

THE COMPLETION OF ADMINISTRATIVE LAW

5.1 INTRODUCTION

In pre-democratic South Africa, as in many countries influenced by English law, judicial review was by far the most significant form of control of administrative power. In fact, South African administrative law has always principally been about the judicial diagnosis of maladministration and the provision of judicial remedies for the abuse of power.¹ This is not surprising when one considers how little the public-law system had to offer besides judicial review. Until very recently there was no pretension to an integrated system of administrative law in which judicial review was regarded as merely supplementary to the business of making good primary decisions, and in which other forms of control and reconsideration – such as administrative adjudication – were taken seriously.² Safeguards commonly enjoyed in other jurisdictions, such as freedom-of-information legislation, public hearings, notice-and-comment procedures and ombudsmen, hardly seemed attainable here even in the 1980s and early 1990s.³

In the absence of other effective safeguards and procedures, judicial review had a crucial role to play in the administrative system. Legal education, too, tended to emphasise judicial review – something that produced case law, ‘real’ law – at the expense of other procedures, which were suspiciously tainted with ‘policy’.⁴ In terms of the traffic-light metaphor made famous by Harlow and Rawlings, South African administrative lawyers took an unashamedly red-light view of things.⁵ They also found it convenient to ignore the inherent limitations of review, well understood in other jurisdictions, such as the expense and formality associated with going to court; the restricted and retrospective focus of judicial review; its irregular and unsystematic nature; its inability to foster public participation; and its doubtful educational value.⁶

¹ See eg W H B Dean ‘Our Administrative Law: A Dismal Science?’ (1986) 2 *SAJHR* 164 at 164-5; Cora Hoexter ‘The Future of Judicial Review in South African Administrative Law’ (2000) 117 *SALJ* 484 at 485ff.

² Hoexter ‘Future of Judicial Review’ (note 1 above) 485-6.

³ Compare especially the ‘comprehensive, integrated, accessible system’ introduced in Australia from the 1970s and described in Robin Creyke ‘Administrative Justice: Beyond the Courtroom Door’ 2006 *Acta Juridica* 257.

⁴ L G Baxter *Legal Education and Public Policy* Inaugural Lecture at the University of Natal, Pietermaritzburg (1984) 3ff.

⁵ Carol Harlow & Richard Rawlings *Law and Administration* 2 ed (1997).

⁶ On these and other limitations see Hoexter ‘Future of Judicial Review’ (note 1 above) 488-94.

In a system that aspires to a culture of justification, however, such limitations cannot safely be ignored. Even on the assumption that judicial review operates very efficiently on its own terms, it is over-optimistic to imagine that administrative accountability can be achieved by means of a single method of control. A culture of justification is far more likely to flourish where the system relies on a variety of methods of control, including political and administrative safeguards. Thus an essential aspect of the transformation of pre-1994 South African administrative law was its completion and integration. There was a need to combine judicial review with other procedures that could supply the missing elements or make up for disadvantages such as the inaccessibility of review to ordinary South Africans.⁷

This need was fully acknowledged at the Breakwater Workshop in 1993. Several of the papers read at the workshop dealt with non-judicial safeguards in the administrative process,⁸ while the need for a broader range of controls was addressed in considerable detail in the Breakwater Declaration. One of its Points of Departure was the fact that South African administrative law had a ‘retrospective focus’ and needed to create ‘procedures and structures which will foster good decision-making’.⁹ Another stressed the importance of utilising limited human and material resources as efficiently as possible in promoting the goal of administrative justice.¹⁰ The Areas of Agreement revealed a commitment to a range of procedures and institutions, besides judicial review, to ensure good governance. A number of specific procedures and institutions were listed, including consultative and participatory rulemaking and decision-making procedures;¹¹ access to official information;¹² and the training of public servants in the principles of good governance.¹³ Finally, areas listed as deserving further consideration included administrative appeals;¹⁴ the possibility of prescribing administrative procedures in legislation;¹⁵ and the codification of the principles of good governance.¹⁶

Thanks to the democratic Constitution, South Africans are closer today than they have ever been to a complete and integrated system of administrative law in which a number of

⁷ Ibid, and see Sammy Adelman ‘Accountability and Administrative Law in South Africa’s Transition to Democracy’ (1994) 21 *Journal of Law and Society* 317.

⁸ Three of the sixteen published papers dealt with appeal as an alternative to review, and two with rulemaking. In addition, there were papers on alternative dispute resolution and freedom of information.

⁹ Item ii.

¹⁰ Item v of the Points of Departure.

¹¹ Item ii of the Areas of Agreement.

¹² Ibid item v.

¹³ Ibid item vii.

¹⁴ Item i of the Areas Requiring Further Consideration.

¹⁵ Ibid item ii.

¹⁶ Ibid item v.

different safeguards play appropriate roles. They are also closer than ever to what Mureinik termed ‘responsive’ democracy as opposed to mere ‘snapshot’ democracy, or the citizen’s right to vote every few years.¹⁷ Responsive democracy, Mureinik argued, implied both participation by the governed and accountability to the governed – two democratic values that were conspicuous by their absence before 1994. While Mureinik discussed these ideals particularly in relation to judicial review (which in itself is telling), it is important to appreciate the variety of methods of promoting participation and accountability. The most important methods surveyed in this chapter – judicial review itself, administrative appeals, legislative oversight, public participation, ombudsman institutions and access to information – all promote one or other of these values, and some promote both.

This chapter begins with a discussion of the ways in which the nature of judicial review has changed since 1994. It then surveys the development of other safeguards in the administrative system. While these tend to suggest that South African administrative law has transformed by moving beyond its almost exclusive reliance on judicial review, it should be appreciated that the survey is essentially an academic one: no statistical evidence exists to show whether judicial review is being relied on less *in practice* as a result of its supplementation by other safeguards.¹⁸

In relation to that supplementation there are some remarkable gains to record, such as provision in s 4 of the PAJA for public participation in administrative decision-making. However, some of the reforms have so far taken place in the realm of theory rather than practice, while other potentially important institutions have proved less successful than was initially hoped. It will be shown, too, that in the enactment of the PAJA the legislature squandered many additional opportunities for the creation or reform of methods of disciplining administrative power.

5.2 JUDICIAL REVIEW

Throughout the common-law world today, judicial review counts as a highly significant control over administrative discretion and has become ‘immensely popular as a treatment for

¹⁷ Etienne Mureinik ‘Reconsidering Review: Participation and Accountability’ 1993 *Acta Juridica* 35. On the many meanings of democracy, ‘a noun permanently in search of a qualifying adjective’, see Theunis Roux ‘Democracy’ in Stuart Woolman et al *Constitutional Law of South Africa* 2 ed (OS 07-06) Chapter 10; and for the most comprehensive account, see David Held *Models of Democracy* 3 ed (2006).

¹⁸ No studies appear to have been done in this regard, and no statistics on judicial review collected by the Department of Justice or any other entity – a fact that must seem amazing to those in Commonwealth jurisdictions.

the pains of modern governance'.¹⁹ Furthermore, at least at an abstract level, there is considerable agreement about what administrative-law review is expected to deliver.²⁰ Probably the three most important functions performed by judicial review are the achievement of accountability, the promotion of good administration and safeguarding the rights of individuals against the abuse of power.²¹

In pre-democratic South Africa the last of these three functions was pre-eminent. As has been explained above and in Chapter 1, the courts played crucial role in protecting individual rights through the application of principles of administrative law. Handicapped by the doctrine of parliamentary sovereignty, the courts had to 'claim space and push boundaries to find means of controlling public power'²² – and they managed this feat largely by means of administrative-law review. The importance of the courts' role in this regard was exaggerated by two related factors: the paucity of alternative safeguards and the sense that the courts were the only authorities to be trusted with people's rights.

In the constitutional era review remains an essential mechanism for remedying maladministration and for ensuring administrative accountability, and rightly so. However, the first of those pre-1994 factors at least has fallen away, thus possibly reducing the traditional prominence of administrative-law review in the system. Furthermore, the Constitution and the PAJA have changed the very basis of judicial review and have also laid the foundations for a system of 'non-judicial' review that may take shape in future. These three important changes, as well as some of their implications for the transformation of administrative law, are discussed in turn below.

(a) The prominence of judicial review

As Baxter observed in 1984, the administrative abuse of human rights in the pre-democratic era accounted for 'the excessive attention given by South African administrative lawyers to judicial review'.²³ He succinctly described the position as follows:

¹⁹ Marc Hertogh & Simon Halliday 'Judicial Review and Bureaucratic Impact in Future Research' in Marc Hertogh & Simon Halliday (eds) *Judicial Review and Bureaucratic Impact* (2004) 269 at 277.

²⁰ Carol Harlow 'The Multiple Functions of Judicial Review' Paper Presented at a Conference on *Effective Judicial Review: A Cornerstone of Good Governance* Hong Kong (2008) 5.

²¹ The Rt Hon The Lord Woolf, Jeffrey Jowell QC & Andrew Le Sueur *De Smith's Judicial Review* 6 ed (2007) 5.

²² Chaskalson P in *Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) (hereafter *Pharmaceutical Manufacturers Association*) para 45.

²³ Lawrence Baxter *Administrative Law* (1984) (hereafter simply 'Baxter') 70.

‘The courts remain the best, and sometimes the only, available means of remedying the abuse of administrative power; it is to them that administrative lawyers must turn, even when other remedies could have proved more efficient. Until such alternatives are created, the courts will be expected to carry a heavy burden in administrative law.’²⁴

Things are different today as a result of the dramatic changes outlined in Chapter 1: the advent of a supreme Constitution with a justiciable Bill of Rights and the simultaneous introduction of many other constitutional safeguards. The Constitution includes rights to administrative justice and to freedom of information – reforms that were almost unthinkable before the 1990s – and the ‘national legislation’ mandated in each instance has been enacted to give effect to these rights. The Constitution also creates a number of state institutions to support constitutional democracy, including a Public Protector, an Auditor-General, a Human Rights Commission and a Commission for Gender Equality.²⁵ It lists the basic democratic values and principles governing the public administration, and creates a Public Service Commission to promote those values and principles.²⁶ All these things, once undreamed-of luxuries, are now basic elements of the new South African administrative law.²⁷

As Klaaren depicts it, South Africa is experiencing a ‘second wave’ of administrative justice: the development of non-judicial institutions that attempt to ensure compliance with administrative law.²⁸ In the constitutional era administrative-law review thus fills a somewhat different niche as one of a number of methods of disciplining administrative power. The presence of a full-scale Bill of Rights, too, means that some of the work formerly done by that type of review is now performed by more general constitutional review under provisions such as ss 9, 32 and 34 of the Constitution. The effect of all this may ultimately be to reduce reliance on review under s 33. However, there is little sign of this yet, and there are

²⁴ Ibid.

²⁵ Chapter 9 of the Constitution. These are only a few of the many democracy-supporting institutions that are part of the wider democratic system. See further Jeremy Sarkin ‘An Evaluation of the Role of the Independent Complaints Directorate for the Police, the Inspecting Judge for Prisons, the Legal Aid Board, the Human Rights Commission, the Commission on Gender Equality, the Auditor-General, the Public Protector and the Truth and Reconciliation Commission in Developing a Human Rights Culture in South Africa’ (2000) 15 *SA Public Law* 385; and for a more recent assessment, see the *Report of the Ad Hoc Committee on the Review of Chapter 9 and Associated Institutions* (2007) (the *Asmal Report*).

²⁶ Chapter 10 of the Constitution.

²⁷ For an overview of the democratic reinvention of administrative law, see Hugh Corder ‘Reviewing Review: Much Achieved, Much More to Do’ in Hugh Corder & Linda van der Vijver (eds) *Realising Administrative Justice* (2002) 1.

²⁸ Jonathan Klaaren ‘Three Waves of Administrative Justice in South Africa’ 2006 *Acta Juridica* 370 at 379. He sees the first wave as ‘more or less doctrinal, focusing on the norms enforced preeminently by instances of judicial review of administrative action’ (at 378), while the third and more diffuse wave consists of practices (such as regulatory impact analysis and public/private partnerships), many of which develop in the private sector and then spread to the public administration (at 379-80).

countervailing factors that may tend to encourage even more reliance on such review. An important factor is the liberalisation of the rules of standing, described in Chapter 3 of this thesis. Another is the codification of the grounds of review in s 6 of the PAJA, which would tend to make the grounds more accessible and thus more likely to be used than their counterparts at common law.²⁹ That, at any rate, has been the Australian experience. As Saunders indicates in relation to the Administrative Decisions (Judicial Review) Act of 1977,

‘[a] list of grounds proved a useful tool for lawyers, decision makers and judges outside the relatively small circle of administrative law specialists who had deep familiarity with the arcane rules of judicial review under the general law in the early 1980s. Before the AD(JR) Act came into effect, no more than a small handful of cases dealing with judicial review against the Commonwealth was heard in Australia each year. From 1980, however, the judicial review case load of the Federal Court of Australia grew exponentially.’³⁰

Will written grounds of review have a similar effect in South Africa, especially when combined with extended standing? In the absence of statistical evidence as to the incidence of judicial review, one can only speculate. However, it seems likely that the encouragements to administrative-law litigation are at least strong enough to offset the factors pulling in the other direction.

(b) The basis and nature of review

The basis and nature of judicial review have changed considerably since 1994. Previously judicial review took place on common-law grounds worked out by the Supreme Court in the exercise of its inherent jurisdiction, using the justification of the ultra vires doctrine. As Innes CJ explained it more than a century ago:

‘Whenever a public body has a duty imposed on it by statute, and disregards important provisions of the statute, or is guilty of gross irregularity or clear illegality in the performance of this duty, this Court may be asked to review the proceedings complained of and set aside or correct them. This is no special machinery created by the Legislature; it is a right inherent in the Court.’³¹

²⁹ See Hoexter ‘Future of Judicial Review’ (note 1 above) 498.

³⁰ Cheryl Saunders ‘Constitutions, Codes and Administrative Law: The Australian Experience’ Paper Presented at a Conference on *Effective Judicial Review: A Cornerstone of Good Governance Hong Kong* (2008) 18.

³¹ *Johannesburg Consolidated Investment Co v Johannesburg Town Council* 1903 TS 111 at 116.

