutional and other legal issues should be highlighted. Issues of compliance with international or regional law or international standards should be considered. Issues that may impact on the effectiveness of the legislation should be noted, as well as aspects of the legislation that may raise ethical or political issues, or would raise significant concerns with key stakeholders. These danger areas may be discussed with the departmental officials on the drafting team, and ways may be identified to circumvent these issues in the legislation. Obtaining the advice of Senior Counsel regarding constitutional and legal issues may assist to confirm what danger areas need to be addressed, and potentially provide solutions to address those issues in the legislation that is developed.⁵⁵

⁵⁰ Ibid 41.

⁵¹ Ibid 42.

⁵² Ibid 43.

⁵³ Ibid 45-46.

⁵⁴ Ibid 46-47.

⁵⁵ Ibid 49-50.

(iii) *Determining the most appropriate legislative solution*

The next stage of the analysis is assessing the policy options and selecting the most appropriate legislative solution from the range of possible legislative solutions. As drafters are legally trained and generally have a policy or socio-economic research background, the work of departmental officials and other specialist expertise is often important at this stage. The drafter should ensure that there has been thorough research, analysis, and discussion to determine the most appropriate legislative solution. An approach based on reason informed by experience is the best method for selecting the most appropriate legislative solution.⁵⁶

A well-developed legislative solution should:

1. Identify the causes of the problematic behaviours that are causing the social need that has been identified and needs to be addressed;
2. Provide a preliminary choice of methodology that will be applied, including: defining the scope of the legislative solution; identifying the problematic behaviour that need to be addressed; examining the history of the social problem to understand what aspects need to be regulated and how it might be appropriately regulated; and examining experiences in other countries and solutions that were applied elsewhere;
3. Identify potential legislative solutions to the problem, based on some comparative legal assessment, academic or senior counsel opinions, and departmental analyses;
4. Identify the types of conformity-inducing measures that might be included in legislation to address the problematic behaviour that the legislation will address;
5. Describe the legislative solution that is proposed as being the most appropriate legislative solution, which should be adopted;
6. Provide an assessment of the expected impact of the proposed solution based on research, which includes an analysis of the likely effectiveness of the proposed legislative solution, and an analysis of the likely cost and benefits of the proposed legislative solution;
7. Identify the proposed monitoring mechanisms that would be appropriate, that must be addressed;⁵⁷
8. Analyze the potential statutory interpretation of the legislative provisions. The drafter and other departmental legal advisors engage on this assessment. While the ideal for

⁵⁶ Ibid 52-55.

⁵⁷ Ibid 56-57.

drafting is to mitigate the necessity for the application of rules of statutory interpretation, instances still, however, may arise where statutory interpretation must be applied;⁵⁸

9. Consider the interpretation of the legislative plan in relation to relevant international agreements, regional legislation, and international standards that the legislation is envisaged to implement; and⁵⁹
10. Detail the implementation of the legislative plan through delegated legislation, and assess the appropriate balance between what matters should be addressed in original legislation, and what matters should be addressed in delegated legislation.⁶⁰

(iv) *Designing the legislation— structure*

The next stage of the drafting process is to design the legislation, and the structure of legislation is central. The prime regulatory message should be stated as near as possible to the beginning of the legislation, where the reader's attention will likely be captured.⁶¹ Ensuring that the prime message of the legislation, and what users of the legislation must do or refrain from doing, are communicated promotes the effectiveness of the legislation. Careful structuring of legislation may prevent the length and complexity of the legislation from hindering the effective communication of the regulatory message.⁶²

Lord Thring propounded five rules for the logical structuring of legislation.⁶³ The first rule is that provisions declaring the law should be separate from, and take precedence over, provisions that provide for the administration of the legislation. The regulatory message should take precedence over the administration of the legislation. Therefore, legislation should first state the law; then state who has the authority to administer the law; and finally, state how the law will be administered.⁶⁴

The second rule is to provide for simpler propositions in legislation and then follow with more complex provisions, in an ascending scale of complexity. This promotes the accessibility and comprehension of legislation. The third rule is to place principal provisions, which set out

⁵⁸ Ibid 57-58.

⁵⁹ Ibid 57-58.

⁶⁰ Ibid 58.

⁶¹ Ibid 61.

⁶² Ibid 61-62.

⁶³ Sir Henry Thring *Practical Legislation, the Composition and Language of Acts of Parliament and Business Documents* (1877) 9-13.

⁶⁴ Ibid.

the material objects of the legislation, at the beginning of the legislation, and then place subordinate provisions, which are those that give effect to the principal provisions. Rule four provides that those provisions that are exceptional provisions (such as savings), and temporary provisions that provide for transitional arrangements relating to the repeal of existing legislation and the implementation of the new legislation should be placed after the principal provisions. The fifth rule is that procedure and matters of detail should not generally be placed in the body of the Act, and should rather be provided for in delegated legislation. An appropriate balance needs to be struck between what should be included in the original legislation, and what should appropriately be provided for in delegated legislation. Consideration may be given to providing for certain detail in a Schedule to the legislation.⁶⁵

Drawing on an empirical and methodological assessment of users of legislation conducted by the ‘Good Law’ initiative of the Office of the Parliamentary Counsel in the United Kingdom,⁶⁶ Xanthaki proposes a ‘layered approach’ to structuring legislation. The first part of legislation addresses the general members of the public, focuses on the main regulatory message of the legislation, and contains the provisions which are particularly relevant to those users. The second part addresses non-legal professionals, in which more detail regarding aspects of the main regulatory message are provided. The language used in the second part may be somewhat technical, but still accessible for those professionals. The third part focus on legislative interpretation, procedure and the application of legislation. The language in that part might be more complex, but not to an extent that it prevents other groups from reading the entire legislation.⁶⁷ It would be challenging to draft legislation that is structured so differently from how legislation is structured currently, and to separate provisions relating to specific users. However, it is important to focus on who the users of legislation are, and to try to communicate effectively with various users.⁶⁸ It is worthwhile to examine continually the structure of legislation, and promote innovations that may improve the accessibility of legislation.

⁶⁵ Ibid.

⁶⁶ Bertlin (note 37 above).

⁶⁷ Xanthaki (note 1 above) 76-78.

⁶⁸ See Office of the Parliamentary Counsel *Drafting Guidance* ‘Part 1- Clarity’ at 1, last accessed from https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/666328/drafting_guidance_Dec_2017.pdf on 20 August 2018.

3.3 MOUSMOUTI'S CONSIDERATION OF 'QUALITY' AND 'EFFECTIVENESS' IN LEGISLATION

(a) 'Effectiveness', 'quality' and the 'effectiveness test'

Mousmouti also provides insights regarding promoting effectiveness in legislation. According to Mousmouti, 'effectiveness, as a measure of quality in legislation, expresses the extent to which legislation is capable of guiding the attitudes and behaviour of target populations to those prescribed by the legislator'.⁶⁹ Effectiveness may also be understood as 'a measure of the causal relations between the law and its effects', and an effective law is 'one that is respected or implemented, provided that the observable degree of respect can be attributed to the norm'.⁷⁰

This conception of 'effectiveness' focuses on the ability of legislation to guide attitudes and behaviour and produce observable effects, as well as the extent to which legislation is respected and implemented. It includes what Xanthaki describes as 'effective' legislation (identifying intended outcomes and focusing on those outcomes in the drafting process) as well as 'efficacy' (assessing the achievement of regulatory goals).

Based on an analysis of legislation, Mousmouti developed an 'effectiveness test' that may be applied to assess the effectiveness of specific legislation and to guide the drafting process. The key elements of legislation that are considered in the effectiveness test are the structure of the legislation, its purpose, the substantive content, and the results produced by the legislation. The structure impacts on the accessibility and coherence of the legislation, and how effectiveness may be conceptualized. The purpose specified provides benchmarks by which effectiveness may be assessed. The substantive content of the legislation affects how the legislation responds to the persons and the subject matter that it regulates. Requirements and procedures that are set out in legislation to obtain information to assess the results of the legislation affects the quality of information that is available to evaluate and improve legislation. Two other factors that are important for effectiveness are the consistency and coherence between the elements of the legislation and their evidential basis.⁷¹

⁶⁹ 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) 14.

⁷⁰ Mousmouti (note 3 above) at 200. See also Maria Mousmouti 'Effectiveness as an Aid to Legislative Drafting' *The Loophole* May 2014 (Issue 2 of 2014) 15, last accessed from <http://www.calc.ngo/sites/default/files/loophole/may-2014.pdf> on 21 August 2018.

⁷¹ Mousmouti (note 69 above) 3.

The effectiveness of legislation is promoted by appropriately considering the overarching structure of the legislation during the drafting process; the legislation contains a clear and substantive definition of the purpose of the legislation; the substance of the legislation is chosen in a consistent manner, based on evidence; and the legislation includes requirements for the evaluation of the legislation to provide information to use in the assessment of the effects of the legislation.⁷²

The purpose describes what the legislation seeks to achieve, the substantive content sets out how that purpose will be achieved and communicates this to the users of the legislation, the overarching structure provides how the rules in the legislation interact with the overall legal framework, and the results produced are the evidence of what the legislation has achieved.⁷³ How each of these elements is addressed in legislation, and the relationship between the elements, determines the legislation's effectiveness. Effectiveness is promoted where the purpose is expressed in a clear and substantive manner; the substantive content is consistently expressed through clear and precise rules; evaluation requirements are included that allow for the collection of adequate information to assess the implementation of the legislation; and the overarching structure of the legislation has been considered, to promote the coherence of and accessibility to the legislation. A clear vision of what is sought to be achieved should be expressed (through the purpose and the substantive content); how the results of the legislation are going to be measured is stated; and conditions for rational law making are provided. Coherence is vital for integrating these key elements to produce effective legislation. Effectiveness in relation to specific legislation depends upon the problem that the legislation seeks to solve, the objectives specified, and the solutions that are provided in the legislation to address the problem. Consistency in design and drafting contribute to the coherence of the legislation.⁷⁴ Effectiveness is a measure of the rationality and coherence of legislation. Assessment based on evidence promotes the refinement of the legislation to enhance its effectiveness.⁷⁵

Legislation is not static; it evolves throughout the development of the legislation, through to its implementation. The impact of legislation must periodically be assessed, and legislation must be revised or even replaced to address failures of effectiveness. Legislation is always

⁷² Ibid 4.

⁷³ Ibid 15 and 59.

⁷⁴ Ibid 21.

⁷⁵ Ibid 20.

fallible. Failures in effectiveness may arise, if the rules that are provided for in the legislation are not appropriate to address the problem that the legislation seeks to address; if the strategies and mechanisms for enforcement of the legislation are inappropriate; if compliance with the legislation is difficult, or unintended consequences result when the legislation is implemented.

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Legislative quality is comprised of two main aspects: the rationality of the process of developing the legislation, and the practical effects of the legislation that are observed when it is implemented. According to Mousmouti:

‘Rationality and effectiveness are inherently linked in the life cycle of legislation. Rationality prevails when a law is designed or drafted, and effectiveness prevails when a law is implemented. The one cannot exist without the other: rationality enforces effectiveness and effectiveness informs and supports rationality in rule making. In the same way, the two cannot be seen separately: rationality and effectiveness must guide the process of lawmaking.’⁷⁷

This conception of legislative quality encompasses constitutional principles such as legality, effectiveness and legal certainty, which are aspects of ‘legislative quality’, as well as ‘regulatory quality,’ which includes concepts of efficiency, legitimacy, and efficacy.⁷⁸ Quality is influenced by a variety of factors, including the form of the legislation (the design, drafting and presentation of the texts), the substance of the legislation (including conformity with principles and values that guide drafting), and the consideration and assessment of outcomes.⁷⁹ ‘Quality’ is considered at two stages in the legislative process— during the development of legislation, and also during implementation, where the outcomes and impact must be assessed. During the legislative development stage, quality is assessed in terms of rationality, and quality is pursued by applying principles, procedures and processes. During the implementation stage, quality is assessed by considering the effectiveness of legislation.

Mousmouti focuses on the intersection of legislative quality and the realization of the fundamental right to equality. Legislation that is intended to give effect to the fundamental human right of equality is frequently unsuccessful, and sometimes even reproduces inequality. Examinations of quality in legislation generally have not considered the realization of fundamental human rights, and rather focused on legislation dealing with the operation of

⁷⁶ Ibid.

⁷⁷ Ibid 9.

⁷⁸ Ibid 10.

⁷⁹ Ibid 10-11.

markets and other practically focused regulatory matters. The focus of discussion has been on ‘regulatory quality’ rather than ‘legislative quality’,⁸⁰ owing to the recognition of the impact of legislation on economic growth.⁸¹ Mousmouti explores the relationship between legislative quality, and the realization of the fundamental right of equality.⁸² It is difficult to implement abstract concepts such as fundamental rights in legislation. To do so requires a comprehensive legislative formulation of the right, the formulation of mechanisms for the right’s implementation, and the establishment of a framework that is clear and simple, yet also sophisticated, to address the complex issues and social relationships that are involved.⁸³ The experience in South Africa of developing and enacting the PAJA, implementing it, and the ongoing need to develop other legislation that integrates into the administrative-law framework established by the Constitution and the PAJA, illustrates this challenge.

