



REPUBLIC OF NAMIBIA

LAW REFORM AND DEVELOPMENT COMMISSION

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NAMIBIA**

DISCUSSION PAPER

By

Professor Hugh Corder

**Commissioned and Published by the Law Reform and Development
Commission**

LRDC 28

Windhoek, Namibia

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LAW REFORM AND DEVELOPMENT COMMISSION

The Namibian Law Reform and Development Commission (the LRDC) is a creature of statute established by **Section 2** of the **Law Reform and Development Commission Act, 1991 (Act No. 29 of 1991)**.

The core mandate of the Commission is to undertake research in connection with all branches of law and to make recommendations for the reform and development thereof.

The current Commission members' are–

Mr S Shanghala, Chairperson
Adv J Walters, Ombudsman

Under section 3 of the Law Reform and Development Commission Act, 1991, Commissioners are appointed by the President. Previous Commissioners ceased to hold their office when their term of office for three (3) years lapsed on November 8, 2013. They were –

Ms Dianne Hubbard;
Mr Nixon Marcus;
Ms Damoline Muroko;
Mr Raywood Rukoro and
Ms Y Dausab.

The Secretary to the Commission is Mr J.T. Namiseb who heads the Directorate of Law Reform, an organizational component in the Ministry of Justice. The Directorate of Law Reform serves as Secretariat to the Commission, assisting the Commission in the exercise of its powers and the performance of its duties and functions under the Law Reform and Development Commission Act, 1991. The Commission and Secretariat are housed on the 1st Floor, Mutual Platz Building, Post Street Mall, Windhoek.

All correspondence to the Commission should be addressed to:

The Secretary
Law Reform & Development Commission
Private Bag 13302
Windhoek
Republic of Namibia

Fax: (+264-61) 240064
Tel.: (+264-61) 230486
E-mail: lawreform@moj.gov.na

Foreword

The doctrine of subsidiarity of the State provides the philosophical underpinning for entrusting responsibilities to various organs. The state consequently regulates many aspects of individual and collective everyday life. This affords administrative bodies and officials tremendous power, and the law which they have to administer in the course of this, is frequently complex and uncertain and subject to abuse.

This is the crux of this Administrative Justice Project in so far as it is concerned with the legal forms and constitutional status of public authorities; with their powers and duties and with the procedures followed in exercising them; with their legal relationships with one another and private individuals. Although administrative justice is usually thought of as mainly concerned with the interaction between the citizen and the state, it also involves the complex and changing landscape consequential to the fluid boundaries between “public” and “private” law.

Article 18 of the Namibian Constitution condenses administrative justice as a Fundamental Right however in very abstract terms, and notwithstanding this there is no statute in place, to give greater detail to the requirements and expectations of administrative binding standards against which to measure administrative action and provisions providing mechanism for the expeditious, inexpensive and accessible settlement of administrative disputes. The need for establishing an administrative justice legal framework was copiously recommended at the Conference on Administrative Law held in August 2008 which marked the commencement of the reform and development process.

We are pleased to acknowledge that this project is generously funded by Konrad Adenauer Foundation through its Rule of Law Program under the governance of Prof. C Roshmann, Nairobi, Kenya and has also greatly benefited from the expertise of Prof.H. Corder who has been engaged as a consultant on this project.

In order to make sure that proposed regulations are suitable for achieving the stated policy goals and the compatibility of such framework, the Law Reform and Development Commission undertook regional consultations over the period May 2011 to February 2014 consequent to which this Discussion Document is presented.

This Discussion Document examines amongst others;

- a brief description of the role and main components of administrative justice.
- the landscape of the administrative justice “system” and the importance of administrative justice to ordinary people.
- areas where there is need for education;

- the possibility of the use of alternative dispute resolution (ADR) mechanisms, and
- redress mechanisms for administrative complaints.

In publishing this Discussion Document, the Law Reform and Development Commission hopes to achieve the following:

- provide a base document which helps to focus on component parts of administrative justice;
- demonstrate the potential breadth of administrative justice as a subject area;
- promote awareness and understanding of it as an area worthy of specific and sustained attention;
- illustrate the portability of the underlying values relating to decision making and redress in public and some private contexts;
- help identify relationships, overlaps and gaps in relation to redress provision;
- help identify where further work is needed; and
- encourage further dialogue.

This Discussion Document represents an initial exploration into developing an administrative justice landscape in Namibia. By providing this Discussion Document to all interested institutions, organizations and persons, we wish to encourage further engagement with the aim of improving the existing administrative legal framework in order for this process to translate into an antiphonal administrative justice legal framework.



Sakeus Edward Twelityaamena Shanghala
Chairperson

CONTENTS

Page

1.	Chapter 1: Introduction.....	9
2.	Chapter 2: The Process of Public Participation and Consultation.....	11
3.	Chapter 3: The Issues.....	20
4.	Chapter 4: Essential Challenges Confronting A Namibian Administrative Justice Legislation.....	32
5.	Chapter 5: Relevant Comparative Developments.....	38
6.	Chapter 6: Recommendations for the Structure and Content of an Administrative Justice and Appeals Tribunal Act (Ajata) For Namibia.....	54

CHAPTER 1

1. INTRODUCTION

1.1. The achievement of reasonable compliance with the requirements of administrative justice has, over the past three decades, come to be seen as an indispensable part of any constitutional democracy. In particular, the role which administrative fairness and efficiency can play in the protection of human and constitutional rights is increasingly recognized, as the notion of “democracy” advances from a majoritarian representative model to a participative and responsive model. Encouraged by the pioneering provision to safeguard administrative justice in the Namibian Constitution, the Law Reform and Development Commission (LRDC) of the Republic of Namibia took the important decision in 2010 to investigate ways in which the quality of administrative justice in Namibia could be enhanced through statutory intervention and other measures.

12.1. In particular, legislation is needed, to regulate and promote administrative justice and to establish an appropriately structured administrative appeals tribunal is a possibility, as well as subordinate instruments which set standards for administrative rule-making and the conduct of administrative officials in the discharge of their obligations.

1.3. Instrumental in this initiative was a Conference on Administrative Law held in August 2008, which made the following recommendations:

- (a) That the various elements of administrative justice should be codified through legislation;
- (b) That the creation of an Administrative Tribunal for the adjudication of administrative disputes should be investigated;

(c) That training of administrative officials on the proper execution of their responsibilities within the framework of administrative justice should be introduced; and

(d) That awareness should be raised generally on the relationship between constitutional and human rights and administrative justice.

1.4. This document briefly sketches some of the most important elements of such a deliberate process of law reform and development, in order to provide the basis for discussions between interested parties. It does not pretend to be exhaustive, nor prescriptive: it merely marks a certain stage of “work in progress”. It is informed by a series of extensive consultations with those active in the law and in public administration (both at regional and local levels) in Windhoek and most of the regions throughout Namibia, over the period May 2011 to December 2013.

1.5. This Discussion Document is intended as the basis for further consultation during the high level workshop with all interested parties, which will be held after this Discussion Document has been published.

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CHAPTER 2

2. THE PROCESS OF PUBLIC PARTICIPATION AND CONSULTATION

2.1. In a modern participative democracy, such as in Namibia, it would detract from the quality of the envisaged legislation were there not to be a serious attempt at consulting those to be most closely affected by the law. To this end, members of the Law Reform and Development Commission (LRDC) and the consultant on this project, Professor Hugh Corder, engaged in an extensive process of consultation with a relatively wide range of role-players in the public administration and the legal and court systems of Namibia, during the course of more than two and a half years, as follows: 10 to 12 May, 2011 (Khomas Region); 3 to 8 June, 2012 (Otjozondjupa Region, Oshikoto and Oshana; 26 to 28 February, 2013 (Swakopmund and Walvis Bay); 20 to 21 November 2013 (Katima Mulilo and Rundu); 3 December 2013 (Windhoek and Khomas region); 9,11,13 and 20 December 2013 (Kunene Region, //Kharas Region, and Omaheke Region) and Hardap Region on 24 January 2014.