This remained a standard (albeit rather inaccurate³²) description of judicial review until 1994, since when all almost every feature of review has altered. The process of change began with s 24 of the interim Constitution, which provided a new constitutional basis for administrative-law review. Section 24 was succeeded in due course by s 33 of the 1996 Constitution, with its instruction regarding the enactment of national legislation to give effect to the administrative justice rights. That national legislation was ultimately enacted in 2000 in the form of the PAJA, which has given judicial review a statutory basis for the first time. However, to the extent that it is not incompatible with the Constitution, the common law remains capable of informing the meaning of s 33 and of the PAJA.³³

Significantly, the PAJA is now the primary or default pathway to judicial review. As the Constitutional Court has indicated, '[t]he Courts' power to review administrative action no longer flows directly from the common law but from PAJA and the Constitution itself'.³⁴ Direct constitutional review is available only infrequently, typically when original legislation is challenged on the basis that it limits the rights in s 33 unjustifiably.³⁵ However, both of these pathways to judicial review depend on the presence of 'administrative action'. When the action sought to be reviewed does not qualify as such, some other pathway has to be found. As far as exercises of private power are concerned, common-law review remains available.³⁶ In relation to exercises of public power, the main alternative pathway is the constitutional principle of legality.³⁷ Another is special statutory review, which is occasionally provided for by the legislature.³⁸ This has recently been supplemented by the identification of a sixth pathway – special (or perhaps 'extra-special') statutory review for action in the labour sphere that *does* qualify as administrative action for the purposes of s 33 of the Constitution.³⁹

³² For most of the twentieth century common-law review did not in fact depend upon the existence of a public body (the actions of private bodies were sometimes reviewable as well) or a statutory duty (a power would suffice). Nor did the irregularity have to be 'gross' or the illegality 'clear'.

³³ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) para 22.

³⁴ *Ibid.*

³⁵ *Zondi v MEC for Traditional and Local Government Affairs* 2005 (3) SA 589 (CC) para 99, and see also eg *Islamic Unity Convention v Minister of Telecommunications* 2008 (3) SA 383 (CC) paras 59-60.

³⁶ *Klein v Dainfern College* 2006 (3) SA 73 (T) para 24.

³⁷ The principle is discussed fully in Chapters 2 and 4 above.

³⁸ For an exposition of this form of review, see *Nel NO v Master of the High Court* (ECD) unreported case 1633/2001 at 8-9 and the judgment on appeal in *Nel NO v The Master* 2005 (1) SA 276 (SCA) para 23.

³⁹ Section 145 of the Labour Relations Act 66 of 1995 provides special statutory grounds for the review of arbitration awards of the Commission for Conciliation, Mediation and Arbitration. In *Sidumo v Rustenburg Platinum Mines Ltd* 2008 (2) SA 24 (CC) the Constitutional Court held that s 145 was best regarded as legislation alongside the PAJA: that is, as specialised legislation giving effect to s 33 of the Constitution in the labour sphere (para 89). An important consequence was that the statutory grounds of review laid down in s 145 were suffused with the content of s 33. It remains to be seen whether such suffusion will take place in other contexts of special statutory review as well, ie when the action in question qualifies as administrative action under s 33, or whether it will be confined to the labour sphere. See further Cora Hoexter 'Clearing the

So, what was once a system of common-law review (with occasional provision being made for special statutory review) has become a veritable maze of pathways to judicial review. This proliferation of pathways means that judicial review is effectively guaranteed in relation to exercises of both public and private power, and that is no doubt a good thing. However, it also complicates the system considerably. Not only litigants and their advisors but the courts themselves have experienced some difficulty in recent years in appreciating the status of the PAJA and in working out the relationship between it and the other pathways to review.⁴⁰ In some cases the common law and s 33 have been regarded as free alternatives, for instance, while in others the PAJA has been ignored and s 33 has simply been appealed to directly.⁴¹ This is constitutionally unacceptable, for logic dictates that specific norms such as the PAJA must be resorted to before higher or more general ones. The constitutionally mandated character of the PAJA, too, implies that one cannot simply prefer to use one of the other pathways when the PAJA is applicable. Indeed, if this were permitted the PAJA would soon become redundant.⁴²

As the Constitutional Court has pointed out, a potential problem arising out of multiple pathways is the growth of ‘parallel systems of law’:⁴³ separate and distinct accretions of administrative law associated with different avenues to review. These would seem to be inconsistent with the idea of ‘one system of law’ that the court first insisted on in the *Pharmaceutical Manufacturers Association* case.⁴⁴ Yet parallel systems seem unavoidable to some extent at least: the point of the principle of legality, in particular, seems to be that it does not demand as much as ‘regular’ administrative law does.⁴⁵

Intersection? Administrative Law and Labour Law in the Constitutional Court’ (2008) 1 *Constitutional Court Review* 209 at 215, and cf Clive Plasket ‘Administrative Law’ 2008 *AS* (forthcoming).

⁴⁰ Clive Plasket ‘Administrative Law’ 2006 *AS* 107 at 111-12.

⁴¹ See eg *National Educare Forum v Commissioner, South African Revenue Service* 2002 (3) SA 111 (Tk) at 128H, *Mafongosi v United Democratic Movement* 2002 (5) SA 567 (Tk) para 12 and *Johannesburg Municipal Pension Fund v City of Johannesburg* 2005 (6) SA 273 (W) para 15. This tendency reached its apogee in *New Clicks South Africa (Pty) Ltd v Tshabalala-Msimang NO* 2005 (2) SA 530 (C): see further Cora Hoexter ‘Administrative Action in the Courts’ 2006 *Acta Juridica* 303 at 313ff.

⁴² See Hoexter ‘Administrative Action’ (note 41 above) 316, and see further Iain Currie ‘What Difference Does the Promotion of Administrative Justice Act Make to Administrative Law?’ 2006 *Acta Juridica* 235.

⁴³ See eg *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 (2) SA 311 (CC) para 436 and *Sidumo v Rustenburg Platinum Mines* (note 38 above) paras 248-9 (in relation to the right to fair labour practices contained in s 23 of the Constitution).

⁴⁴ Note 22 above, para 44.

⁴⁵ Cora Hoexter ‘The Constitutionalisation and Codification of Judicial Review in South Africa’ Paper Presented at a Conference on *Effective Judicial Review: A Cornerstone of Good Governance* Hong Kong (2008) 14-15.

(c) The possibility of non-judicial review

South Africa has always fitted into the English-law model of judicial supervision by the ordinary courts rather than the continental model of supervision by special administrative courts. The continental model is informed by especially strong commitments in history to the distinction between law and politics. The introduction of specialised courts in France, in particular, sprang from a post-Revolution determination to prevent the regular courts from interfering with administrative conduct, which was not regarded as a properly legal concern.⁴⁶ On the other hand, the traditional English suspicion of the French system is usually attributed to the enormous influence of Dicey's late nineteenth-century formulation of the rule of law,⁴⁷ and his insistence that '[t]here exists in England no true *droit administratif*'.⁴⁸ While they might have separate administrative courts across the channel, Dicey proudly emphasised the subordination of both citizens and public authorities in England to 'the ordinary courts of the land'.⁴⁹ This attitude held sway in South Africa, too,⁵⁰ and indeed its hegemony has only come to be challenged in recent years.

The main strength of a specialised administrative jurisdiction is that it develops expertise on the part of its judges, but both models obviously have their advantages. For instance, under the Anglo-American model the citizen has the benefit of courts of high standing and undoubted independence without any of the demarcation problems associated with divided jurisdiction.⁵¹ Today, however, it is becoming increasingly difficult to treat these two models as absolutes, particularly since there has been a movement towards the establishment of special administrative courts even in systems strongly influenced by English administrative law. The best example of this is Australia, where a Commonwealth

⁴⁶ See Mauro Cappelletti 'The Law-making Power of the Judge and its Limits: A Comparative Analysis' (1981) 8 *Monash University Law Review* 15, and see Baxter (note 23 above) 24-7.

⁴⁷ A V Dicey *Introduction to the Study of the Law of the Constitution* (1885) 10 ed (1959) 183-205.

⁴⁸ *Ibid* in the seventh edition of the work (1908) at 391. However, as appears from his piece on 'The Development of Administrative Law in England' (1915) 31 *Law Quarterly Review* 148, Dicey ultimately conceded that administrative law did exist on his side of the channel.

⁴⁹ Dicey (note 47 above) 188. See further Harlow & Rawlings (note 5 above) 38ff; Jeffrey Jowell 'The Rule of Law and its Underlying Values' in Jeffrey Jowell & Dawn Oliver (eds) *The Changing Constitution* 6 ed (2007) 5 at 6ff.

⁵⁰ See B Beinart 'Administrative Law' (1948) 11 *THRHR* 204 at 219ff; J R de Ville *Judicial Review of Administrative Action in South Africa* (2003) 6-9.

⁵¹ Christopher Forsyth *Administrative Law* 10 ed (2009) 10. That demarcation may be an especially troubling issue is illustrated by the jurisdictional problems encountered in South Africa after 1994. On the division of jurisdiction between the Constitutional Court and the Supreme Court of Appeal, see Iain Currie & Johan de Waal *The New Constitutional and Administrative Law vol I Constitutional Law* (2001) at 274ff; and on the 'often incoherent' distinction between constitutional and other matters, see Carole Lewis 'Reaching the Pinnacle: Principles, Policies and People for a Single Apex Court in South Africa' (2005) 21 *SAJHR* 509 at 513ff.

Administrative Appeals Tribunal, or AAT, was established in 1976 to rationalise and replace some of the many appellate tribunals that had existed previously.⁵²

In South Africa the traditional division remains fairly clear at present, but it may well become blurred in future. This is because s 33(3) of the Constitution creates the possibility of review of administrative decisions by a court ‘or, where appropriate, an independent and impartial tribunal’.⁵³ This has been taken up in the PAJA, which contains several references to review by a court *or* tribunal,⁵⁴ and which defines a tribunal in s 1 as ‘any independent and impartial tribunal established by national legislation for the purpose of judicially reviewing an administrative action in terms of this Act’. The PAJA thus lays the foundations for what might in time become a system of special administrative courts or a type of ‘non-judicial’ review. Further foundations are laid in s 10(2)(a)(iii) of the Act, where the inspiration provided by the AAT is fairly evident. This provision enables the Minister to establish an advisory council to advise him or her on

‘the appropriateness of establishing independent and impartial tribunals, in addition to the courts, to review administrative action and of specialised administrative tribunals, including a tribunal with general jurisdiction over all organs of state or a number of organs of state, to hear and determine appeals against administrative action’.

This power has not yet been used, however.

Another development under the PAJA is the definition of ‘court’ to include a magistrate’s court, ‘either generally or in respect of a specified class of administrative actions’. Such courts may be designated by the Minister by notice and presided over by a magistrate or an additional magistrate designated in terms of s 9A of the PAJA. Section 9A, which was added to the Act in 2002,⁵⁵ makes detailed provision for the designation and training of magistrates for the purposes of undertaking judicial review functions in terms of the PAJA. The main benefit of such reform would be improved access to judicial review. However, review by magistrates is a controversial topic: concerns have been raised about the independence of magistrates’ courts as well as the competence of magistrates to cope with

⁵² Administrative Appeals Tribunal Act 1975 (Cth); see further Creyke (note 3 above).

⁵³ This echoes s 34 of the Constitution, which confers a right of access to ‘a court or, where appropriate, another independent and impartial tribunal or forum’.

⁵⁴ See the preamble and ss 6-10.

⁵⁵ Section 9A was inserted by s 2 of the Promotion of Administrative Justice Amendment Act 53 of 2002.

administrative-law review.⁵⁶ The establishment of special administrative courts or a new type of non-judicial review would be very likely to spark similar concerns.

In any event, neither of these possibilities has been pursued very far. In relation to non-judicial review, the Minister has not even taken the first step of establishing an advisory council and there has been no suggestion that this is likely to be done. In relation to review by magistrates, some training of magistrates has taken place so far, but none has actually been designated.

5.3 ADMINISTRATIVE APPEALS

A theme dealt with in Chapter 4 of this thesis is the porous nature of the distinction between appeal and review, or legality and merits, in the context of the judicial review (that is, scrutiny) of administrative action. It was argued that in the process of such judicial scrutiny, consideration of the merits is often unavoidable. Nevertheless, the dichotomy continues to have significant practical implications in terms of the relief offered by administrative appeals as opposed to judicial review. Both safeguards allow for reconsideration of an administrative decision by a higher authority. However, judicial review is an external safeguard against maladministration, whereas administrative appeals are an internal or domestic mechanism. Furthermore, unlike review, appeals are established specifically in order to investigate the merits. The person or body to whom the appeal is made is invited to step into the shoes of the original decision-maker and decide the matter anew.

In many systems administrative or internal appeals are an important adjunct to judicial review and may also be regarded as a significant alternative to judicial review. Baxter explains the benefits of a system of administrative appeals as follows:

‘A right of appeal is an invaluable safeguard. It provides an aggrieved individual with the assurance that the decision will be reconsidered by a second decision-maker. The appellate body is able to exercise a calmer, more objective and reflective judgment. Detached from the “dust of the arena”, as it were, and the immediacy of the initial decision, the second decision-maker is in a better position to discern a faulty reasoning process and, in particular, to evaluate facts. This assumes special importance in the case of a discretionary decision since much of that decision is likely to depend on the inferences . . . drawn from the raw evidence . . .’⁵⁷

⁵⁶ Clive Plasket *The Fundamental Right to Just Administrative Action: Judicial Review of Administrative Action in the Democratic South Africa* PhD Thesis, Rhodes University (2002) 511; and see M Olivier ‘Is the South African Magistracy Legitimate?’ (2001) 118 *SALJ* 116.

⁵⁷ Baxter (note 23 above) 255, emphasis removed.