Just as legislation is evolving and not static, the conception of effectiveness must have two aspects, one of which, rationality, is applied prospectively during the process of developing the legislation, and the other, effectiveness, is applied when the legislation is implemented and legislation is reviewed on an ongoing basis, to assess ‘whether the attitudes and behaviours correspond to those prescribed by the regulator’.⁸⁴ Quality of legislation only may be realized if rationality is applied to promote effectiveness, and effectiveness is assessed to reinforce the rationality of the legislation. Effectiveness acts as a drafting principle, and also an assessment of the effects of the legislation.⁸⁵

(b) Overarching structure

The first element of the effectiveness test considers the overarching structure of legislation, and how the legislation is integrated into the relevant legislative framework. In non-discrimination legislation in Europe the effort to legislate complex legal concepts and phenomena such as fundamental rights, promotes the development of a complex legislative framework that may involve several layers of legislation (the constitution, primary legislation, and delegated legislation), and results in a substantial number of legislative provisions regulating various aspects of the right. Legislation may develop incrementally, in a piecemeal

⁸⁰ Mousmouti (note 69 above) 10; see Voermans (note 3 above) at 60 and 64; Baldwin & Cave (note 3 above) 85.

⁸¹ Ibid.

⁸² Mousmouti (note 69 above) 9-10.

⁸³ Ibid 15.

⁸⁴ Ibid 12 and 57; see Luzius Mader ‘Evaluating the Effects: A Contribution to the Quality of Legislation’ (2001) 22:2 *Statute Law Review* 119 at 126.

⁸⁵ Mousmouti (note 69 above) 58.

manner, which may result in complexity and a fragmented approach to addressing the fundamental right. Complexity, coherence, and fragmentation impact significantly on the integration of the legislation in the legal framework. The overarching structure of the legislation tends to be addressed on an ad-hoc basis, if at all. The process of legislative development may sometimes hinder the appropriate consideration of the overarching structure.⁸⁶ Properly considering the substance of legislation being developed in the broader context may not be achievable, because the legislation may address a small part of the larger objective of realizing the fundamental right. The optimum overarching structure for the legislation may be undermined when legislation is developed incrementally.⁸⁷

These observations are pertinent for a drafter in South Africa developing legislation that must be integrated with the administrative-law framework that is established by the Constitution and the PAJA. A drafter will be developing legislation in an incremental manner that further develops the framework of administrative law. The challenge is to avoid the potential for the overarching structure and the integration of the legislation into the administrative-law framework to be undermined. Developing an appropriate structure for the legislation that will enable it to be appropriately integrated into the administrative-law framework, and also achieve the other regulatory objectives, is especially important.

Poorly structured legislation results in the legislation being incomprehensible and inaccessible to the legislation's addressees. It also results in incoherent legislation, and produces difficulties when applying the law. Behavioural change may also be hindered, which is the objective of the legislation. As a result, the problem which the legislation seeks to address may not be addressed.⁸⁸ Three models of structuring legislation include a 'unified approach' where a central piece of legislation seeks to address all aspects of the matter in a single piece of legislation. An 'integrated and diffuse' approach involves the matter being addressed in an integrated manner in different areas of law, and is not addressed in a single piece of legislation. A 'fragmented' approach involves the matter being addressed thorough different pieces of legislation addressing aspects of the matter separately.⁸⁹ In administrative law in South Africa, what is needed is an 'integrated and diffuse' approach, with the PAJA and the Constitution forming the foundation of the framework.

⁸⁶ Ibid 117.

⁸⁷ Ibid 118.

⁸⁸ Ibid.

⁸⁹ Mousmouti (note 69 above) 10.

Coherence, which relates to consistency in the law's form and substance, affects the accessibility and comprehensibility of legislation for users, and the ability of administrative bodies to apply the law.⁹⁰ Codification of the law promotes coherence, as well as the constitutional entrenchment of fundamental rights.⁹¹ The entrenchment of fundamental rights promotes the coherence of rules contained in other legislation, 'by bringing rules together under other principles, acting as an aid to interpretation but also allowing the judiciary to cover gaps and rectify overall inconsistencies and adverse impact of the law.'⁹² Coherence is linked to the 'unification of the legislative material under a common structure or principles'.⁹³ The entrenchment of the rights to just administrative action and the expression of those rights and the codification of common law administrative law through s 33 of the Constitution and the PAJA provides a core content to administrative law and the delineation of administrative power that may provide the basis for a coherent administrative-law framework.

The overarching structure of the legislation impacts on the way effectiveness is understood in the context of the legislation, and how effectiveness is implemented, and may be measured.⁹⁴ The more unified and coherent the legislative framework is, the more clearly effectiveness in relation realising a constitutional right or central legislation that gives effect to the constitutional right may be measured. The more diffuse the legislative framework, the more challenging it is to assess the effectiveness of numerous pieces of fragmented legislation in promoting the realisation of the constitutional right.⁹⁵

(c) The purpose of legislation

The purpose or objective of legislation plays an important role at three points in the development and implementation of legislation. The purpose and policy objectives underpinning the legislation guide the development of the legislation's content, and provides a 'benchmark' for what the legislation intends to achieve.⁹⁶ The purpose is relevant also for the interpretation of legislation, where the 'purposive approach' is applied. The more clearly the purpose is expressed in legislation, the more meaningful the assistance it may provide in interpretation. The purpose of legislation forms the basis on which the effectiveness of

⁹⁰ Ibid 123.

⁹¹ Ibid 123-124.

⁹² Ibid 125.

⁹³ Ibid.

⁹⁴ Ibid 126.

⁹⁵ Ibid.

⁹⁶ Ibid 129-130.

legislation is assessed, by comparing the outcomes that result to the purpose that was sought to be achieved.⁹⁷

While the object or purpose provision in legislation is important for communicating the purpose of the legislation to the user, ‘clear and accurate expressions of purpose are in general rare.’⁹⁸ Striking a balance between making broad policy-related statements and narrow, pragmatic statements is the most effective way to craft purpose statements. If only narrow, technical statements are indicated as the purpose, then there is not a linkage with a broader policy or legal objective, such as the realization of a fundamental right. If a statement is very broad, it is primarily policy-based, and may go even beyond the scope of what in fact the legislation addresses. It may also be difficult to develop measures to assess the legislation. Purpose clauses that are properly formulated to provide a balance of generality and specificity, may assist in understanding and assessing the effectiveness of the legislation, and may provide a meaningful and optimal mechanism for the assessment of effectiveness.⁹⁹

(d) *The substantive content of legislation*

Central to effectiveness is the substantive content of legislation, as ‘[t]he choice of rules, enforcement mechanisms and legislative expression that will form a law determine to a great extent its prospects to bring results.’¹⁰⁰ The substantive content implements the ‘legislative solution’ that has been developed to address the problem that is being regulated, and the solution is comprised of the choice of rules that are included in the legislation, the enforcement mechanisms that are provided to ensure compliance, and the way the legislation is expressed. The text of the legislation, and the choices which are made regarding the different components of the ‘legislative solution’, determine the potential effectiveness of the legislation. The appropriate decisions in relation to each of these factors must be determined in the context in which the legislation is developed.¹⁰¹ Mousmouti concludes from her research, however, that:

‘Legislation formulated as a consistent and articulate response to a specific problem (reflected in the purpose of legislation), with a balanced and coherent content appears to have the capacity, at least theoretically, to bring about the desired results and to pass the “test” of legality.

⁹⁷ Ibid 130.

⁹⁸ Ibid 155.

⁹⁹ Ibid 162-163.

¹⁰⁰ Ibid 164.

¹⁰¹ Ibid 202.

Legislation with a weak, unbalanced or superficial conceptual structure appears to have more chances to fail, partially or entirely.’¹⁰²

The main drivers that impact on the formulation of substantive content are evidence (information and analysis, and knowledge regarding the success and failures of previous legislative solutions), ‘legislative traditions and internal concerns of the legal order’¹⁰³ (which affect choices by the legislature), supranational legislation and standards, and combinations of these factors.¹⁰⁴ Evidence may promote effectiveness, as a basis for improving legislation. Legislative traditions and internal tensions in the legal order may reduce the range of choice that may be available to the legislature to address an issue, and so a well-considered and rational choice focusing on effectiveness may not necessarily be made by the legislature.¹⁰⁵ Dictates of international legislation or standards may promote the incorporation and transplantation of rules that are formulated in a manner that is not adapted to the requirements of the domestic legal framework, and as a result, are not able to be effectively implemented through the legislation.¹⁰⁶ Evidence as a basis for selecting the enforcement mechanisms that are provided for in legislation promotes effectiveness. Taking into consideration legislative traditions and internal tensions in the legal order and seeking to develop solutions that consider the legal traditions and internal tensions may enhance the effectiveness of legislative expression. The three aspects of substantive content must all be appropriate, and function in a unified manner, for the legislation to be effective.¹⁰⁷ Mousmouti concludes that ‘the content of the law is conducive to results when formulated in an evidence-based manner taking into account data

¹⁰² Ibid 202-203.

¹⁰³ Ibid 203.

¹⁰⁴ Ibid.

¹⁰⁵ Problems which have been turned into political issues may impede the consideration by the legislature of what is the most effective legislative solution. An example which may have this unfortunate impact is the current debate regarding addressing the issue of land reform, where political parties have announced their view that s 25 of the Constitution needs to be amended to expropriate land without compensation, while the parliamentary consultation process on the issue of land reform and proposed approaches to address the issue legislatively are still ongoing. See minutes of the Constitutional Review Committee considering s 25 of the Constitution, last accessed from <https://pmg.org.za/committee/52/> on 7 September 2018, and see the Statement of the African National Congress on Land Reform, last accessed from <https://www.timeslive.co.za/politics/2018-08-01-in-full--land-reform-anc-to-amend-constitution-read-ramaphosas-statement-here/> on 7 September 2018.

¹⁰⁶ Mousmouti (note 69 above) 203. An example is the Financial Intelligence Centre Amendment Act 1 of 2017, which contains amendments to the Financial Intelligence Centre Act 38 of 2001 to align with international anti-money-laundering requirements determined by the Financial Action Task Force (‘FATF’). It proved difficult to reconcile powers of search and investigation required by FATF with the constitutional protection of privacy. After initially being enacted by Parliament, it was referred back to Parliament by the President to reconsider the provisions, and some refinements were made prior to re-enacting the Financial Intelligence Centre Amendment Act.

¹⁰⁷ Ibid.

and knowledge and when the legislative techniques, enforcement mechanisms and legislative expression are formulated and articulated in a complementary and coherent way.’¹⁰⁸

An essential task in developing legislation is to determine the regulatory strategy, and necessary measures that must be provided in the legislation to effectively implement the strategy. Then, rules need to be specified clearly, precisely, and comprehensibly. The extent to which this is achieved will determine the degree of effectiveness of the legislation.¹⁰⁹ If rules in legislation are not suitable to address the problem that is the objective of the legislation, effectiveness will likely not be achieved.¹¹⁰ Various formal and more informal enforcement techniques have been developed. To enable an effective regulatory strategy, a regulator must be provided with a range of regulatory tools that a regulator may apply to promote compliance. This is the rationale of the ‘responsive regulation’ approach.¹¹¹ Legislation that does not provide for effective enforcement measures to promote compliance will be ineffective.¹¹² Developing necessary rules, and providing for an appropriate enforcement strategy are essential for the effectiveness of the substantive content of legislation.¹¹³ The formulation of a suitable regulatory approach and crafting rules and enforcement mechanisms to implement the approach are considered further in chapter 4.

Mousmouti, like Xanthaki, refers to the objectives of clarity, precision and unambiguity as being essential for promoting the effectiveness of legislation, especially when legislation deals with matters that are complex and potentially vague.¹¹⁴ Crafting clear definitions translates initially vague concepts into a form that facilitates accessibility and understanding, and avoids vagueness and ambiguity. It is challenging to develop definitions for complex and technical terms, but significant effort should be expended, if necessary.¹¹⁵ Unclear, imprecise and vague rules result in ineffective legislation.¹¹⁶ Key definitions may play a role in delimiting

¹⁰⁸ Ibid 205.

¹⁰⁹ Ibid 164.

¹¹⁰ Ibid 165.

¹¹¹ John Braithwaite ‘The Essence of Responsive Regulation’ (2011) 44 *University of British Columbia Law Review* 475.

¹¹² Mousmouti (note 69 above) 165.

¹¹³ Ibid 168.

¹¹⁴ Ibid 168.

¹¹⁵ Ibid 169.

¹¹⁶ Ibid 201.

the scope of the exercise of administrative power, and the scope of application of the legislation.¹¹⁷

The selection of the content of legislation is not always based on a rational analysis that is focused on producing the specified results. In some instances, selection may be predetermined, politically dictated, or even random.¹¹⁸ Similarly, the enforcement mechanisms included in legislation may not be selected solely on the basis of a rational assessment, but may be influenced by other factors such as the structure of the legal framework, or political sensitivities and compromises.¹¹⁹ Drafters must be mindful of these influences, and try to consciously apply a rational approach for deciding on substantive content in legislation and how it should be expressed.

(e) Capturing the results of legislation

Monitoring the implementation of legislation and evaluating results is a requirement of democratic governance, to assess whether the principles of legality and legal certainty are adhered to. Monitoring and evaluation also assist to prevent and address adverse effects on fundamental rights that may arise. It is also the only means for consistently evaluating how the legislation is responding to and resolving the problem that the legislation is intended to address. The evaluation process must be an ongoing, iterative process that involves collecting data, identifying where there are discrepancies between the results that the legislation envisaged and the actual observed impact, and the revision or replacement of legislation as may be necessary.¹²⁰

Evaluation has not been widely applied to legislation, and its application in many jurisdictions is not consistent, and is frequently underdeveloped.¹²¹ This is certainly the case in South Africa. Developing and implementing an effective evaluation mechanism for legislation

¹¹⁷ For example, extensive definitions of ‘financial product’, ‘financial service’ and ‘financial stability’ in ss. 2, 3 and 4 of the Financial Sector Regulation Act 9 of 2017 are key to delimiting the scope of the powers of the regulators responsible for implementing the legislation, namely the Prudential Authority, the Financial Sector Conduct Authority and the South African Reserve Bank.

¹¹⁸ Mousmouti (note 69 above) 199.

