

CHAPTER 5

DRAFTING OF DELEGATED LEGISLATION

5.1 INTRODUCTION

In this chapter, the theoretical framework developed in chapter 3 is applied to the drafting of delegated legislation. A determinant of the effectiveness of delegated legislation, and whether delegated legislation appropriately provides for the delineation of administrative power, is the relationship between and the integration of the original and delegated legislation. Part 5.2 discusses the importance of ensuring that the scope of delegated legislative authority that is provided for does not exceed what is constitutionally permissible. Part 5.3 discusses the importance of accountability to and oversight by the legislature of delegated legislative authority. Part 5.4 examines the role of the empowering provisions in original legislation in determining the scope of delegated legislation. Part 5.5 considers some challenges that arise in applying aspects of the theoretical framework for legislation to the development and drafting of delegated legislation.

5.2 SCOPE OF DELEGATION OF LEGISLATIVE POWER

In modern regulatory regimes, '[t]he making of delegated legislation by members of the executive is an essential part of public administration'.¹ Legislatures do not have the capacity to process the volume of legislation that modern regulatory regimes require. Legislative programmes are often backlogged, and it may be difficult even for critical legislation to be processed within a reasonable period. Legislatures are unfamiliar with many of the practical realities and details of administration. It is challenging for the legislature to assess, foresee and address all issues relating to the implementation of specific legislation, or to understand and specify the detail that must be addressed for effective regulation to be achieved. There must be a degree of adaptability in a regulatory regime, for requirements to be adjusted efficiently to address issues that emerge and shortcomings in the regulatory approach that are identified. If all detail is contained in original legislation, the regulatory framework will not be sufficiently adaptable.

¹ *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 (2) SA 311 (CC) para 113 *per* Chaskalson J.

Delegated legislation may be promulgated and amended more easily than original legislation. There is a trend towards developing ‘framework’ original legislation, which sets out the general structure, principles, requirements and policy approach of the regulatory framework. The original legislation empowers the making of delegated legislation that contains the detail regarding the implementation of the regulatory framework. The power to make delegated legislation may be delegated to the minister responsible for the administration of the legislation, or to a regulatory body that is responsible for supervision and regulation in terms of the legislation.

The reality of modern regulatory regimes, and the importance of delegated legislation, were acknowledged by the Constitutional Court in *Executive Council, Western Cape*,² where Chaskalson P stated:

‘In a modern State detailed provisions are often required for implementing and regulating laws and Parliament cannot be expected to deal with all such matters itself. There is nothing in the Constitution which prohibits Parliament from delegating subordinate regulatory authority to other bodies. The power to do so is necessary for effective law-making. It is implicit in the power to make laws for the country and I have no doubt that under our Constitution Parliament can pass legislation delegating such legislative functions to other bodies.’³

In South Africa, the rationale for delegating legislative power to a regulatory body rather than a minister, is that ministers are less in touch with the day-to-day realities of regulation and supervision than regulatory bodies and administrators. Regulatory bodies and administrators may have specialized expertise and insight into how issues may effectively be addressed. In practice, draft regulations may be developed by officials in the department or the regulatory body that is responsible for administering the legislation who have expertise in the area to which the legislation relates. Sometimes, both types of officials work together to develop draft regulations. The draft regulations are submitted to the Minister for approval and promulgation, along with an explanation of the purpose of the draft regulations, their content, and the rationale for the approach adopted in the draft regulations.

² *Executive Council, Western Cape Legislature v President of the Republic of South Africa* 1995 (4) SA 877 (CC) (*Executive Council, Western Cape*).

³ *Ibid* para 51. See also *Janse van Rensburg NO v Minister of Trade and Industry NO* 2001 (1) SA 29 (CC) para 24 (*Janse van Rensburg*); *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC) para 32 (*Affordable Medicines*).

It is certainly the case, as Vivier JA noted in *Bezuidenhout v Road Accident Fund*, that the delegation of some legislative authority is essential, because the legislature ‘cannot directly exert its will in every detail. All it can do is lay down the outline.’⁴ Vivier JA defined the limits of the extent to which legislative power may be delegated as follows:

‘There is, however, a difference between delegating authority to make subordinate legislation within the framework of a statute under which the delegation is made, and assigning plenary legislative power to another body, including . . . the power to amend the Act under which the assignment is made.’⁵

A critical assessment that must be made when developing legislation to establish a regulatory framework through original legislation, which will be implemented through delegated legislation, is to strike the correct balance between what should be captured in the original legislation, and what should be captured in delegated legislation. The *Executive Council, Western Cape* case highlighted some indicia as to whether plenary legislative power has in fact been delegated. These include where the power granted goes beyond giving effect to principles and policies set out in the original legislation,⁶ or if the power granted amounts to granting a discretion to determine what the law is, rather than a discretion to define how the law is executed.⁷ Another consideration is whether the legislature’s distinctive functions and duties are interfered with. In that case, the court found that there had been such an interference.⁸

A helpful guideline is that legislation should set out the broad principles and policy framework, while delegated legislation should stipulate the detail necessary for the implementation of the legislation. The boundary between permissible and impermissible delegation is not completely clear, but if the delegation of legislative powers is intended to enable filling in detail within the framework of the original legislation, then quite likely it would be permissible. Factors that should be considered when assessing the constitutionality

⁴ *Bezuidenhout v Road Accident Fund* 2003 (6) SA 61 (SCA) para 10.

⁵ *Executive Council, Western Cape* (note 2 above) 51. See also *Janse van Rensburg* (note 3 above) para 24; *Affordable Medicines* (note 3 above) para 32; *AAA Investments (Proprietary) Limited v Micro Finance Regulatory Council* 2007 (1) SA 343 (CC) paras 49, 122.

⁶ See *Executive Council, Western Cape* (note 2 above) para 130, citing the American cases of *Panama Refining Co v Ryan* 293 US 388 (1935) at 415 and 418; *ALA Schechter Poultry Corp et al. v United States* 295 US 495 (1935) at 530.

⁷ *Executive Council, Western Cape* (note 2 above) para 130, citing the American cases of *CC Hampton & Co v United States* 276 US 394 (1928) at 407, quoting from *Wilmington and Zanesville Railroad Co v Commissioners* 1 Ohio St 77 (1852) para 19.

⁸ *Executive Council, Western Cape* (note 2 above) para 126. See also Lourens du Plessis *Re-interpretation of Statutes* (2002) 49.

of a delegation of legislative power include the nature and ambit of the delegation, the identity of the person or institution to whom the power is delegated, and the subject matter of the delegated power.⁹

The scope of the delegated legislative powers must be circumscribed in the original legislation in accordance with the Constitution, and appropriate guidance for the exercise of those powers must be provided, as highlighted by the Constitutional Court in *Dawood*.¹⁰ Guidance need not be provided solely in the original legislation, but might also be provided through additional detail contained in the delegated legislation.¹¹ Where it might not be possible or appropriate for the legislature to provide detailed provisions in original legislation, the guidance should be enabled and required to be provided through delegated legislation. If no guidance is provided in legislation, the courts are unable to determine how individual decisions should be taken by decision-makers. Administrators are left to make decisions without guidance, resulting in their decisions potentially being taken on review.

The extent to which original legislation delegates legislative powers, and the degree to which delegated legislation is relied upon in the implementation of the legislative framework, varies substantially. The Income Tax Act 58 of 1962, for example, contains powers to make regulations and for certain matters to be determined in delegated legislation. However, a substantial proportion of the detail of the income tax framework is contained in the original legislation. A disadvantage of this approach is that the Income Tax Act (as well as other tax legislation) must be amended annually through a Taxation Laws Amendment Bill to align the legislation with announcements regarding taxation that have been made in the annual budget.

At the other end of the spectrum lies the Currency and Exchanges Act 9 of 1933 ('the CEA'), which is an extreme example of a legislative framework where the content of the original legislation is minimal (the Act contains only five remaining substantive provisions), and a substantial regulatory regime granting extremely broad administrative powers has been developed through delegated legislation, the Exchange Control Regulations ('the Regulations').¹²

⁹ *Constitutionality of the Mpumalanga Petitions Bill*, 2000 2002 (1) SA 447 (CC) para 19 (*Mpumalanga Petitions Bill*).