Administrative appeals are generally thought to have two main advantages over judicial review.⁵⁸ First, administrative tribunals are very often the best judges of decisions made by other agencies: they are more likely to have the necessary specialist expertise and to have a thorough grasp of the relevant policy decisions. Secondly, they are less mired in technicality than courts of law and thus tend to be cheaper, speedier and more accessible than courts – particularly when court rolls are overburdened.⁵⁹

Whether these advantages will be realised in fact naturally depends on the nature of the particular appeal tribunal and the complexity of the case before it, so that generalisations are dangerous.⁶⁰ In the South African context, however, and as will be explained further below, it is important to appreciate that these advantages cannot generally be taken for granted. While this country has always had a wide range of appellate bodies, it has never known the full benefits of a reliable and rational system of administrative appeals. This reality was recognised by the South African Law Commission in an investigation culminating in 1992.⁶¹ It was also reflected in Govender's 1993 contribution to the Breakwater Workshop, where he described South Africa as having a 'disparate collection of appeal bodies with vastly differing modes of operation, and consequently different levels of effectiveness' and argued for the reform and rationalisation of the system.⁶² The 'need for and design of' administrative appeals featured in the Breakwater Declaration, too, albeit only as an area requiring further consideration.⁶³ Regrettably, little has changed since then. Administrative appeals remain an area in which reform is desirable but unlikely to occur.

(a) The need for reform before 1994

Administrative appeal tribunals have always varied widely in South Africa. This is corroborated by the thorough survey conducted by the Law Commission in the early 1990s, in

⁵⁸ Franks Committee *Report of the Committee on Administrative Tribunals and Enquiries* (1957) (Franks Report) para 38.

⁵⁹ See in this regard Arvind P Datar 'The Tribunalisation of Justice in India' 2006 *Acta Juridica* 288 at 288-9. Having described the extraordinary proliferation of tribunals in that country, he warns that the overcrowding of the courts should not be used 'as an excuse to create tribunals that are ill-equipped to resolve disputes and dispense justice' (at 302).

⁶⁰ Sir Robert Carnwath 'Tribunal Justice – Judicial Review by Another Route' Paper Presented at a Conference on *Effective Judicial Review: A Cornerstone of Good Governance* Hong Kong (2008) para 15.

⁶¹ South African Law Commission Project 24, *Investigation into the Courts' Powers of Review of Administrative Acts: Report* (1992) (hereafter *SALC 1992 Report*) 49-50. This report was preceded by discussion papers published in 1986 (*Working Paper 15*) and 1991 (*Working Paper 34*). A *Supplementary Report* was produced in 1994, though never published.

⁶² Karthy Govender 'Administrative Appeals Tribunals' 1993 *Acta Juridica* 76 at 83.

⁶³ Item i of the Areas Requiring Further Consideration.

which it identified no fewer than eight categories of appeal body: Ministers, departmental officials, administrative tribunals, representative bodies, supervisory agencies, other administrative organs, special courts and the ordinary courts.⁶⁴ As the Commission indicated, these bodies differed in respect of their powers and functions, their constitution and their procedure.⁶⁵ Furthermore, as pointed out by Govender, they differed in the extent to which they reflected the three characteristics identified by the Franks Committee as essential to an effective system of tribunals: openness, fairness and impartiality.⁶⁶ This seemed to be conceded by the Law Commission, which apparently accepted that as a result of the creation of appellate bodies on an ad-hoc basis, there was ‘no coherent system’ of administrative appeals.⁶⁷

The Law Commission considered various options for reform, including the creation of a special administrative division of the Supreme Court and a general appellate tribunal along the lines of the Australian Administrative Appeals Tribunal (AAT).⁶⁸ The chief aim in creating that general tribunal was to take over appeal functions from ‘the proliferation of tribunals which has been such a feature of 20th century government’ in Australia, and to do so ‘at a high level of quality’,⁶⁹ thereby enhancing the coherence of the system. The idea of an AAT had considerable attraction given the similar proliferation of tribunals in South Africa, and this option (including a piecemeal version of it) had strong and eloquent support from academics in particular. However, the Commission was daunted by the extent of the reform required, particularly at a time of constitutional change, as well as the cost implications.⁷⁰ Ultimately it recommended the retention of the existing system, and proposed rather feebly that ‘reform should rather be effected with regard to judicial review’⁷¹ – in particular, that the grounds of review should be extended. This recommendation seemed to miss the point that administrative appeals are capable of functioning as a viable *alternative* to judicial review: ideally, a more specialised, more accessible, cheaper and democratically less threatening alternative. It is difficult to see how improving judicial review would solve the problems of

⁶⁴ *SALC 1992 Report* (note 61 above) para 3.12.4.

⁶⁵ *Ibid* para 3.12.

⁶⁶ Govender (note 62 above) 79, with reference to the *Franks Report* (note 58 above).

⁶⁷ *Ibid*.

⁶⁸ In terms of the Administrative Appeals Tribunal Act 1975 the AAT has jurisdiction over cases ‘ranging from taxation to veterans’ affairs and from therapeutic goods to wildlife protection’: Cheryl Saunders ‘Appeal or Review: The Experience of Administrative Appeals in Australia’ 1993 *Acta Juridica* 88 at 89, and see also Govender (note 62 above) 85-7. Creyke (note 3 above) 262 records that the AAT finalised nearly 10 000 cases in 2003-4, in line with the ‘spectacular’ output of Australian tribunals generally.

⁶⁹ J Griffiths ‘Australian Administrative Law: Institutions, Reforms and Impact’ 1985 *Public Administration* 445, quoted in Govender (note 62 above) 85.

⁷⁰ *SALC 1992 Report* (note 61 above) para 3.12.

⁷¹ *Ibid* para 3.12.38.

incoherence identified by the Law Commission. As Govender pointed out in 1993, reform had necessarily to be directed at administrative appeals themselves in order to enhance the coherence of the system and to introduce openness, fairness and impartiality where these were lacking.⁷²

(b) Developments since 1994

Sad to relate, little has changed since 1994. There is still ‘no coherent system’ of administrative appeals in this country. Appeals continue to be heard by a range of bodies from individual officials to courts of law. Appeals to Ministers probably remain the most common kind,⁷³ but provision is also made for appeals to supervisory bodies;⁷⁴ to tribunals specially created to hear administrative appeals, such as licensing appeal boards and town planning appeal boards;⁷⁵ to special courts presided over by judges, often assisted by expert lay assessors;⁷⁶ and to ordinary courts.⁷⁷ There are still great differences in the powers and procedures of appeal bodies, and it remains unclear to what extent the variation has a rational basis. The arguments for rationalisation and reform of the system would seem to be as strong as ever.

In this regard, the possible advantages of an AAT were again acknowledged by the Law Commission in 1999 in the draft Bill included in its *Report on Administrative Justice*.⁷⁸ The Bill proposed the creation of an Administrative Review Council (ARC) – another Australian-inspired institution⁷⁹ – which would make recommendations for the reform of administrative appeals and complaints mechanisms within a certain period.⁸⁰ The ARC was also mandated to investigate the establishment of specialised administrative tribunals,

⁷² Govender (note 62 above) 87.

⁷³ For instance, appeals lie to the relevant Minister in terms of s 43 of the National Environmental Management Act 107 of 1998 and in terms of s 16 of the Communal Property Associations Act 28 of 1996.

⁷⁴ For example, appeals lie from disciplinary tribunals to the South African Council for the Landscape Architectural Profession and the Engineering Council of South Africa, respectively, under s 33 of the Landscape Architectural Profession Act 45 of 2000 and s 33 of the Engineering Profession Act 46 of 2000.

⁷⁵ In terms of s 83A of the Income Tax Act 58 of 1962, for instance, certain appeals may be heard by a specially constituted tax board; and various appeals lie to the Film and Publication Review Board in terms of s 20 of the Films and Publications Act 65 of 1996.

⁷⁶ Examples are the tax court, which is in the nature of an inferior court, and the Competition Appeal Court, which has a status similar to that of a High Court and which hears appeals from the Competition Tribunal in terms of s 37 of the Competition Act 89 of 1998.

⁷⁷ For instance, s 20 of the Health Professions Act 56 of 1974 enables any person aggrieved by the Health Professions Council, a decision of a professional board or a disciplinary tribunal to appeal to the appropriate High Court. In terms of s 86A of the Income Tax Act appeals proceed from a tax court to the relevant provincial division or, with leave of the President of the tax court, directly to the Supreme Court of Appeal.

⁷⁸ South African Law Commission Project 115, *Report on Administrative Justice* (1999) at 15ff.

⁷⁹ Australia’s Administrative Review Council was established under Part V of the Administrative Appeals Tribunal Act 1975 (Cth).

⁸⁰ Clause 15(a) of the SALC draft Bill (note 78 above).

‘including a tribunal with general jurisdiction over all organs of state or a number of organs of state, to hear and determine appeals against administrative action’.⁸¹

These provisions would at least have ensured further investigation of the system of appeals and might eventually have led to the creation of something resembling an AAT. Unfortunately, they were never enacted into law. Instead they were watered down considerably in the PAJA, which merely allows (and does not require) the Minister to make regulations establishing a council to advise him or her on such matters.⁸² The creation of an AAT-type body (and indeed any other programmatic reform relating to administrative appeals) thus depends on a chain of events: the making of regulations to establish an advisory council, its giving the appropriate advice, and that advice being heeded and acted upon by the Minister. The reform process, if it ever occurs, will certainly be a lengthy and complicated one. However, it seems unlikely at the time of writing that the Ministry of Justice will ever make the necessary regulations. The reform of this area of administrative law is probably as remote a contingency as it has ever been.

Meanwhile, the need for reform has become acute in certain areas of the administration. In fact, the traditional advantages of appeals – speed, efficiency and expertise – cannot be taken for granted in South Africa today as they may be in more established administrative systems. Appeal processes seem to have broken down completely in some departments, the most shocking and endemic example being the administration of social welfare in certain provinces. In KwaZulu-Natal the High Courts have since 2000 been ‘indundated with a massive and ever-increasing volume of litigation by thousands of indigent applicants for social assistance seeking relief against the department as a result of its failure to expeditiously process their applications and appeals’.⁸³ In the Eastern Cape, too, the courts have become ‘the primary mechanism for ensuring accountability in the public administration of social grants’.⁸⁴ But even where these problems are not endemic, it cannot simply be assumed that an appeal process will be quicker and speedier than judicial review, for the converse might well be true in fact. For instance, in the *Earthlife Africa* case in 2005 it was revealed that more than seventy complicated appeals were pending to the Minister in terms of s 35 of the Environment Conservation Act 73 of 1989.⁸⁵ The court took this fact into account

⁸¹ Ibid, clause 15(c).

⁸² Section 10(2)(a) of the PAJA.

⁸³ Maya AJA In *MEC: Welfare (KZN) v Machi* [2006] SCA 83 (RSA) para 3.

⁸⁴ Froneman J in *Kate v MEC for the Department of Welfare, Eastern Cape* 2005 (1) SA 141 (SE) para 4.

⁸⁵ *Earthlife Africa (Cape Town) v Director-General: Department of Environmental Affairs and Tourism* 2005 (3) SA 156 (C) para 33.

in dismissing an argument that the applicant ought to have waited for the outcome of its appeal to the Minister before resorting to judicial review.

5.4 LEGISLATIVE OVERSIGHT

Parliamentary and judicial controls are generally regarded as complementary external checks on administrative power: while judicial review addresses the legality of administrative action, legislative oversight is directed at its merits. In view of the accountability of the legislature to the electorate, legislative activity presents an important opportunity for scrutinising and controlling administrative activity – at least in theory.⁸⁶

In reality, the modern tendency of the executive to dominate the legislature is a serious detraction from this type of control.⁸⁷ In many western democracies the legislative process is in fact largely under the control of the executive.⁸⁸ This tendency has been and remains strong in South Africa. Writing in 1948, Beinart remarked on the dominance of the Cabinet in the political system and described the government as ‘largely independent of parliamentary control’.⁸⁹ The same might well be said today in the very different context of constitutional democracy. As in many other countries, the South African executive has ‘burgeoned in size, influence over the legislature and power over the citizenry’.⁹⁰ The South African legislature, on the other hand, may be the most representative organ of state but has effectively become the least powerful branch of government.⁹¹ The tendency for the executive to dominate the legislature is further reinforced by the joint effect of party discipline and the party-based electoral system.⁹² Members of the majority party, in particular, may fear that close scrutiny of government will be perceived as disloyalty to the party.⁹³

The most significant legislative controls on the executive and the administration are adumbrated below. To a greater or lesser extent these give effect to general duties placed on the legislature by the Constitution. Section 55 of the Constitution places a duty on the

⁸⁶ See generally Hugh Corder, Saras Jagwanth & Fred Soltau *Report on Parliamentary Oversight and Accountability* (1999). These authors define oversight as ‘a commodious concept that refers to the crucial role of legislatures in monitoring and reviewing the actions of the executive organs of government’ (para 2.1).

⁸⁷ See generally Ziyad Motala ‘Towards an Appropriate Understanding of the Separation of Powers, and Accountability of the Executive and Public Service Under the New South African Order’ (1995) 112 *SALJ* 503.

⁸⁸ In the British context see eg Peter Cane *Administrative Law* (2004) 355ff; and in the Australian context, see eg Mark Aronson, Bruce Dyer & Matthew Groves *Judicial Review of Administrative Action* 3 ed (2004) Chapter 1.

⁸⁹ Beinart (note 50 above) 231.

⁹⁰ Marius Pieterse ‘Coming to Terms with the Judicial Enforcement of Socio-Economic Rights’ (2004) 120 *SAJHR* 383 at 388.

⁹¹ Currie & De Waal (note 51 above) 94.

⁹² *Ibid* 131-2. On the nature of the system of proportional representation, see Glenda Fick ‘Elections’ (OS 06-04) in Woolman et al (note 17 above) Chapter 29 at 29--9ff.

⁹³ See Corder, Jagwanth & Soltau (note 86 above) para 2.2.

National Assembly to provide for mechanisms ‘to ensure that all executive organs of state in the national sphere of government are accountable to it’. It must also maintain oversight of the exercise of national executive authority, including the implementation of legislation – a function characteristic of the administration. In addition, one of the ways in which the National Assembly represents the people and ensures government by the people is by ‘scrutinising and overseeing executive action’.⁹⁴

However, as is evident from the list below, these grand-sounding prescriptions tend to lose something in their translation from theory to practice. In each instance parliamentary control over governmental activity is weaker in reality than it may sound in theory, and the transformation of the post-1994 system less complete than it might be.