¹¹⁹ Ibid. Examples of Bills that are politically motivated in content are the Banks Amendment Bill [B12-2018], a private member’s Bill tabled by the Economic Freedom Fighters which seeks to enable state owned entities to register as banks in terms of the Banks Act 1990, and the South African Reserve Bank Amendment Bill [B26-2018], a private member’s Bill tabled by the Economic Freedom Fighters on 16 August 2018, which proposes the nationalization of the South African Reserve Bank by the amendment of the South African Reserve Bank Act 90 of 1989. See Standing Committee on Finance *Minutes of Meeting of 4 September 2018*, last accessed from <https://pmg.org.za/committee-meeting/26996/> on 7 September 2018.

¹²⁰ Ibid 207.

¹²¹ Ibid 207-208.

is an intensive exercise, as legislation may be complex, regulating a range of matters, with potentially multiple objectives, and involving a wide range of actors interacting over an indefinite period. Identifying a causal relationship between the legislation and results, and identifying legal effects, may be difficult, as well as potentially costly, time consuming, and resource intensive.¹²² Evaluation focuses on the role of legislation in promoting social change, which may not be the only rationale for legislation. As a result, evaluation may not necessarily assess the full range of objectives of a piece of legislation. Evaluation monitors and assesses the effects in a systematic and objective manner.¹²³ Evaluation is a learning process, and obtaining knowledge about the effects of legislation may assist the development and ongoing refinement of legislation. The elements for evaluation are effectiveness (‘the relation between the attitudes of the target population and the ones prescribed by the legislator’),¹²⁴ efficacy (the extent to which the goal is achieved) and efficiency (an assessment of the costs and benefits of the legislation).¹²⁵ A variety of methodological tools have been developed, and a combination of methodologies may be employed that are appropriate for the legislation.¹²⁶

Among the types of evaluation requirements that might be imposed in legislation, clauses explicitly requiring evaluation may be included, and obligations for periodic reporting regarding the implementation of legislation may be provided for. Rules of the legislature, Cabinet, a department or regulatory bodies involved in making delegated legislation might include more detailed evaluation requirements and procedures. Guidelines and circulars may also be used as tools to implement monitoring and evaluation methodologies.¹²⁷

Evaluation is a cyclical process,¹²⁸ that must address the entire life cycle of legislation. The evaluative process must connect the information obtained with the preparatory process of revisions or refinements. Evaluation is essential for the effectiveness of legislation, and is a tool for capturing the actual effects of legislation.¹²⁹ Effectiveness requires evaluation data. Evaluation involves synthesizing all available information on the legislation, including the

¹²² Ibid 208.

¹²³ Ibid.

¹²⁴ Ibid 209. See Mader (note 84 above) 125; 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).

¹²⁵ Ibid.

¹²⁶ Ibid.

¹²⁷ Ibid 210-211.

¹²⁸ Ibid 232.

¹²⁹ Ibid 233.

original objectives and the perceived impact of the legislation.¹³⁰ The more consistent the information that is used, and the more the information may be linked to the purpose of the legislation, the more possible it becomes to meaningfully assess the legislation. The more limited the information that is available, the less meaningful the evaluation of legislation may be.¹³¹

3.4 THE WORK OF THE SEIDMANS AND ABEYESEKERE ON DRAFTING FOR TRANSFORMATION AND GOOD GOVERNANCE

(a) *The role of the drafter*

In the United Kingdom, and in some Commonwealth jurisdictions, drafting of Bills is done by drafters in a central drafting office.¹³² Traditionally, in the United Kingdom, the drafting tradition, established by Lord Thring, adopted the official stance that drafters perform only a technical function, to implement the instructions provided by the instructing department, and to ensure that government policy is reflected in the legislation, that the legislation does not conflict with the constitution, the existing law, or violate existing ‘vested rights’.¹³³ The reality, however, is that drafters are required to provide substantial detail in legislation, and are called upon to make substantive decisions regarding the content of legislation.¹³⁴ A drafter is a participant in determining the policy content that is included in the legislation. This is because there is an inextricable link between form and content. Drafters must engage with policy content, to determine the appropriate wording and the details that are incorporated in the legislation. The wording and detail of legislation develop in tandem, with detail being developed as the legislation is being written, and the wording being refined in an iterative process to express the detail appropriately.¹³⁵ By translating policy into the details of legislation, a drafter is involved in defining the meaning of that policy in operation.¹³⁶

¹³⁰ Ibid 233-234.

¹³¹ Ibid 234.

¹³² Ann Seidman, Robert B Seidman & Nalin Abeyesekere *Legislative drafting for Democratic Social Change* (2001) 23 (‘The Seidmans & Abeyesekere’). Interestingly, the Seidmans and Abeyesekere note the ‘Senior State Law Adviser’ in South Africa as an example of a central drafting office where the drafting of Bills is done. It seems that this statement was based on engagements with the Office of the Chief State Law Adviser that occurred around 1994 and soon after. Currently, the Office of the Chief State Law Adviser finally reviews and refines, in conjunction with the drafters from the government departments, legislation that is approved by Cabinet and tabled in Parliament. The bulk of the drafting is done by drafters in the government departments, and now, if there is legislation that Parliament itself is responsible for, parliamentary drafters prepare that legislation.

¹³³ Ibid 23.

¹³⁴ Ibid 23-24 and 25-26.

¹³⁵ Ibid 26.

¹³⁶ Ibid 27.

Details of legislation are particularly important in a law that seeks to promote transformation. The legislation is effective only if it induces the desired behaviour in those who are subject to the law. If there is significant discretion allowed to actors, it will be unlikely that the desired behaviour will occur. The desired behaviour must be specified precisely, and clarity and precision are important.¹³⁷ Drafters should engage with officials and discuss content that needs to be addressed in a Bill with departmental colleagues who are part of the drafting team. Drafters must learn techniques to communicate policy, and skills to translate the policy into the legislation.

Drafters may fail to translate policy into effective legislation for three main reasons: (1) the approach that drafters deal not with the law's substance, but only its form; (2) the weaknesses of the drafting institutions within which drafters function; and (3) the drafters' lack of a theory or methodology for making that translation.¹³⁸

Another traditional drafting approach was that legislation should be designed primarily to guide judges in deciding cases.¹³⁹ Drafters did not focus on writing legislation to produce a change in the behaviour of the law's addressees. The focus on providing guidance to judges produced an emphasis on precision, rather than on clarity, and promoted the use of legalese.¹⁴⁰

This approach also resulted in drafters making significant decisions regarding the substance of detailed provisions of legislation, yet denying that they did.¹⁴¹ Also, it led drafters to ignore the potential for legislation that they developed to facilitate or hinder change,¹⁴² and the impact of the decisions that they were making regarding the substance of the legislation.¹⁴³ As legislation only communicates policy, drafters adopted an approach of providing only a memorandum of law with legislation,¹⁴⁴ which provides a very brief rationale for the legislation, and a summary of the provisions.¹⁴⁵

Drafters relied upon departmental colleagues for research relating to the policy underpinning the legislation.¹⁴⁶ Drafters would conduct research relating to any legal issues,

¹³⁷ Ibid.

¹³⁸ Ibid.

¹³⁹ Ibid 30.

¹⁴⁰ Ibid 31.

¹⁴¹ Ibid.

¹⁴² Ibid.

¹⁴³ Ibid 32.

¹⁴⁴ Ibid 33.

¹⁴⁵ Ibid 33. This is exemplified by many memoranda on the objects of Bills in South African legislation which are tabled along with a Bill in Parliament.

¹⁴⁶ Ibid 34.

and comparative research on legislation in other countries that addresses similar matters to that being addressed in the legislation being developed.

In few jurisdictions do drafting offices require that legislation be developed on a foundation of reason informed by experience. It is necessary to study what the current factual circumstances are, consider and reflect on them, and then develop an approach regarding what should be done.¹⁴⁷ Xanthaki also strongly advocates what she refers to as the ‘phronetic’ approach of reason informed by experience as the means to select the best legislative solution.¹⁴⁸

It is essential for drafters to proceed from a clear legislative drafting theory and methodology. Without this foundation, the drafting process may become haphazard,¹⁴⁹ and it will be uncertain whether effective legislation that will address the social problem that the legislation seeks to address will be produced.¹⁵⁰ Drafters need an institutional structure that ensures that the drafting theory and methodology is applied, and that the legislation developed is founded on a sound basis of reason informed by experience. In many jurisdictions, there are procedures for submitting legislation to Cabinet and into the legislature. Drafting offices often have rules and manuals regarding the formal technical aspects of legislation. Drafting manuals generally do not set out a theoretical approach or methodology that should underpin the drafting of legislation, specify a procedure or process for preparing legislation, or provide a template for a detailed report to accompany and provide detailed justification for the legislation.¹⁵¹ Without a clear guiding theory or methodology, serious flaws may result in legislation that is produced. For example, legislation may be prepared that is a compromise between contesting stakeholders, and attempts to satisfy everyone. The legislation produced would not have a consistent and coherent approach. Sometimes behaviour might be criminalized, which really does not warrant such a drastic sanction. Content might be transposed from legislation in other jurisdictions, without thoroughly considering whether the provisions are appropriate and will produce the desired effects on parties’ behaviour in their jurisdiction.¹⁵² In these circumstances, the effectiveness of the legislation and its ability to produce the desired change in behaviour would be compromised.

¹⁴⁷ Ibid.

¹⁴⁸ Xanthaki (note 1 above) 52-55.

¹⁴⁹ The Seidmans & Abeyesekere (note 132 above) 37.

¹⁵⁰ Ibid 39.

¹⁵¹ Ibid.

¹⁵² Ibid 40.

Drafting in South Africa generally does not proceed based on a consistent theoretical and methodological approach, or in terms of a thorough, well-structured and managed process. The quality of the processes and the legislation produced vary substantially as a result. Not adopting a well-structured and managed drafting process may result in processes becoming protracted and lengthy, and the legislation produced not being well integrated and failing to address all issues.¹⁵³

(b) *Drafting to promote transformation and good governance*

Ann and Robert Seidman and Nalin Abeyesekere focus on how law may promote social development, and how legislative drafting may be applied to produce legislation that will promote development. Their manual for legislative drafters, *Legislative Drafting for Democratic Social Change*,¹⁵⁴ describes how legislative drafting techniques may be applied to produce legislation that promotes social development. These authors discuss practical legislative drafting skills within a theoretical and methodological framework that enables the translation of policy into laws that will facilitate intended transformation and development.

Ineffective drafting reflects, and contributes to, difficulties that governments face in addressing poverty and promoting development and transformation in their countries.¹⁵⁵ In many instances, countries seeking development and transformation have not succeeded in achieving these goals, or not to the desired extent. These failures have been accompanied by an absence of good governance.¹⁵⁶ ‘Governance’ has been understood in development discussions as ‘the government’s capacity to manage social and economic resources to attain development’. ‘Good governance’ has been understood as ‘effective government plus non-arbitrary decision-making: governance by rule, accountability, transparency and participation.’

¹⁵⁷ Poor governance has been a significant social problem in many developing and transitioning countries.¹⁵⁸

¹⁵³ An example of a rather protracted and perhaps unsuccessfully managed legislative development process was that of the Companies Act 71 of 2008, which involved various drafters at different stages, resulting in legislation that failed to adequately address all issues. The legislation could not be brought into operation immediately, and the subsequent Companies Amendment Act 3 of 2011 had to be enacted before the Companies Act could be brought into operation in 2011. Significant errors were discovered during the development of delegated legislation. See Portfolio Committee on Trade and Industry *Minutes of the Meeting of 15 November 2010*, last accessed from <https://pmg.org.za/committee-meeting/12368/> on 26 August 2018.

¹⁵⁴ The Seidmans & Abeyesekere (note 132 above).

¹⁵⁵ Ibid 6.

¹⁵⁶ Ibid.

¹⁵⁷ Ibid.

¹⁵⁸ Ibid.

Development is an ongoing process, and not a fixed end-state that a country arrives at. Lawmaking and legislative drafting may facilitate this development process. Government seeks to facilitate development, by creating an enabling environment through various initiatives.¹⁵⁹

There is a symbiotic relationship between good governance and development. For development to be promoted, the government must effectively implement policies, through legislation, which are designed to facilitate development. If government decisions are arbitrary, an environment that will facilitate development will not arise. If the rule of law, accountability, transparency, and public participation are not present, government decision-making will become arbitrary. State power may be used by officials to advance their own interests, and not the general welfare of the people. If the government does not implement changes to promote the well-being of the people, good governance may disintegrate, as worsening poverty may breed political instability, and development will not result in those conditions. Difficulties in developing and implementing effective legislation may contribute to challenges for development and good governance.¹⁶⁰

The key components of ‘good governance’ are effective government and non-arbitrary decision-making. The rule of law is essential to ensure non-arbitrary decision-making. One element of the rule of law is ‘governance by rule’, in which decision-makers reach decisions according to agreed norms based upon reason and experience. A second element is ‘accountability’, where decision-makers must justify their decisions publicly, and their decisions are subjected to review by recognized higher authorities and the electorate. A third element is ‘transparency’, in terms of which government business is conducted openly by officials, so its details are available, and may be debated. A fourth element is ‘participation’, where persons affected by a potential decision have the opportunity, to the extent that is feasible, to provide inputs and take part in decisions. These elements together promote predictability of government action.¹⁶¹ For development to be promoted, government must effectively implement policies that are designed to facilitate development.

The Seidmans and Abeyesekere assert that “the legal order and the laws that underpin it potentially count as major causes of the transformations required to achieve ‘development’,

¹⁵⁹ Ibid 9.

¹⁶⁰ Ibid 8-10.

¹⁶¹ Ibid 8.