2.2. The first meeting in Windhoek centred primarily on the legal sector, although a broad cross-section of the leadership of the public administration, including the Ombudsman, some Permanent Secretaries, the NIPAM (Namibian Institute for Public Administration and Management) and SoEs (State-owned Enterprises, gathered in a single meeting lasting a morning. The subsequent visits to the regions, and the second visit to Windhoek, focused exclusively on bodies of both regional and local government, with representation from both elected councillors and the officials who service such councils. This immensely valuable process of consultation delivered much guidance for the development of this discussion paper, and is summarized below.

2.3 Central public authorities

2.3.1. Without attributing what follows to any one or more of those who made representations at such meetings, it is fair to state that the following responses (in no particular order of importance) were widely voiced:

- i. Strong support was expressed for legislation to give greater detail, clarity, and effectiveness to the constitutional provisions in Article 18.
- ii. The idea of formulating proper standards for good administrative conduct was equally strongly advocated, and the potential role of NIPAM to train public servants to strive to comply with such standards was seen as central. It was suggested that reasonable working knowledge of administrative justice may in time become a prerequisite for promotion above a certain level in the public service.
- iii. The interface between any new statutory code and the common law processes of review (and associated remedies) would have to be carefully spelled out and managed.
- iv. Widespread political support for any process of reform would be essential, especially from the executive level of government.
- v. The divide between executive and administrative action would have to be carefully examined: all exercises of public power are subject to constitutional scrutiny in the courts, but differing standards of review should apply, with a less onerous degree of scrutiny being exercised in respect of executive action, consonant with appropriately respectful deference under the doctrine of separation of powers.
- vi. Alternative dispute resolution (such as mediation and arbitration in tribunal format) may well be entirely appropriate for many areas of the public administration, especially in rural areas.
- vii. Attention should be paid to revising the rules of standing to sue, in order to widen access to administrative justice.

- viii. If the reforms are seen as an administrative straitjacket, then they are doomed to fail.
- ix. The extent to which traditional authorities and leaders should be subject to administrative justice in their activities, if at all, should be carefully considered and spelled out.
- x. The inclusion of rulemaking as administrative action should be explicitly dealt with in any legislative reform package.
- xi. The view was generally held that a specialist division of the High Court to deal with administrative law disputes, or the establishment of a new, separate Administrative Court, would be both counter-productive and unnecessarily costly.
- xii. On the other hand, strong support was expressed for the establishment of some form of administrative appeals tribunal, perhaps even on a decentralised basis with branches of such a tribunal in each of the regions, such as has been done by the office of the Ombudsman, to some extent.
- xiii. Access to information forms a critical partner to administrative justice rights, and needs to be protected and spelled out as part of any reform measures.
- xiv. The extent of the power of the reviewing body to substitute its own decision for that of the administrative authority should be specifically countenanced, but sparingly used.
- xv. The obligatory giving of reasons for administrative decisions, preferably simultaneously with their publication, was an essential element of a good system of administrative justice.

- xvi. The application of any new regime which may be adopted to SOE's and private entities which wield public power or perform public functions must be considered and expressly dealt with.
- xvii. Maintaining efficiency in the administration was an important element of any proposed reform measures.
- xviii. The interrelationship of any new regime of administrative review with other existing constitutional organs (such as the office of the Ombudsman, the Public Service Commission, and so on) must be borne in mind.
- xix. The type of widespread consultation which marked the beginning of this project should be strengthened and deepened, including visits to the regions.

2.4 Regional Views

2.4.1 The chief purpose of the consultative visits to the regions was, against the above background, to investigate the feasibility of such ideas and the constraints being experienced by regional and local government structures by hearing the views of those directly involved in public administration.

2.4.2 During the visit to the North of the country, many issues were identified as needing further attention, both from a broader law reform point of view (**not strictly within the mandate of this project and not listed here¹**), as well as from an administrative justice perspective. The issues of broader concern to the law reform process have been communicated separately to the Chair of the Commission, for the attention of the Commission in its future work. Specific issues (in the sense that the concerns relate closely to

¹ All duly noticed and have been brought to the attention of those rightly placed to take up the issue.

administrative justice, either in its empowerment or its accountability guise) mentioned included:

- i. The relationship between elected/ appointed councillors and those who serve the councils as administrators needs to be spelled out through intensive education and training, especially the necessity that all action taken by such councils and their servants needs to comply with the constitutional requirements of lawfulness, fairness and reasonableness (Articles 1 and 18 of the Namibian Constitution).
- ii. Detailed guidelines for good administrative decision-making at all levels of the public administration are an urgent priority. These probably need to be routed through the Public Service Commission, and to be endorsed at the highest level of political leadership in the country.
- iii. Huge efforts need to be put into training, both of administrators and of councillors, as to what is required of them by the Namibian Constitution and the law. It seems that the best chance of success for training councillors would be that the training be sanctioned and even carried out by political leadership, whereas experts could do what was necessary for public administrators. There should, however, be a degree of joint training as well, so that each “constituency” can know what is expected of the other.
- iv. The shining example of the *Public Service Charter*, which appears in laminated form on the walls of many government offices, under the imprint of the Founding Father, President Nujoma, needs both to be taken seriously, but also to be replicated and customized to their circumstances by each administrative authority, at all levels of the exercise of public power. Here the example of the *Customer Service Charter* adopted by the Otjiwarongo Town Council is worth examination and emulation.

- v. It is likely that a modest statute will be required to put flesh onto the administrative justice skeleton provided by Article 18 of the Constitution. This need not be extensive, nor unduly ambitious, but rather an attempt to spell out in binding legislative terms what the duties of the public administrators, and the rights of those subject to their processes, are in law.
- vi. The establishment of a General Administrative Appeals Tribunal should be seriously considered, to provide certainty, speed of resolution, informality of process, and to be less costly, when compared with the current practice of judicial review of administrative action in the High Court.
- vii. It may be that special divisions of any such Tribunal may need to be created to devote themselves to particular issues, such as rights of access to land, the award of tenders, town planning and licensing decisions, and so on. An advantage of this route will be to alleviate the burden of the frequent resort to review process on the time and capacity of the superior courts, which already seem to be struggling to deal with their case-load, if the delay in giving judgments is an indication.

2.4.3 Prior to the visit to the West of the country in early 2013, and informed by the feedback already received and summarised above, those to be consulted were asked to respond in particular (but not to confine themselves) to the following questions:

- (a) would it assist the attainment of administrative efficiency, fairness and openness, in pursuit of the noble goals of Article 18 of the Namibian Constitution, were there to be a statute in place, to give greater detail to the requirements and expectations of administrative justice at all levels of public governance in Namibia? and
- (b) is there a case to be made for providing a mechanism for the expeditious, inexpensive and accessible settlement of administrative

disputes between citizen and government, including a reconsideration of the merits of a matter, without having to resort to judicial review of administrative action in the High Court?

2.4.4. In fact, and probably unsurprisingly, there was much in common with the summary of responses outlined above in the responses received from the Erongo Regional Council, representatives of the various local authorities and the departments of central government in that region, as well as the Town Council of Walvis Bay. Such concerns were essentially repeated in the multiple visits to regional towns in late 2013.

2.4.5. Again, at the risk of repetition, but because it would otherwise not do justice to the strongly expressed views of many of those consulted, the following appeared to be the most important administrative justice issues raised:

- i. Strong views were expressed in support of extensive training being needed both by officials, but especially by councillors, so that they could be better aware of the lawful scope of their authority to act, as well as the obligations to act fairly and reasonably imposed on them by the Namibian Constitution.
- ii. The symbolic importance (as in the case of the Public Service Charter) of prominently-displayed commitments to civic service was evident, such as is to be seen in the Mission Statement of the Erongo Regional Council, as follows: *“Erongo Regional Council will serve its customers through the delivery of prompt and accurate services, and striving for excellent customer service, while remaining transparent and maintaining good partnerships.”*

- iii. Strong and widespread support was noted for the establishment of an independent administrative appeals tribunal, with a regional presence, to assist and complement the jurisdiction of the Ombudsman, and to pursue the goal of widening access to administrative justice in an inexpensive, expeditious, and effective manner. The educative and monitoring roles of such a tribunal were emphasized.