(a) The enactment of legislation

While legislation empowers administrators to act, it simultaneously constrains the exercise of their powers. To give a simple example, a discretion conferred on an administrator may be wide or narrow. Its breadth will depend on the language used and the constraints imposed by the legislature in the form of ‘decisional referents’,⁹⁵ such as factors to be taken into account by the administrator. In the course of interpreting legislation the court ascertains in what way the legislature has sought to structure the power conferred.

In theory the legislature gives careful thought to the ambit of the discretion it confers and the appropriateness of the constraints it imposes. The truth is probably less inspiring. First, as Cane suggests, politically contentious issues as to how the powers will be exercised and to what ends may not even be raised or debated in the legislature.⁹⁶ Secondly, Pieterse points out (with particular reference to South Africa) that the executive of today tends to have greater expertise in technically specialist areas than the legislature, which is typically made up of popularly elected laypersons.⁹⁷ This helps to explain why the legislature generally finds it convenient to delegate wide discretionary powers to members of the executive and to impose referents of a vague kind, if any – a tendency always strong in this country, and one that the Constitutional Court has deplored.⁹⁸

⁹⁴ Section 42(3) of the Constitution.

⁹⁵ Baxter (note 23 above) 89 describes decisional referents (a term borrowed from the work of Gifford) as standards or criteria that shape a discretionary decision.

⁹⁶ Cane (note 88 above) 355.

⁹⁷ Pieterse (note 90 above) 385-6.

⁹⁸ *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC) para 54; *Janse van Rensburg NO v Minister of Trade and Industry NO* 2001 (1) SA 29 (CC) para 25; *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC) para 34.

(b) The responsibility of Ministers to Parliament

The principle of ministerial responsibility to the legislature has its roots in a convention of the Westminster constitutional system, and is now entrenched in our Constitution. Section 92(2) of the Constitution makes Cabinet members ‘accountable collectively and individually to Parliament for . . . the performance of their functions’. In terms of s 92(3)(b) they are under a duty to provide Parliament with ‘full and regular reports concerning matters under their control’.⁹⁹

Collective responsibility essentially means that the Cabinet is expected to present a united front in public. Individual Ministers are expected to support Cabinet decisions or, if they are unable to do so, to resign. Individual responsibility, on the other hand, implies that Ministers are accountable to the legislature for their actions and for the performance of their departments. It implies the giving of reasons and explanations, or what has been termed ‘explanatory accountability’.¹⁰⁰ The doctrine’s main instruments are votes of no confidence, public exposure, interpellations and parliamentary question time.¹⁰¹ A major weakness, as Currie and De Waal point out, is that members of Parliament may ask questions of Ministers but the Constitution does not explicitly require the Minister to answer these satisfactorily.¹⁰² Furthermore, a good deal of governmental activity is effectively sheltered from parliamentary questions simply because so many important decisions are taken at the administrative level.¹⁰³

But perhaps the expectation that Ministers are capable of accounting for all the actions of their officials is a hopelessly optimistic one in the first place. Drewry suggests that in the era of big government, in which ministries are large, fragmented and increasingly decentralised, this sort of accountability is in fact a ‘mythical aspiration’.¹⁰⁴ He shows that the rise of the administrative state with its complex bureaucracy has blurred and expanded traditional conceptions of executive functions, which have come to be shared with salaried administrators.¹⁰⁵ The move from mere ‘government’ to the far broader concept of ‘governance’ depicted by Drewry also shows up the antiquated and necessarily artificial nature of devices like ministerial responsibility.

⁹⁹ Similar provisions govern the accountability of provincial MECs to their legislatures. See further Currie & De Waal (note 51 above) 261.

¹⁰⁰ Corder, Jagwanth & Soltau (note 86 above) para 3.3.2(ii).

¹⁰¹ See generally I M Rautenbach & E F J Malherbe *Constitutional Law* 4 ed (2004) 144 and 212.

¹⁰² Currie & De Waal (note 51 above) 256.

¹⁰³ *Ibid* 94, and see Cane (note 88 above) 358; Corder, Jagwanth & Soltau (note 86 above) para 3.3.2(iii).

¹⁰⁴ Gavin Drewry ‘The Executive: Towards Accountable Government and Effective Governance?’ in Jowell & Oliver (note 49 above) 185 at 186.

¹⁰⁵ *Ibid* 191.

In South Africa the artificiality of the system has long been apparent, since our Ministers have traditionally been very slow to accept individual responsibility for maladministration or serious errors of judgment in their departments.¹⁰⁶ It seems that individual ministerial responsibility has always been weak in this regard – or, as Rautenbach and Malherbe delicately put it, ‘the circumstances under which a minister must resign have always been controversial’.¹⁰⁷ Govender noted in 1993 that the ostensible check of ministerial responsibility had been emasculated by ‘cynical and selective observance’ in the apartheid era.¹⁰⁸ Unfortunately, this cynicism has persisted into the democratic era. An egregious example is provided by a former Minister of Health, Manto Tshabalala-Msimang, whose dissident stance on AIDS and her opposition to the use of antiretroviral therapies led to repeated calls for her resignation, not only locally but internationally.¹⁰⁹ These fell on deaf ears. A decade earlier her predecessor, Nkosazana Dlamini-Zuma, was equally unreceptive to calls for her resignation over the hugely extravagant and irregular funding of *Sarafina II*, a musical about AIDS.¹¹⁰

(c) Parliamentary scrutiny of delegated legislation

The Breakwater participants agreed on the need for ‘effective Parliamentary control and supervision of the nature and scope of delegated power and the way in which it is exercised’.¹¹¹ Perhaps the most typical form of such control is laying delegated legislation before the legislature, and thus giving its members an opportunity to examine the vast body of legislation that they do not have the time to enact.¹¹² Baxter calls this ‘[t]he classic device developed for the purpose of counterbalancing the delegation of legislative power’.¹¹³ However, it is easier said than done. The sheer volume of secondary legislation tends to be extremely daunting, and members of Parliament are naturally preoccupied with their own primary lawmaking responsibilities.

¹⁰⁶ See Baxter (note 23 above) 33.

¹⁰⁷ Rautenbach & Malherbe (note 101 above) 179, and see also eg John Henry May *The South African Constitution* 3 ed (1955) 131, where it is observed that ‘in South Africa ministries are apt to cling to power more tenaciously than they would in similar circumstances in other democratic countries’.

¹⁰⁸ Govender (note 57 above) 76.

¹⁰⁹ See eg ‘Manto Should Resign’ *Independent Online* 17 August 2006, last accessed from www.iol.co.za on 14 April 2009; ‘Aids Experts Condemn SA Minister’ *BBC News* 6 September 2006, last accessed from www.news.bbc.co.uk on 14 April 2009; Sumayya Ismail ‘Resign Today, Website Urges Manto’ *Mail & Guardian* 20-26 October 2006.

¹¹⁰ See eg ‘The Sarafina II Controversy’ *Phila Legislative Update* no 03, June 1996, last accessed from www.healthlink.org.za on 14 April 2009; Suzanne Daley ‘South Africa Scandal over “Sarafina” Spotlights Corruption in the ANC’ *The New York Times* 8 October 1996.

¹¹¹ Item i of the Areas of Agreement.

¹¹² See Cane (note 88 above) 361.

¹¹³ Baxter (note 23 above) 211.

These considerations help to explain the weakness of legislative scrutiny of delegated legislation both in pre-democratic South Africa¹¹⁴ and today.¹¹⁵ Section 101(3) of the Constitution demands that subordinate legislation be accessible to the public, while s 101(4) envisages that national legislation ‘may specify the manner in which, and the extent to which’ instruments of subordinate legislation must be tabled in Parliament and approved by Parliament. However, s 17 of the Interpretation Act 33 of 1957 merely requires a list of such legislation, and not the legislation itself, to be tabled in Parliament within fourteen days of its promulgation. This provision has in any event been interpreted as merely directory.¹¹⁶ A more effective way of ensuring legislative scrutiny is for a particular statute to require the tabling of delegated legislation made under it, or better still, to require approval by Parliament before the delegated legislation is promulgated. For instance, s 10(4) of the PAJA requires some regulations made under the Act to be submitted to Parliament before publication in the *Gazette* and others to be approved by Parliament before publication in the *Gazette*.

In recent years Parliament has investigated ways of improving the scrutiny of delegated legislation, but without much result.¹¹⁷ The matter is currently being considered by the South African Law Reform Commission in its review of the Interpretation Act (Project 25).¹¹⁸ Meanwhile, one of South Africa’s provinces has set an example by enacting a regime for such scrutiny. The Gauteng Scrutiny of Subordinate Legislation Act 5 of 2008 responds to s 140(3) and (4) of the Constitution, the equivalent at the provincial level of s 101(3) and (4), by providing for the tabling of legislation as well as its scrutiny by a standing committee.¹¹⁹

(d) Reports to Parliament

In theory the national legislature considers a vast number of reports on the activities of the executive branch every year. For the purposes of administrative law some of the most

¹¹⁴ See further Catherine O’Regan ‘Rules for Rule-making: Administrative Law and Subordinate Legislation’ 1993 *Acta Juridica* 157. Several of O’Regan’s proposals for facilitating scrutiny of delegated legislation were adopted by the South African Law Commission in the draft Administrative Justice Bill it produced in 1999 (note 78 above), but these were unfortunately not included in the PAJA. See further at 5.8 below.

¹¹⁵ See generally Hugh Corder *Final Report on Methods of Scrutiny of Delegated Legislation by Parliament* (1999) (*Corder Report*).

¹¹⁶ *Bloem v State President of the Republic of South Africa* 1986 (4) SA 1064 (O) at 1089ff.

¹¹⁷ See the *Interim Report of the Joint Subcommittee on Delegated Legislation on Scrutiny of Delegated Legislation* (2002), which was based on the recommendations made in 1999 in the *Corder Report* (note 115 above). Parliament’s Joint Rules Committee has since turned its attention to the possible adoption of an Accountability Standards Act that does not specifically address such scrutiny: see further Jonathan Klaaren & Sanele Sibanda ‘Introducing the Gauteng Scrutiny of Subordinate Legislation Act’ (2009) 23 *SAJHR* (forthcoming).

¹¹⁸ See Discussion Paper 112, *Statutory Revision: Review of the Interpretation Act 33 of 1957* (2006) Chapter 3, especially para 3.89 et seq. (The Law Commission became the ‘Law Reform Commission’ by virtue of the Judicial Matters Amendment Act 55 of 2002.)

¹¹⁹ See further Klaaren & Sibanda (note 117 above).

important reports are those required from the Public Protector and the Auditor-General in terms of the legislation governing those institutions.¹²⁰ However, there are a great number of other statutes requiring reports to be submitted annually or from time to time. The reports of any commissions of inquiry appointed by the President are also considered by Parliament and its committees.¹²¹

In practice there are difficulties with the reporting system which considerably reduce its utility and effectiveness. In their penetrating analysis of parliamentary oversight, Corder et al identify the main problems as the absence of official procedures for recording, indexing or tracking written submissions to parliamentary committees;¹²² the format and content of many written reports, which tend to provide too much detail while excluding the information most pertinent to the oversight function;¹²³ the late submission of reports;¹²⁴ and the absence of an established procedure for responding to reports.¹²⁵ The last problem is especially pernicious, as it means that many reports are simply not addressed.

5.5 PUBLIC PARTICIPATION

Ideally, public participation means the active involvement of members of an informed community in the decision-making processes that affect them. A significant element of democracy¹²⁶ and of responsive government, public participation goes well beyond ‘snapshot’ democracy, or voting in periodic elections.¹²⁷ Elections tend to be infrequent. Furthermore, as Atkinson points out in the context of local government, the increasing diversity and complexity of urban society make it very difficult for elected representatives to know the wishes of the citizens they purport to represent.¹²⁸ Another reality is that politicians are concerned primarily with the initial decision to formulate a plan and with its final adoption or rejection, meaning that the views of the public are not necessarily communicated at the crucial stage when alternatives are being considered.¹²⁹

¹²⁰ Discussed at 5.6 below.

¹²¹ In terms of s 84(2)(f) of the Constitution.

¹²² Corder, Jagwanth & Soltau (note 86 above) para 5.2.1.

¹²³ Ibid para 5.2.2.

¹²⁴ Ibid para 5.2.3.

¹²⁵ Ibid para 5.3.

¹²⁶ See generally Roux (note 17 above); John Morison ‘Models of Democracy: From Representation to Participation?’ in Jowell & Oliver (note 49 above) 134.

¹²⁷ Mureinik (note 17 above) 35.

¹²⁸ Doreen Atkinson *Techniques of Public Participation in Local Government* Electoral Institute of South Africa (1997) 3.

¹²⁹ Ibid 2.

(a) Public participation under the democratic Constitution

Public participation in governmental decision-making was virtually unknown in South Africa before 1994.¹³⁰ Today, however, the Constitution makes express provision not only for representative¹³¹ and direct¹³² democracy but also for participatory¹³³ democracy, particularly with regard to original lawmaking. Sections 59(1) and 72(1) of the Constitution place a duty on the National Assembly and the National Council of Provinces respectively to facilitate public involvement in their legislative and other processes, while s 118(1) does the same in respect of provincial legislatures.¹³⁴ That these are enforceable duties and not mere constitutional flourishes has been demonstrated in a series of judgments handed down by the Constitutional Court in recent years.¹³⁵

As far participation in administrative processes is concerned, the Breakwater participants agreed on the need for ‘genuinely consultative and participatory rule-making and decision-making procedures, accessible to the people affected’.¹³⁶ The enactment of s 4 of the PAJA may be regarded as a significant post-1994 response to that call.

¹³⁰ See Baxter (note 23 above) 215ff.

¹³¹ Especially in s 19, which includes the right to make political choices, the right to free, fair and regular elections and the right to vote.