‘transition’ and ‘good governance’.”¹⁶² Changing institutions is critical in development and transition. Institutions have a significant role in making resource allocations, and they influence significantly the degree to which the rule of law is adhered to.¹⁶³ Institutions also have a significant role in determining a country’s level of development. A main difference between ‘developed’ and ‘developing’ countries is owing to the institutions in the political, economic and social systems. Systematic change in the behaviour of a country’s institutions may create an enabling environment to improve people’s quality of life.¹⁶⁴ Difficulties making necessary behavioural change in institutions, result in difficulties in achieving ‘development’ and ‘transformation’.¹⁶⁵

Law is the main means by which policy is translated into legal rules.¹⁶⁶ To change patterns of behaviour, government prescribes the desired behaviour of those who are subject to the law, as well as the desired behaviour of administrators who implement the law.¹⁶⁷ Enacting a policy into law grants legitimacy to the policy, and may help to persuade those who are subject to the law and administrators to change the dysfunctional behaviour that the law seeks to address.¹⁶⁸ Law by itself does not cause changed behaviour. Some desired change may result from factors other than the law. There are also laws that are enacted which are never effectively implemented. In some instances, however, the law is an important factor in changing conduct.¹⁶⁹ When seeking to provide an enabling environment for development and transformation, law plays a vital role of channeling actions into desired directions. Drafters have the challenge of writing a law that will likely result in the desired behaviour.¹⁷⁰

A critical question that arises is why people behave the way they do. Generally, individuals and groups make decisions and choices based on the constraints and resources in their environment. In the context of legislation, there are ‘legal’ and ‘non-legal’ constraints and resources.¹⁷¹ Law and the legal order are the ‘legal’ constraints and resources. Law addresses the primary addressees whose behaviour the law seeks to change, and officials who are

¹⁶² Ibid 10.

¹⁶³ Arguably, issues relating to corruption and maladministration at Eskom, a major national public enterprise, are having a significant impact on both the resource allocation and development of the country, as well as a negative impact on the adherence to the rule of law.

¹⁶⁴ The Seidmans & Abeyesekere (note 132 above) 11.

¹⁶⁵ Ibid.

¹⁶⁶ Ibid 12-13.

¹⁶⁷ Ibid 13-14.

¹⁶⁸ Ibid 14.

¹⁶⁹ Ibid 14-15.

¹⁷⁰ Ibid 15.

¹⁷¹ Ibid.

responsible for implementing the law. Implementing agencies apply direct and indirect measures to induce compliance with the law. The addressees of the law consider the legal and non-legal constraints and resources when deciding whether to comply. The legal and non-legal factors interact and influence the behaviour of the addressees.¹⁷² The complete physical, social, economic, political and institutional context in which the law operates must be considered.¹⁷³ Laws that do not produce changed institutional behaviour and promote developmental processes indicate that there is a problem in the law-making system, which contributes to a failure for development and transformation to occur. Drafting is a key part of the law-making system. There may be non-legal factors that are beyond the scope of legislation to influence, but drafters may try and ensure that the legislation may influence behaviour to the extent that is possible.¹⁷⁴

(c) *The research report*

Along with legislation, drafters must also prepare a research report. In many jurisdictions, including South Africa, Bills are accompanied with a brief and perfunctory ‘Memorandum of Law’,¹⁷⁵ which is insufficient to explain and justify the legislation. Development requires good governance, which entails effective laws and non-arbitrary decisions. To address a social problem’s causes, an effective law must stipulate the behaviour of primary role occupants, and required behaviour of the implementing agency. The law must contain detailed provisions that will induce the behaviours prescribed. The research report provides a guide to the drafter for designing the substantive provisions of the legislation. It helps to ensure that the relevant available facts are identified and organized based on reason informed by experience.¹⁷⁶

A research report substantiates the decision-making process that resulted in the development of the legislation. Preparing a report based on an outline that incorporates the key aspects that need to be considered and explained, assists the drafter to gather necessary information and evidence, and guides the logical analysis and structuring of the information. The report also provides explanations and evidence that may be used by legislators and others to assess whether the Bill will achieve its objective.¹⁷⁷ The research report helps to ensure that

¹⁷² Ibid 16.

¹⁷³ Ibid 99.

¹⁷⁴ Ibid 17.

¹⁷⁵ In South Africa, referred to as the Memorandum on the Objects of the Bill.

¹⁷⁶ The Seidmans & Abeyesekere (note 132 above) 85-86.

¹⁷⁷ Ibid 86.

the Bill was developed through a decision-making process based on reason informed by experience.¹⁷⁸

The effectiveness of a Bill and whether it will in fact produce the desired changes in behaviour of the designated role occupants and the implementing agency, depends both on the content of the Bill, as well as on the other non-legal factors that impact upon those role occupants and the implementing agency. The research report, therefore, must describe all the factors that will impact on the implementation of the legislation, and explain how, in this context, the Bill will produce the desired changes in behaviour. A poorly prepared research report indicates that the Bill was prepared without a sufficiently sound understanding of the context in which it must operate. Drafters must focus both on the form of the Bill, as well as the factual and logical basis for its substance.¹⁷⁹ The research report assists the drafter to apply the legislative theory and methodology for drafting Bills that are consistent with good governance.¹⁸⁰

Describing the behaviour that constitutes a social problem, proposing hypotheses regarding the causes of the behaviour, and testing those hypotheses in light of the available facts, is beneficial for the development of legislation. The research report should demonstrate that the detailed provisions in the Bill are likely to address the causes of the identified problematic behaviour.¹⁸¹

The final section of the research report should propose a detailed legislative scheme that sets out a description of and an explanation for the detailed provisions of the Bill.¹⁸² The Bill's provisions must address the identified causes of the problematic behaviour in a logical manner. It should also discuss the cost effectiveness of the legislative scheme. The scheme should also identify the consequences of the Bill for different sectors of society, particularly for the underprivileged and vulnerable.¹⁸³

¹⁷⁸ Ibid 87.

¹⁷⁹ Ibid.

¹⁸⁰ Ibid 88.

¹⁸¹ Ibid 99.

¹⁸² Ibid.

¹⁸³ Ibid 100.

(d) *Problem-solving methodology*

The Seidmans and Abeyesekere advocate a problem-solving methodology based on reason informed by experience,¹⁸⁴ as being preferable to an ‘end-means’ methodology.¹⁸⁵ An ‘end-means’ methodology involves looking at the goals and objectives of the policy-maker, developing possible alternative legislative solutions to achieve the objective, and then selecting the solution that it appears will achieve the objective in the most socially cost-effective manner. That approach does not involve conducting significant research as to how to achieve the goals, and leaves quite a degree of discretion to the values of those in power.¹⁸⁶ In certain limited instances, where there is significant uncertainty regarding the conditions that are present, adopting an incremental approach may allow a social problem to be addressed in a gradual manner, through a series of legislative amendments.¹⁸⁷

The first stage of the problem-solving approach is to identify the difficulty that must be addressed. The report must describe the role occupants or social actors whose problematic behaviour is the social problem that must be addressed, the nature of the problematic behaviour must be described, and relevant evidence to substantiate this must be provided.¹⁸⁸ The second stage involves proposing and testing various possible explanations regarding the causes of the problematic behaviour.¹⁸⁹ The third step is to propose a legislative solution, by reviewing the possible legislative measures that might potentially address the problematic behaviour, consider the social and economic consequences of the various solutions, and propose the legislative solution that should be adopted based on the assessment of the various possible solutions.¹⁹⁰ The fourth stage is to indicate how the Bill includes adequate mechanisms for monitoring and evaluating the implementation of the Bill.¹⁹¹

Behaviour commonly has more than one cause, so it is necessary to identify each of the causes of behaviour, to eliminate or change problematic behaviour.¹⁹² The mnemonic ‘ROCCIP’ may be helpful to recall the main categories of causal factors that legislative theory

¹⁸⁴ Ibid 88.

¹⁸⁵ Ibid 89.

¹⁸⁶ Ibid.

¹⁸⁷ Ibid.

¹⁸⁸ Ibid 91.

¹⁸⁸ Ibid 92.

¹⁸⁸ Ibid 90.

¹⁸⁹ Ibid 91.

¹⁹⁰ Ibid 91-92.

¹⁹¹ Ibid 92.

¹⁹² Ibid 93.

has identified: Rule, Opportunity, Capacity, Communication, Interest or incentive, Process, and Ideology. These categories may be grouped into sets of subjective and objective factors.¹⁹³ The subjective factors include interest and ideology. Interest refers to the perceptions of the role occupants of what their personal interests and incentives are (both material and non-material).¹⁹⁴ Ideology addresses other subjective factors that do not fall under the category of ‘interest’, and includes ‘values, attitudes, tastes, myths and assumptions about the world, social and economic ideologies, religious beliefs, and more or less well-defined political, social, and economic ideologies’.¹⁹⁵ Objective factors include currently applicable rules, opportunity, communication, and process. A rule may be problematic for reasons such as the following: (1) a rule may be vague or ambiguous; (2) a rule may permit or command problematic behaviour; (3) it may not address the cause of the problematic behaviour; (4) a rule may permit behaviour by implementing agencies and administrators that is not transparent or accountable; or (5) a rule may grant unnecessary discretion to administrators.¹⁹⁶

Opportunity considers whether the environment in which the addressees of a rule are acting enables them to behave as the rule commands, or makes it difficult or impossible to comply.¹⁹⁷ Capacity assesses whether the addressees of a rule have the capacity to act as the rule requires, or there are factors that hinder or prevent compliance. Communication evaluates whether adequate efforts have been made by the government or implementing authorities to effectively communicate the rule to its addressees. Process analyses the procedures and criteria that addressees of rules use to decide whether they will comply with the rule. These categories may assist drafters to examine and develop hypotheses to explain the causes of problematic behaviour.¹⁹⁸

(e) Developing the legislative solution to promote conformity

When preparing a legislative solution, a drafter should initially develop ‘a menu’ of potential options to address the problem.¹⁹⁹ Fruitful sources of ideas for legislative solutions are comparative law and experience, scholarly literature in that area of law and other disciplines that may be relevant, and departmental officials and key stakeholders.²⁰⁰

¹⁹³ Ibid 95.

¹⁹⁴ Ibid.

¹⁹⁵ Ibid 96.

¹⁹⁶ Ibid 96-97.

¹⁹⁷ Ibid 97.

¹⁹⁸ Ibid 98.

¹⁹⁹ Ibid 103.

²⁰⁰ Ibid.

An important component for legislation are conformity-inducing measures to promote desired behaviour. Traditionally, the main conformity-inducing measures included in legislation are sanctions and punishments.²⁰¹ Sanctions, punishments and rewards, though, only address the ‘interest’ causes of problematic behaviour, and may not effectively address other possible causes of problematic behaviour. Rewards may work as effectively as sanctions and punishments to address ‘interest’ causes of behaviour. Over-criminalization of behaviour should be avoided.²⁰²

Conformity-inducing measures may be categorized as direct or indirect.²⁰³ Criminal sanctions are one type of direct measure, which may be appropriate in certain circumstances. However, the emphasis should be on creating effective implementing agencies, rather than on imposing additional criminal sanctions.²⁰⁴ Civil damages and penalties may provide a means of redress and deterrence.²⁰⁵ Administrative penalties are an increasingly common enforcement mechanism in legislation. Rewards may promote adherence to rules, when there is a low level of compliance, at a lower cost than enforcing sanctions and punishments on everyone who is not complying. Where legislation permits different levels of conformity with a rule, legislation may provide different levels of reward for different levels of conformity. By prescribing requirements for behaviour, legislation may potentially prompt a change of ideology. This is relevant for promoting the recognition of fundamental rights such as equality,²⁰⁶ or the realization of the rights to just administrative action.

A potentially unlimited range of indirect conformity-inducing measures may be developed and included in legislation. Where lack of capacity is hindering compliance, initiatives might be included to enable compliance. Communication deficiencies might be addressed by including requirements for an implementing agency or other actors to ensure that those who are required to comply with a rule are aware of the existence and content of the rule. To address issues relating to the process of implementing a rule, provisions addressing the structure of an implementing agency and its decision-making processes may be included in the legislation.²⁰⁷

²⁰¹ Ibid 103-104.

²⁰² Ibid 104.

²⁰³ Ibid.

²⁰⁴ Ibid 105.

²⁰⁵ Ibid 105-106.

²⁰⁶ Ibid 106.

²⁰⁷ Ibid 106-107.

A drafter may consider each category of causes of behaviour that have been identified, obtain relevant data regarding the behaviour, and develop and refine the hypotheses for the causes of the behaviour based on the available data. The drafter may then develop potential legislative solutions to address the identified causes of behaviour.²⁰⁸

(f) *Impact assessment*

An assessment of the Bill's probable costs and benefits is a central aspect of the research report. The impact on various social groups and economic strata must be considered. The impact on the environment, human rights, and good governance should also be examined.²⁰⁹ Of relevance to the topic of this thesis, a research report must demonstrate how the Bill will promote good governance, provide for 'transparent, accountable, participatory decision-making in accordance by rule',²¹⁰ and reduce the prospects of poor governance, and corruption.²¹¹ The economic costs and benefits should be estimated as accurately as possible, both for government, and for private actors.²¹² It may be more challenging to identify the extent of economic benefits that may result than the costs, and the full extent of benefits may only be identified on implementation. Estimating some social costs and benefits, which may be intangible, may be difficult, but they may have a substantial impact on the quality of life of people, particularly historically disadvantaged people, and on the development of a country. It is important to identify and assess, as well as reasonably possible, the social and economic benefits.²¹³

As there are inevitably unintended consequences that may arise from legislation when it is implemented, and some costs and benefits may be difficult to accurately assess when legislation is being developed, monitoring and feedback mechanisms must be included in a Bill, to allow a proper assessment of whether the law produces the intended changes in behaviour, and to quantify the costs and benefits resulting from the legislation. Legislative oversight is an important mechanism for assessing legislation. This legislative oversight role may be explicitly incorporated in legislation, for example through requirements for ministers or administrative institutions to report to the legislature regarding the operation of the legislation and their activities in terms of the legislation, and to submit delegated legislation

²⁰⁸ Ibid 107.