- iv. Having expressed support in principle for the establishment of such a tribunal, several words of caution or qualification were noted: the tribunal must “add value”, not just exist in name; the phenomenon of “forum-shopping”, where dissatisfied citizens picked the most advantageous route to remedy their complaint, as opposed to the most appropriate one, must be guarded against through careful legislative regulation; the existence of such a tribunal must not prevent a citizen having access to review through the High Court, either in the first instance, or as a forum for the review of the decisions of the tribunal; proper and detailed criteria must be determined in advance according to which the presiding officer in such a tribunal should make decisions; and intensive and continuing training should be devoted to ensuring a high standard of expertise in its staff.

- v. Regulations must be put in place to ensure proper declaration in advance of potential or actual conflicts of interest between both councillors and officials, where it came to tendering for and concluding contracts for the provisions of goods and services to regional and local authorities.

- vi. Minimum standards for subordinate regulations and rule-making should be set in any administrative justice regime, for both the guidance of those public administrators charged with their drafting and as benchmarks of good administrative conduct.

- vii. Unreasonable delay in administrative decision-making or the implementation of administrative decisions should be a ground for their review and invalidation.

- viii. Alternative dispute resolution (ADR) should be actively pursued to simplify and expedite the resolution of administrative disputes, and to reduce costs. The use of the “med-arb” or “conc-arb” models (a process where mediation or conciliation is first attempted, moving into an arbitral mode if this first stage of the process fails) should be considered as part of the ADR suite of processes.

2.5 Consultation Summary

2.5.1 Despite one or two differences of emphasis, which are likely to reflect the level (*idest* whether it be central, regional or local government) or particular locality (*idest* concerns with the exercise of traditional authority in the far north of the country) of governmental activity, there is a remarkable similarity from what appears above in the diagnosis of what needs remedying to achieve better levels of administrative justice, and thus compliance with the requirements of Article 18 of the Namibian Constitution. This list of issues in common to most respondents provides the best starting point for what would need to be regulated by any administrative justice statute in Namibia, the necessity of which appears to be widely, if not universally, accepted.

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CHAPTER 3

3. THE ISSUES

3.1. The Current Status of Administrative Justice

3.1.1. The foundation stone for any consideration of reform measures for the system of administrative justice in Namibia must be Article 18 of the Namibian Constitution, the most important element being the following:

“Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed upon such bodies and officials by common law and any relevant legislation, and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a competent court or tribunal.”²

3.1.2. Thus did Namibia lead the way internationally in terms of creating a right to administrative justice in its highest law. It seems that this right seeks to achieve a number of things and raises a number of questions, which need to be borne in mind when the research into, discussions about and drafting of the appropriate legislation envisaged in this project takes place, among them:

- (a) it imposes duties on bodies and officials. This means that the initial burden of proof in any litigation rests on the administration to satisfy a reviewing body that it had acted fairly, reasonably and lawfully;
- (b) in some manner, the word “administrative” must be defined--- this crucial necessity in any system of administrative justice is dealt with extensively below;

² Article 18 of the Constitution of Namibia, 1990.

- (c) attention must be given to acts done by the executive branch of government which are not “administrative” yet need to be reviewable;
- (d) the difference between the concepts of “fairness” and “reasonableness” needs to be defined. In particular, does the former term extend beyond the procedural aspect, to the substance of the decision-making process, and if so, is this not a more exacting standard than “reasonableness” as a ground of review?
- (e) compliance with the requirements of “the common law and relevant legislation” indicates that administration must be “lawful”, but such lawfulness must also imply consistency with the Namibian Constitution;
- (f) how extensive does the “aggrievedness” of a person have to be to justify her/his right of review? Is it necessary in some manner to limit access to review to those who have been affected by administrative action beyond a certain limit?
- (g) what are the differences between “acts” and “decisions”, and why draw that distinction?
- (h) what does the concept of “redress” imply: mere setting aside of the decision or act, or replacement of the administrative action by the view of the court, or more than these remedies?
- (i) is the duty to give reasons for such acts and decisions included impliedly in this right? The answer is highly likely to be in the affirmative, for it is almost impossible to determine the “reasonableness” of an action if one is not privy to the reasons why the action was taken;

- (j) does the concept of a “competent” court include a magistrate’s court?
- (k) what tribunals are referred to, what should their powers be, how independent should they be, should they be “in house” or in another department of state, or totally independent of the public administration?
- (l) what about other, non-judicial forms of administrative review, which may well serve to widen access to justice?
- (m) And so on.

3.1.3. These seem to me to be some of the preliminary questions which need some resolution before discussions about the shape, form and structure can begin in earnest. It is particularly important to note that the terms of reference of this LRDC project include what could be styled “pre-emptive” or “anticipatory” review, in the form of a set or sets of guidelines for good administrative conduct. Experience in other jurisdictions teaches us that such guidelines are by far the most effective way of delivering administrative justice as widely as possible in society, and in raising the general standard of administrative conduct. They may be resisted by the officials initially, but over time their usefulness in increasing efficiency and delivering fairness becomes clear. They also have a further major advantage, in that they are typically less costly to implement, as opposed to retrospective court processes which are expensive in terms of time, money and human capacity. It is also likely that routine compliance with them by public officials will increase levels of efficiency in the public administration, which in turn will raise the level of fairness and reasonableness throughout the public administration.

3.1.4. Further constitutional provisions add strength to the implementation of rights such as those contained in Article 18:

3.1.4.1. Article 1(6) provides that:

“This Constitution shall be the Supreme Law of Namibia”

3.1.4.2. Article 5 reads as follows:

“The fundamental rights and freedoms enshrined in this Chapter shall be respected and upheld by the executive, legislature and judiciary and all organs of the Government and its agencies and where applicable, by all legal and natural persons in Namibia and shall be enforceable by the Courts in the manner hereinafter prescribed.”

3.1.4.3 Article 30 sets out the oath of office for the President-elect, including a duty to “...uphold, protect and defend as the Supreme Law the Constitution of the Republic of Namibia...”, and Schedule 2 provides a Ministerial Oath in substantially similar terms.

3.1.4.4 Article 32(1) provides that:

“As the Head of State, the President shall uphold, protect and defend the Constitution as the Supreme Law...”

3.1.4.5. The provisions of Article 66, which affirm the continuing validity of the common law and customary law, and Chapter 10 which established and provides the authority for the office of the Ombudsman, are also of note in this context. Taken together, these provisions set a binding standard against which to measure the lawfulness of executive conduct, as well as administrative action taken by members of the executive.

3.1.4.6. One of the most important practical constraints which must be borne in mind in any process of law reform and development such as this one is the scarcity of human and financial resources. Whatever set of measures are put in place must be able to be implemented effectively; otherwise it will lose all credibility in the eyes both of administrators as

well as the people whom they must serve. This does **not** mean that essential steps required by the Constitution can be discarded because they will need additional budget, it just implies that care must be taken to estimate the costs, also on the understanding that spending some resources now may well lead to far greater savings in the future, as well as to the achievement of an intangible degree of civic legitimacy.

- 3.1.4.7. The brief outline above of some of the supreme legal framework as well as main issues for debate may assist in reaching a degree of consensus and in setting clear goals for this project.