¹⁰ *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC) para. 50 (*Dawood*).

¹¹ *Ibid* para 54.

¹² Exchange Control Regulations, 1961, as promulgated by Government Notice R 1111 of 1 December 1961 in *Government Gazette Extraordinary* 123 dated 1 December 1961, as amended, last accessed from <https://www.resbank.co.za/RegulationAndSupervision/FinancialSurveillanceAndExchangeControl/Legislation/Documents/Exchange%20Control%20Regulations,%201961.pdf> on 26 August 2018.

The CEA has not been updated or amended in the past 20 years. The main substantive provision in force is s 9, which empowers the ‘Governor General’ to make regulations, which through s 1 of the Interpretation Act 33 of 1957 (‘the IA’), means the President. It is rare in current legislation for the President to be empowered to make regulations. Section 9 is breathtaking in the scope of the regulation-making powers that are granted. Subsection (2)(c) empowers any sanction to be imposed in regulations, whether criminal or civil, and extensive powers to seize money or goods are granted. Regulations may authorize the delegation of these powers of seizure to any other person. Limited powers of review of a seizure of assets are set out in subsec (2)(d)(i). Subsection (2)(e) provides that regulations may be made with retrospective effect, and may be made to apply even to matters that are currently being litigated. Subsection (3) provides that the Governor General (President) may ‘suspend in whole or in part this Act or any other Act of Parliament or any other law relating to or affecting or having any bearing upon currency, banking or exchanges, and any such Act or law which is in conflict or inconsistent with any such regulation shall be deemed to be suspended in so far as it is in conflict or inconsistent with any such regulation.’ That constitutes an absolute abdication of legislative authority to the President. Subsection (5) provides that regulations may authorize other persons to make ‘rules and orders’.

The South African Law Reform Commission, in its *Report on Legislation Administered by the National Treasury* of October 2011 (Project 25 Statutory Law Revision),¹³ considered the CEA as part of its comprehensive review of legislation administered by the National Treasury, and recommended the following:

‘The power given to the President to suspend Act 9 of 1933 or any other legislation that is inconsistent with the regulations made by him or her and the automatic suspension of legislation inconsistent with such regulations violates the doctrine of separation of powers implied in the Constitution which gives the power to make and repeal legislation to deliberative elected legislative bodies. The exercise of the power contained in section 9(3) of this Act by the President would deprive Parliament the opportunity to consider the inconsistency and amend legislation and is thus tantamount to the repeal of the legislation in question by the executive. The SALRC recommends that section 9(3) be repealed.’¹⁴

¹³ Last accessed from http://www.justice.gov.za/salrc/reports/r_pr025_treasury-oct%202011.pdf on 28 August 2018.

¹⁴ Ibid at 120.

The existing Regulations grant effectively all powers in relation to currency and exchange to the National Treasury. The Treasury is authorized to grant permissions or exemptions for certain transactions, which may be subject to conditions. These permissions or exemptions in the exchange control context are referred to as ‘Rulings’. ‘Treasury’, as defined in reg 1, ‘means the Minister of Finance or an officer in the Department of Finance who, by virtue of the division of work in that Department, deals with the matter on the authority of the Minister of Finance’.

Section 9(5)(a) of the CEA authorizes the issuing of Orders and Rules,¹⁵ which comprises orders, rules, exemptions, forms and procedural arrangements. In terms of reg 22E(1) and rule 2 of the Orders and Rules, the Minister of Finance has delegated to the Governor, a Deputy Governor, the Head of the Financial Surveillance Department of the South African Reserve Bank, as well as other officials in that department, the powers, functions and duties assigned to and imposed on the National Treasury under the regulations, with the exception of the powers and the functions assigned to the Treasury by regs 3(5) and (8), 16, 20 and 22. These powers have been delegated subject to minimal guidance or control. The Regulations and Rules and Orders are not extensive, and one gets only a limited sense from reading them of how the exchange control system operates and in practice is regulated.

Regulation 2(2) provides that an Authorised Dealer may not ‘buy, borrow, receive, sell, lend or deliver any foreign currency or gold except for purposes or on conditions that the National Treasury may determine’. The Financial Surveillance Department of the South African Reserve Bank (‘the SARB’) sets out those permissions conditions in Currency and Exchanges Manuals for Authorised Dealers¹⁶ (‘the Manuals’). Guidelines have been issued

¹⁵ Orders and Rules under the Exchange Control Regulations issued under Government Notice R 1111 of 1 December 1961, published in Government Notice R 1112 in *Government Gazette Extraordinary* 123 dated 1 December 1961, as amended, last accessed at <https://www.resbank.co.za/RegulationAndSupervision/FinancialSurveillanceAndExchangeControl/Legislation/Documents/Orders%20and%20Rules.pdf> on 26 August 2018.

¹⁶ South African Reserve Bank ‘Currency and Exchanges Manual for Authorised Dealers 2918-02-01’, last accessed from <https://www.resbank.co.za/RegulationAndSupervision/FinancialSurveillanceAndExchangeControl/Documents/Currency%20and%20Exchanges%20Manual%20for%20Authorised%20Dealers.pdf> on 26 August 2018; South African Reserve Bank ‘Exchange Control Manual for Authorised Dealers in foreign exchange with Limited Authority 2018-02-02’, last accessed from <https://www.resbank.co.za/RegulationAndSupervision/FinancialSurveillanceAndExchangeControl/Documents/Currency%20and%20Exchanges%20Manual%20for%20ADLAs.pdf> on 26 August 2018.

for businesses¹⁷ and individuals,¹⁸ and circulars have also been issued.¹⁹ The exchange control framework is largely set out in the Manuals, guidelines and circulars issued by the SARB. Section 9 of the CEA effectively delegates legislative authority entirely. The Manuals are where the real functioning and control of the exchange control system is set out. The CEA establishes a completely skewed legislative framework.

In *Shuttleworth*,²⁰ s 9 of the CEA and the reg 10(1)(c) were in the spotlight. The case highlights the importance of, and challenges arising in relation to, ensuring that original legislation delegates legislative power only to a constitutionally permissible extent, and that the subject matter of the powers that are delegated are permissible to be delegated. In *Shuttleworth*, the main appeal concerned the constitutionality of the exit charge, and the first issue the court considered was whether it was the Minister who had taken the decision to impose the exit charge, or it was the SARB who took the decision.²¹ The majority of the Constitutional Court held that it was the Minister who had taken the decision, and the SARB had implemented the decision. It was noted that this did not dispose of the matter, and that the critical issue was whether the exit charge was a levy or tax that needed to be imposed in terms of a money Bill.²²

The second issue that the court focused on in the main appeal, was whether the exchange control charge for emigrating funds was a tax or levy that was intended to raise revenue, or was merely a mechanism to disincentivise funds being moved outside of the country.²³ The majority held that the primary purpose of the charge was not directed at raising revenue, but was focused on protecting the economy and discouraging the removal of capital from the country.²⁴ Therefore, the requirements in s 9(4) of the CEA in relation to regulations intended to raise revenue, did not apply.²⁵ Any revenue-raising measure that constitutes a ‘tax’ as contemplated in terms of s 77 of the Constitution would need to be enacted by a money Bill in terms of

¹⁷ South African Reserve Bank ‘Currency and Exchanges Guidelines for business entities 2018-02-02’, last access from

<https://www.resbank.co.za/RegulationAndSupervision/FinancialSurveillanceAndExchangeControl/Documents/Currency%20and%20Exchanges%20Guidelines%20for%20Business%20Entities.pdf> on 26 August 2018

¹⁸ Ibid.

¹⁹ Last accessed from

<https://www.resbank.co.za/RegulationAndSupervision/FinancialSurveillanceAndExchangeControl/Pages/Exchange-Control-Circulars.aspx>.

²⁰ *South African Reserve Bank and Another v Shuttleworth and Another* 2015 (5) SA 146 (CC) (*Shuttleworth*).