²⁰⁹ Ibid 111.

²¹⁰ Ibid 112.

²¹¹ Ibid.

²¹² Ibid.

²¹³ Ibid 113.

for scrutiny prior to its final publication. Legislation may include a ‘sunset clause’, which provides that the legislation will expire after a specified period, unless the legislature ratifies its continuation. Section 15 of the National Payment System Act 78 of 1998 provides for a standing committee to be appointed by the Minister of Finance to review that Act, and to advise the Minister regarding revisions which should be made. It is currently uncommon for post-implementation requirements for review and monitoring of the implementation of legislation to be provided for in South African legislation, which is a significant failing. Sunset clauses are not included in South African legislation, and it may not be feasible to provide for sunset clauses in a significant number of pieces of legislation, considering the already congested legislative programme, and the South African Parliament’s increasing inefficiency in processing legislation, which places substantial constraints on law-making.²¹⁴

(g) Drafting to promote effective legislation and non-arbitrary decision-making

A common complaint about legislation is that it is ineffective and poorly implemented, even if it might appear to be ‘good’ legislation on paper. The Seidmans and Abeyesekere propose approaches to promote the effective and non-arbitrary implementation of legislation.²¹⁵ In practice, a large proportion of transformative legislation tries to address problematic conduct of officials in existing implementing agencies. The problem frequently results from a failure by the agency to properly fulfil its mandate. Frequently, amendment legislation is needed to try to enhance the effectiveness of the implementing agency and increase the likelihood that the agency will fulfil its mandate.²¹⁶ Drafters must ensure that legislation contains provisions that are likely to result in appropriate behaviour by administrators when implementing the legislation. If an agency is not effectively implementing the legislation, there must be a shortcoming in the provisions that relate to the functions of officials in the implementing agency, and their behaviour. If in legislation there is a need to address the ineffectiveness of an implementing agency, the research report should identify and explain the causes of the problematic behaviour that are resulting in ineffective implementation.²¹⁷ Analysing the behaviour of an implementing agency requires an examination and an explanation of the

²¹⁴ Moira Levy ‘A trickle of Legislation as Parliamentary Wheels Grind Slow’ *Daily Maverick* 21 August 2018, last accessed from <https://www.dailymaverick.co.za/article/2018-08-21-a-trickle-of-legislation-as-parliamentary-wheels-grind-slow/> on 22 August 2018; Parliamentary Monitoring Group *Legislative Performance/Output in Parliament* August 2018, last accessed from <https://pmg.org.za/page/BillsStudy> on 22 August 2018.

²¹⁵ The Seidmans & Abeyesekere (note 132 above) 125.

²¹⁶ Ibid 126.

²¹⁷ Ibid 127.

behaviour of administrators who are carrying out the agency's operations, and how that behaviour relates to the overall behaviour of the institution. The agency behaviour must be analyzed into sets of behaviour of groups of administrators or individual administrators. Drafters must design laws that will encourage administrators to behave in a manner that is consistent with the effective and non-arbitrary implementation of the legislation and good governance.²¹⁸

Problematic behaviour by administrators generally involves making inappropriate decisions.²¹⁹ Decisions that result from the decision-making process depend on the inputs and feedbacks that are provided to decision-makers, and how in light of those inputs and feedbacks, the decision-makers reach and rationalize the decisions taken.²²⁰ The input and feedback processes, and the conversion processes that convert the inputs and feedback received into decisions, involve behaviour patterns of administrators acting in the face of laws or regulations that intend to prescribe their behaviour.²²¹ The inputs into the system are made by the participants in the system. The inputs which are permitted into the decision-making process, and those which are excluded from the process, determine the factors (which includes the evidence, submissions, arguments, theories, and issues) that the decision-makers consider when making a decision. A research report should indicate the feedback and inputs that administrators permit into the decision-making system.²²² This determination is made based on the rules (both formal and informal) of the implementing agency.²²³ It is important for drafters to consider and in legislation address the decision-making processes of the implementing agencies. The rules regarding who is permitted to make inputs into the decision-making process, and the criteria and procedures of the process should be assessed, as that determines the manner and extent of participation by stakeholders.²²⁴ In South Africa, these rules would need to be considered in relation to the PAJA and the regulations in terms of the PAJA.

It is also relevant to consider whether the implementing agency's rules provide for the review of the performance of the institution. It may be worthwhile to provide for mechanisms to monitor and evaluate the performance of implementing agencies in legislation.²²⁵ Reporting

²¹⁸ Ibid 128.

²¹⁹ Ibid 129.

²²⁰ Ibid 130-131.

²²¹ Ibid 131.

²²² Ibid.

²²³ Ibid 131-132.

²²⁴ Ibid 132.

²²⁵ Ibid 133.

requirements are provided for institutions to report on their activities to the responsible Minister and Parliament in annual reports,²²⁶ but consideration might be given to providing for additional monitoring and evaluation mechanisms.

It is also important to examine the conversion processes which are in place in an implementing agency. It is important for legislation or agency rules to specify criteria regarding what information and factors should be considered, and what may not be considered, when taking a decision.²²⁷ Requiring written reasons to be provided for decisions promotes accountability and transparency, and assists in any review process that may occur.²²⁸ The presence and procedures of internal review mechanisms are also relevant to consider and examine. If certain decisions are not taken by a single official, but are taken by a body made up of a group (such as a panel or a board), this may potentially mitigate against an arbitrary decision being taken, so it may be appropriate to provide for certain decisions to be taken by a collective, and not an individual.²²⁹

Ineffective implementation of legislation may result from rules granting officials too much discretion, or where there is an inadequate system for monitoring decisions. The broader the discretion that officials are granted, the more likely they may use their powers to serve their own interests, and not the intended purpose for implementing the institution's mandate. If there are not effective monitoring and supervision mechanisms in place, officials may feel that they have the scope to violate the boundaries of their authority. Narrow discretion is essential for promoting accountability. Discretion that is too broad may provide scope for arbitrary decision-making and corruption, and promote the ineffective implementation of legislation.²³⁰

Mechanisms for monitoring implementing agencies' behaviour are infrequently addressed in legislation. Systematic monitoring is important for ensuring the accountability of institutions. Monitoring may occur through court processes, or through referral of matters to an ombud scheme. Parliamentary committees may exercise oversight over implementing agencies. Parliamentary oversight may play an important role when Committees are strongly motivated to exercise their function, and when they exercise their authority clearly and

²²⁶ See s 40 of the Public Finance Management Act 1 of 1999 and s 55 of the Financial Sector Regulation Act 9 of 2017.

²²⁷ The Seidmans & Abeyesekere (note 132 above) 133-134.

²²⁸ Ibid 134.

²²⁹ Ibid.

²³⁰ Ibid 135.

strongly.²³¹ Committees, however, not uncommonly face challenges and delays in investigating matters, with Ministers and key officials failing to attend parliamentary committee meetings, and failing to submit key information to committees.²³² The research report should examine the supervisory mechanisms provided for in the legislation, and whether feedback is enabled from those who are affected by the legislation.²³³

When assessing opportunity to act in accordance with the legislation, it is relevant to consider whether the implementing agency is ‘reactive’ or ‘proactive’ when addressing violations of the legislation. A reactive implementing agency is suitable where members of the public will become aware when contraventions of the law happen that may impact them, and have a motive to lay a complaint or commence legal action. A reactive institution depends upon reports of contraventions being submitted by complainants.²³⁴ A proactive implementing agency, which investigates to discover contraventions of legislation, is appropriate where persons who may be affected by a violation may not be aware that a violation has taken place, the nature of the harm that a person might suffer as a result of a contravention may not be substantial enough that it would be considered worthwhile to make an application to court, or the public may not be very concerned about enforcement of the legislation. Some institutions may have both reactive and proactive components, such as the police, and financial sector regulators, who both operate based on reports made by members of the public who are affected by contraventions of legislation, and also conduct investigations to monitor compliance and discover contraventions that may not be easily detected by members of the public.²³⁵ It is, therefore, important to consider whether the way in which the implementing agency becomes aware of contraventions of the legislation is suitable in relation to the functions that the agency is performing.

²³¹ The ongoing investigation of the Portfolio Committee on Public Enterprises into the activities of Eskom are an important example of the exercise of parliamentary oversight; See, for example, 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.

²³² See, for example, Portfolio Committee on Transport, *Minutes of the Meeting of 24 November 2017 of the Portfolio Committee on Transport* ‘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. See also 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.

²³³ The Seidmans & Abeyesekere (note 132 above) 135.

²³⁴ Ibid.

²³⁵ Ibid 135-136. The Financial Sector Conduct Authority and the Financial Intelligence Centre in South Africa are examples of regulatory bodies that operate both proactively and reactively.

In respect of capacity, it must be assessed whether administrators in the implementing agency have the necessary resources to effectively carry out their duties. These include having the necessary knowledge, training, skills and expertise, as well as material resources and funding to perform their functions.²³⁶ In respect of members of tribunals and dispute settlement mechanisms, it needs to be ensured that the decision-makers have the required expertise, and receive the necessary information and law, so that they are able to make decisions and implement the law. Administrators may be involved in making polycentric decisions which involve a range of inputs and a variety of potential outputs. The implementing agency's rules and structure must not limit, and should, if possible, support the ability of administrators to make these decisions in a manner that is appropriate,²³⁷ which in the South African context means in accordance with the Constitution, the PAJA and other applicable requirements in legislation. Regarding financial resources, it should be considered whether legislation is necessary to provide the agency with adequate financial resources.²³⁸

In relation to the communication of the legislation, administrators who are implementing legislation must be aware of and properly understand the legislation that they are implementing.

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Regarding interests or incentives, the various interests that officials may have in their personal capacities should be examined, as well as whether there may be areas where their personal interests or other incentives may conflict with their official duties. Mechanisms might be developed to prevent the private incentives overriding their official responsibilities.²⁴⁰ Requirements for the disclosure of interests and for recusal where a conflict of interest may arise, and prohibitions on engaging in other business that may conflict with official duties, are examples of this type of provision. Codes of ethics may assist to ensure that officials are aware of their duties and what constitutes a conflict of interest. Incentives may have an impact on behaviour, although an incentive may not be effective if there is not a strong relationship between the incentive, merit and actual performance. With negative incentives, such as the potential for criminal prosecutions, fines, and dismissals, where the approach is mainly reactive enforcement, this may result in a low level of detection of contraventions of an official's

²³⁶ Ibid 136.

²³⁷ Ibid 137-138.

²³⁸ Ibid 138.

²³⁹ Ibid.

²⁴⁰ Ibid.

²⁴⁰ Ibid.

responsibilities.²⁴¹

Considering ideology or values, it must be determined whether there are institutional values present in an implementing agency, which may be negatively impacting on the institution's performance.²⁴² If negative institutional values are identified, measures in legislation such as providing education or information, or setting appropriate requirements, may promote a change in the institutional values.²⁴³

Legislation must include rules that address the conduct of officials. For example, it should be ensured that there are mechanisms or an implementing agency that enable officials to be held to account. Frequently, legislation fails to provide for any monitoring and supervising mechanism to enforce the rules that are applicable to officials. It is also, unfortunately, common that the more senior an official is, the less likely that a mechanism for accountability is provided for. While legislation regulating the public service may provide for some degree of accountability and enforcement, it may not be very effective in influencing officials' behaviour. There may be reactive remedies of judicial review or to bring civil actions, which rely on an affected person bringing a court application.²⁴⁴

Careful consideration must be given to the structure of an implementing agency that is established in legislation.²⁴⁵ The objective is to develop an institutional arrangement that is appropriate for the particular circumstances in which the institution will operate, and addresses problematic behaviour that is being addressed by the legislation.²⁴⁶ An initial consideration is whether a new function should be granted to an existing agency, or a new agency should be established to undertake the function. If it is being considered to provide an additional function to an existing implementing agency, it must be assessed whether the existing agency will have the capacity to perform the new function. Whether the new function is related to the existing functions of the agency would be pertinent. Using an existing agency may be significantly less costly than establishing a new agency. Establishing a new agency provides an opportunity to establish a new institutional culture with new people, who may be strongly motivated to carry

²⁴¹ Ibid 138-139.

²⁴² Ibid 139.

²⁴³ Ibid.

²⁴⁴ Ibid 139-140.

²⁴⁵ Ibid 141.

²⁴⁶ Ibid 142.

out the mandate of the new institution.²⁴⁷

It is relevant to consider the advantages and disadvantages of the four common types of implementing agencies. If the institution is intended to focus on dispute resolution, then establishing an administrative tribunal or an ombud scheme may be appropriate. These types of institution have become increasingly important as mechanisms for addressing failures in administrative action. Tribunals may have specialized expertise that is attuned to considering administrative action in particular fields. Tribunals may be empowered to provide a range of appropriate remedies that may provide redress for persons affected by unlawful administrative action.²⁴⁸ They may provide a more expeditious and cost-effective avenue for redress than judicial review in the courts.