3.2 Judicial interpretation of some of these provisions

3.2.1 *The Namibian superior courts have been seized with many applications for judicial review since 1990, some of which have been reported. In general, it is fair to say that, like the South African experience, the effects of prior practice and the common law approach in general have been quite tenacious, and that the legal profession (including the judiciary) have adapted to the new legal superstructure quite slowly. This is not surprising, and is in fact probably a good thing, on balance, because the wisdom of the common law was developed over many decades and will inevitably continue to influence the interpretation of key aspects of administrative justice in the constitutional era.*³

3.2.2. The following points of interest arise out of a consideration of some of the Namibian case-law,⁴ briefly stated:

- i. Aspects of Article 18 have received attention. So we learn that its “requirements are the minimum Constitutional requirements that a Court must apply when deciding whether an administrative body or

³ For the most authoritative restatement of the relationship between the Constitution and the common law in South Africa, see *Pharmaceutical Manufacturers In re Ex parte President of the RSA* 2000(2) SA 674 (CC), at para 41 to 44.

⁴ Unless otherwise stated, I am relying in what follows on a summary of the pertinent case-law, prepared and supplied to me by the Namibian LRDC. I am grateful for this assistance.

administrative official has acted ultra vires; that is, whether there has been a failure of administrative justice” within its meaning;⁵ That the term ‘aggrieved persons’ should be assessed by a more stringent standard of reasonableness i.e. would a reasonable person in an applicant’s position have adequate cause to be aggrieved that their fundamental rights have been infringed or threatened by an unlawful administrative decision;⁶ and that the relationship between “fairness and reasonableness” in Article 18 is best characterised as follows--- “An administrative body may arrive at a decision in a fair manner but its decision may nevertheless be unreasonable. On the other hand an unreasonable decision would always be unfair.”⁷

- ii. Several decisions have interpreted the meaning of “administrative decision”. In *Open Learning Group Namibia Finance cc v Permanent Secretary, Ministry of Finance*⁸, the court was faced with a contractual relationship between the parties and the question was whether the ordinary rules of the private law of contract should apply, or the higher obligations arising from administrative law. The High Court found that the contractual relationship was “framed” by the principles of administrative justice, as an administrative expression of government action. On the other hand, in *Permanent Secretary, Ministry of Finance v Ward*⁹, the Supreme Court characterised the relationship between the parties as one governed by the law of contract, and thus held that an application for review of administrative action was the wrong course to pursue.
- iii. Harking back to the common law justification for judicial review, the court has held that its entitlement to review a discretionary administrative decision is to be found in the “inherent common law

⁵ *Haidongo Shikwetepo v Khomas Regional Council* Case no A364/ 2008, unreported.

⁶ *Minister of Mines and Energy v Petroneff* Case no A24/2011, unreported.

⁷ *Frank v Chairperson of the Immigration Selection Board* 1999 NR 257 (HC).

⁸ 2006 (1) NR 275 (HC).

⁹ 2009 (1) NR 314 (SC).

power”.¹⁰ Mirroring a similar dispute in South Africa, and reaching the same conclusion,¹¹ the court has also held that, where a statute creates specialist jurisdiction for a court, then resort to the High Court is inappropriate.¹²

- iv. In the *Petroneff* case, a decision of Cabinet was reviewed according to general principles of administrative law. However, and appropriately, the judiciary has also shown that it is clearly aware of the effects of the doctrine of the separation of powers, and the need on occasion to be deferential (as respect, not submission) to the executive branch of government.¹³ Of some importance in this context is the judgment in *Mbanderu Traditional Authority v Kahuure*¹⁴, in which the Supreme Court held that traditional authorities were organs of state,¹⁵ and therefore in principle subject to administrative review, but that the applicability of such review would depend on the nature of the function discharged: in this case, the act of adopting the constitution of a community, being primarily a legislative act, was not “administrative action”.
- v. Several cases have raised the “public/ private distinction” i.e to what extent should nominally private bodies which exercise public power or perform a public function be subject to administrative justice standards. In deciding such questions, the courts have been strongly guided by the approach of the South African Constitutional Court in the *President of the RSA v SARFU* case¹⁶, where the stance taken was

¹⁰ *Katapi Trading cc v Minister of Mines and Energy* Case no A216/2008, unreported.

¹¹ See *Gcaba v Minister for Safety and Security* 2010 (1) SA 237 (CC).

¹² In this case the jurisdiction of the Labour Court through the Labour Act 11 of 2007 was confirmed: see *Haidongo Shikwetepo v Khomas Regional Council* Case no A364/ 2008, unreported.

¹³ See *Waterberg Big Game Hunting Lodge v Minister of Environment and Tourism* Case no S13/2004, unreported, and *Black Range Mining v Minister of Mines and Energy* 2009 (1) NR 140 (HC).

¹⁴ 2008 (1) NR 55 (SC).

¹⁵ A term of some importance in South African constitutional law, see the Constitution of South Africa, 1996, at section 239.

¹⁶ *President of the RSA v SARFU* 2000(1) SA 1 (CC).

that the most important aspect was the nature of the function exercised, rather than the identity of the functionary.¹⁷

- vi. The common-law requirement of procedural fairness has been endorsed in the constitutional era¹⁸, and the court has concluded that the doctrine of legitimate expectation was implicit in the requirements demanded of the administration by Article 18.¹⁹
- vii. The giving of reasons for a decision is taken to be implied in the requirements of Article 18. This aspect has been carefully analysed and persuasively proposed by Glinz²⁰, relying in particular on *Frank*²¹, *Chairperson of the Immigration Selection Board v Frank*,²² and *Sikunda v Government of the Republic of Namibia*.²³ This thoroughly logical conclusion would appear to be settled law in Namibia, and Glinz shows authoritatively that it is broadly in line with both German and South African authority.
- viii. Standing to use, unsurprisingly, has arisen for decision from time to time, and the courts seem to have adopted both a sensible but also a generous stance in this regard,²⁴ yet not countenancing unjustifiable attempts to broaden standing,²⁵ again in line with developments in comparative jurisdictions.

¹⁷ See *Oppermann v President of the Professional Hunting Association of Namibia* 2000 NR 238 (SC); *Shixwaneni v Congress of Democrats* 2008 (1) NR 134 (HC); and *Disciplinary Committee for Legal Practitioners v Slysken Sikiso Makando* Case no A216/08, unreported.

¹⁸ See *Kessel v Ministry of Lands and Resettlement and two similar cases* 2008 (1) NR 167 (HC)

¹⁹ See *Waterberg Big Game Hunting Lodge v Minister of Environment and Tourism* Case no S13/2004, unreported.

²⁰ Glinz Cornelia, 'The Right to Reasons as part of fair administrative procedure: A Comparative study of Namibian, South African and German Law' *Namibia Law Journal* 3, (2009)1.

²¹ See *Frank v Chairperson of the Immigration Selection Board* 1999 NR 257 (HC), where the court said that it could not judge what was reasonable unless the administrative body gave its reasons for arriving at a decision.

²² 2001 NR 107 (SC).

²³ 2001 NR 181 (HC).

²⁴ See *Petroneff* (note 4), and *Arthur Frederick Uffindell T/A Aloe Hunting Safari's v Government of the Republic of Namibia* Case no A 141/2000, unreported.

²⁵ *Andreas Vaatz v Municipal Council of Windhoek* 2010 (1) NR.

ix. Finally, the court has again taken a realistic approach towards remedy, holding that it has discretion in this regard, either to remit the matter to the administrator concerned, or to decide the matter itself.²⁶ In exercising such discretion, the court will tend to remit, but will be guided by what is fair to both parties.

3.2.3. This incomplete and sketchy review of judicial attitudes towards Article 18 and administrative justice in general in the constitutional era delivers no surprises to one versed in the administrative law of the British Commonwealth. Indeed, the Namibian judiciary seems to have more than adequately built a bridge between the common-law based past and the fundamental-right centred present in this area of the law. With this background, one or two pertinent issues need to be raised in isolation.