²¹ Ibid para 29.

²² Ibid paras 35-39.

²³ Ibid para 28.

²⁴ Ibid paras 57, 71-72.

²⁵ *Shuttleworth* (note 20 above) paras 60-61.

national legislation in accordance with the requirements of that section.²⁶ The majority did not address whether other revenue raising measures might be addressed through delegated legislation, or whether original legislation processed in terms of s 75 of the Constitution would be required. The court only noted that ‘sections 75 and 77 of the Constitution have superseded the provision of s 9(4)’²⁷ of the CEA. The majority failed to properly assess whether the exit charge was imposed in a constitutionally compliant manner.

Moseneke DCJ, for the majority, disagreed with the contention in the minority judgement that it was not permissible to delegate the authority to make delegated legislation to a body other than the executive, and that Parliament may not delegate plenary legislative authority.²⁸ The regulation-making powers granted to the President did not constitute a delegation of plenary legislative powers, because the President was granted powers to make ‘regulations’, which had been used to make reg 10(1)(c). Regulation 10(1)(c) prohibited capital being exported except in accordance with conditions that may be imposed by the Minister. This was not a delegation of legislative power from the President to the Minister. The Minister set the exit charge as a condition. Moseneke DCJ concluded that ‘[t]he trail from legislation to the regulations to implementation is there’.²⁹

This assessment fails to recognise that the only thing that the CEA effectively does is empower the President, the Minister of Finance and the SARB to make the legislation in relation to exchange control. The regulation making power in effect is a plenary delegation of legislative power. The alleged ‘trail’ of power referred to as the basis for the majority’s conclusions regarding the delegation of legislative power does not address or cure the plenary delegation of legislative power that occurred.³⁰

Moseneke DJC recognized the need for the SARB to be able to respond on an urgent basis to capital flows which may fluctuate rapidly in the current era of electronic transactions to protect the value of the currency, which justified the broad regulation-making powers granted.³¹

²⁶ Ibid para 64.

²⁷ Ibid para 62. Note also that at para 64 the court only held that the charge was not one that ‘attracted the definition of a “money bill”’.

²⁸ Ibid para 65.

²⁹ Ibid para 67

³⁰ See Cora Hoexter ‘*South African Reserve Bank v Shuttleworth: A Constitutional Lawyer’s Nightmare*’ (2018) VIII *Constitutional Court Review* 333 at 342-343.

³¹ Ibid paras 68-70.

A cross-appeal by Mr Shuttleworth regarding the constitutionality of s 9(1) of the CEA and reg 10(1)(c) was also considered by the court. This challenge was on the basis that there was a failure to provide guidance for the exercise of powers as highlighted by the court in *Dawood*,³² and the scope of the discretion granted was too broad and open-ended. Moseneke DCJ highlighted the court's indication in *Dawood* in relation to discretionary powers that 'at times, they will be broad, particularly where the factors relevant to a decision are so numerous and varied that it is inappropriate or impossible for the legislature to identify them in advance.'³³ He concluded that the complexity of the exchange control system, the need for flexibility and a rapid response, and the necessity of maintaining financial stability 'must not be underestimated. I am not persuaded that the broad discretion under section 9(1) and regulation 10(1)(c) offends *Dawood* or the Constitution.'³⁴ The responsibility to ensure a stable economy justifies that the executive is granted broad powers.³⁵

Froneman J, in his dissenting judgment, appropriately held that revenue may only be raised through original legislation, and not through delegated legislation. While other charges and fees may not constitute a 'tax' that must be enacted in terms of a money Bill in terms of s 77 of the Constitution, those revenue raising measures would need to be authorized by legislation in terms of the general legislative procedure set out in s 75 of the Constitution.³⁶

Froneman J correctly identified that the CEA is the same type of pre-constitutional legislation that was considered in *Ynuico Limited v Minister of Trade and Industry and Others*.³⁷ There, Didcott J observed of the legislation in issue, the Import and Export Control Act 45 of 1963:

'Section 2(1)(b) and the ensuing notice were products of an era when the reign of Parliament was subject substantively to no constitutional discipline or control. In exercising the sovereignty which it thus enjoyed Parliament could competently confer on a Minister or somebody else whatever legislative powers it chose to assign to him, including plenary ones, and it did so not infrequently. Of the instances that spring to mind the most notorious was probably the occasion when the Native Administration Act 38 of 1927 appointed the Governor-General as the "Supreme Chief" of those whom it called "natives"' and equipped him with a power to legislate for them which was virtually absolute. That provision has become a dead letter by now and will no doubt

³² *Dawood* (note 10 above) paras 52-6.

³³ *Ibid*.

³⁴ *Shuttleworth* (note 20 above) para 81.

³⁵ *Ibid* para. 77.

³⁶ *Ibid* paras 93-95.

³⁷ 1996 (3) SA 989 (CC).

be removed from the statute book in due course. Still active there, however, are plenty of others less anachronistic which authorized the delegation of legislative power in terms quite as broad as and no less consequential than the ones of section 2(1)(b).³⁸

Froneman J focused on the important distinction, made in *Executive Council, Western Cape*,³⁹ between the delegation of subordinate legislative power, and a plenary delegation of legislative power. After examining s 9 of the CEA, he concluded:

‘It is difficult to conceive of a more comprehensive divesting of legislative power from Parliament to the Executive than what is contained in section 9 of the Exchanges Act. Take it away and what remains of the Exchanges Act is a hollow shell. If the interpretation given to section 9(4) in the main judgment is accepted, it means that the President may, except for raising taxes, in his discretion legislate by way of regulation about anything relating to currency, banking or exchanges without constraint. That amounts to assigning plenary legislative power to him. The Constitution does not allow that, no matter how important the regulation of international finance may be.

It is clear that the Exchanges Act provides no substantive framework within which the President must exercise these extraordinary powers. The only substantive provision in the Act, apart from section 9, is section 2: it deals with the repayment of contractual loans by payment in South Africa’s legal tender.’⁴⁰

Froneman J argued that in the emphasis in *Dawood* on the need to provide guidance for the exercise of powers, whether in original legislation, or correctly enabled delegated legislation,

‘lies a complete answer to the exceptionalism claimed for the legality of the executive power to legislate without legal constraint by way of regulations under section 9(1). This applies even more strongly for sub-delegating the power to the Minister to exercise it by way of policy’.⁴¹

The powers of the President to make regulations in relation to raising revenue in terms of s 9(4) of the CEA could not have been delegated to the Minister, as there was no power to subdelegate those legislative powers. The power to make orders and rules is subordinate to the regulation making power in s 9(4), and the power to make orders and rules could not be used to impose measures to raise revenue.⁴² Therefore, there was not a subdelegation of powers in accordance

³⁸ Ibid para 7.

³⁹ *Executive Council, Western Cape* (note 2 above) para 51.

⁴⁰ *Shuttleworth* (note 20 above) paras 111-113.

⁴¹ Ibid para 114.

⁴² Ibid paras 115-118.

with s 238 of the Constitution, which requires that a subdelegation of powers must be ‘consistent with the legislation’ in terms of which the subdelegation is purported to be made.⁴³ The Minister of Finance had also not exercised legislative power, as there was no legal instrument relating to the exit charge. The Minister had effectively tried to raise revenue through policy formulation by an announcement in a budget speech, and revenue cannot be raised through policy formulation.⁴⁴

Froneman J correctly assessed the nature of the CEA’s legislative framework. While it is possible to disagree with the characterization of the nature of the exit charge,⁴⁵ the extremely concerning aspects of the majority judgment involve the failure to thoroughly analyse the need for original legislation to raise revenue,⁴⁶ the failure to recognize the effective delegation of plenary legislative power,⁴⁷ and the failure to properly assess the subdelegation of power.⁴⁸ The majority of the court did not consider whether it was necessary, and would be possible, for the legislature to develop a new legislative scheme that would allow for a sufficient degree of flexibility and adaptability in the exchange control system, while providing a constitutionally sound legislative framework to guide the exercise of those powers. Owing to an over-concern to avoid disruption to the exchange control system, the reasoning employed in the majority judgment fudged the analysis of the constitutional issues, and resulted in a judgment that deviates from approaches adopted in other judgments of the court.⁴⁹ The majority failed to fulfil the court’s responsibility under s 172(1)(a) of the Constitution to declare provisions of the CEA and the Regulations unconstitutional, and failed to utilize s 172(1)(b) to make an appropriate order to address possible implications of a declaration of invalidity, while requiring the exchange control regime to be updated or replaced in a constitutionally compliant manner.⁵⁰ The continued operation of unconstitutional legislation such as the CEA cries out for the

⁴³ See Hoexter (note 30 above) at 343-344.