¹³² Roux (note 17 above) 10--4 defines direct democracy as ‘a system of government in which major decisions are taken by the members of the political community themselves, without mediation by elected representatives’. He notes that this form of democracy survives in a subsidiary form in many modern constitutions – typically in the right to freedom of assembly and in making provision for the holding of referenda (at 10--8). In South Africa s 17 of the Constitution confers on everyone the right, ‘peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions’; while ss 84(2)(g) and 127(2)(f) of the Constitution envisage the calling of a referendum by the President and the Premier of a province respectively.

¹³³ Roux (note 17 above) 10--14 suggests that participatory democracy, ineluctably associated with Carole Pateman’s *Participation and Democratic Theory* (1970), is by most accounts an attempt to re-inject elements of direct democracy into modern systems of representative democracy. In this sense it is ‘essentially about the question whether, and if so, how, citizens should be given the right to participate in the making of decisions that affect them, notwithstanding the fact that the basic form of political organisation in the modern nation-state is, and is likely to remain, representative democracy’.

¹³⁴ These provisions also require the bodies concerned to conduct their business ‘in an open manner’, an injunction that is repeated in s 160(7) in respect of municipal councils. In addition, s 160(4)(b) requires proposed by-laws to be published for public comment.

¹³⁵ *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC), *Matatiele Municipality v President of the Republic of South Africa* 2007 (1) BCLR 47 (CC) and *Merafong Demarcation Forum v President of the Republic of South Africa* 2008 (5) SA 171 (CC), though the latter adopts a more deferential approach to the legislature.

¹³⁶ Item ii of the Areas of Agreement.

(b) Public participation and the PAJA

Section 4 of the PAJA is an important and innovative addition to the law on procedural fairness.¹³⁷ The section refers specifically to two types of public participation: notice and comment procedures and public inquiries.

Notice and comment procedures, which have their origin in the United States, are primarily a means of ensuring participation in the rulemaking and policy-formulation process.¹³⁸ In essence these procedures require proposed legislation to be published for public comment. At the end of a specified period the comments are assessed by the rulemaking authority and the proposed legislation is modified where the comments are considered persuasive. Only then is the legislation promulgated in its final form – ideally with a concise description of the comments received and the administrator’s reasons for adopting the legislation in the form chosen.

Baxter describes this type of rulemaking procedure as a ‘surrogate political process’ that helps compensate for the fact that democratically elected representatives do not make the actual choices embodied in the standards that are produced by the administration.¹³⁹ Publishing the proposed rules and considering comments on them helps to achieve fairness and the mature consideration of the rules. It allows the agency to benefit from the expertise and contributions of those who send in comments, as well as ensuring that the agency maintains a flexible and open-minded attitude towards proposed rules. The decision-makers are also made to justify their rulemaking before an informed public.

Notice and comment provisions have sometimes been incorporated in specific South African statutes,¹⁴⁰ but until the enactment of the PAJA there was no general legislation in this country requiring administrative officials to engage in the process. Section 4 of the Act, which came into force in 2002,¹⁴¹ applies ‘where an administrative action materially and adversely affects the rights of the public’. This wording would certainly seem to encompass

¹³⁷ See the discussion at 2.4(c)(v) above, and see further Elmene Bray ‘Public Participation in Environmental Law’ (2003) 18 *SA Public Law* 121; Karthy Govender ‘An Assessment of Section 4 of the Promotion of Administrative Justice Act 2000 as a Means of Advancing Participatory Democracy in South Africa’ (2003) 18 *SA Public Law* 404; Jeannie van Wyk ‘Planning Law and the Promotion of Administrative Justice Act’ in Claudia Lange & Jakkie Wessels (eds) *The Right to Know: South Africa’s Promotion of Administrative Justice and Access to Information Acts* (2004) 81; Christian Wefelmeier ‘Public Participation in German Administrative and Environmental Law’ in the same collection at 99.

¹³⁸ See generally L J Boule ‘Administrative Justice and Public Participation in American and South African Law’ 1986 *TSAR* 136; O’Regan (note 114 above); Lawrence G Baxter ‘Rule-making and Policy Formulation in South African Administrative Law’ 1993 *Acta Juridica* 176.

¹³⁹ Baxter ‘Rule-making’ (note 138 above) 179.

¹⁴⁰ For instance, s 32 of the Environment Conservation Act 73 of 1989.

¹⁴¹ Unlike ss 1-3 and 5-9 of the PAJA, which came into operation on 30 November 2000, ss 4 and 10 entered into force on 31 July 2002 by virtue of Proc R63 in *GG* 23674 of that date.

rulemaking but is by no means confined to it. The section is thus potentially of use whenever proposed action affects a number of people.

Subsection 4(1) invites administrators to choose between holding a public inquiry, following a notice and comment procedure, doing both of these things or adopting any other procedure, provided it is fair. The Act offers no guidelines to inform the choice, but it will be governed at least partly by the nature of the action. Notice and comment procedures are suited to action of a general kind and find their classical application in the sphere of rulemaking, while a public inquiry may be more useful in the case of particular decision-making. Another relevant consideration is the geographical impact of the proposed decision: notice and comment procedure is better suited to administrative action having regional or national application, while public inquiries are more suitable for local issues.¹⁴² Further considerations are cost, efficiency and – on the basis that the administrator may not necessarily be able to delegate the power to conduct a notice and comment procedure – the ‘anticipated size and duration of the participatory procedure’.¹⁴³

The choice whether to use notice and comment or public inquiry procedures, including a failure to make a choice, is expressly excluded from the realm of ‘administrative action’ for the purposes of the PAJA.¹⁴⁴ It is thus not reviewable under the PAJA, though (like any other exercise of public power) it is presumably subject to review in terms of the constitutional principle of legality. The exclusion does not extend to s 4(2) and (3), however: if an administrator opts for a public inquiry or notice and comment procedures it is obliged to comply with the requirements of those subsections. These are very general, allowing the participatory procedure in question to be tailored to suit the situation.

As far as public inquiries are concerned, a public hearing is an essential element of the procedure.¹⁴⁵ The administrator must compile a written report on the inquiry and give reasons for any administrative action taken or recommended. It must also publish a concise summary of the report. In the case of a notice and comment procedure¹⁴⁶ the administrator must ‘take appropriate steps’ to communicate the proposed action (typically the making of a rule) to those likely to be affected by it, call for comments from them, consider the comments and

¹⁴² Caroline Mass ‘Section 4 of the AJA and Procedural Fairness in Administrative Action Affecting the Public: A Comparative Perspective’ in Lange & Wessels (note 137 above) 63 at 73.

¹⁴³ Ibid 74. The PAJA expressly enables the administrator to ‘appoint a suitably qualified person or panel of persons’ to conduct the public inquiry (s 4(2)(a)) but has no corresponding provision in respect of the notice and comment procedure.

¹⁴⁴ Section 1(ii) excludes from the definition of administrative action ‘any decision taken, or failure to take a decision, in terms of section 4(1)’.

¹⁴⁵ Section 4(2) of the PAJA.

¹⁴⁶ Section 4(3) of the PAJA.

then decide whether to take the action, with or without changes. In both cases the administrator must observe any rules laid down by the Minister to regulate the procedure.¹⁴⁷ These are currently contained in a set of Regulations on Fair Administrative Procedures which was published in 2002.¹⁴⁸

The PAJA gives considerable scope for departures from these procedures,¹⁴⁹ as well as exemptions¹⁵⁰ and variations¹⁵¹ allowed by the Minister with the approval of Parliament; and, as already noted, decisions under s 4(1) are not administrative action under the PAJA. As far as public participation is concerned, then, the public may have to rely more heavily on the good intentions and efficiency of administrators than on any stick wielded by the courts. Nevertheless, s 4 in the Act is an important achievement for South African administrative law at a symbolic level, and its presence in the PAJA is likely to have a positive effect on the rate and quality of participation in administrative decision-making.

5.6 OMBUDSMAN INSTITUTIONS

According to the definition offered by the International Bar Association, an ombudsman is a constitutional mechanism designed to monitor the use of government power.¹⁵² Its incumbent ought to be an independent, high-level public official who is responsible to the legislature and not the executive. The main function of the ombudsman is to receive and investigate complaints from the public about government maladministration. In addition, the ombudsman should be empowered to investigate suspected cases of maladministration on his own initiative. It is essential for the success of the institution that the ombudsman be backed by the authority of the state and equipped with powers of investigation and inspection. Finally, the ombudsman takes no remedial action but rather issues reports and makes recommendations, usually to the legislature.

In South Africa an office displaying a few of these characteristics was established in 1979 as a result of the ‘Information Scandal’, which implicated high-ranking government officials in the misuse of public money. The jurisdiction of the Advocate-General was essentially confined to such misuse,¹⁵³ however, and the office was justifiably criticised on the

¹⁴⁷ See ss 4(2)(b)(i)(bb) and 4(3)(d). In turn, s 10(1) of the PAJA requires the Minister to make regulations relating to ‘the procedures to be followed in connection with’ public inquiries and notice and comment procedures, amongst others.

¹⁴⁸ GN R1022 in GG 23674 of 31 July 2002.

¹⁴⁹ Section 4(4).

¹⁵⁰ Section 2(1)(a).

¹⁵¹ Section 2(1)(b).

¹⁵² The work of the IBA and its Ombudsman Forum is discussed by Baxter (note 23 above) at 283ff.

¹⁵³ Section 4(1) of the Advocate-General Act 118 of 1979.

basis of its narrow jurisdiction as well as its lack of publicity and difficulty of access.¹⁵⁴ These difficulties were reduced by means of legislative amendments in 1991.¹⁵⁵ Today the Advocate-General has been supplanted by two¹⁵⁶ rather more successful institutions established by the democratic Constitution: the Public Protector – an office ‘modelled on the institution of the ombudsman’¹⁵⁷ – and the Auditor-General. In what follows the most important features of these two offices are outlined and their performance and value briefly assessed.

(a) *The Public Protector*

Section 181 of the Constitution envisages the appointment of a Public Protector.¹⁵⁸ In accordance with the equivalent provision in the interim Constitution, legislation providing for the establishment of an office of Public Protector was enacted by Parliament in 1994.¹⁵⁹

The Public Protector holds office for a non-renewable period of seven years.¹⁶⁰ He or she is nominated by a committee of the National Assembly, the committee being composed proportionally of members of all parties represented in the Assembly. The nomination must be approved by a resolution adopted by a majority of members of the Assembly before the nominee is appointed by the President.¹⁶¹ This process is designed to prevent any one political party from being able to control the appointment process. Similar procedures apply to the removal of the Public Protector from office. The Public Protector may be removed from office by the President once a committee of the National Assembly has made a finding that grounds of misconduct, incapacity or incompetence exist, and once that finding has been adopted by a resolution of a two-thirds majority of the members of the Assembly.¹⁶²

¹⁵⁴ For instance, complaints had to be submitted on affidavit. See further Harold Rudolph ‘The Ombudsman and South Africa’ (1983) 100 *SALJ* 92.

¹⁵⁵ The Advocate-General Amendment Act 104 of 1991, discussed in Ivor Heyman ‘The Advocate-General Amendment Act of 1991: Does South Africa have an Ombud of which its Citizens can be Proud?’ (1993) 9 *SAJHR* 264.

¹⁵⁶ The Independent Complaints Directorate (ICD) may also be regarded as a type of ombud for human rights abuses and corruption in the South African Police Service: see Sarkin (note 25 above) 390ff.

¹⁵⁷ *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, 1996 (4) SA 744 (CC) (the *First Certification* case) para 161.

¹⁵⁸ Michael Bishop & Stuart Woolman ‘Public Protector’ (OS 12-05) in Woolman et al (note 17 above) Chapter 24A at 24A--1 explain that the term – similar to the Spanish ‘Defensor del Pueblo’ – was preferred to ‘ombudsman’ partly on account of the sexist connotations of the latter.

¹⁵⁹ Public Protector Act 23 of 1994.

¹⁶⁰ Section 183 of the Constitution.

¹⁶¹ Section 193 of the Constitution.

¹⁶² Section 194 of the Constitution.

The Constitution insists on the independence and impartiality of the Public Protector¹⁶³ – essential qualities if the Public Protector is to investigate ‘sensitive and potentially embarrassing affairs of government’.¹⁶⁴ To help ensure independence and impartiality the Constitution forbids any organ of state, state official or private person from interfering in the performance of the functions of the Public Protector.¹⁶⁵ The Public Protector Act 23 of 1994 also contains a number of practical measures similar to those employed to ensure the independence of judges. The remuneration and terms and conditions of employment of the Public Protector may not be adversely altered during his or her term of office;¹⁶⁶ the incumbent is prohibited from performing remunerative work outside his or her official duties;¹⁶⁷ and the incumbent and his or her staff are protected from legal liability in respect of any finding or recommendation made in good faith and submitted to Parliament or otherwise made public.¹⁶⁸ However, a potentially serious detraction from independence is that the Public Protector remains completely reliant on the executive for financing.¹⁶⁹

The jurisdiction of the Public Protector is extremely wide. Section 6(4) of the Act empowers the Public Protector to investigate allegations of ‘maladministration in connection with the affairs of government at any level’,¹⁷⁰ the abuse of or unjustifiable exercise of power by a person performing a public function, improper or unlawful enrichment as a result of an act or omission in the public administration or of a person performing a public function, and any act or omission by a government employee or a person performing a public function ‘which results in unlawful or improper prejudice to any other person’. Investigations may be based either on receipt of a complaint¹⁷¹ or on the Public Protector’s own initiative. In practice, however, almost all investigations are based on complaints received.¹⁷²

¹⁶³ Section 181(2) of the Constitution.

¹⁶⁴ See *First Certification* case (note 157 above) para 163.

¹⁶⁵ Section 181(4). Subsections 11(1) and (4) of the Public Protector Act make contravention of this requirement a criminal offence, and prescribe maximum penalties of one year’s imprisonment, a fine of R40 000 or both a fine and imprisonment.

¹⁶⁶ Section 2(2)(b).

¹⁶⁷ Section 1A(4).

¹⁶⁸ Section 5(3).

¹⁶⁹ See Corder, Jagwanth & Soltau (note 86 above) para 7.2.1. On the importance of financial and administrative independence with reference to the Independent Electoral Commission in particular, see *New National Party of South Africa v Government of the Republic of South Africa* 1999 (3) SA 191 (CC).