A second institutional option is to provide for direct administration through a department, including through a government component,²⁴⁹ which is a specialized entity created within a department to perform a function. Among the advantages of this type of institutional structure are that it may, if properly managed, be an efficient way for government to perform functions, and it may provide quite a flexible structure. They are specialized institutions that employ officials who have specific skills, knowledge, and expertise. As the department or government component are directly tasked with the responsibility of implementing legislation, officials may take a more proactive, rather than a reactive, approach to addressing issues, and they may exhibit commitment and enthusiasm in the work of implementing the legislation. The structure permits the development of input and feedback mechanisms that promote accountability and communication. Possible disadvantages to this structure are that a department or government component may be under greater political influence than certain other types of structures. They may also be very bureaucratic and hierarchical, and thus may not operate efficiently, take initiative, or exhibit enthusiasm.²⁵⁰

²⁴⁷ Ibid. This was a rationale for establishing a new Financial Sector Conduct Authority in terms of the Financial Sector Regulation Act 9 of 2017, and to disestablish the previous Financial Services Board established in terms of the Financial Services Board Act 97 of 1990.

²⁴⁸ Ibid 143. For example, the Office of the Pension Funds Adjudicator and the Office of the Ombud for Financial Services Providers which are established in terms of the Pension Funds Act 24 of 1956, and the Financial Advisory and Intermediary Services Act 37 of 2002 are examples of statutory ombuds which provide dispute resolution mechanisms to financial customers regarding issues arising from pension funds and financial services providers.

²⁴⁹ Established in terms of s 7A and listed in Schedule 3 to the Public Service Act Proclamation 103 of 1994.

²⁵⁰ Ibid 146-147.

A third approach is to provide for an institution that is a public entity.²⁵¹ A public enterprise is viewed as potentially as being less subject to ministerial control than a department or government component. It is also able to operate more as a business. In South Africa, what is defined as a ‘state-owned company’ in s 1 of the Companies Act 71 of 2008 is, in terms of s 9 of that Act, subject to the requirements of the Companies Act, except where the Minister of Trade and Industry has specifically granted an exemption from the application of a requirement.²⁵² Public enterprises also are not subject to the requirements of the Public Service Act Proclamation 103 of 1994,²⁵³ and they are subject to somewhat different financial reporting requirements in terms of the Public Finance Management Act 1 of 1999. One of the drawbacks of public enterprises is that there is a significant risk of corruption, which is a threat to good governance.²⁵⁴ Unfortunately, this has become apparent in South Africa recently, with recent parliamentary investigations into state capture at Eskom and other public enterprises,²⁵⁵ and the commencement of a Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State.²⁵⁶

If a public enterprise is established, proper mechanisms must be put in place to ensure transparency and accountability, and to the extent possible, promote participation. It should be demonstrated that efforts are made to address possible avenues for corruption to occur.²⁵⁷ This is discussed further in the next chapter.

Another institutional option is to implement a function through a private entity, where government contracts with private companies to perform a function. It is often asserted that a private enterprise would be able to perform a function in a more cost-effective manner, although this would need to be carefully assessed in each case to determine if, in fact, that would be the result. A risk of corruption also arises in relation to this model, so it would be important for the institutional structure to minimize that risk.²⁵⁸ Arrangements entered into would need to be carefully developed and scrutinized, to ensure that the implementation of the arrangement is in fact beneficial, and that the function is performed in a cost-effective manner, to the necessary standard. Mechanisms for oversight and monitoring of the arrangement would

²⁵¹ As defined in s 1 and listed in Schedules 2 or 3 of the Public Finance Management Act 1 of 1999.

²⁵² The Seidmans & Abeyesekere (note 132 above) 149.

²⁵³ Published in *Government Gazette* 15791 of 3 June 1994.

²⁵⁴ The Seidmans & Abeyesekere (note 132 above) 150.

²⁵⁵ See note 231 above.

²⁵⁶ Information on the Commission of Inquiry is available at <https://www.sastatecapture.org.za/>.

²⁵⁷ The Seidmans & Abeyesekere (note 132 above) 150.

²⁵⁸ Ibid.

be critical, so that the risk of corruption would be minimized. This type of arrangement might be structured as a public-private partnership.²⁵⁹

To promote non-arbitrary decision-making, the decision-making process that is provided for should ensure that ‘all stakeholders may supply inputs of facts and logic, and that the decisions-makers decide by a pre-existing rule in an accountable, transparent manner’.²⁶⁰ It should be demonstrated in the research report that the requirements of the rule of law are satisfied by the decision-making process: ‘decision by rule, participation by stakeholders, transparency and accountability’.²⁶¹ A Bill should stipulate the factors that the decision maker must consider when making the decision. Unlimited discretion cannot be granted.²⁶²

Legislation must provide mechanisms for dispute resolution, as unavoidably, no matter how well-crafted the legislation, disputes regarding administrators’ decisions will arise. In addition to resolving disputes, these mechanisms are a vital means for holding administrators accountable. The dispute resolution mechanism that is provided must be appropriate for the specific activity that the implementing agency is undertaking. An internal appeal process, an ombud scheme, or a specialized tribunal may provide a specialized, potentially more cost-effective and expeditious means for resolving disputes than judicial review.²⁶³ To assist with dispute resolution and judicial review, a requirement to provide reasons for certain decisions may be specified.²⁶⁴

Determining the extent of powers that an implementing agency should have to make delegated legislation or other rules, involves an assessment of the degree to which the legislation should be transitive (all the rules are included within the primary legislation) or intransitive (broad powers are granted to make delegated legislation and rules).²⁶⁵ Intransitive legislation may be appropriate where: the subject of the legislation is difficult, complex or technical; a range of actors are carrying out a variety of activities; rules need to be applied in varying circumstances; or rules need to adapt to a rapidly changing environment. The primary legislation may provide guidance for the exercise of the legislation- making powers, specify

²⁵⁹ See, for example, National Treasury PPP Unit *Public Private Partnership Manual: Practice Notes issued in terms of the Public Finance Act*, last accessed from <http://www.ppp.gov.za/Legal%20Aspects/PPP%20Manual/Main%20Intro+Contents.pdf> on 29 January 2018.

²⁶⁰ The Seidmans & Abeyesekere (note 132 above) 151.

²⁶¹ Ibid.

²⁶² Ibid 152.

²⁶³ Ibid 153.

²⁶⁴ Ibid 154.

²⁶⁵ Ibid 155.

the scope of the powers, require that appropriate information is gathered through a regulatory impact assessment, and provide for a consultation process with stakeholders. These measures would enable the implementing agency to make effective and appropriate delegated legislation in terms of the primary legislation.²⁶⁶

Delegated legislation may be inadequate owing to: the process for making delegated legislation; the capacity of officials who are involved in making the delegated legislation;²⁶⁷ interests and ideologies of officials; or inadequate ‘legislative’ facts.²⁶⁸ If the empowering legislation does not specify adequate criteria and procedures, the discretion granted to officials will be too broad.²⁶⁹ Procedures for making delegated legislation might include a notice and comment procedure, and a requirement to submit the delegated legislation to the legislature for scrutiny for a specified period, prior to the final delegated legislation being published.²⁷⁰ Requirements might also be stipulated to publish a document specifying the rationale for the delegated legislation and the various provisions contained in the delegated legislation, and to publish a summary of comments received during the comments process, along with a response to those comments.

A variety of mechanisms may assist to delimit the scope of the power to make delegated legislation. One way is to limit the scope of the rule-making powers to making rules that will achieve the object of the legislation.²⁷¹ The remedies that may be imposed by the implementing agency for violating or obeying the rule may be specified. The factors that the maker of the delegated legislation may consider should be those that experience suggests should be considered in relation to that type of decision. Taking into consideration factors that would result in an improper decision should be prohibited.²⁷²

²⁶⁶ Ibid 157.

²⁶⁷ Which would arguably include the drafting skills of the drafter.

²⁶⁸ The Seidmans & Abeyesekere (note 132 above) 159.

²⁶⁹ Ibid 160. See, for example, ss 98 to 100 of the Financial Sector Regulation Act 9 of 2017.

²⁷⁰ Ibid 161.

²⁷¹ Ibid.

²⁷² Ibid.

3.5 A THEORETICAL FRAMEWORK TO PROMOTE THE CONSTITUTIONALLY COMPLIANT EXERCISE OF ADMINISTRATIVE POWER

The theoretical frameworks developed by Xanthaki, Mousmouti and the Seidmans and Abeyesekere provide a foundation to develop a theoretical approach that may be applied to draft legislation that promotes the constitutionally compliant exercise of administrative power.

(a) The role of the legislative drafter

Xanthaki, Mousmouti and the Seidmans and Abeyesekere all note the necessity of drafters having a clear understanding of their role in the development of ‘effective’ legislation that promotes transformation and good governance. As Xanthaki advocates, drafters must view their role as being part of the regulatory process that seeks to achieve quality in regulation, through the translation of policy into legislation.²⁷³ In performing this critical role, drafters must engage with the departmental team that is developing the legislation, to ensure that the regulatory objective of the legislation is achieved through the exercise of administrative power in a constitutionally compliant manner. This must also be a foundational component of the regulatory approach that is implemented through the legislation. In this way, a potential tension may be prevented from arising between achieving a regulatory objective, on the one hand, and providing for the constitutionally compliant exercise of administrative power, on the other.

The Seidmans and Abeyesekere have questioned the ‘myth’ of the role of the drafter as simply being a ‘translator’ of policy into legislation, and noted the undesirability and impossibility of the isolation of the drafter from policy considerations.²⁷⁴ All three frameworks examined here focus on the extensive work that must be undertaken prior to the commencement of actual ‘drafting’ of the legislation, to develop and assess the various options for implementing the proposed policy approach in legislation. The regulatory approach and mechanisms must be considered and assessed, and potential options must be identified and examined. Evidence must be gathered, and the various legislative options must be assessed based on reason underpinned by experience. The drafter, generally without a policy or socio-economic analytical background, must rely substantially on the expertise of departmental colleagues to assess policy options and gather evidence to support the choice of a legislative

²⁷³ Note 5 above.

²⁷⁴ The Seidmans & Abeyesekere (note 132 above) 27.

approach. Even so, drafters need to familiarize themselves with the policy that is informing the legislation, and with the regulatory impact assessment methodologies and other analytical approaches that must be applied to determine the best legislative approach based on reason informed by experience. Drafters need to expand significantly their range of interest, expertise and understanding beyond the strictly technical traditional legislative drafting skills.

Drafters must ensure that the regulatory approach that is incorporated in legislation, and the regulatory mechanisms that are included to implement the regulatory approach, contain as an integral component the regulation of administrative power in a manner that is constitutionally compliant and gives effect to the rights to just administrative action. They should emphasize to the departmental team that is involved in the legislation that this is imperative for the effectiveness of the legislation being developed, and ensure that this is reflected in the legislative report. They must also ensure that the assessment of the potential legislative options, and the regulatory impact assessments and post-implementation assessments of the legislation that are proposed for inclusion in the legislation and which are subsequently carried out, include measures that will enable insight into the lawfulness, reasonableness, and procedural fairness of the implementation of the legislation.

Drafters also have a responsibility to capacitate their drafting offices or units to develop and implement processes along the lines advocated in the three frameworks examined. Drafting processes must be thorough, rationally based, and focused on developing effective legislation, including legislation that controls the exercise of administrative manner in accordance with the Constitution. The frameworks examined indicate the substantial work that must be undertaken in the preparation for drafting, and the importance of the assessment of legislation. The actual drafting of legislation in fact occupies a relatively modest part of the process. Drafters must focus sufficient attention on all stages of the drafting process as described in these frameworks. Some aspects, most notably the pre-and ex-post assessment of legislation, have not received the significant attention that they deserve.

(b) Drafting to promote transformation and good governance

As described in part 3.4 above, the Seidmans and Abeyesekere provide a framework for a drafting process to develop legislation that promotes transformation and good governance. Their insights are relevant for drafters in South Africa, where the constitutional dispensation ushered in an era of transformation of the legal and socio-economic landscape in the country. The linkages defined in part 3.4(b) above between transformation and good governance may

be construed as two aspects of ‘efficacy’ or ‘legislative quality’ as referred to by Xanthaki. ‘Good governance’, as described by the Seidmans and Abeyesekere, refers to ‘rationality’ described by Mousmouti as a component of legislative quality. The achievement of ‘transformation’ as discussed by the Seidmans and Abeyesekere is describing the ‘effectiveness’ of legislation as understood by Mousmouti, which is the desired outcome of legislation in South Africa. While to a certain extent, economic and administrative efficiency considerations may appear to be in tension with the rationality objective of good governance, the Seidmans and Abeyesekere’s insight that ultimately, the realization of legal and socio-economic transformation will inevitably fail without the concurrent realization of good governance, owing to their symbiotic relationship, certainly holds in practice. The nature of the content of ‘rationality’, ‘good governance’ and the rights to lawfulness, reasonableness and procedural fairness, which is context-specific in application, enable the regulation of administrative power in a manner that is congruent with constitutional requirements. This approach is consistent with and promotes legal and socio-economic transformation as a key goal of legislative effectiveness in South Africa. Drafters following this understanding and approach should be enabled to develop legislation that will regulate administrative power in a manner that achieves good governance, the realization of the rights to just administrative action, and transformation.

(c) Quality, efficacy and effectiveness

‘Efficacy’, as the ultimate regulatory goal²⁷⁵ in the framework of Xanthaki, must necessarily be understood as requiring the exercise of administrative power in a constitutionally compliant manner, that realizes the rights to just administrative action and is consistent with the principles of the rule of law, lawfulness, reasonableness, procedural fairness, and the right to reasons. In the narrower sense of ‘legislative efficacy’, being ‘the capacity of a piece of legislation to achieve the regulatory aims that it set out to address,’²⁷⁶ the regulatory aims of legislation must always be carried out through the exercise of administrative power in a constitutional manner that realizes the rights to just administrative action. Legislation, therefore, must always regulate the exercise of administrative power.

The implementation of policy in legislation must be consistently informed by this approach, and a regulatory impact assessment of legislation that is undertaken must specifically

²⁷⁵ Xanthaki (note 1 above) 5.