⁴⁴ *Shuttleworth* (note 20 above) paras 121-123.

⁴⁵ See Hoexter (note 30 above) at 339-341.

⁴⁶ *Ibid* at 9-10.

⁴⁷ *Ibid* at 10-11.

⁴⁸ *Ibid* at 11-12.

⁴⁹ See *Gaertner v Minister of Finance* 2014 (1) SA 442 (CC) where customs and excise legislation was considered; *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 para 45 and *Affordable Medicines* (note 3 above) considering legislation raising revenue, as discussed by Froneman J in *Shuttleworth* (note 20 above) paras 94-101; *Justice Alliance of South Africa v President of the Republic of South Africa* 2011 (5) SA 388 (CC) paras 52 and 53-69 in relation to the delegation of legislative powers; *Democratic Alliance v Masondo NO* 2003 (2) SA 413 (CC) paras 21-22 regarding subdelegation; *Armbruster v Minister of Finance* 2007 (6) SA 550 (CC) para 80, regarding the necessity of aligning the implementation of the exchange control regime with the Constitution.

⁵⁰ Hoexter (note 30 above) at 346. See *Muvumvu v Minister of Transport* 2011 (2) SA 473 (CC) paras 49-59, where an appropriate order was crafted to address the implications of a declaration of invalidity that impacted upon the Road Accident Fund.

establishment, by both the government and the legislature, of a systematic process of review of legislation, to ensure that all unconstitutional and archaic legislation is repealed and replaced with constitutionally sound and modern legislation.⁵¹

A legislative framework may enable complex circumstances to be addressed promptly and effectively, while providing sufficient guidance for the exercise of powers to make delegated legislation, and the powers granted in delegated legislation. Chapter 2 of the Financial Sector Regulation Act 9 of 2017 ('the FSRA') addresses financial stability,⁵² and provides the SARB with the mandate to address risks to financial stability and financial crises when they arise. Section 30 of the FSRA empowers the SARB to direct the Prudential Authority to issue directives, or prudential standards that impose requirements on systemically important financial institutions whose possible failure would result in a systemic event. Section 30 guides the Prudential Authority in relation to its powers to make directives in terms of s 143 of the FSRA and its power to make standards in terms of ss 98 to 104 and 106.

Provisions may enable regulations, standards, or rules to be made on an urgent basis, while still providing for parliamentary oversight. Section 100 of the FSRA provides for making urgent standards, and s 288(7)-(9) enables the making of urgent regulations. Through the application of creativity and drafting expertise, mechanisms that provide for adequate oversight and sufficient flexibility within a regulatory framework that is constitutionally compliant may be developed.

The CEA legislative framework deals with exchange control, which might be viewed as being distinct and specialised in nature compared to other legislation. *Shuttleworth* considered the application of s 77 of the Constitution in relation to the CEA, which is not applicable in relation to most legislation (which is processed in terms of either section 75 or 76 of the Constitution). However, the fundamental flaws in the CEA legislative framework that were highlighted by Froneman J in *Shuttleworth*⁵³ are pertinent to the consideration of the constitutionally permissible delegation of legislative powers, and the appropriate construction of legislative frameworks generally.

⁵¹ The South African Law Reform Commission has undertaken a significant review project which might be drawn upon, in the reports for various departments in terms of Project 25: Statutory Law Revision, reports last accessed from <http://www.justice.gov.za/salrc/reports.htm> on 28 August 2018.

⁵² Maintaining financial stability may require an extremely urgent response by the SARB, even more so than in relation to exchange control.

⁵³ *Shuttleworth* (note 20 above).

With all original legislation, it must be assessed, in light of all applicable constitutional provisions, whether the scope of delegation of legislative power provided is constitutionally compliant, whether sufficient guidance is provided in relation to the exercise of delegated legislative powers., and whether it is constitutionally and otherwise legally competent for delegated legislation to be made in respect of the matters that the legislation seeks to empower. The CEA is a pre-constitutional legislative framework that exemplifies everything that must be avoided when seeking to construct an effective, constitutionally sound legislative framework that appropriately provides for the delegation of legislative powers, as well as the effective integration between original and delegated legislation.

5.3 ACCOUNTABILITY AND OVERSIGHT

Where legislative power is delegated, sufficient accountability to the legislature and oversight of the exercise of the power by the legislature must be ensured. Delegated legislative power has traditionally been delegated to the executive based on the constitutional accountability of the executive to the legislature, as reflected in ss. 91 and 92 of the Constitution.⁵⁴ There are, however, instances where legislation delegates legislative power to parties other than the executive, as considered in the *Mpumalanga Petitions Bill* case.⁵⁵ An example of legislation that grants powers to a person or body other than a member of the executive is the regulation-making powers of the Auditor-General in terms of s 52 of the Public Audit Act 25 of 2004. Where there is a delegation of powers to persons or entities other than the executive to make delegated legislation, mechanisms of oversight by and accountability to the legislature must be provided for in relation to the exercise of those powers.⁵⁶

Scrutiny by the legislature of delegated legislation is essential in the current constitutional dispensation, as a component of the oversight responsibilities of Parliament. Section 104(4) of the Constitution provides that legislation may specify the manner in which, and the extent to which, instruments containing delegated legislation must be tabled in Parliament. Section 140(4) provides similarly in relation to provincial legislatures. The extent of parliamentary scrutiny of delegated legislation in pre-constitutional legislation was generally

⁵⁴ *Executive Council, Western Cape* (note 2 above) para 55.

⁵⁵ *Mpumalanga Petitions Bill* (note 9 above) paras 17-20 and 25.

⁵⁶ See Hendrina Christina Botha *Principles, Requirements and Techniques Relating to the Drafting of Delegated Legislation: A Legal Analysis* (unpublished thesis for Doctor Legum in Constitutional Law, University of Johannesburg, 2013) 33-37.

limited. Section 9(4) of the CEA, for example, requires tabling of regulations in Parliament after they have been made. Regulations providing for raising revenue would need to be approved by a resolution of both houses of Parliament, or they would cease to have effect 30 days after tabling. There is no provision in the CEA for the scrutiny of other types of delegated legislation prior to finalization and promulgation. Section 17 of the IA requires that the President, a Minister, the Premier or a member of the Executive Council of a province must submit to Parliament or a provincial legislature a list of delegated legislation that has been published in the *Government Gazette*.

Some recent legislation provides for a more significant role for parliamentary scrutiny by requiring the submission of delegated legislation to Parliament prior to its finalisation and publication. Sometimes additional specified information must also be submitted, to enable Parliament to scrutinise, deliberate and provide comments on draft delegated legislation.⁵⁷ Other recent legislation, however, is silent on the role of Parliament in scrutinising delegated legislation.⁵⁸ There is currently not a consistent legislative practice in relation to the degree of parliamentary scrutiny of delegated legislation that is provided for in original legislation. This might be addressed in legislation to provide for a consistent procedure for the processing and scrutiny of delegated legislation. The Australian Legislative Instruments Act 139 of 2003 ('the LIA') addresses the scrutiny of delegated legislation in part 2 of chapter 3. It is required that delegated legislation (referred to as 'legislative instruments') be tabled in both houses of Parliament,⁵⁹ and a period is provided for within which a motion of disallowance may be brought in Parliament.⁶⁰ Section 9(4) of the CEA provides for disallowance of regulations that relate to revenue, but in general, South African legislation does not provide for disallowance of delegated legislation. The Australian process does not provide a role for Parliament prior to the promulgation of delegated legislation, only a power of disallowance after the delegated legislation is made.