3. Administrative Tribunals

3.3.1 As the comparative survey above has abundantly demonstrated, the broad goal of accessibility to administrative justice is frequently and increasingly pursued through the establishment of administrative appeals tribunals (AATs).²⁷ Tribunals are often seen as a means to emphasise a shift in ensuring administrative justice, and to achieve a better level of effectiveness and a more efficient public administration, so most legal systems have established AATs to some extent.

3.3.2 Namibia is no stranger to this notion, there being several such specialist bodies already in existence in certain areas e.g immigration, refugees, and land matters. None of these has general jurisdiction, and the question is whether this avenue should be seriously pursued as a means to raising the standard of administrative justice. For a country like Namibia, with vast distances between the main centres of population (except in the north) and a relatively small population, some might argue that the expense involved in both financial and human resources terms in establishing such bodies is

²⁶ See *Erindi Ranch (Pty) Ltd v Government of the Republic of Namibia* Case no 72/2011, unreported.

²⁷ See especially Australia, Canada, the UK, India, and so on.

unwarranted. This may be the case, but it may also be that the relatively scattered concentrations of people living in the country make it extremely worthwhile in delivering acceptable standards of administrative justice precisely to have a decentralised system of appeals tribunal, especially given the regional system of government in place. Thus one can imagine a composite structure called the Namibian Administrative Appeals Tribunal (NAAT), headquartered in Windhoek with most of its internal administrative functions being performed there. Regional Administrative Appeals Tribunals (AATs) could be in place in each regional centres of government, their size of staff (in terms of capacity to deal with clients) determined by the number of people living within their geographical jurisdiction.

- 3.3.3 The attraction of such a system of tribunals would be the speed with which they could respond to complaints, their local knowledge, the relatively low cost of resolving issues, the informality of operation, the accessibility of the forum, and the potential to develop a greater efficiency and understanding between the administration and those subject to it. Were such a system to be in place, it could be attached to the office of the local magistrate (although functioning separately from such office) and could be of general jurisdiction, in terms of the type of issue which it could determine. In more populous areas, however, such as in the national capital, in the Walvis Bay/ Swakopmund area, and in the north, there may well be a case for establishing specialist chambers within each AAT, depending on the demand for certain types of dispute resolution e g taxation, social security, immigration and refugees, labour rights, agricultural or industrial land-use licensing, and so on.
- 3.3.4 Such tribunals have shown, in other legal systems, a capacity for accommodating alternative means of resolving disputes, such as mediation, conciliation and arbitration, lowering levels of misunderstanding and lessening an adversarial approach. There also exists the potential, with the assistance of the NIPAM, for requiring the staff of such a tribunal proactively to pursue educational and training

initiatives among both the local public and the local administration, thus further contributing to an increased level of administrative justice.

3.4 Traditional Authorities and State-owned Enterprises

3.1.1 Two groups of bodies in Namibia which exercise public power or perform public functions are traditional leadership and SOEs. This is the case in many other similar societies, especially in Africa, and the question arises whether their actions and decisions should be subject to the obligations imposed by administrative law.

3.1.2 The Namibian Supreme Court seems already to have provided guidance in answering this question as regards traditional authorities, through its decision in the *Mbanderu* case.²⁸ In other words, such bodies are in principle acting in the public domain and are “administrative bodies” as defined in Article 18. One would argue strongly that this is the correct approach, in line with that taken at least in South Africa,²⁹ and that this approach would also be the one most appropriate to use with respect to SoEs.³⁰ This statement does not, however, end the matter, as shown in the *Mbanderu* case, because the judiciary recognises that such bodies also frequently exercise powers and functions which are quintessentially private in nature.

3.3.4. Thus it would be best to propose that a future administrative justice statute in Namibia defines such bodies as subject to administrative justice requirements, but that each case should be judged on its own facts and circumstances. This is, in any event, the general approach of most legal systems, because it is clear that even avowedly public bodies such as state departments may, on occasion, act like private individuals, for example in entering into day-to-day commercial contracts such as renting premises,

²⁸ 2008 (1) NR 55 (SC).

²⁹ Although the South African Constitution is more explicit in its treatment of traditional leadership, in Chapter 12.

³⁰ See the cases referred to in note 17 above, where the Namibian courts have effectively taken this route. Again, in South Africa this approach is firmly established in the case law.

purchasing stationery, contracting with information and communications technology companies, etc.

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CHAPTER 4

4. ESSENTIAL CHALLENGES CONFRONTING A NAMIBIAN ADMINISTRATIVE JUSTICE LEGISLATION

4.1.1. In what follows, and to assist the discussion of the ideas proposed in this Discussion Paper, further details of the challenges which must be faced in drafting an administrative justice statute for Namibia are provided. Lest this seem a daunting list, it is comforting to note that these elements are typically part of such a statute in the British Commonwealth. These seem to be the main challenges:

4.2. Administrative Conduct Subject to the Statute must be defined

4.2.1. Phrases like “administrative decision” (Australia) or “administrative action” or “public power or public function” (South Africa) have been used, but each has been subject to varying interpretations by the courts, before a settled meaning is achieved. The emphasis placed by Article 18 on “administrative” officials and bodies seems at first glance to imply government officials exercising power in the public interest or for public purposes, but what if such officials are entering into ordinary contracts for the purchase and supply of goods and services or employing people to work for government i.e. acting “privately”, or as if they were private purchasers or employers? and what of SoEs that wield enormous authority in public life, or even privately-owned businesses that are contracted by the State to supply goods or services: should such bodies not be regarded as “administrative” for purposes of Article 18?

4.2.2. Such questions must be confronted and answered: most systems contemplate the subjection of some forms of “private” power to an administrative justice regime, while also recognising that some forms of conduct of nominally public bodies should not be included within the definition, for fear of forcing the public administration to grind to a halt for excessive levels of compliance with standards of administrative justice. So

lines must be drawn, as clearly and helpfully as possible. It may well be helpful to begin this discussion by reference to Article 93 of the Namibian Constitution, which spells out to some extent the meaning to be given to the word “official” within the context of the office of the Ombudsman.

4.3. Executive action

4.3.1. Having said this, the issue of the regulation under law of executive conduct must be addressed. In other words, most legal systems recognise that the exercise of official power with a high level of policy content should not be subject to the same intrusiveness of review as more routine administrative conduct. So the action or decision of a Cabinet Minister when making a policy statement is typically not included within the definition of “administrative”, but it is not by that token immune from review, and is rather to be tested according to standards such as “rationality” or “honesty” or “lawfulness” (in a relatively superficial sense). Compliance with the “rule of law” and the supremacy of the Constitution as the origin of all public power is the usual standard here. On the other hand, Ministers can naturally engage in conduct that is typically “administrative”, not “executive”, and such activity would be subject to the ordinary review processes.

4.4. Fairness: procedural aspect

4.4.1. Attention must be given to defining the standards of review, which are “fairness” and “reasonableness”. Fairness certainly prescribes a procedural element, such as used to be described as the rules of natural justice, that the other party must be heard (*audi alteram partem*) and that no official should be a judge in his own cause (*nemo iudex in sua causa esse debet*). In modern terms, judges have moved to prescribe compliance with a “general duty to act fairly in all circumstances”, the actual content of such fairness being a flexible concept, which varies with the context. So the South African Promotion of Administrative Justice Act of 2000 (Act No. 3 of 2000); (PAJA), in section 3 lists elements of procedural fairness which **must** be complied with in all circumstances, and another list of desirable

attributes, which may be followed by administrators. Yet again, those administrative bodies which can justify a “different but fair” process are entitled to follow such, but if challenged, the burden of proving its fairness rests on the administrator. So the catchphrase is flexible compliance.

4.5. Fairness: substantive aspect?

4.5.1. But does the general requirement of “fairness” include “fairness on the merits”, that is substantive fairness? This is a much more difficult idea, because it effectively hands the authority to the court to determine whether the outcome (the actual decision) of the administrative conduct falls within the limits of “fairness”. This may appear at first sight to be a transgression of the doctrine of the separation of powers, taking away the power from the “political branch” of government (which means the legislature and the executive) and giving it to the judiciary.