²⁷⁶ Ibid. See also Gunningham & Sinclair (note 7 above); Baldwin (note 7 above).

consider and assess the administrative implications and impact of legislation. Assessments of the statutory interpretation of legislation must examine the exercise of administrative power under the legislation in the context of constitutional requirements, the PAJA and relevant case law.

‘Quality’ of legislative drafting must be interpreted as requiring an assessment of the degree to which the drafting provides for the delineation of administrative power consistent with the constitutional administrative-law framework.

Xanthaki’s definition of legislative ‘effectiveness’ as ‘the extent to which the legislation manages to introduce adequate mechanisms capable of producing the desired regulatory results’ requires that the ‘adequate mechanisms’ be designed to operate in a manner that is consistent with all constitutional administrative-law requirements. The regulatory framework might not, otherwise, produce ‘desired regulatory results’. An ‘effective’ piece of legislation must, as part of the main outcomes that are sought to be achieved, ensure that those outcomes are achieved through a regulatory approach that in its design and implementation in the legislation incorporates the exercise of administrative power in accordance with constitutional requirements. Setting out the legislation’s objectives and purpose clearly provides for the delineation of administrative power. Focusing on clearly defining the objectives of the legislation, and strongly linking all exercises of administrative power in terms of the legislation to those objectives, promotes the constitutionally compliant exercise of administrative power. Defining the administrative powers, and providing appropriate guidance in relation to the exercise of those powers, would result in ‘necessary and appropriate measures’ being incorporated in the legislation to achieve the regulatory objective. Enforcement measures that are included must enable the regulatory body responsible for the legislation to effectively implement the legislation, in a manner that is consistent with the constitution and the PAJA. Assessment mechanisms to measure the impact of the implementation of legislation must include mechanisms to assess administrative implementation of legislation, and whether the implementation is consistent with the constitutional rights to lawful, reasonable, and procedurally fair administrative action.²⁷⁷

Considering Mousmouti’s description of effectiveness expressing ‘the extent to which legislation is capable of guiding the attitudes and behaviour of target populations to those

²⁷⁷ Xanthaki (note 1 above) 8 and n 60, citing Mousmouti (note 3 above) 202.

prescribed by the legislator,’²⁷⁸ effectiveness must be understood as including guiding the attitudes and behaviour of institutions and administrators who are responsible for implementing the legislation. The legislation must guide their behaviour in a manner that is consistent with the constitutional rights to just administrative action and the PAJA, and the principles of lawfulness, reasonableness and procedural fairness. Assessment mechanisms must be able to determine whether the observed exercise of administrative power complies with those prescripts.

Mousmouti’s conception of ‘legislative quality’ as being comprised of the elements of ‘rationality’ in the process of the design of legislation, and ‘effectiveness’ in respect of the observed effects of legislation, is helpful in considering how drafting may promote the development of legislation that delineates administrative power in a constitutionally compliant manner. The approaches to the drafting process proposed by Xanthaki, Mousmouti, and the Seidmans and Abeyesekere all seek to ensure rationality during the development of legislation, and that legislative development is based on an approach of ‘reason informed by experience’. Adopting a thorough, organized and well-informed drafting process as propounded by these models, and applying analysis and assessments at each stage of the process based on rationality and reason informed by experience, may facilitate the achievement of the objective of providing for a regulatory approach and administrative mechanism that results in the exercise of administrative power in a lawful, reasonable, and procedurally fair manner.. Ensuring that the assessment of the implementation includes scrutiny of the exercise of administrative power in terms of the legislation, assists with the ongoing refinement and improvement of legislation. Assessment also promotes the quality of legislation in respect of its regulation of the exercise of administrative power.

(d) The effectiveness test

Mousmouti’s development of an ‘effectiveness test’ provides a mechanism to assess legislation, both prospectively and after its enactment, to determine its effectiveness. The application of the test in the development of legislation is considered further in chapter 4. The assessment of the components of Mousmouti’s ‘effectiveness test’ must include determining whether the overarching structure of the legislation, the expression of the purpose of the legislation, the substantive content of the legislation, and the assessment of the effects of the legislation, promote the achievement, as an aspect of the overall regulatory objective of the

²⁷⁸ Mousmouti (note 69 above) 14.

legislation, of the exercise of administrative power in a manner that is consistent with the Constitution and the PAJA.

(e) Tools for achieving effectiveness

When using the assessment tool of efficiency as a measure of legislative quality, which requires a cost-benefit analysis, the assessment must be made considering the recognition, in s 33(3) of the Constitution and ss 2(1)(b), 3(4)(b)(v), 4(4)(b)(v), and 5(4)(b)(v) and (6) of the PAJA, of the need to promote an efficient administration as an aspect of the consideration of the content of the rights to just administrative action in the context of a specific case. Arguments for efficiency cannot trump the recognition of the constitutional rights. Efficiency, financial costs, and the recognition of the constitutional rights are all relevant and necessary considerations for assessments of legislative quality.

The drafting tools of clarity, precision, and unambiguity are pinpointed by Xanthaki, as well as Mousmouti, the Seidmans and Abeyesekere, as techniques that should be applied in the drafting of all legislative provisions. Regarding the delineation of administrative power, clarity, precision and unambiguity assist understanding by regulatory bodies and administrators of their mandates, the nature and scope of their powers, and the requirements that they must adhere to when exercising those powers. Drafters need to maintain consistent scrutiny and focus when crafting each provision to implement these techniques. The application of the drafting techniques of plain-language drafting and gender- neutral language are means by which clarity, precision, and unambiguity may be achieved in the furtherance of the constitutionally compliant delineation of the scope of administrative power in legislation. The application of these drafting tools and techniques will be considered further in chapter 4, as well as additional tools that have been developed for the promotion of quality in legislation in the European Union.

(f) The drafting process

The theoretical frameworks of Xanthaki, Mousmouti, and the Seidmans and Abeyesekere are all founded on a basis that effective legislation may potentially be achieved only through a rational, structured, thorough, organized, iterative drafting process. Unfortunately, drafting processes may lack structure, may not be underpinned by a structured process, and may be haphazard. The drafting process may be viewed as a linear, and not an iterative, process. In these circumstances, the prospects of the legislation produced being effective, and defining the

scope of administrative power in a constitutionally compliant manner, will be unlikely.²⁷⁹ Defining and effectively managing the drafting process is a core responsibility for drafters.

(i) *The drafting proposal or drafting instructions*

Xanthaki's framework elucidates the role of complete drafting proposals or drafting instructions providing a sound basis for commencing the drafting process. Xanthaki's discussion refers to jurisdictions where drafters work in a central drafting office, and departments provide instructions, often in a formal written document, to request the central drafting office to develop requested legislation. In South Africa, however, legislative drafting is decentralized, and drafters in various government departments develop legislation that will be tabled by members of the executive for consideration by the legislature. Draft legislation that is prepared by government departments is submitted to the Office of the Chief State Law Adviser for scrutiny and 'pre-certification' prior to the submission of legislation to Cabinet for approval for publication of the draft legislation for public comment. The State Law Advisers provide a 'pre-certification opinion' in which they confirm that the draft legislation is constitutionally compliant, and is drafted in accordance with the drafting standards of the Office of the Chief State Law Adviser. Again, prior to final approval by Cabinet of legislation for tabling in Parliament, the Office of the Chief State Law Adviser must provide a final certification opinion confirming that the legislation that will be tabled in Parliament is constitutionally compliant, and is drafted in a manner that complies with the standards of the Office of the Chief State Law Adviser.

In South Africa, the drafters in government departments who do the substantial proportion of the work in developing legislation that is ultimately tabled in Parliament, do not receive a formal set of drafting instructions that brief them on the legislation that they are requested to develop.

However, Xanthaki's discussion of the drafting instructions remains relevant for drafters in South Africa, as it identifies the essential information that drafters must ensure that they obtain from their departmental colleagues. These colleagues must provide them with the necessary instructions, guidance and information to enable them to be properly placed to develop legislation that satisfies the objective of efficacy. This initial phase of the process, whether it involves the provision of a formal written brief to a central drafting office, or entails

²⁷⁹ The Seidmans & Abeyesekere (note 132 above) 26.

engagements between departmental drafters and instructing colleagues within the department, is crucial for the successful development of legislation that satisfies the objective of efficacy.²⁸⁰

As drafters in South Africa do not receive formal drafting instructions, they must be proactive and ensure that they receive the necessary information to enable them to draft the legislation properly. This may occur through meetings with and enquiries to colleagues on the departmental drafting team, if they are not initially provided with either written or oral information that is sufficiently detailed to provide a basis for commencing drafting. In relation to the key questions that Xanthaki identifies in part 3.2 (c)(i) above, which requires defining the administrative mechanisms that are necessary to be able to implement each of the options for addressing the problem that the legislation must resolve, all potential administrative mechanisms must ensure that administrative power is exercised in a constitutionally and PAJA-compliant manner. Drafters require sufficient information and explanation to understand the area of regulatory activity that is sought to be regulated, and the regulatory approach that is proposed to adopt to achieve the regulatory objective of the legislation. They must understand the institutional form and structure that will be responsible for implementing the legislation, and the objective, mandate, and functions that the institution will be endowed with in terms of the legislation. They must be aware of all the powers, including enforcement powers, and the types of administrative actions that the regulatory body and administrators will need to be empowered to exercise to implement the legislation.

It would be advisable for individual drafters (and drafting units in departments) to consider developing a template to assist drafters to ensure that they obtain instructions in respect of the key matters highlighted by Xanthaki in part 3.2(c)(i) above, and for the purposes of the delineation of administrative power, the matters referred to in the previous paragraph.

(ii) *The legislative plan*

Xanthaki advocates developing a formalized legislative plan, that is agreed to between the drafter and the departmental officials on the drafting team, which is described in part 3.2 (c)(iii) above. South African drafters do not consistently have a practice of developing and agreeing on a legislative plan before commencing drafting, and it would provide a sound foundation for commencing drafting to do so. Individual drafters, and drafting units in departments, should consistently adopt the practice of developing a detailed, agreed legislative plan before

²⁸⁰ Xanthaki (note 1 above) 21. See also Ruth Fox & Matt Korris *Making Better Law: Reform of the Legislative Process from Policy to Act* (2010) 86.

commencing drafting, and develop a template to assist with the process. An aspect of the legislative analysis included in a legislative plan, should be an assessment of the interrelationship of the envisaged legislation with the Constitution and the PAJA, and an indication of provisions that should be included to enable that appropriate interrelationship, and the realization of the rights to just administrative action. The establishment of any institution to administer the legislation should be addressed, the structure of that institution, and its objective, and the institution's mandate, powers and functions should be detailed. The administrative action that it is envisaged will be taken by administrators should be identified. The regulatory approach and administrative mechanisms that will be implemented should be addressed in detail, and they must be specified in a manner that is consistent with the Constitution and the PAJA.

(iii) *Legislative report*

The legislative plan advocated by Xanthaki is primarily intended as an internal document of the drafting team which forms an agreed basis for the development of legislation. The Seidmans and Abeyesekere, as referred to in part 3.4(c), motivate for the development of a detailed legislative report that should be circulated along with the draft legislation, to provide an explanation for the legislation and a basis for stakeholders and the public to scrutinize and comment upon the legislation. It is frequently the case in South Africa that when legislation is circulated for comment and tabled in Parliament, it is accompanied by a brief and perfunctory Memorandum on the Objects of the Bill, which covers required headings in a 'tick-box' approach, and contains only a cursory summary of the content of the Bill.²⁸¹ Sometimes a more detailed explanatory memorandum may be provided, but the content generally does not contain the level of analysis and detail that is advocated by the Seidmans and Abeyesekere.

While it may seem that preparing an extensive legislative report is an unnecessary expenditure of effort by drafters and the drafting team, it is submitted that in fact it is a worthwhile exercise that encourages the development of effective legislation. Publishing the legislative report along with the legislation may help the public to understand the legislation and its purpose, and encourages them to consider and comment upon the legislation and

²⁸¹ In South Africa, the 'Memorandum on the Objects' of the Bill is published with the tabled version of the Bill in Parliament. It has a series of standard required headings, which are very briefly discussed. The Memorandum published with the Public Investment Corporation Amendment Bill [B1-2018] is just over a page long, for a brief amendment Bill of 6 clauses. See http://pmg-assets.s3-website-eu-west-1.amazonaws.com/B1_-_2018_Public_Investment_Corporation.pdf, last accessed on 22 August 2018.

whether the legislation is likely to be effective. This encourages a productive consultation process that will improve the quality and expected effectiveness of the legislation. The more intensive the development process that is undertaken, and the more stringent the testing and analysis that occurs during that process, the more likely that the parliamentary processing of the legislation will proceed relatively smoothly and efficiently, because most fundamental issues have been considered and solutions have been identified and implemented during the development process.

The legislative report must contain a description and assessment of how administrative power will be exercised in terms of the proposed legislative solution, and demonstrate how administrative power will be exercised in accordance with the constitution.

(iv) *Problem-solving methodology*

The three theoretical frameworks which have informed this PhD thesis research advocate the adoption of a problem-solving approach based on reason informed by experience to assess possible legislative solutions and identify the best legislative solution. Consistently applying a problem-solving approach will result in the adoption of a legislative solution that is consistently and practically focused on addressing the problem. The ‘ROCCIPI’ analysis outlined in part 3.4 (d) provides an approach to assist in identifying and describing problematic behaviour and the sources of the behaviour that the legislative solution needs to tackle.²⁸²

(v) *Determining the most appropriate legislative solution*

The assessment of possible legislative solutions should include an assessment of the alignment of each proposed legislative solution with constitutional and PAJA requirements, and an impact assessment should include a consideration of the effects of implementation of the legislative solution on the rights to lawfulness, reasonableness and procedural fairness, and the right to reasons. The most appropriate legislative solution should provide for institutional and structural arrangements for the implementation of the legislation, and for administrative powers that are crafted in a manner that promotes the exercise of administrative power in a constitutionally compliant manner. The legislative solution should include conformity-inducing measures that would promote the constitutionally and PAJA compliant exercise of administrative power.