The South African Law Reform Commission, in clause 13 of the draft Bill included in its *Report on Administrative Justice* of August 1999 (Project 115),⁶¹ provided for a duty on the Office of the Chief State Law Adviser to publish proposals for administrative rulemaking, as well as a duty on administrators to communicate rules and standards in an appropriate way to

⁵⁷ See s 105 of the Financial Markets Act 19 of 2012, and s 103 of the FSRA.

⁵⁸ See s 171 of the National Credit Act 34 of 2005 and s 120 of the Consumer Protection Act 68 of 2008.

⁵⁹ Section 38 of the LIA.

⁶⁰ Ibid s 42.

⁶¹ Last accessed on 12 August 2018 at http://www.justice.gov.za/salrc/reports/r_prj115_aja_1999aug.pdf.

those who would be likely to be affected by them. The draft Bill also provided for registers and indexes of rules and standards to be kept. While these types of requirements are not included in the PAJA, consideration should be given to implementing these proposals in practice, and possibly incorporating these types of requirements in legislation, and for the requirements to apply to all delegated legislation, and not only rules and standards.⁶²

Beginning in 1998, Parliament undertook initiatives to establish more formal functions for the scrutiny of delegated legislation. A Joint Subcommittee on Delegated Legislation (‘the subcommittee’) was established and conducted initial work regarding mechanisms for the scrutiny of delegated legislation. Professor Corder was engaged to prepare a report to the subcommittee (‘the Corder Report’),⁶³ which was presented to the subcommittee in 1999. The subcommittee prepared an interim report (‘interim report’) in October 2002. The Corder report considered the constitutional context and the practices and legislation in other jurisdictions, assessed the conditions in South Africa, and concluded with a set of proposals for a mechanism for parliamentary scrutiny of delegated legislation.⁶⁴ Legislation in other jurisdictions that addresses the scrutiny of delegated legislation was considered, as well as the nature of committees established by legislatures to scrutinise delegated legislation. The interim report noted that s 101(4) of the Constitution might be interpreted as requiring either that all delegated legislation should be subject to the requirement of tabling and approval, or that Parliament may determine which delegated legislation should be subject to tabling and approval by Parliament.⁶⁵ The interim report recommended that legislation be enacted to provide for norms and standards for the tabling and approval of delegated legislation, and that s 17 of the IA might be reinforced. The rules of Parliament might be updated to address internal matters relating to the tabling of delegated legislation.⁶⁶

⁶² Sections 98 to 100 of the Financial Sector Regulation Act 9 of 2017 provide for a procedure for the Prudential Authority and Financial Sector Conduct Authority which are established in terms of that Act to make delegated legislation, which is referred to as standards. A comment procedure is set out, which includes a period for public comment and Parliamentary scrutiny. Part 2 of chapter 17 of the Act provides for the establishment of a Register on which original and delegated legislation, and other specified information relating to decisions taken by the regulators, must be published for public access.

⁶³ Hugh Corder *Final Report on Methods for Scrutiny of Legislation by Parliament* 2 March 1999, last accessed from <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/1999/minutes/991027scrutiny.htm> on 26 August 2018.

⁶⁴ Joint Subcommittee on Delegated Legislation *Interim report of Joint Subcommittee on Delegated Legislation on Scrutiny of Delegated Legislation* 29 October 2002, last accessed from <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/2005/050525delegatedlegreport.htm> on 26 August 2018 (*Interim Report*).

⁶⁵ Ibid Chapter 1- Constitutional mandate. Unfortunately, the version of the report that is available online does not contain page or paragraph numbers.

⁶⁶ Ibid.

The subcommittee recommended that delegated legislation should be included in the requirements for tabling and approval that would be included in proposed legislation, except if other legislation provides for another scrutiny mechanism and excludes delegated legislation from scrutiny under the general requirements in the envisaged parliamentary legislation.⁶⁷ Parliament should establish mechanisms for making delegated legislation more accessible to the public, and a joint committee should be established for the scrutiny of delegated legislation.⁶⁸ Mechanisms for the scrutiny of delegated legislation, and a mechanism for the disallowance of provisions in delegated legislation, should be established.⁶⁹ An interim scrutiny committee should be established, to advise portfolio and select committees in Parliament regarding delegated legislation that might be referred to it, and scrutinise delegated legislation that Parliament might be required to approve.⁷⁰

A Joint Committee on Delegated Legislation was established and was operational from 2012. In 2012 the Joint Committee considered four sets of regulations, in 2013 it considered two sets of regulations, and the last meeting that seems to have been held by the Joint Committee was on 18 February 2014. Subsequently, the Joint Committee has fallen into abeyance.⁷¹ Current practice is that delegated legislation that is tabled in Parliament is referred to the relevant standing and select committees for consideration, and the committees then decide how they may wish to address the delegated legislation. Regarding legislation in the financial sector, the Standing and Select Committees on Finance generally do not submit comments on delegated legislation that is tabled in terms of financial sector laws, largely owing to the volume of work that the committees need to attend to.

It is unfortunate that the process of establishing a consistent approach to the parliamentary scrutiny of delegated legislation has stalled, as it would be beneficial if legislation set out a clear and consistent approach. Legislation might draw upon experiences and legislation in countries such as Australia (as referred to above),⁷² Canada,⁷³ the United

⁶⁷ Ibid chap 3.

⁶⁸ Ibid chap 6.

⁶⁹ Ibid chap 7.

⁷⁰ Ibid chap 9.

⁷¹ See Joint Committee on Delegated Legislation Meeting Minute of 18 February 2014, last accessed from <https://pmg.org.za/committee-meeting/16943/> on 26 August 2018. See also listings for meetings of the Joint Committee on Delegated Legislation, last accessed from <https://pmg.org.za/committee/6/?filter=2014> on 26 August 2018, where records of committee meetings are available.

⁷² LIA (note 59 above).

⁷³ *Statutory Instruments Act* RSC 1985 c S-22, last accessed from <http://laws-lois.justice.gc.ca/PDF/S-22.pdf> on 26 August 2018.

Kingdom⁷⁴ and other jurisdictions, and the experiences of committees that may be involved in the scrutiny of delegated legislation. As highlighted by Professor Corder,⁷⁵ this experience might inform the finalisation and implementation of an approach that is well suited to the South African constitutional and parliamentary context.

Rose-Ackerman, Egidi and Fouwkes note efforts in South Africa at the provincial level to develop scrutiny to oversee delegation, and how at the national level efforts to provide for processes to scrutinize delegated legislation have sadly stalled.⁷⁶ The Gauteng Scrutiny of Subordinate Legislation Act 5 of 2008 ('the GSSLA')⁷⁷ provides in s 2 for the scrutiny of draft delegated legislation before it is promulgated, by a standing committee that is established in s 3. The State Law Adviser in the Office of the Premier must certify subordinate legislation before it is submitted to the legislature. Section 4 specifies the criteria in respect of which delegated legislation is scrutinized: constitutionality; proper authorization by the original legislation; compliance with any condition in the original legislation; whether the delegated legislation constitutes a reasonable exercise of the delegated legislative power; whether the delegated legislation raises or spends revenue that is not authorized by the original legislation; vagueness and ambiguity; whether the delegated legislation provides for retrospectivity without proper authorization in the original legislation; and fulfilment of formal drafting requirements. In terms of s 5, delegated legislation cannot be made unless it is approved by the standing committee, or if the standing committee does not approve, it is submitted to the house for consideration and is approved. Section 6 provides that an index of delegated legislation is published.⁷⁸

The Kwazulu-Natal Delegation of Powers Repeal Act 3 of 2012 in s 1 repealed the Kwazulu-Natal Delegation of Powers Act 8 of 1994, but in s 2(2) allowed a grace period of one year for the legislature to review all delegations, and decide which should be withdrawn and replaced with a new delegation in terms of a specific empowering provision of any

⁷⁴ *Statutory Instruments Act 1946* CHAPTER 36 9 and 10 Geo 6, last accessed from <http://www.legislation.gov.uk/ukpga/Geo6/9-10/36/data.pdf> on 26 August 2018.