4.5.2 This is doubtless not an acceptable nor wise approach, for all sorts of reasons, but it is important to note that this does not mean that the judge can decide whether the conduct is wrong or correct: rather to ask the question, does it fall within the limits of fairness? Such an approach can be justified, but must be carefully considered, if only because it can place the courts in an invidious position, which can affect the collegially supportive role which ought to exist between the judiciary and the other branches of government. Whatever, the approach adopted there can be no avoiding this issue in Namibia, because of the constitutional requirement of fairness?

4.6. Reasonableness

4.6.1 The same arguments apply to the constitutional standard of reasonableness, which applies to the conduct of all administrative officials and bodies. This no doubt demands a degree of scrutiny of the merits of an administrative action, thus nominally transgressing the line between “appeal and review”, but this line is accepted as being very flexible, and

largely within the interpretation of the reviewer. Provided that the reviewing authority sees its role as regulating the limits of what is reasonable, and refrains from second-guessing the administrative conduct on the basis of “correctness”, the standard of “reasonableness” is properly justiciable (within the jurisdiction of the courts). In South African administrative law, reasonableness has been defined as requiring the rationality of the decision-making process as well as the proportionality of the impact of the decision, and this seems to be an acceptable starting point for Namibian circumstances.

4.7. Grounds of review

4.7.1. Article 18 requires compliance with the requirements of the common law and relevant legislation. It seems appropriate, therefore, that the grounds of review (generally falling within the categories of “lawfulness, fairness and reasonableness”), should be listed, both for the guidance of administrative officials as well as those who review their conduct. Both the Australian Administrative Decisions (Judicial Review) Act of 1977, (Act No 59 of 1977) and South Africa’s PAJA, 2000 do this, in a non-exhaustive listing. The open-endedness of the list is important, as it allows for the development of new review grounds, within the broad bounds of lawfulness, reasonableness and fairness.

4.8. The giving of reasons

4.8.1 Integral to review for reasonableness and the right of those subject to administrative conduct to “seek redress” before a court or tribunal is the duty to give reasons which lies on the administrator. While the common law does not require this generally, it has become part of the standard of good governance expected of those who wield public power, and is directly to be implied from the stipulations of Article 18. Moreover, as is to be seen in section 5 of the PAJA, some sort of minimum level of rationality must attach to such reasons: in the South African case, the standard is set at “adequacy”.

4.9. Setting generic standards for administrative conduct

4.9.1 Administrative officials and bodies typically take a wide range of decisions and actions in the course of a working day. Review, whether by a court or a tribunal, is necessarily retrospective, and limited to the conduct challenged. It would be far preferable and add to the efficiency of the administration were officials to have guidelines ready, to assist them to take a decision or to act so that the possibility of challenge for non-compliance with administrative justice was remote. In other words, by setting and then following guidelines for good administrative practice prospectively, many (if not most) challenges to administrative conduct could be pre-empted, and the general standard of administrative justice could be enhanced. Such guidelines ought to be part of an administrative justice statute.

4.10. Alternatives to judicial review

4.10.1. The long history of judicial review of administrative action in common law jurisdictions means that lawyers seem to regard it as the only effective means of combating unlawful administrative conduct. Many alternatives exist today, such as access to information, administrative appeals tribunals (either within the administrative body concerned or by an external agency), the office of ombudsman, and so on. The inclusion of such alternative mechanisms in a single administrative justice statute must be considered, and if deemed necessary or expedient, acted upon. In any event, the office of Ombudsman already exists in Namibia, and some administrative tribunals exist.

4.11. Procedural aspects

4.11.1 Many statutes contain provisions relating to requirements for standing to sue, or time periods within which reasons must be asked for and given, or an application for judicial review must be launched and responded to, rules

which apply to such proceedings, and so on. After reviewing the situation in Namibia at present, a call will have to be made as to the extent to which provision must be made for such matters in the administrative justice statute contemplated. It is almost certain, however, that provision will have to be made for Ministerial authority to make regulations of general application for the more effective achievement of administrative justice standards.

4.12. Continuing audit and reform

4.12.1. It is unlikely that any single process of reform will be able effectively to capture all that is needed to remedy the shortcomings of the current state of administrative justice. Thus there ought to be provision for regular review of the enforcement of such a statute, and recommendations for the improvement of the law and its regulations over time. Such a responsibility could be assigned to the Law Reform and Development Commission, or to a subcommittee of such or another similar body, which will be charged with the duty to advise the Minister from time to time.

4.12.2. This list is quite clearly not exhaustive, but these seem to be the main features which ought to be included in any legislative intervention in this field.

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CHAPTER 5

5. RELEVANT COMPARATIVE DEVELOPMENTS

- 5.1 In any process of law reform, it is wise not to attempt to reinvent the wheel, while always recognizing that wholesale transplantation from one legal system to another is rarely successful or a good idea. Nevertheless, it would be foolish to ignore similar initiatives in different parts of the world. There are essentially two major “families” of administrative law in the world, that are based on the English common law (and to be seen particularly in the countries of the British Commonwealth, and to a much lesser and more distant effect in the United States of America) and that based on the civil law systems of continental western Europe, which in itself tends to be divided between those based on the French and those based on the German model.
- 5.2 Given the dominant influence of English administrative law on South Africa over more than 150 years, and in turn the unlawful but historical treatment of Namibia almost as a fifth province of South Africa from 1945 to 1990, it seems appropriate to refer for guidance to fellow jurisdictions in the British Commonwealth, in the first instance. This is not an exclusive focus; however, some of the strongest models are those which draw on the achievements as well as lessons learned by several national jurisdictions.
- 5.3 So there are many models to look at, but why has there been this high level of activity in this area of the law? There are many reasons for this, but chief among them are the growth of executive and administrative power within the State in the second half of the 1900’s, the rising expectations among ordinary people that the state should provide basic services (such as health, educational and social services), the State’s need to regulate economic and social life, especially as urbanization gains pace among a rising population, and the necessity for allocating considerable discretion to State Officials to empower them to provide services, but qualified by the

need that such services should be provided equitably, reasonably, transparently and fairly.

5.3 In contemplating the drafting of such a statute, it is helpful to consider the experience of appropriate foreign comparators, always bearing in mind the relatively peculiar antecedents and needs of our own legal system. So we can take note of the main features of the statutory regulation of administrative law in the following legal systems (in no necessary order of importance).³¹

5.4 Australia

5.4.1 Australia provides a very significant model, sharing as it does the same parent legal system and judicial traditions. More importantly, however, Australia is the site of the most deliberate and systematic reform of its administrative law in the whole of the British Commonwealth. This process began in the early 1970s and is much too complex a revolution to describe here in any detail.³² Suffice it to say that, after exhaustive investigation by government-appointed commissions of inquiry, the federal Parliament adopted a series of statutes over a number of years which has effectively codified the main features of the entire edifice of administrative justice, without removing the capacity of the courts to exercise review jurisdiction. This process has been repeated in differing degrees in most of the constituent states and territories of Australia.³³

5.4.2 The year of enactment and short title of the major pieces of legislation give a flavour of the magnitude and creativity of the 'new administrative law' of Australia:

³¹ The summaries which follow are updated and revised versions of Hugh C. 'Piercing the Paper Curtain: Prospects for an Administrative Justice Act' in Grethchen Carpenter (ed.) *Focus on the Bill of Rights* (1996), pp 78-97.

³² An excellent and critical review of these developments, some thirty years on, is to be found in Robin C. *Beyond the Courtroom Door*, (Acta Juridica, 2006) 257 – 287.

³³ While Victoria and New South Wales led the way in this regard, the most thorough-going reforms were adopted by Queensland, with the extensive preparatory work being done by the Electoral and Administrative Review Commission.