²⁸² The Seidmans & Abeyesekere, (note 132 above) 95-100.

In respect of proposed legislation that would amend existing legislation, the description of the legislative problem and the problematic behaviour that is sought to be addressed might include addressing identified administrative action that may currently be observed which is inconsistent with the rights just administrative action. An assessment of the statutory interpretation of the legislation should consider the interpretation of the administrative powers that are granted in terms of the legislation, in the context of the constitutional rights and PAJA requirements. Monitoring mechanisms that are provided for in a legislative solution should include monitoring of the exercise of administrative power in terms of the legislative solution, and an assessment of whether the exercise of administrative power is consistent with constitutional and PAJA requirements. Where the legislative solution entails making delegated legislation, it should be indicated how appropriate guidance is provided in terms of the primary legislation and other means to ensure the constitutional exercise of those powers. The legislative solution must define scope of the legislation,²⁸³ and the delineation of administrative power in a constitutionally compliant manner is a central aspect of defining the scope of the legislation.

Conformity-inducing measures are an essential ingredient of the legislative solution, and drafters must formulate two sets of conformity-inducing measures for the addressees of the legislation: one set for regulatory bodies and administrators who are responsible for implementing the legislation, and another set for the other addressees who are the subjects of the regulatory framework. Drafters should explore the range of potential conformity-inducing measures, and incorporate a variety of measures in tandem as a strategy to promote the exercise of administrative power in a lawful, reasonable, and procedurally fair manner. Direct measures such as penalties, rewards and incentives, measures to promote a change in institutional culture and individual mindsets, and clearly specifying behavioural requirements, may be considered.

²⁸⁴ Indirect measures to address weaknesses in capacity, communication, institutional structure and culture, and decision-making processes are examples of measures that may be able address shortcomings and failures in the exercise of administrative power. Drafters should be creative in developing conformity-inducing measures to tackle problematic administrative behaviour.²⁸⁵ This is explored further in chapter 4.

²⁸³ Ibid 100.

²⁸⁴ Ibid 106.

²⁸⁵ Ibid 106-107.

(g) The structure of legislation— internal and overarching

The three theoretical models examined in this chapter all promote the importance of the structure of legislation as a determinant of the effectiveness of legislation. Xanthaki and the Seidmans and Abeyesekere have assessed the internal structure of legislation, while Mousmouti has identified the effect of the overarching structure of legislation on legislation's effectiveness.

Considering Xanthaki's assessment of structure described in part 3.2(c)(iv) above, focusing on expressing the regulatory objective of the legislation to the users of the legislation (both the public and regulators and administrators who are administering the legislation) is valuable advice. A clearly stated regulatory objective, which is incorporated in the legislation in a constitutionally and PAJA consistent manner, may provide a sound foundation for the delineation of administrative power in the legislation. Separating provisions that establish the fundamental regulatory objects of the law from those that provide for administrative aspects, also assists with crafting and assessing the administrative mechanisms that need to be provided for in the legislation. The structure should properly provide for the establishment and jurisdiction of institutional structures that need to be established with a clearly stated objective. The endowment of administrative powers should be linked to the object of the legislation and the objective of the institution, and potentially internal appeal, ombud, or special tribunal mechanisms should be established to address disputes relating to the exercise of administrative power. Mechanisms for the review of legislation should also be included in the concluding provisions of the legislation. Appropriate parliamentary oversight and other reporting requirements must be provided for.

Procedural matters may be dealt with in delegated legislation, to the degree that a constitutionally compliant delegation of legislative powers permits, and provided that sufficient guidance in the exercise of administrative powers is included in legislation. By having the structure of the legislation clearly distinguishing administrative matters in a separate part of the legislation, drafters may craft the language of the provisions in that portion of the legislation in a manner that particularly speaks to and may be comprehended by the administrators who are implementing the legislation. A clear message may be provided to administrators regarding how they should approach the implementation of the legislation, and what their role, functions and duties are. The formulation and clear expression in legislation of express and ancillary implied powers, discretionary and mechanical powers, and mandatory

and directory provisions, are important elements of communication to administrators that must be considered and addressed. Public participation in the development of delegated legislation and administrative decisions that impact upon the public should be provided for, as well as parliamentary oversight of delegated legislation.

Mousmouti's assessment in part 3.3(b) above of the overarching structure of legislation is very pertinent for this research. The South African administrative-law framework may be described as falling somewhere in between her description of the 'unified' and 'integrated and diffuse' approaches. The Constitution and the PAJA provide the central core of the administrative-law framework, but it is necessary to address the appropriate delineation of administrative power and aspects of the realization of the rights to just administrative action in other pieces of 'specific' administrative law in an incremental and piecemeal manner. In respect of this type of legislative framework which is not completely 'unified', accessibility and coherence must be achieved through ensuring the appropriate integration of the various pieces of legislation that address the rights to just administrative action and the delineation of administrative power.²⁸⁶ The more fragmented a legislative approach to addressing a fundamental right, the greater the challenges are to ensuring appropriate integration and accessibility.²⁸⁷ Drafters must be aware of this integrative challenge when they are developing legislation, and try to overcome the potential deficiencies of a not fully unified administrative-law framework, while promoting the potential benefits that may result from providing for the necessary nuanced sector-specific application of the rights to just administrative action and the principles of lawfulness, reasonableness, and procedural fairness.

The overarching integration of legislation is a key concern in relation to the delineation and control of administrative power, which will be further explored in chapter 4. Legislation must be integrated into the constitutional administrative-law framework, as well as within other substantive law frameworks that the legislation gives effect to or must interact with.

²⁸⁶ Mousmouti (note 69 above) 118.

²⁸⁷ Ibid.

(h) The object or purpose of legislation

Mousmouti, as noted in part 3.3(c) above, identifies that how the object or purpose is specified in legislation is a determinant of the effectiveness of legislation. It is certainly an important mechanism for ensuring the appropriate delineation of the scope of administrative power. Crafting provisions that contain both broader policy-linked statements and narrower, more specific objectives that link the broader objective to implementation may facilitate effective legislation.²⁸⁸ Xanthaki notes that in more recent times, some drafters have questioned the value of ‘purpose’ or ‘object’ clauses, as they are often worded in very general terms, which do not provide any means to assess or measure the achievement of the purpose or object. However, if the purpose or object clause is crafted carefully, is worded in an objective manner, and provides for specific, measurable objectives that may assist in the assessment of the effectiveness of the legislation, the purpose or object clause may play an important and beneficial role in conveying the regulatory message of the legislation, and provide a measure for assessing the effectiveness of the legislation.²⁸⁹

The scope of administrative power may be defined and its exercise may be regulated in accordance with the requirements of the Constitution, by explicitly linking the object of legislation to the objective or mandate of a regulatory body that is responsible for administering legislation, and by further linking the exercise powers and functions a regulatory body and administrators to the object of the legislation and the mandate of the regulatory authority.

(i) The substantive content of legislation

Mousmouti describes how a consistent, coherent and balanced formulation of the substantive content of legislation promotes the effectiveness of the legislation.²⁹⁰ Evidence provides a valid basis for developing and revising legislation,²⁹¹ and for selecting the enforcement mechanisms that are included in legislation. The application of techniques of legislative drafting and legislative expression, and the enforcement mechanisms included in legislation, are aspects of the substantive content of the legislation that, when applied consistently and coherently, contribute to the effectiveness of the legislation.²⁹² Enforcement mechanisms that are provided

²⁸⁸ Ibid 163.

²⁸⁹ Xanthaki (note 1 above) 68-69.

²⁹⁰ Mousmouti (note 69 above) 202-203.

²⁹¹ Ibid 203.

²⁹² Ibid 205.

to regulatory bodies and administrators must enable them to promote compliance with the legislation, and legislation must promote the exercise of those powers by regulatory bodies and administrators in a manner that is lawful, reasonable, and procedurally fair.

Underpinning the substantive content of legislation must be a sound regulatory approach or strategy, and the regulatory mechanisms that will be utilized to implement the regulatory approach or strategy. An integral component of the regulatory approach must be the exercise of the regulatory powers in a manner that is constitutionally compliant. A soundly framed regulatory strategy or approach may inform the development of regulatory mechanisms and the substantive content of the legislation that ensures the constitutionally compliant exercise of administrative power.

(j) Assessment of legislation

The three theoretical frameworks considered in this chapter, and particularly Mousmouti, have emphasized the pre- and post-implementation assessment of legislation as essential for promoting the effectiveness of legislation. Among the evaluation requirements that might be imposed in legislation, clauses explicitly requiring periodic evaluation should consistently be included in legislation, as well as obligations for periodic reporting regarding the implementation of legislation. Since the effectiveness of legislation must be defined to include the constitutionally compliant delineation and regulation of administrative power as a core element, evaluation measures must include mechanisms to assess effects relating to the administration of legislation, and the degree to which the legislation is being implemented in a lawful, reasonable and procedurally fair manner.

Both pre- and post-implementation assessments of legislation must consider not only the implementation of primary legislation, but also anticipated (in the case of the pre-assessment of draft legislation) and actual (in the case of post-implementation assessment of legislation) effects of delegated legislation and other regulatory instruments that are issued in terms of primary legislation. This is considered in more detail in chapters 4 and 5.

This aspect of the drafting process is severely underdeveloped in South Africa, and departmental drafters need to work with their departments, the Office of the Chief State Law Adviser, and the Department of Planning, Monitoring and Evaluation to develop approaches for the assessment of legislation.

(k) Drafting to promote effective legislation and non-arbitrary decision-making

The Seidmans and Abeyesekere consider the factors that are necessary to address in legislation in order to produce effective legislation that encourages administrative power to be exercised in a rational, non-arbitrary manner.²⁹³ Their assessment provides insight and guidance for incorporating the constitutionally compliant control of administrative power in legislation. They pinpoint the significant influence of institutional form, structure and culture, dispute resolution mechanisms, rules, decision-making processes, and the delegation of powers in the resulting conduct of administrators in exercising their functions, and this certainly is an area that warrants analysis and attention in drafting.²⁹⁴ Reporting, monitoring and assessment mechanisms, both for institutions, as well as individual administrators, are necessary for promoting lawful, reasonable and procedurally fair decision-making.²⁹⁵ Constitutionally compliant powers to make delegated legislation must be provided.²⁹⁶ This approach is further explored in chapters 4 and 5.

3.6 CONCLUSION

The models of Xanthaki and Mousmouti thoroughly consider ‘quality’ and ‘effectiveness’ in legislation,²⁹⁷ and its sustained application throughout the drafting process. Mousmouti’s development of the ‘effectiveness test’ provides a theoretical and practical framework that may be applied to consider and assess the regulation of administrative power in legislation, and how legislative drafting may produce legislation that effectively regulates administrative power in a manner that is consistent with constitutional requirements. The Seidmans and Abeyesekere’s

²⁹³ The Seidmans & Abeyesekere, (note 132 above) 125-161.

²⁹⁴ Ibid 128-134.

²⁹⁵ Ibid 135.

²⁹⁶ Ibid 159-161.

²⁹⁷ Di Donato, for example, has analysed various definitions and efforts to assess the ‘quality’ of regulation, and assessed effectiveness in the context of regulatory reform and competitiveness in Europe in the wake of the financial crisis. See Luca di Donato ‘Which Direction Is the Regulatory Quality Pendulum Taking?’ (2015) 17 *European Journal of Law Reform* 1. To broaden the consideration of what may constitute ‘quality’ and ‘effectiveness’ in legislation, and how those objectives might be achieved, it is also relevant to consider the literature on the ‘Legisprudence’, an approach that focus on examining and promoting rationality in legislation, and considers the factors that are involved in and influence different aspects of the law-making process from a theoretical perspective. See, for example Svein Eng ‘Legislative Inflation and the Quality of Law’ in Luc J Wintgens (ed) *Legisprudence: A New Theoretical Approach to Legislation* (2002) 65; Luc J Wintgens ‘Legislation as an Object of Study of Legal Theory: Legisprudence’ in Wintgens (ed) *Legisprudence* 9; Bruce Anderson & Philip McShane ‘Grounding Behaviour in Law and Economics’ in Luc J Wintgens (ed) *Legislation in Context: Essays in Legisprudence* (2007) 157; Inoue (note 24 above); Philippe Thion ‘Questioning Alternatives to Legal Regulation’ in Wintgens (ed) *Legislation in Context* 95; Peter Wahlgren ‘Legislative Techniques’ in Wintgens (ed) *Legislation in Context* 77.

framework and methodology, with its emphasis on the promotion of good governance and development, provides significant insights that may be applied to develop legislation that is consistent with the objective of the transformation of administrative law and the legal order generally, and the promotion of good governance and the rule of law. These are the fundamental objects of the Constitution, and of the legislation that has been developed in South Africa since the advent of the constitutional dispensation.

These approaches and their innovations have been combined to describe a theoretical framework that may be applied to the drafting and post-implementation assessment of legislation. This framework may be applied both during the development of new legislation and to the refinement of existing legislation so that it appropriately provides for the exercise of administrative power in a constitutionally compliant manner, as a core component of the concepts of ‘quality’ and ‘effectiveness’ in legislation.

Drafters in South Africa have an important and challenging role to prepare legislation that provides for both good governance and socio-economic transformation to promote development. The constitutionally consistent delineation of administrative power must be provided for in all legislation, to promote the necessary change in behaviour that will result in good governance, and realize the transformational objectives of the Constitution. The application of the theoretical and methodological approach described in part 3.5 is investigated in chapters 4 and 5.