⁷⁵ Hugh Corder *Final Report on Methods for Scrutiny of Legislation by Parliament* 2 March 1999, last accessed from <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/1999/minutes/991027scrutiny.htm> on 26 August 2018.

⁷⁶ See Susan Rose-Ackerman, Stefanie Egidy & James Fowkes *Due Process of Lawmaking: The United States, South Africa, Germany and the European Community* (2015) 109-110.

⁷⁷ See also Jonathan Klaaren & Sanele Sibanda 'Introducing the Gauteng Scrutiny of Subordinate Legislation Act' 2009 25 *SAJHR* 161.

⁷⁸ Last accessed from <http://www.gauteng.gov.za/government/departments/office-of-the-premier/Documents/Legal/Gauteng%20Scrutiny%20of%20Subordinate%20Legislation%20Index%202011.pdf>

applicable law.⁷⁹ It is hoped that the activity at provincial level may stimulate efforts to enact legislation at the national level, although there seems to be a discrepancy between legislatures' expressed appetite to exercise oversight over delegated legislation, and the resources and time that are allocated for doing the work required.

5.4 EMPOWERING PROVISIONS

Empowering provisions must be meticulously crafted so that legislative powers are properly delegated, all necessary matters are enabled to be addressed in delegated legislation, and sufficient guidance is provided for the exercise of the powers to make delegated legislation. Particularly where powers to make delegated legislation are granted to a regulator, as opposed to a member of the executive, Parliament should have a specified oversight role in relation to that delegated legislation. This would include specifying a process for Parliament to scrutinize and potentially comment on delegated legislation before it is finalized and made.⁸⁰

Legislation may include more than one empowering provision to make delegated legislation, and when making delegated legislation it is vital to specify the correct empowering provision in the enacting provision of the delegated legislation. Some legislation refers to matters being 'prescribed' by a minister in various provisions, and then there is a more general 'regulation-making' provision that refers to a list of various matters in respect of which regulations may be made. A procedure for making regulations may be specified in the general regulation-making provision. An explicit link must be made between the various provisions providing for matters to be 'prescribed' and the general regulation making provision, to clarify that there is a general regulation-making power and a consistent procedure applicable to all instances where regulations are made in terms of the legislation. If the linkage is not properly made, an interpretive question may arise whether a procedure that is set out in the general provision applies to the various instances of matters being prescribed in terms of other provisions in the original legislation, or whether the different provisions grant separate regulation making powers.

In the FSRA, for example, 'regulation' is defined to mean 'a regulation made in section 288'. Section 61(4) requires the Minister to make regulations setting out a process for the appointment of a Commissioner and Deputy Commissioners of the Financial Sector Conduct

⁷⁹ See Rose-Ackerman, Egidy & Fouwkes (note 76 above) 110.

⁸⁰ See ss 98-100 and 288 of the FSRA.

Authority. Section 301(4) empowers the Minister to make regulations to facilitate ‘the coming into effect, appropriate implementation and operation of this Act’. It may be interpreted that these sections are separate empowering regulation-making provisions to the general regulation-making powers in s 288, and that the regulation-making procedure in s 288 does not apply to regulations made in terms of ss 61(4) and 304(1). To clarify that there is a general regulation-making power and a consistent, consolidated regulation-making procedure which applies when making the regulations in terms of any provision in the FSRA, the definition of ‘regulation’ should be amended so that it does not only include a ‘regulation in terms of section 288’. Section 288(1) should be amended to clarify that the procedures contained in s 288 apply to all regulations made in terms of the Act, including regulations that are empowered or required to be made in other sections of the Act. It must be clear to which matters and processes each empowering provision to make delegated legislation in original legislation applies, in order to avoid any possible confusion about which empowering provision, and which procedures are applicable to the delegated legislation that is being made.⁸¹

Where there may be overlapping jurisdiction or responsibilities of Ministers or regulators regarding the subject matter of delegated legislation that is proposed to be made, requirements in original legislation for prior consultation or concurrence before delegated legislation is made would be necessary.⁸² Where concurrence or consultation is not strictly speaking required, but the subject matter of delegated legislation is related to or overlaps with the responsibilities or jurisdiction of other Ministers or regulators, consultation facilitates the development of delegated legislation that is workable and acceptable to all affected departments and regulators.

It assists those who will draft delegated legislation, and those who are empowered to make delegated legislation, to clearly indicate in the original legislation which powers are discretionary, and which are mandatory. If an empowering provision to make delegated legislation addresses some mandatory and some discretionary powers, those might be separated

⁸¹ Botha (note 56 above) 202-203. An example where there are multiple empowering provisions and it may not be completely clear which would be the applicable empowering provision is ss. 39, 53 and 67 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

⁸² Botha (note 56 above) 200-201; see ss. 27 and 40 of the Promotion of National Unity and Reconciliation Act 34 of 1995, and also ss 75, 280 and 306, which empower the Minister of Justice and Constitutional Development and the Minister of Social Development to make regulations in relation to different matters.

out into subsections or paragraphs, with introductory wording that clarifies that the powers listed in the subsection or paragraph are discretionary or mandatory.⁸³

Thornton discusses the distinction between the granting of ‘general’ legislative powers, and ‘particular’ or ‘specific’ legislative powers. ‘General’ legislative powers may be granted in broad terms, an example of which is s 9(1) of the CEA. Another common type of empowering provision is where a power is granted to make delegated legislation ‘in relation to any matter that may or must be prescribed in terms of this Act’. This is intended to refer to the various other provisions in the legislation that require or permit the Minister to prescribe matters, and provides a mechanism to link the other specific empowering provisions in original legislation to a general empowerment provision. Another type of provision enables other incidental or administrative measures to be addressed, by authorising delegated legislation to be made in relation to or ‘any matter necessary for the proper implementation or administration of this Act’. This type of provision is important to include, as it is impossible to envisage and explicitly state all of the ancillary administrative functions that are needed to implement the regulatory framework. Finally, the power to make delegated legislation may be authorized ‘in respect of the following purposes’, and then a list of specific purposes that are related to the general purpose of the original legislation may be listed.⁸⁴

The scope of some of these formulations may give rise to concerns regarding their correct interpretation. The very broad and general formulations, of which s 9(1) of the CEA is a prime example, are now eschewed owing to potential constitutional concerns, as noted in the discussion in part 5.2 on *Dawood*⁸⁵ and *Shuttleworth*⁸⁶ and the scope of delegation of legislative power. Providing for a ‘catch-all’ to provide for incidental and administrative matters is necessary, and is generally accepted drafting practice. Allowing some scope of discretion to legislate in the formulation of specified purposes may be appropriate, because specifying the powers too narrowly may result in the unintended exclusion of certain matters from the scope of the delegated legislative power.

In contrast to provisions that provide for a general delegation of powers, other provisions provide for the delegation of powers to legislate for specified purposes or in relation to clearly

⁸³ Botha (note 56 above) 204-205). See s 10(1) and (2) of the PAJA, which separates out mandatory and discretionary powers.

⁸⁴ Helen Xanthaki *Thornton Legislative Drafting* 5 ed (2013) 417-418.

⁸⁵ *Dawood* (note 10 above).

⁸⁶ *Shuttleworth* (note 20 above).

specified matters, or in relation to the exercise of specified powers or functions. A legislative provision may address a single specific power to make delegated legislation. In a centralized empowering provision, after an initial fairly general delegation of powers, specific powers may be authorized ‘in respect of the following purposes’ that are listed.⁸⁷

To promote the effectiveness of the regulatory framework, the formulation of the purposes for which delegated legislation may be made should be clearly linked to the purpose of the original legislation. This may prevent the scope of the powers from being misinterpreted to extend beyond the proper scope of the original legislation. The ambit of the powers would also be constrained by their interpretation in the context of the fundamental rights in the Constitution.⁸⁸ The power to make delegated legislation will be clearly defined, where the power to make delegated legislation is linked to an indicated purpose or the object of the original legislation, and the purposes and matters for which delegated legislation may be made are clearly and specifically described. Drafters of empowering provisions, and the drafters of delegated legislation, must be aware of the potential interpretive risks that may arise in relation to empowering provisions, and exercise caution when developing empowering provisions, and when interpreting them while preparing drafting delegated legislation.