- (i) 1975 Administrative Appeals Tribunal Act and Racial Discrimination Act ;
- (ii) 1976 Ombudsman Act and Federal Court of Australia Act;
- (iii) 1977 Administrative Decisions (Judicial Review) Act;
- (iv) 1982 Freedom of Information Act;
- (v) 1984 Sex Discrimination Act;
- (vi) 1986 Human Rights and Equal Opportunity Commission Act; and
- (vii) 1988 Privacy Act.

5.4.3 Three features of these Acts must be spelled out: the **establishment of appeals tribunals** recognises and attempts to remedy the difficulties created by a rigid adherence to the appeal versus review distinction so characteristic of English-based administrative law³⁴; the **grounds of judicial review** well known in our law **are codified**, but in an open-ended fashion, there being a provision that a court may intervene where the administrative decision 'was otherwise contrary to law',³⁵ and the state of **administrative justice is under constant investigation and review**, undertaken by an official body, the Administrative Review Council,³⁶ which reports its findings regularly to parliament and suggests further reforms.

5.4.4 Although the Australian approach has its critics, both within that country³⁷ and abroad,³⁸ the boldness and comprehensiveness of the undertaking deserve close examination, and might be well suited to Namibian conditions at this time. It is perhaps significant to note, however, that the extensive use of both tribunals and judicial review in the area of migration law led the Australian government in the late 1990s and early 2000s to attempt the use of privative (or ouster) clauses to cut back on such use. This was often

³⁴ For a perspective view on appeals tribunals, see Robin C. *Tribunals – ‘Carving out the Philosophy of the Existence’: The Challenge* (2012) 71 AIAL Forum 19-33.

³⁵ See s 5(1) of the Administrative Decisions (Judicial Review) Act of 1977, Act No 59 of 1977.

³⁶ Set up in terms of the Administrative Appeals Tribunal Act of 1975, part V.

³⁷ See for example, William De Maria. *Exposing the AAT's Private Parts*, (1991) 16 *Legal Services Bulletin* 10, and the report of the proceedings of a seminar held to review the first decade of the reformed system: *Administrative Law – Retrospect and Prospect* Canberra Bulletin of Public Administration (1989).

³⁸ The Law Reform Commission of Canada decided not to follow Australia's lead when considering the reform of its own administrative law. See *Towards a Modern Federal Administrative Law* (1987).

resisted by the High Court, but ultimately it had a dampening effect on the “progressive” reputation of Australian administrative law.

5.5 Europe (except the United Kingdom)

5.5.1 The members of the European Union³⁹ are fairly clearly divided between those who have committed many of their rules of administrative law and procedure to statute, and those who rely mainly on 'due process' provisions in their constitutions and the development of the law through judgments of the courts.⁴⁰ In the latter category, one finds France,⁴¹ Italy, Belgium, Greece, Ireland, Luxembourg and Portugal. Among the former, Germany, Denmark, the Netherlands and Spain each provide interesting models. Typical features of all these systems are the emphasis on both empowerment as well as accountability of the public administration (justifying the description as 'green light' models of administrative justice), a system of administrative tribunals and courts entirely separate from the ordinary civil courts of the country, merits review as a standard practice, and an ultimate appeal to a Council of State, which is effectively the supreme administrative authority in each country. A closer look at four such systems will assist.

(a) Germany

Central to the administrative justice regime in Germany is the Law relating to Federal Administrative Procedure⁴² and similar statutes in the Länder.⁴³ These laws⁴⁴ systematise and simplify the administrative law within their jurisdictions, and often provide for popular participation

³⁹ Recent Developments in the administrative law of the rest of Europe after the collapse of the Soviet hegemony are usefully summarised in Denis J.G and Smilov D.M. *Administrative Law in Central and Eastern Europe 1996 – 1998* (1999).

⁴⁰ The information in this part is drawn largely from the outstanding work of J. Schwarze. *European Administrative Law* (1992), from which further details can be gleaned.

⁴¹ As the leading jurisdiction in this group, reference may be made to N.L. Brown and J.S. Bell. *French Administrative Law* (5ed) 1998, for a detailed treatment in English.

⁴² The *Verwaltungsverfahrensgesetz* of 25 May 1976.

⁴³ Mostly enacted in 1976 and 1977.

⁴⁴ The impetus for which arose in a German Lawyers' Conference in 1960.

in the administrative process. A separate system of administrative courts exists in Germany, the current form of which was established in 1960.⁴⁵

(b) Denmark

On 19 December 1985, the Danish system of administrative procedural law was extensively codified in two Laws. The Law on Public Administration sets out the rights of citizens to receive fair and impartial treatment from the administration, and the duties of the administrators in such process, including the giving of reasons and the observance of confidentiality. The Law on the Public Character of the Administration guarantees the right of citizens to consult the records of public authorities - indeed, openness of process is a much-emphasised feature of Danish administrative law.⁴⁶

(c) The Netherlands

Until early 1996, review of administrative decisions before the Raad van State was regulated by the Wet AROB.⁴⁷ This specified four grounds of review: the infringement of a generally-applicable provision; improper purpose; inequitable decision-making in the light of all interests; and the contravention of a basic notion of proper administration entrenched in the general legal consciousness.⁴⁸ This code has been replaced by the *Algemene Wet Bestuursrecht* of 16 February 1996, which endeavours comprehensively to regulate the administrative process and opportunities for its review.

⁴⁵ For a very brief but easily accessible overview of German administrative law, see Wilhelm Rapp 'Report on administrative law and judicial review of administrative decisions in Germany' in Hugh Corder and Fiona McLennan *Controlling Public Power* (1995) at 216-220.

⁴⁶ Schwarze Op. Cit. 163-4.

⁴⁷ The law on 'administratieve rechtspraak overheidsbeschikkingen' of 1 May 1975.

⁴⁸ Schwarze Op. Cit. 189-191

(d) Spain

The Spanish Law relating to administrative procedures, like its German counterpart but pre-dating it by some years,⁴⁹ standardises and simplifies procedures and improves popular participation in the administration. It goes further, however, in its attempt also to encompass the substantive rules of administrative law.⁵⁰

5.6 United Kingdom

5.6.1 The judge-made nature of English administrative law is well known to most southern African lawyers. While the activities of a vast range of administrative tribunals and inquiries are regulated by statute,⁵¹ leading to some uniformity of process, establishing mechanisms for the appointment of members, stipulating powers for appeal and review and imposing a general duty to give reasons for their decisions, the grounds of review are not generally codified.⁵² The essential qualities sought for the administrative process by the Franks Committee (1957), whose work preceded the adoption of this Act, are especially noteworthy: 'openness, fairness and impartiality', to which have been added subsequently 'efficiency, expedition and economy' - perhaps these are the values which ought to guide the drafting of the national legislation envisaged in Namibia. Procedural reforms in 1981 produced a uniform 'application for judicial review'⁵³ in place of the obscure complexity of the royal prerogative writs, a step which itself threw up problems on interpretation by the courts.⁵⁴

5.6.2 Significant advances in the working relationships between the courts and administrative tribunals have occurred over the past dozen years.⁵⁵ This

⁴⁹ The *Ley de Procedimiento Administrativo* was adopted on 17 July 1959.

⁵⁰ Schwarze Op.Cit. 201-202

⁵¹ The Tribunals and Inquiries Act of 1992, successor to the Act of the same name of 1958

⁵² For an excellent recent treatment of English administrative law see De Smith, Woolf and Jowell *Judicial Review of Administrative Action* 6th ed. 2007.