¹⁷⁰ Section 6(4)(a)(i). The term ‘maladministration’ is widely used internationally in ombudsman legislation, and is generally understood to permit examination not only of the legality but also the merits of administrative conduct: see Baxter (note 23 above) 284.

¹⁷¹ The Act specifies that complaints must be submitted in the form of a written or oral declaration made under oath or ‘by such other means as the Public Protector may allow with a view to making his or her office accessible to all persons’ (s 6(1)(b)).

¹⁷² Bishop & Woolman (note 158 above) 24A--12n4 point out that only five investigations between 1 April 2004 and 31 March 2005 were based on ‘own initiative’, while 22 350 individual complaints were considered.

Section 182(1)(c) of the Constitution enables the Public Protector to take ‘appropriate remedial action’, a concept fleshed out in the Act to include mediation, conciliation, advice regarding appropriate remedies and ‘any other means that may be expedient in the circumstances’.¹⁷³ However, the office has no jurisdiction to investigate ‘the performance of judicial functions by any court of law’.¹⁷⁴ A complaint will not ordinarily be entertained unless it has been reported within two years of its occurrence.¹⁷⁵

The Constitution obliges all organs of state to assist the Public Protector to ensure the effective performance of his or her powers and functions.¹⁷⁶ In addition, the Public Protector has powers to direct witnesses to appear before him or her to give evidence.¹⁷⁷ Failure to comply with such a direction or to answer questions is a criminal offence.¹⁷⁸

One of the best remedies against the abuse of public power is publicity. The Public Protector is required to make at least an annual report to the National Assembly on his activities during that year,¹⁷⁹ and is also under a duty to report in cases of urgency or on request by the Speaker of the National Assembly or the Chairperson of the National Council of Provinces.¹⁸⁰ Reports are to be open to the public ‘unless exceptional circumstances . . . require that a report be kept confidential’.¹⁸¹

The number of cases brought before the Public Protector increased dramatically in the first few years after the inception of the office, as did the proportion of cases finalised. It was reported that 2 369 new cases were received between January and December 1996, of which 764 were finalised.¹⁸² In the period 1 April 2004 to 31 March 2005 the number of new cases received was 22 350, with 17 539 cases being finalised.¹⁸³ Since then there has been a fairly sharp decline in the number of new cases¹⁸⁴ and in the number of cases finalised.¹⁸⁵

¹⁷³ Section 6(4).

¹⁷⁴ Section 6(6) of the Act.

¹⁷⁵ Section 6(9) of the Act.

¹⁷⁶ Section 181(3) of the Constitution.

¹⁷⁷ Section 7(4) of the Act.

¹⁷⁸ Section 11(3). The maximum penalties are a fine of R40 000, twelve months’ imprisonment or both fine and imprisonment (s 11(4)).

¹⁷⁹ Section 181(5) of the Constitution; s 8(2)(a) of the Act.

¹⁸⁰ Section 8(2)(b) of the Act.

¹⁸¹ Section 182(5) of the Constitution. Section 8(2A) of the Act requires the Public Protector to furnish a committee of the National Assembly with the reasons for holding the opinion that exceptional circumstances exist and sets out criteria for determining whether such circumstances exist. If the committee concurs, the report is dealt with as a confidential document in terms of the rules of Parliament.

¹⁸² Sarkin (note 25 above) 411 quotes information supplied by the Public Protector’s office in March 2000. The Public Protector’s reports are available at www.publicprotect.org, last accessed on 15 April 2009.

¹⁸³ *Annual Report 2004-5* at 20-1.

¹⁸⁴ In 2005-6 the number of new cases was 17 415, and in 2006-7 it went down to 12 629: see *Annual Report 2006-7* at 20-1.

¹⁸⁵ *Ibid.* In 2005-6 the number of cases finalised was 17 619, but it declined to 13 434 in 2006-7.

The annual reports issued by the Public Protector reveal that complaints relate to almost every conceivable interaction between the public and the government: non-payment of pensions and benefits; prison conditions and the calculation of parole dates for prisoners; non-enforcement of town planning schemes; irregularities in awarding tenders; and victimisation by police and prosecuting authorities. The assistance given varies considerably. Complainants are often directed to the most appropriate source of help or informed about the correct procedures to follow to pursue their complaint.

In 2004-5 the most common complaints referred to the Public Protector included unreasonable delay in the taking of administrative decisions, failure to give adequate notice of a decision or adequate reasons for a decision, unfairness in the provision of public services and denial of access to information.¹⁸⁶ This list suggests that the office is an important complement to judicial review. As Bishop and Woolman observe, the courts 'are simply not designed to handle the large number of complaints that arise from simple misunderstandings or bureaucratic red tape', and are not well suited to 'the resolution of injustices that turn more on unfairness than illegality'.¹⁸⁷ Furthermore, the services of the Public Protector are free.

Clearly the office has the potential to play a valuable role in exposing and curing maladministration. However, it is difficult to assess its value overall. In its early years the office was undoubtedly hampered by its small budget and correspondingly limited staff complement.¹⁸⁸ Doubt was expressed about the independence of the office¹⁸⁹ and its effectiveness in exposing maladministration,¹⁹⁰ and the general sense was that the Public Protector had not performed as vigorously as many had hoped it would. Writing in 2000, Sarkin observed that the Public Protector 'had at times been perceived to be political and less than robust'.¹⁹¹ These doubts were renewed a few years later by the Public Protector's handling of the 'Oilgate' investigation.¹⁹² This arose out of allegations that a substantial amount of public money had improperly been transferred from a parastatal organisation, PetroSA, to a private company, Invume Management, acting as a front for the ruling party,

¹⁸⁶ *Annual Report 2004-5* at 23.

¹⁸⁷ Bishop & Woolman (note 158 above) 24A--2, and see the *Asmal Report* (note 25 above) 95.

¹⁸⁸ The Public Protector's office had a staff of about 30 people in 1998, serving a population of approximately 40 million. When compared to the equivalent institution in Ghana (a staff of about 420 serving a population of 20 million) or Uganda (a staff of 110 and a population of 18 million), it seems clear that the institution was seriously underfunded.

¹⁸⁹ See eg Jeremy Sarkin 'Current Developments' (1999) 15 *SAJHR* 587 at 601-2.

¹⁹⁰ See eg Mungo Soggot *Mail & Guardian* 8-14 October 1999.

¹⁹¹ Sarkin (note 25 above) 410, referring to Claire Bisseker 'Baqwa Wilds Wet Noodle' *Financial Mail* 28 November 1997 and 'Kicking the Watchdog Before he Barks' *Financial Mail* 20 November 1998.

¹⁹² See the Public Protector's *Report on an Investigation into an Allegation of Misappropriation of Public Funds by the Petroleum Oil and Gas Corporation of South Africa, Trading as PetroSA, and Matters Allegedly Related Thereto* (2005).

the African National Congress (ANC). However, the Public Protector declined to scrutinise the role of Imvume Management or the ANC on the basis that these entities did not perform public functions – a conclusion that struck some as disingenuous.¹⁹³ Indeed, commentators have been known to refer to the Public Protector as the ‘ANC Protector’ in view of the large number of ANC members who have been cleared of wrongdoing in recent years.¹⁹⁴ Finally, internal strife in the office was sufficiently serious to require the intervention of a special parliamentary committee in 2006.¹⁹⁵ Some of these problems are canvassed in the *Asmal Report* of 2007, whose recommendations include improving public awareness of the office; greater collaboration between the Public Protector and other Chapter 9 institutions; and reform with regard to the funding of the office.¹⁹⁶

(b) The Auditor-General

The Auditor-General, a ‘watchdog over the government’,¹⁹⁷ is an ombudsman-type office similar to that of the Public Protector but with much more limited jurisdiction. The focus of the office is not inefficient or improper bureaucratic conduct but the proper use and management of public money. Section 188 of the Constitution states that the Auditor-General must audit and report on the accounts, financial statements and financial management of all national and provincial state departments and administrations, as well as municipalities. The reports of the Auditor-General must be made public.¹⁹⁸ They must also be submitted to any legislature that has a direct interest in the audit and to any other authority prescribed by national legislation.¹⁹⁹

Section 181(2) of the Constitution asserts that the Auditor-General is independent and that the powers and functions of the office should be exercised without fear, favour or prejudice. In terms of s 189 the tenure of the Auditor-General is for a fixed, non-renewable term of between five and ten years. The Public Audit Act 25 of 2004 gives detailed effect to

¹⁹³ See eg Peter Bruce ‘The Thick End of the Wedge’ *Business Day* 3 August 2005; ‘Oilgate: Anatomy of a Whitewash’ *Mail & Guardian* 5-11 August 2005; Shameela Seedat & Judith February ‘Oilgate Slick Won’t Wash Away’ *Business Day* 17 August 2005.

¹⁹⁴ See eg Kevin O’Grady ‘Mushwana Letting “ANC Petticoat Show”’ *The Weekender* 11-12 November 2006, who indicates that in sixteen investigations into the activities of ANC members reported in the media since 2003 the Public Protector made negative findings in only three.

¹⁹⁵ The fraught relationship between Lawrence Mushwana and his deputy, Mamiki Shai, was the subject of any number of media reports during 2006: see eg Moipone Malefane ‘Public Protector Row Hits New Low With Sex Slurs’ *Sunday Times* 16 July 2006. An ad hoc parliamentary committee on operational problems was appointed by the Speaker in August 2006 to help resolve the issue.

¹⁹⁶ Note 25 above, especially at 106-7.

¹⁹⁷ *First Certification* case (note 157 above) para 164.

¹⁹⁸ Section 188(3) of the Constitution. The reports of the Auditor-General are available at www.agsa.co.za, last accessed on 15 April 2009.

¹⁹⁹ Section 188(3) of the Constitution.

the constitutional provisions, and deals with such matters as conditions of service, functions, administration, reporting obligations and powers of investigation. The provisions for appointment and removal are similar to those that apply to the Public Protector. As with the Public Protector, these provisions are intended to ensure that the Auditor-General is independent of the executive and of other influences, and responsible only to Parliament. Unlike the Public Protector, however, the Auditor-General is not reliant on the executive for its funding. The office funds itself by charging fees for its services, a feature that undoubtedly enhances its political independence.²⁰⁰ Indeed, Woolman and Schutte describe the Auditor-General as the institution most likely of all the Chapter 9 institutions to retain its independence and discharge its constitutional responsibility.²⁰¹

As to the effectiveness of the Auditor-General in practice, Sarkin's assessment of 2000 was more sanguine than in relation to the Public Protector. He noted that the office had 'done some excellent work'²⁰² and described the new incumbent of the time, Shauket Fakie, as 'more vigorous and energetic'²⁰³ than his predecessor, whose work had been criticised. Some of the more recent investigations conducted by the Auditor-General have exposed instances of financial mismanagement ranging from huge debt at the Government Printing Works²⁰⁴ and unauthorised expenditure by several government departments²⁰⁵ to irregularities in procurement processes at the Companies and Intellectual Property Registration Office.²⁰⁶ The Auditor-General attracted some controversy, however, over his refusal to provide access to records concerning the procurement of arms²⁰⁷ and his subsequent failure to comply with a court order to produce the records within a certain period.²⁰⁸

A particular problem identified in the *Asmal Report* is 'persistent disregard for the Auditor-General's recommendations by government departments and other public institutions', and it is suggested that this be brought to the attention of the National

²⁰⁰ Section 23 of the Public Audit Act.

²⁰¹ Stuart Woolman & Yolandi Schutte 'Auditor-General' (OS 12-05) in Woolman et al (note 17 above) Chapter 24B at 24B--2.

²⁰² Sarkin (note 25 above) 414.

²⁰³ Ibid.

²⁰⁴ See eg Frank Nxumalo & Wiseman Khuzwayo 'State Printer Castigated for Unauthorised Overdraft' *Business Report* 23 January 2004.

²⁰⁵ See eg Lynda Loxton 'Fakie Fingers the Government's Black Sheep of Financial Management' *Business Report* 20 January 2005.

²⁰⁶ See eg 'Probe Uncovers Irregularities at Cipro' *Mail & Guardian* 13-19 October 2006; Zukile Majova 'Cipro Officials Squander Millions on Illegal Tenders' *Mail & Guardian* 3-9 November 2006.

²⁰⁷ See *CCII Systems (Pty) Ltd v S A Fakie NO* 2003 (2) SA 325 (T).

²⁰⁸ See *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA), where the Supreme Court of Appeal set aside a finding of contempt of court.

Assembly.²⁰⁹ Further recommendations include increasing public awareness of the activities of the office and greater collaboration between the Auditor-General and the Public Protector, including the establishment of mechanisms to track and monitor referred matters.²¹⁰

5.7 ACCESS TO INFORMATION

One of the Areas of Agreement in the Breakwater Declaration was the need for ‘open government, access to official information and the minimisation of official secrets legislation’.²¹¹ This was an understandable response to the apartheid state’s obsession with secrecy. Before 1994 huge resources were directed towards maintaining secrecy in government,²¹² and many statutes contained provisions making it a criminal offence for officials to release even the most innocuous information.²¹³ As regards the security establishment in particular, the Truth and Reconciliation Commission remarked on its ‘almost claustrophobic culture of secrecy whose transformation requires concerted action’.²¹⁴ The introduction of a constitutional right of access to information was thus an innovation of huge significance. In one of the earliest cases to deal with the right, Jones J acknowledged its importance in these terms:

‘The purpose of s 23 is to exclude the perpetuation of the old system of administration, a system in which it was possible for government to escape accountability by refusing to disclose information even if it had bearing upon the exercise or protection of rights of the individual. This is the mischief it is designed to prevent. . . . Demonstrable fairness and openness promotes public confidence in the administration of public affairs generally. This confidence is one of the characteristics of the democratically governed society for which the Constitution strives.’²¹⁵

²⁰⁹ Note 25 above at 78, and see also at 71, 77.

²¹⁰ Ibid 78.

²¹¹ Item v of the Areas of Agreement.

²¹² See generally Anthony S Mathews *The Darker Reaches of Government* (1978) Chapter VII; Christopher Merrett *A Culture of Censorship: Secrecy and Intellectual Repression in South Africa* (1994). On the ‘baseline state’ of secrecy and the current state of access to information in South Africa, see Klaaren (note 28 above) 371ff.