In South Africa, with few exceptions, granting a power to amend or repeal original legislation through delegated legislation would be an unconstitutional violation of the separation of powers.⁸⁹ Section 47(1)(a) of the Public Finance Management Act 1 of 1999 does require the Minister of Finance to amend schedule 3 to the Act, to reflect all currently designated public entities. Arguably, that is not an instance of amending the substance of the original legislation, the power is intended to ensure that all public entities that are in existence and to which the legislation applies are indicated in the schedule. Sections 2(2) and 3(3) of the FSRA empower the Minister of Finance to designate additional categories of financial products and financial services that fall within the ambit of the definition of ‘financial product’ and ‘financial service’, in the circumstances and for the purposes specified in those provisions. This power does not allow the expansion of the overall scope of the definitions of ‘financial product’ and ‘financial service’ that are set out in ss 2 and 3. The power enables clarity to be provided that new types of financial products and financial services which are continually emerging in

⁸⁷ Xanthaki (note 84 above) 417-418.

⁸⁸ Ibid 418-419.

⁸⁹ *Executive Council, Western Cape* (note 2 above) para 62.

the financial sector indeed fall within the scope of those definitions, and are subject to regulation by the FSRA.

The granting of a power to exempt or exclude a person from the application of original legislation is a substantial power that in effect alters the application of the legislation, and that power should not be granted in unconditional terms. Guidance should be provided that the power is exercisable only if certain conditions are satisfied. An example of this type of provision is s 66(1) of the Insurance Act 18 of 2017.⁹⁰

If it is intended to grant powers to make delegated legislation that operates retrospectively, or to impose fees, penalties or sanctions, the *Shuttleworth* case suggests that caution must be exercised in empowering the delegation of these types of powers. These sensitive matters must be explicitly empowered in original legislation, and clear guidance regarding the exercise of these types of powers must be provided.⁹¹ Caution must be exercised in relation to potentially creating offences in delegated legislation, due to the implications for fundamental rights. An example of how this might be appropriately addressed is in s 92(4) of the Promotion of Access to Information Act 2 of 2000.

5.5 INTEGRATION AND ALIGNMENT

Meticulously crafting powers to make delegated legislation, and ensuring an appropriate alignment and interconnection between original and delegated legislation, is necessary for the development of an integrated system of administrative law, as well as for an integrated and effective legislative and regulatory framework in a specific area of regulatory activity. The empowering provision, discussed in part 5.3, is the primary mechanism for ensuring alignment between the enabling original legislation and delegated legislation. It plays a critical role in ensuring that the appropriate separation of powers is maintained. It is also the mechanism through which the appropriate delineation of administrative power may proceed from the Constitution through the original legislation, as it may be exercised ultimately in terms of delegated legislation. The injunction in s 39(2) of the Constitution that all legislation must be interpreted in a manner that promotes ‘the spirit, purport, and objects of the Bill of Rights’ is supportive of legislation being interpreted and applied in a manner that promotes integration of the legislation within the constitutional and administrative law framework. Delegated

⁹⁰Xanthaki (note 84 above) 424.

⁹¹Ibid.

legislation also must be interpreted in light of the enabling original legislation, as its purpose is to give effect to the original legislation.⁹² This approach promotes alignment between the original and delegated legislation. When drafting delegated legislation, careful attention must be paid to the empowering provision in the original legislation, interpreted in the context of the legislation as a whole.⁹³

If delegated legislation is misaligned with the empowering provision in the original legislation, the original legislation as a whole and the Constitution, the delegated legislation would be invalid to that extent, as delegated legislation cannot amend or be *ultra vires* the original legislation.⁹⁴ Misalignment between delegated and original legislation may arise where the scope of the powers to make delegated legislation that are conferred is misconstrued,⁹⁵ or where the scope of a definition that is used in the delegated legislation differs from and is broader than the scope of the definition of the term in the empowering legislation.⁹⁶ The scope of the empowering provision must be analysed, and the definitions and all provisions in the delegated legislation must be scrutinized, to be certain that proposed delegated legislation falls squarely within the ambit of the empowering provision, interpreted in the context of the legislation as a whole.

Drafters of delegated legislation must ensure that delegated legislation is integrated with the PAJA, and that the processing of the delegated legislation complies with the Regulations on Fair Administrative Procedures⁹⁷ or the suitable alternative consultation requirements contained in the original legislation.

In some instances, certain provisions of original legislation may not be able to be implemented unless necessary delegated legislation is also brought into operation at the same time. When drafting commencement provisions in original legislation, it is beneficial to enable different provisions of the original legislation to be brought into operation on different dates, so that each provision may commence when it may be properly implemented. This is permitted

⁹² Botha (note 56above) 226.

⁹³ Botha (note 56 above) 232-233.

⁹⁴ See *Ex Parte Gauteng Provincial Legislature: In Re Dispute Concerning the Constitutionality of certain provisions of the Gauteng School Education Bill of 1995* 1993 (3) SA 165 (CC) paras. 23-27.

⁹⁵ See *De Staat v Botha* 1961 4 SA 584 (O); *Ex parte Minister van Justisie: In re S v Concalves* 1976 (3) SA 629 (A).

⁹⁶ See *S v Tarajka Estates (Edms) Bpk* 1963 4 SA 467 (TPA).

⁹⁷ Government Notice No. R1022 published in *Government Gazette* 23764 of 31 July 2000; see Botha (note 56 above) 239.

by s 13 of the IA. The *Pharmaceutical*⁹⁸ case is an example of the unfortunate consequences that may arise when a provision of original legislation is brought into operation without the necessary delegated legislative framework being in place. It is imperative to have an implementation plan regarding when provisions of legislation should be brought into operation and when necessary delegated legislation must be developed and promulgated. Necessary co-ordination and organisation must be in place, particularly where legislation is establishing a new regulatory regime. Botha recommends developing a checklist to analyse and identify all of the sections, subject matter, and aspects that must or may be prescribed in terms of the legislation.⁹⁹ Section 14 of the IA assists in this process, by permitting matters such as developing delegated legislation and other administrative measures prior to the commencement of the Act.¹⁰⁰

Within delegated legislation, the enacting provision sets out who is making the delegated legislation and the authority in terms of which the delegated legislation is being made. This essential provision defines the link between the original and delegated legislation.

The use of purpose clauses in delegated legislation is uncommon, but there are occasional examples, notably the Merchant Shipping (Maritime Security) Regulations, 2004,¹⁰¹ where reg 2 provides a clear and detailed purpose provision. Regulation 1 of the Regulations relating to Banks in terms of the Banks Act 94 of 1990 also sets out the objective of the regulations.¹⁰² A purpose provision might provide a linkage both to the empowering provision in the original legislation and the matters in respect of which regulations may be made, as well as to the object or purpose of the original legislation. The inclusion of an application clause clarifies the scope of jurisdiction for the exercise of administrative power in terms of the regulations.¹⁰³ Some regulations simply jump from the definitions straight into a series of requirements, and do not place the requirements into any context whatsoever, which does not

⁹⁸ *Pharmaceutical Manufacturers of South Africa: In re Ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC). See also *President of the Republic of South Africa v South African Dental Association* 2015 (4) BCLR 388 (CC); *Minister for Environmental Affairs v Aquarius Platinum* 2016 (5) BCLR 673 (CC).

⁹⁹ Botha (note 56 above) 265.

¹⁰⁰ Ibid 257-262.

¹⁰¹ Government Notice R751 published in *Government Gazette* 26488 of 21 Jun 2004.

¹⁰² Government Notice R1029 published in *Government Gazette* 35950 of 12 December 2012.

¹⁰³ See reg 4 of the Merchant Shipping (Maritime Security) Regulations, 2004 (note 101 above).

assist users (those subject to the legislation and administrators) in understanding the legislative framework and how the delegated legislation is integrated within that framework.¹⁰⁴

The effectiveness of delegated legislation may potentially be undermined if it is voluminous and complex, difficult to access or challenging to keep track of. Users of legislation must be able to access all relevant, current delegated legislation in order for the regulatory regime to be effective.¹⁰⁵ When developing delegated legislation, analysis should be made of the other delegated legislation that has been produced in terms of the original legislation, to ensure that there will not be any contradiction or overlap. Where numerous, brief, specific, pieces of delegated legislation have been issued to address a range of specific matters, consideration should be given to consolidating the delegated legislation into a single larger, better organized and structured, piece of delegated legislation. Where there may be more than one piece of original legislation that impacts on those who are subject to the legislation, an assessment of the delegated legislation under those other pieces of legislation should be undertaken. This might decrease the likelihood of duplication, inconsistency, and overregulation, and promote an integrated regulatory framework.

5.6 IMPLEMENTING THE THEORETICAL FRAMEWORK

(a) The drafter of delegated legislation and quality assurance

Original legislation is generally drafted by lawyers who have training and experience in legislative drafting. The State Law Advisers also scrutinise the constitutionality of original legislation to ensure that the legislation is constitutional and conforms to acceptable drafting style. There is, therefore, a degree of quality assurance that is applied to drafting legislation.

Delegated legislation may be drafted by non-legally trained officials in departments or regulatory agencies, who may have had little, if any, formal training in drafting. Even if delegated legislation is prepared by legal advisers in the department, they might not be trained or experienced in drafting. Some, but not all, departments may have a practice that delegated legislation prepared by officials who are not trained in drafting is reviewed by legally trained

¹⁰⁴ See, for example, *The Consumer Protection Act Regulations*, Government Notice R293 published in *Government Gazette* 34180 of 1 April 2011, which is a set of rather disparate requirements stuck together in a set of regulations.

¹⁰⁵ Lourens du Plessis *Re-Interpretation of Statutes* (2002) 22. Part 2 of chapter 17 of the FSRA provides for the establishment of an electronic register for delegated legislation and other important determinations and decisions.

departmental drafters prior to submission for approval by the minister. Delegated legislation prepared for original legislation administered by the Department of Justice and Constitutional Development is prepared by drafters in a section of the Office of the Chief State Law Adviser. The standard of drafting of delegated legislation in government, therefore, may vary considerably. There is not currently a requirement that delegated legislation must be submitted to the State Law Advisers for scrutiny prior to promulgation. There has also not been a requirement for delegated legislation to be submitted to Cabinet for approval. A department may request the State Law Advisers to scrutinize regulations, and assist with finalizing the drafting. This may be done where there are substantial regulations being made in terms of significant original legislation. However, this is not common practice. Given the volume of delegated legislation that is produced, the State Law Advisers do not have the capacity to scrutinise all delegated legislation. There is, therefore, not an effective quality assurance mechanism for the drafting of delegated legislation. Requirements to publish draft delegated legislation for public comment prior to finalization may provide a means for drafting weaknesses to be identified through comments that are received, such as where there is vagueness or ambiguity in provisions, and inconsistencies or conflicts with other legislation.

For delegated legislation to be produced that is effective, measures should be implemented by departments and regulatory agencies to which legislative powers have been delegated, to ensure that delegated legislation is prepared by trained drafters, or at the very least, is scrutinized and finalized by a trained drafter prior to approval and publication. The capacity of the Office of the Chief State Law Adviser might be expanded to provide services to assist departments in the finalisation of delegated legislation. Training initiatives and the development of drafting manuals and other materials by the Department of Justice and Constitutional Development for legal advisers and other officials in departments and regulatory agencies might be increased. Unfortunately, given the other competing priorities for government in general, and departments and regulatory agencies, the quality of drafting of delegated legislation may not be viewed as being of importance. However, the potential for well-drafted delegated legislation to promote constitutionally compliant administrative action and the effective implementation of legislation that implements government's programmes and policies must be highlighted.

(b) *Drafting process*

The theoretical framework highlights the importance of a thorough, organized, and well-planned and documented drafting process. As delegated legislation varies markedly in its nature, extent and complexity, the drafting process for delegated legislation may vary significantly. With brief delegated legislation that is addressing a specific and limited purpose, it would not be necessary or appropriate to undertake an elaborate drafting process. However, it would be helpful for drafters to at least put in place a basic standard process that focuses on examining whether the delegated legislation is aligned to the empowering provision in the original legislation and the purpose of the original legislation, is consistent with the Constitution and the PAJA (and delegated legislation under the PAJA), and contributes to the overall regulatory scheme that is being implemented through this legislative framework. An examination of the alignment of the delegated legislation with other delegated legislation that has been made in terms of the original empowering legislation also would be required. It must also be assessed whether the proposed delegated legislation may potentially be inconsistent with other original or delegated legislation.

The more complex and extensive the delegated legislation that is being prepared, the more planning and organization that would be necessary in the drafting process, and the more similar the drafting process might be to the process for developing original legislation. Even delegated legislation that appears to be relatively simple and straightforward may in fact require significant analysis and discussion during its development and finalization. It is, therefore, good practice for drafters to develop at least a brief process plan and a brief report providing the rationale for the approach taken in the delegated legislation, and a record of discussions and agreements reached during the delegated legislation's development and finalization.

(c) *Structure*

Part 5.5 above has discussed the overarching integration and alignment of delegated legislation. Given the extent to which the scope and complexity of delegated legislation varies, the nature of the structure that is suitable to include in delegated legislation also varies. Lengthy and complex delegated legislation requires a thoughtfully framed structure, that it is organized in a logical and accessible manner for users. Even brief delegated legislation should be evaluated in this regard.

(d) Assessment and review of delegated legislation

The pre- and post-implementation assessment of delegated legislation is an important contributing factor to the effectiveness of legislation that is particularly underdeveloped and underutilized in South Africa. The FSRA is an example of legislation that requires some degree of impact assessment of proposed delegated legislation,¹⁰⁶ and it is envisaged that future legislation for the financial sector will require the regular assessment and review of delegated legislation.¹⁰⁷ Linking delegated legislation and provisions of delegated legislation to the purpose of the empowering original legislation, the performance of a function of a regulatory authority as specified in the original legislation, or to the purpose or matter in the empowering provision in the original legislation to which the provision in delegated legislation relates, may assist for developing measures to assess the pre- and post-implementation effectiveness of legislation. The methodology employed must take into consideration the regulatory framework that the delegated legislation will operate or operates within, and the interaction of the operation of the delegated legislation with other pieces of delegated legislation. Substantial work must be undertaken in this area, involving collaboration between drafters and a range of officials who are involved in the development and implementation of the delegated legislation. The methodology must include measures to assess the exercise of administrative power in terms of the delegated legislation, and whether the rights to just administrative action are realized.

5.7 CONCLUSION

This chapter has highlighted some key aspects relating to the effectiveness of delegated legislation, which are particularly pertinent for drafters to bear in mind when developing delegated legislation. These considerations include ensuring that the scope of delegated legislative authority that is provided for does not exceed what is constitutionally permissible, providing for appropriate accountability and oversight by the legislature of delegated legislative authority, ensuring appropriate integration and alignment of the delegated legislation within the regulatory and constitutional legal framework, and meticulously crafted empowering provisions. Oversight and scrutiny by the legislature of delegated legislation was considered. Some challenges which may arise in applying aspects of the theoretical framework for legislation were also discussed, in particular relating to the experience and training of the

¹⁰⁶ See ss 98(1)(a) and 288(4)(a) of the FSRA.

¹⁰⁷ A proposed clause is included in the Appendix.

drafter and maintaining quality assurance in delegated legislation, the variability of the drafting process that may be appropriate to employ, as well as the complexity and type of structure that may be appropriate to provide for in the delegated legislation. Finally, the necessity of significant work on the development of mechanisms for assessment and review of delegated legislation was highlighted.