²¹³ Notorious examples were the Internal Security Act 44 of 1950, the Defence Act 44 of 1957 and the Prisons Act 8 of 1959; see Mathews (note 212 above) 144ff. Apart from particular statutes, official secrets legislation of a general nature (such as the Protection of Information Act 84 of 1982) was a major obstacle to the disclosure of information.

²¹⁴ *Final Report of the Truth and Reconciliation Commission of South Africa* (1998) vol 1, Chapter 8, para 26, quoted in Iain Currie & Jonathan Klaaren *The Promotion of Access to Information Act Commentary* (2002) para 1.2.

²¹⁵ *Phato v Attorney-General, Eastern Cape* 1995 (1) SA 799 (E) at 815D-F. See also *Jeeva v Receiver of Revenue, Port Elizabeth* 1995 (2) SA 433 (SE) at 44ff.

It is difficult to overstate the transformative potential of a right of access to state-held information. Such a right serves constitutional values including transparency, openness, participation and accountability. It is not only fundamental to a properly functioning participatory democracy²¹⁶ but also increases public confidence in the government and enhances its legitimacy. There are other benefits, too.²¹⁷ Access to information discourages corruption, arbitrariness and other improper governmental conduct and facilitates the protection of rights – something that is easily demonstrated in the area of administrative justice. Like reasons for administrative action, access to state-held information can be of enormous assistance to a person who suspects that his or her rights to administrative justice have been infringed.²¹⁸

(a) The constitutional right of access to information

Section 23 of the interim Constitution conferred on every person ‘the right of access to all information held by the state or any of its organs at any level of government in so far as such information is required for the exercise or protection of any of his or her rights’. This provision inspired the rapid development of case law, especially in relation to accused persons who sought access to information contained in police dockets.²¹⁹ It has since been replaced by an even broader right. Today s 32(1) of the 1996 Constitution confers on ‘everyone’ a right of access to ‘(a) any information held by the state; and (b) any information that is held by another person and that is required for the exercise or protection of any rights’. Significantly, the information no longer has to be required for the exercise or protection of rights. Section 32(1)(b) represents further innovation, as there was nothing to mirror it in s 23. The focus in this part of the right is not on governmental accountability but on a person’s need for access to and control over information concerning himself. Such information will typically consist of medical or banking records, or the information in the personnel files of the person’s employer. This aspect is closely related to the right to privacy and ‘self-actualisation’.²²⁰ Section

²¹⁶ Jonathan Klaaren & Glenn Penfold ‘Access to Information’ (OS 2002) in Woolman et al (note 17 above) Chapter 62 at 62--3.

²¹⁷ A full discussion is contained in Lene Johannessen, Jonathan Klaaren & Justine White ‘A Motivation for Access to Information Legislation’ (1995) 112 *SALJ* 45.

²¹⁸ The right of access to information is considerably broader than the right to reasons for administrative action, and the two rights have different areas of focus. Reasons do not count as such unless they explain administrative action; thus they are statements that require formulation by the administrator. ‘Information’ is not similarly qualified and is a much broader concept than ‘reasons’.

²¹⁹ See eg *Phato v Attorney-General, Eastern Cape* (note 215 above); *S v Nassar* 1995 (2) SA 82 (Nm); *Nortje v Attorney-General, Cape* 1995 (2) SA 460 (C).

²²⁰ Klaaren & Penfold (note 216 above) 62--3.

32(1)(b) is also significant as a guarantee that records passing into private hands as a result of privatisation processes will not be immune from access.

Section 32(2) of the Constitution required the enactment of national legislation to give effect to the right in s 32(1), and expressly allowed for ‘reasonable measures to alleviate the administrative and financial burden on the state’. The operation of s 32(1) was suspended pending the enactment of the legislation. In the interregnum, as with the rights to administrative justice, s 32(1) was to be read as if it were s 23 of the interim Constitution.²²¹ During this period, then, it was not possible to assert the right to information held by ‘another person’.

(b) The Promotion of Access to Information Act

The Promotion of Access to Information Act 2 of 2000 (PAIA) was enacted in response to the constitutional mandate, and came into force in large part in March 2001.²²² Its preamble acknowledges the ‘secretive and unresponsive culture’ of the pre-democratic era, and asserts that one object of the PAIA is to ‘foster a culture of transparency and accountability in public and private bodies’. In accordance with s 32, the Act provides for access to information held both by public and private entities. Though privacy features in the Act as a ground on which access may be refused,²²³ the PAIA is not a typical privacy or data protection statute such as may be found in many other jurisdictions. Its emphasis falls on facilitating access to information rather than protecting privacy.²²⁴

The PAIA does not replace the constitutional right; but because it purports to ‘give effect to’ it, parties must generally assert the right via the Act.²²⁵ Thus the constitutional right is for the most part confined to the indirect role of informing the interpretation of the Act. It is possible to rely directly on s 32 only in exceptional cases, most obviously when the validity of the provisions of the PAIA itself is being challenged.²²⁶

The PAIA is applicable to a ‘record’ – any recorded information, regardless of form or medium – of a public body or private body, regardless of when the record came into

²²¹ In terms of item 23(2)(a) of Schedule 6 to the Constitution.

²²² In terms of Proc R20 in GG 22125 of 9 March 2001, but with the exception of ss 10, 14, 16 and 51. Regulations were published in GN R223 in the same *Gazette*.

²²³ Sections 34 (public bodies) and 63 (private bodies).

²²⁴ The South African Law Reform Commission is currently investigating the enactment of data protection legislation (Project 124).

²²⁵ See *Institute for Democracy in South Africa v African National Congress* 2005 (5) SA 39 (C) paras 16-17.

²²⁶ In *IDASA v ANC* (note 225 above) para 17 Griesel J concluded that s 32 ‘is not capable of serving as an independent legal basis or cause of action for enforcement of rights of access to information in circumstances such as the present, where no challenge is directed at the validity or constitutionality of any of the provisions of PAIA’.

existence.²²⁷ However, to keep the rules of discovery intact the Act does not apply to records requested for the purpose of litigation where the request was made after the commencement of criminal or civil proceedings and access to the record ‘is provided for in any other law’.²²⁸

(i) Access to state-held information

Access to records of public bodies is governed by Part 2 of the Act. A public body is defined in s 1 to include all departments of state or administration at the national, provincial and local levels, as well as any other functionary or institution acting in terms of a constitution or ‘exercising a public power or performing a public function in terms of any legislation’.²²⁹ However, in terms of s 12 the Act does not apply to a record of the Cabinet and its committees. Other exempted records are those relating to the judicial functions of courts and certain other tribunals; individual members of Parliament or provincial legislatures in that capacity; and decisions of the Judicial Service Commission relating to nomination, selection or appointment.²³⁰

Requests for information are directed to the information officer of a public body. The information officer considers the request and notifies third parties where necessary. Section 11 states that a requester ‘must’ be given access to a record of a public body if the procedural requirements of the Act have been met, and ‘if access is not refused in terms of any ground for refusal’. Unlike the position under the interim Constitution, there is no need for the requester to show that the information is in any way necessary for the exercise or protection of rights.²³¹ For the most part, the public body will have to release the information if it relates to the requester. Limited provision is also made for the voluntary disclosure of information.²³²

The claim that free access to official information is a prerequisite for public accountability and an essential feature of participatory democracy must be balanced against the legitimate need for secrecy in matters relating to defence, international relations and

²²⁷ Section 3. See in this regard *Classe v Information Officer of South African Airways* [2006] SCA 163 (RSA) para 10.

²²⁸ Section 7. See *Ingledeu v Financial Services Board: In re Financial Services Board v Van der Merwe* 2003 (4) SA 584 (CC) paras 7, 32-3; and see eg *CII Systems v Fakie* (note 207 above) (request made before institution of action); *Unitas Hospital v Van Wyk* 2006 (4) SA 436 (SCA) (request an attempt to compel pre-action discovery).

²²⁹ Part b(ii) of the definition of ‘public body’ is, in fact, identical to the wording in s 1(a)(ii) of the PAJA, and both are based on the definition of ‘organ of state’ in s 239 of the Constitution. See in this regard *Mittalsteel SA Ltd v Hlatshwayo* 2007 (1) SA 66 (SCA) para 8 et seq, where the Supreme Court of Appeal found that the appellant (in its previous incarnation as Iscor) had been acting as a ‘public body’ for the purposes of the PAIA.

²³⁰ Section 12. In relation to the first three exemptions see Currie & Klaaren *Commentary* (note 214 above) paras 4.16-4.19.

²³¹ See eg *Unrecognised Traditional Leaders of the Limpopo Province v Minister for Local and Provincial Government of the RSA* 2003 (5) BCLR 563 (T) at 569E-F.

²³² Sections 15 (public bodies) and 52 (private bodies) of the Act.

where information is personal or is held in confidence.²³³ Chapter 4 of the PAIA lists a number of grounds on which access to requested information must or may be refused unless a public interest ‘override’ applies.²³⁴ Some of the mandatory grounds protect the privacy of natural persons,²³⁵ records held by the South African Revenue Service,²³⁶ records privileged from production in legal proceedings²³⁷ and commercial information held by a third party.²³⁸ The latter covers trade secrets and other financial, commercial, scientific or technical information. Under s 23 of the interim Constitution organs of state could be and were required to disclose tender documents to allow a competitor it to determine whether its rights to just administrative action had been violated.²³⁹ Under the PAIA, however, the state would be entitled to refuse a request for these records if they contained confidential commercial information.²⁴⁰

In terms of the PAIA access to information must be refused if its disclosure ‘could reasonably be expected to endanger’ the safety of an individual,²⁴¹ and it may be refused if its disclosure would be likely to impair the security of a building, a computer system, a means of transport or any system for protecting the public.²⁴² Access may be refused to information that will reveal methods of investigating or prosecuting crime, or might otherwise prejudice a criminal investigation or prosecution.²⁴³ Information relating to the defence, security and international relations of the Republic need not be disclosed.²⁴⁴ Requests for information may be refused if disclosure is likely ‘materially’ to jeopardise the financial welfare of the Republic or the ability of the government to manage the economy.²⁴⁵ A request may be refused where the record contains an opinion or report whose disclosure ‘could reasonably be

²³³ See *Trustees, Biowatch Trust v Registrar: Genetic Resources* 2005 (4) SA 111 (T) para 39.

²³⁴ Sections 46 (public bodies) and 70 (private bodies). In terms of these provisions, notwithstanding any grounds for non-disclosure, a request must be granted if disclosure of the record would reveal evidence of ‘a substantial contravention’ of the law or ‘an imminent and serious public safety or environmental risk’, and if the public interest in disclosure clearly outweighs the harm contemplated in the relevant non-disclosure provision.

²³⁵ Section 34.

²³⁶ Section 35.

²³⁷ Section 40. Cf *Van Niekerk v Pretoria City Council* 1997 (3) SA 839 (T) (technical report with broad public implications not commissioned solely in response to anticipated legislation); *CII Systems v Fakie* (note 207 above).

²³⁸ Section 36.

²³⁹ *Aquafund (Pty) Ltd v Premier of the Western Cape* 1997 (7) BCLR 907 (C); *ABBM Printing and Publishing (Pty) Ltd v Transnet Ltd* 1998 (2) SA 109 (W).

²⁴⁰ But see *Transnet Ltd v SA Metal Machinery Co (Pty) Ltd* 2006 (6) SA 285 (SCA), where the appellants were unsuccessful in their reliance on s 36(1).

²⁴¹ Section 38(a).

²⁴² Section 38(b).

²⁴³ Section 39.

²⁴⁴ Section 41.

²⁴⁵ Section 42.

expected to frustrate the deliberative process in a public body or between public bodies'.²⁴⁶ Requests that are 'manifestly frivolous or vexatious' may also be refused.²⁴⁷

(ii) *Access to information in private hands*

Part 3 of the PAIA gives effect to the right in s 32(1)(b) of the Constitution by providing in s 50 that a requester 'must be given access to any record of a private body' if the record is required for the exercise or protection of any rights; the procedural requirements laid down in the Act have been complied with; and access to the record is not refused on any of the grounds listed in Chapter 4 of Part 3. The requirement relating to the protection of rights applied generally under the interim Constitution but is now confined to information held in private hands. Appropriately enough, private bodies are thus subjected to a less stringent standard of transparency than public bodies. 'The private sector, in other words, is entitled to keep its information to itself, unless that information is needed to protect rights.'²⁴⁸ However, the private nature of a body is not the decisive factor. Section 8(1) of the PAIA recognises that a body may be 'public' or 'private' for the purposes of the Act depending on whether the record in question 'relates to the exercise of a power or the performance of a function as a public body or as a private body'. For instance, in *Institute for Democracy in South Africa v African National Congress*,²⁴⁹ where the applicants sought access to the donation records of certain political parties, the latter were judged to be private bodies in relation to those records.

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Significantly, a 'requester' is defined to include 'a public body or an official thereof', meaning that the state is entitled to access information in private hands. This rather controversial innovation was clearly not required by the terms of s 32 of the Constitution, but the objects of the Act listed in s 9 offer a justification for it. Section 9(c) indicates that the purpose of the mechanism is 'to give effect to the constitutional obligations of the State of promoting a human rights culture and social justice'.²⁵¹

A private body is defined in s 1 of the Act to cover business entities, juristic persons and natural persons in their business or professional capacities. Typical examples of private

²⁴⁶ Section 44. See eg *Minister for Provincial and Local Government v Unrecognised Traditional Leaders, Limpopo Province, Sekhukhuneland* 2005 (2) SA 110 (SCA).

²⁴⁷ Section 45.

²⁴⁸ Iain Currie & Johan de Waal *The Bill of Rights Handbook* 5 ed (2005) 695.

²⁴⁹ Note 225 above.

²⁵⁰ Shannon Bosch '*IDASA v ANC – An Opportunity Lost for Truly Promoting Access to Information*' (2006) 123 *SALJ* 615 at 620-2 argues that it is inconsistent to regard political parties as exercising public power for the purposes of the PAJA but as private bodies for the purposes of accessing their donation records.

²⁵¹ See further Currie & De Waal *Bill of Rights Handbook* (note 248 above) 693-5.

bodies contemplated by the Act are banks and credit bureaux, which keep personal information about the income, banking history and credit rating of individuals – the sort of records that easily qualify as ‘required for the exercise or protection of any rights’ in terms of s 50(1)(a) of the Act.

There has been considerable debate in the cases as to what sort of ‘rights’ are intended and in what sense the information must be ‘required’ for their protection. Under the interim Constitution, at a time when the qualification applied to information *held by the state* and referred specifically to ‘*his or her rights*’, there was a natural wish to construe ‘rights’ as broadly as possible.²⁵² ‘Required’ can mean several things, ranging all the way from ‘essential’ to merely ‘relevant’ to the protection of rights.²⁵³ In *Clutchco (Pty) Ltd v Davis* the court surveyed the case law before holding that ‘reasonably required’, and not ‘necessity’, was the proper meaning, ‘provided that it is understood to connote a substantial advantage or an element of need’.²⁵⁴ This test has been applied fairly strictly by the courts. For instance, it was not satisfied in *Unitas Hospital v Van Wyk*,²⁵⁵ where the first respondent sought a report on nursing conditions in the hospital in order to build a case of negligence against the hospital. Brand JA characterised the request as one for pre-action discovery and held that the use of s 50 of the PAIA for this purpose ‘must remain the exception rather than the rule’.²⁵⁶ The difficulty in the *IDASA* case,²⁵⁷ on the other hand, was that the applicants were unable to show how the records of donations of certain political parties would assist them in exercising or protecting any of the rights on which they relied. As Griesel J saw it, they were really contending for a general principle of disclosure. They were ‘pointing out, *in general*, that this is desirable in any democracy and that it will be beneficial to openness, transparency and accountability’.²⁵⁸

²⁵² See eg *Van Niekerk v Pretoria City Council* (note 237 above); *Cape Metropolitan Council v Metro Inspection Services (Western Cape)* CC 2001 (3) SA 1013 (SCA) para 27.

²⁵³ See eg *Khala v Minister of Safety and Security* 1994 (4) SA 218 (W) at 224G-225E; *Shabalala v Attorney-General, Transvaal* 1995 (1) SA 608 (T) at 624C-D; *Nortje v Attorney-General, Cape* (note 219 above) at 474F-H; *Cape Metro Council v MIS* (note 252 above) para 28.

²⁵⁴ *Clutchco (Pty) Ltd v Davis* 2005 (3) SA 486 (SCA) para 13 (Comrie AJA).

²⁵⁵ Note 228 above. Leave to appeal to the Constitutional Court was refused on the ground of delay in *Van Wyk v Unitas Hospital* 2008 (2) SA 482 (CC).

²⁵⁶ *Ibid* para 22.

²⁵⁷ *IDASA v ANC* (note 225 above).

²⁵⁸ *Ibid* para 48, emphasis original.

5.8 MISSED OPPORTUNITIES AND THE NEED FOR FURTHER REFORM

In 1993 Baxter argued that

‘[a] genuinely participatory, responsive, accountable, affordable and efficient system of administrative decision-making *is* attainable in South Africa, and every South African, no matter how poor or disadvantaged, is entitled to nothing less. The new system of government must, of course, be tailored to the limited resources available. But those multitudes of South Africans, who have too long had to endure the insult of second- and third-class citizenship, should not now be prepared to settle for second- or third-class administrative justice and accountability.’²⁵⁹

The material discussed in this chapter reveals that a good deal of the reform Baxter hoped for has been introduced by the Constitution and, to a lesser extent, the PAJA. Indeed, in many ways expectations reasonably held in the years before 1994 were exceeded by the sweeping nature of the constitutional reform that actually took place. The Constitution offers a multitude of checks on the use of public power at every level, and the administrative system today is replete with safeguards against secrecy, arbitrariness and maladministration. While some of these safeguards may not be functioning optimally (the office of Public Protector is a possible example), it may seem absurd to ask for more at this stage of South Africa’s development. At the risk of sounding ungrateful, however, my own view is that considerable work remains to be done.

In this regard it must not be forgotten that several important innovations proposed by the Law Reform Commission in its draft Bill of 1999²⁶⁰ were rejected or heavily watered down by the legislature when the PAJA was enacted early in 2000, either for lack of funding or for fear of the burden some of these proposals would have imposed on an unprepared government. For instance, a requirement that administrators take steps to communicate their rules to those likely to be affected by them²⁶¹ was dropped from the PAJA altogether – rather pointlessly, as it happens, for the accessibility of such rules is an express requirement of the Constitution²⁶² as well as an ineluctable requirement of the rule of law.²⁶³ Where the Law Commission’s draft Bill created an Administrative Review Council (ARC) and placed it

²⁵⁹ Baxter (note 23 above) 196, emphasis original.

²⁶⁰ Note 78 above.

²⁶¹ Clause 12(1) of the draft Bill.

²⁶² Section 101(3).

²⁶³ *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) para 102; *Dawood v Minister of Home Affairs* (note 98 above) para 47.

under a duty to make recommendations for reform on certain subjects within two or three years,²⁶⁴ the PAJA merely gives the Minister discretion to make regulations establishing an advisory council which may advise him on certain reforms.²⁶⁵ This power has not been exercised. The idea of non-judicial review,²⁶⁶ for instance, remains a purely theoretical possibility. But what is far more regrettable is that no progress seems to have been made with the reform of the existing system of administrative appeals. Reform is urgently needed in this area if the system is ever to function as a worthy adjunct and alternative to judicial review.²⁶⁷

Several innovations in relation to rulemaking, inspired by the ground-breaking work of both O'Regan and Baxter,²⁶⁸ were watered down in the PAJA. One was a requirement that the State Law Adviser compile and publish protocols for the drafting of rules and standards and, in conjunction with the ARC, provide training to the drafters of rules and standards.²⁶⁹ Earlier versions of the Bill went even further than this in providing for the establishment of a Central Drafting Office, a proposal made in 1993 by O'Regan.²⁷⁰ This office would not only have performed the functions allocated to the State Law Adviser in the final Bill, but would also have been responsible for scrutinising the text of rules and standards and making recommendations to advance the clarity of the text. In its 1999 *Report* the Commission explained that the proposals were scrapped because 'the Department of Justice has suggested that the functions of the Office can better and more cheaply be performed by several specially appointed State Law Advisers'.²⁷¹ The Portfolio Committee on Justice unfortunately discarded the less onerous and less expensive option as well.

Other reforms in the Bill included a requirement that administrators compile and maintain up-to-date registers and indexes of rules and standards used by them, and a duty on the ARC to keep a national index of rules and standards which would be published on the Internet as well as in the *Government Gazette*.²⁷² Earlier versions of the Bill were even more ambitious in that they provided for the automatic lapsing of rules and standards within certain periods in terms of 'sunsetting' provisions. These were dropped by the Law Commission in

²⁶⁴ Chapter 6 of the draft Bill.

²⁶⁵ Section 10(2)(a).

²⁶⁶ Clause 15(c)(i) of the draft Bill and s 10(2)(a)(iii) of the PAJA.

²⁶⁷ On this and other avenues of reform, the Australian system remains an inspiring model: see generally Creyke (note 3 above).

²⁶⁸ O'Regan (note 114 above); Baxter 'Rule-making' (note 138 above).

²⁶⁹ Clause 11 of the draft Bill.

²⁷⁰ O'Regan (note 114 above) 168-9.

²⁷¹ Note 78 above at 33n31.

²⁷² Clause 13 of the draft Bill. It is heartening to note that s 6 of the new Gauteng Scrutiny of Subordinate Legislation Act 5 of 2008 requires the maintenance and regular publication by the Office of the Premier of 'an up-to-date and accessible index, with a precise description of the contents of subordinate legislation and proclamations, rules, notices and determinations'.

favour of a clause requiring the ARC to investigate the feasibility of sunseting clauses.²⁷³ Again, the PAJA is more cautious still. In terms of it the Minister may ask the advisory council (if he ever establishes such a body) to advise him on matters such as the appropriateness of publishing uniform rules and standards, the maintenance of indexes and registers and ‘the appropriateness of requiring administrators, from time to time, to consider the continuance of standards administered by them and of prescribing measures for the automatic lapsing of rules and standards’.²⁷⁴ It is encouraging that the scrutiny and control of delegated legislation are currently being investigated anew by Parliament as well as by the Law Commission²⁷⁵ – but frustrating that some of the interim recommendations made by Parliament’s Joint Subcommittee on Delegated Legislation are almost identical to recommendations made by the Law Commission and rejected by the Portfolio Committee on Justice a decade ago.²⁷⁶

Fortunately not all the innovations proposed by the Law Commission were subject to this fate. However, in the case of certain reforms it is still too soon to tell what effect they are having on the administrative system, while others are necessarily of a continuing nature. The PAJA’s introduction of essentially voluntary procedures to facilitate public participation falls into the first category. It is too early to say whether notice and comment procedures and public inquiries (or other participatory procedures) are even likely to be used by administrators. Likewise, it is too soon to tell what effect the code of good administrative conduct is likely to have. At the time of writing a draft code had been produced in accordance with s 10(5A) of the PAJA as amended by the Judicial Matters Amendment Act 22 of 2005,²⁷⁷ and had been accessible as a draft document for some time, but awaited approval and was not yet in force.²⁷⁸

In relation to reforms of a continuing nature, the most important are surely educating South Africans on administrative law and, more specifically, giving administrators training on the PAJA. Notwithstanding the downgrading of the Law Commission’s proposal in this

²⁷³ Clause 15(d) of the draft Bill.

²⁷⁴ Section 10(2)(a)(iv) of the PAJA.

²⁷⁵ See at 5.4(c) above.

²⁷⁶ *Interim Report on Delegated Legislation* (note 117 above), largely based on the recommendations made by Corder in 1999 (note 115 above). For instance, the report recommends (at 25) that Parliament propose to the executive a central index or register of statutes and their delegated instruments; ways of making delegated legislation known to a population with high levels of illiteracy; and the automatic lapsing of rules and standards by means of ‘sunsetting’ provisions.

²⁷⁷ The original provision, s 10(1)(e) of the PAJA, simply required the Minister to make regulations relating to a code of good administrative conduct. It was replaced with a requirement that the Minister publish in the *Government Gazette* a code of good administrative conduct (s 10(5A)) which must first be approved by the Cabinet and Parliament, and be made within 42 months after the commencement of s 10 (s 10(6)).

²⁷⁸ The draft code is available at www.doj.gov.za, last accessed on 15 April 2009.

regard,²⁷⁹ progress was made at an early stage.²⁸⁰ Justice College, the training institution of the Department of Justice, began holding train-the-trainer workshops and courses for administrators shortly after the PAJA was enacted. Initial awareness-raising workshops allowed the trainers to identify problem areas which were then addressed in practical training.²⁸¹ The main objectives of the training, Wessels records, were to ensure that participants had a clear understanding of the Act and would be able to comply with its provisions in practice; and to motivate participants to implement the Act, which included changing attitudes regarding the way administrative decisions are made.²⁸² Wessels recalls that the workshops revealed some quite alarming ignorance, such as the fact that many administrators had never set eyes on the empowering legislation in terms of which they were making decisions.²⁸³ Anecdotes like this one indicate the importance of sustaining and expanding educational initiatives, several of which are currently being implemented under the auspices of the Department of Justice.

5.9 CONCLUSION

The control of administrative power was a moribund and thoroughly depressing part of South African administrative law in the pre-democratic era but, as shown above, the democratic Constitution has made an enormous difference to the range and effectiveness of controls on the administration. The PAJA, too, has made a contribution to the transformation of our administrative law in this respect. The survey undertaken in this chapter indicates that the aspiration to a more complete and integrated set of administrative-law controls has been realised to a considerable extent.

²⁷⁹ Clause 15(e) of the draft Bill required the ARC to ‘initiate, conduct and co-ordinate programmes for educating the public at large and the members and employees of administrators regarding the contents of this Act and the provisions of the Constitution relevant to administrative action’.

²⁸⁰ See Rainer Pfaff ‘Implementation Strategies for the Promotion of Administrative Justice Act: State-of-Affairs Report and Recommendations for Further Developments’ in Corder & Van der Vijver (note 27 above) 105. In this, as in several other initiatives, South Africa owes a debt of gratitude to German Technical Co-operation (GTZ). An agency owned by the German federal government, GTZ has since 1997 been assisting the South African Law Commission and the Department of Justice in certain areas of law reform, including administrative justice. GTZ initially provided assistance to the Law Commission in researching and producing its draft Administrative Justice Act and has subsequently assisted with various aspects of the PAJA’s implementation, including the drafting of regulations and rules under the PAJA and the creation of a code of conduct. It has also commissioned research on particular areas of the PAJA, including procedural fairness.

²⁸¹ See J H Wessels ‘Training on the Promotion of Administrative Justice Act 3 of 2000’ in Corder & Van der Vijver (note 27 above) 118 at 119.

²⁸² *Ibid* 121.

²⁸³ *Ibid* 119.

In spite of all that has been achieved, however, there is clearly room for further reform – and the need in some areas of the administrative system is no less urgent than it was in 1993. Unfortunately, many valuable opportunities were squandered at the time of the PAJA’s enactment, and the prospects of further programmatic reform of administrative law appear slim. The Breakwater call for the most efficient use of human and material resources would have been met by the creation of an ARC-type body to drive and monitor reform initiatives and, in general, to champion administrative law.²⁸⁴ In the absence of such a body South Africa is reliant on the will of the Minister of Justice to push for reform and on the government’s preparedness to provide funding for such reform. Doubts were expressed some years ago as to whether the Department of Justice had the capacity to take on all the various tasks listed in s 10(2) of the PAJA.²⁸⁵ Given the many challenges that continue to confront the Department,²⁸⁶ the refinement of administrative justice seems unlikely to become a priority.

²⁸⁴ See Pfaff (note 280 above) 114-15.

²⁸⁵ Ibid 114.

²⁸⁶ These challenges include reducing substantial backlogs of cases in the High Courts and magistrates’ courts, working out jurisdictional difficulties in relation to certain specialist courts and addressing the gender imbalance in the judiciary.