⁵³ Under Order 53 of the Supreme Court

⁵⁴ See *O'Reilly v Mackman* [1983] 2 AC 237

⁵⁵ For a fuller treatment of the summary which follows, see Lord Justice Carnwarth "Tribunals and the Courts--- the UK Model" (2011) 24 *Canadian Journal of Administrative Law and Practice* 5-10.

process was initiated by the Leggatt's Report of 2001⁵⁶, which reviewed the tribunal system in England and Wales, and recommended changes so as to achieve "... a system that is independent, coherent, professional, cost-effective and user-friendly". The two major changes recommended were the creation of a new independent tribunal service to manage them separate from the government departments which they served, and the establishment of a "composite, two-tier tribunal structure". This has been largely achieved, based on the provisions of the Tribunals, Courts and Enforcement Act of 2007.

5.6.3 The most significant features of the current tribunal system in England and Wales are thus as follows:

(a) Tribunals are regarded as part of the judicial system, rather than the administration, with the presiding officers called "tribunal judges";

(b) The First-Tier Tribunal is a composite body, divided into the following seven specialist Chambers (each presided over by a President appointed by the Judicial Appointments Commission)—social entitlement; immigration and asylum; health, education and social care; war pensions and armed forces compensation; tax; general regulatory; and land, property and housing;

(c) Employment Tribunals and Appeals Tribunals continue to exist alongside this structure;

(d) The Upper Tribunal, the composite body to hear appeals on points of law as a "superior court of record", is in turn divided into four Chambers, three of which are chaired by High Court judges nominated by the Chief Justice—administrative appeals; immigration and asylum; tax and chancery; and land;

⁵⁶ Leggatt, A. (August, 2001) *Sir Andre Leggatt's Report: The Review of Tribunals for Users- One System, One Service*.

(e) This whole structure is headed by the Senior President, who is also a Lord Justice of Appeal, and in many respects the tribunal judiciary is much closer to their superior court colleagues than before;

(f) Despite the narrowing of the gap between courts and tribunals, the latter are still characterised by the prioritisation of accessibility, expedition and efficiency of process, and the specialist expertise and innovative role of presiding officers; and

(g) An important role is played by the Administrative Justice and Tribunals Council (AJTC), set up by the 2007 Act, to “keep the overall administrative justice system and most tribunals and statutory inquiries under review, to advise ministers on the development of the administrative justice system, to put forward proposals for changes, and to make proposals for research. The AJTC has Welsh and Scottish Committees, and its purpose is “to develop coherent principles and good practice, to promote understanding, learning and continuous improvement, and to ensure that the needs of users are central.” In all these tasks it is guided by the fundamental values of “openness and transparency fairness and proportionality, impartiality and independence, and equality of access to justice”.⁵⁷ The AJTC thus plays a wider role than the Australian Administrative Review Council RC, but their influence in their respective jurisdictions is significant.

5.6.4 Thus have administrative tribunals been taken to a different level of sophistication as part of the administration of civil justice in the UK, emphasising flexibility, specialisation and accessibility. Many aspects of the current system that may well be instructive for Namibia.

5.7 Canada

5.7.1 While there has been no general initiative at federal level, such as in

⁵⁷ All of the above points have been taken from the AJTC Action Plan 2010-11, p.1.

Australia, to reform the whole of administrative law and procedure,⁵⁸ several Canadian provinces have attempted to codify this area of law. The most significant is that of Ontario, whose original Statutory Powers Procedure Act, 1990⁵⁹ was the product of the McRuer Commission of 1968-1971⁶⁰. The most recent consolidation of this Act⁶¹ contains important and detailed provisions defining its scope and applicability,⁶² requiring specific procedures such as pre-trial conferences,⁶³ public hearings,⁶⁴ the admissibility of evidence,⁶⁵ and so on. Elsewhere, the province of Alberta has had an Administrative Procedures Act since 1966, and Quebec reached the stage of tabling 'An Act respecting administrative justice' in 1993.⁶⁶

5.7.2 One of the most important features of Canadian administrative law, however, has been the extensive use made by the Canadian Parliament of statutorily-created specialist tribunals (e.g. human rights, immigration, employment health and safety, etc) to act as regulatory bodies in different sectors of the economy. Such bodies are not necessarily chaired by lawyers and their members are typically appointed by the State Department itself. Equally significant has been the response of the Canadian courts to such specialist bodies: recognising their expertise and legislative foundation, there has been a healthy degree of judicial deference shown to their decisions. Whether this form and extent of deference can be transplanted to other jurisdictions is a moot point.⁶⁷

5.8. The United States of America

5.8.1 The USA provides probably the earliest and most comprehensively codified

⁵⁸ See the leading text-book, G. Heckman, G. van Harten and J.D. Mullan, *Administrative Law; Cases, Text and Materials*, 6th ed. (2010).

⁵⁹ The Statutory Powers Procedure Act, 1990 is also known as the 'SPPA'.

⁶⁰ Royal Commission Inquiry into Civil Rights of 1968-1971.

⁶¹ Royal Statute Ontario 1990, (Ontario).

⁶² Sections 1 and 3.

⁶³ Section 5.3.

⁶⁴ Section 9.

⁶⁵ Section 15.

⁶⁶ *ibid* at 241.

⁶⁷ This issue is fully argued by D. J Mullan "Deference: Is it useful Outside Canada?" 2006 *Acta Juridica* 43-61.

treatment of administrative law in the English-speaking world. The Administrative Procedure Act of 1946 originated from a much-expressed need properly to regulate the large measures of discretion granted to administrators in the socio-economic sphere, following on the steps taken by government to confront the demands placed on it by severe economic depression and the Second World War. The APA (as it is widely known)⁶⁸ has the following main structural components:

- (a) definitions section, including details regarding which agencies are *not* bound by its terms;
- (b) requirements for administrative rule making;
- (c) details of the duties of administrators exercising an adjudicative function;
- (d) requirements for fair hearings;
- (e) the scope and content of a process of judicial review of administrative action ('a person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof'),⁶⁹ and
- (f) the appointment and service conditions of administrative law judges.

5.8.2 This legal regime is amplified by statutes whose objective is 'open government',⁷⁰ as well as a Model Administrative Procedure Act for the States, of 1981, and any number of such Acts in the States. The extent and detail of such regulation has, however, become too complex and

⁶⁸ 5 USC, Chapter 5.

⁶⁹ Section 702.

⁷⁰ Especially the Freedom of Information Act (Section 552) and the Government in the Sunshine Act (Section 552b).

cumbersome over time, inducing Congress to attempt to address the difficulties in two further statutes, the Administrative Dispute Resolution Act and the Negotiated Rulemaking Act, both of 1990.⁷¹

5.8.3 The tendency to over-regulation or over-elaboration ought to be guarded against, and this much and more of great value can be gained from the American experience. To this end, the direct and sensitive application by a leading administrative law-reformer⁷² of American principles and practices to the South African situation before the drafting of the Promotion of Administrative Justice Act may be of some assistance in drafting Namibian legislation. In this regard, we should note the main elements of such a statute proposed by Asimow: the creation of several different administrative adjudicatory models (full-scale formal, informal or conference and summary procedures); rules for public participation in rule-making; and the scope and content of judicial review of administrative action.

5.9 South Asia

5.9.1 British Commonwealth jurisdictions in Asia (such as Singapore, Malaysia, Hong Kong, Pakistan and Sri Lanka) add little to the trends surveyed above. Worthy of note, however, is India's establishment of a Central Administrative Tribunal,⁷³ the important role played by constitutional provisions in its administrative law,⁷⁴ and the judicially-crafted liberalisation of the rules relating to standing to sue.⁷⁵ In language reminiscent of AV Dicey's eulogy to the rule of law,⁷⁶ Krishna Iyer J said:⁷⁷

“ ‘...[L]ittle Indians in large numbers seeking remedies in courts through

⁷¹ Public Law 101-552, 104 Stat 2736 and Public Law 101-648, 104 Stat 4969 respectively.

⁷² See Asimow 'Administrative Law under South Africa's Final Constitution: the Need for an Administrative Justice Act' (1996) 113 *SALJ* 613.

⁷³ In terms of the Administrative Tribunals Act of 1985.

⁷⁴ The Constitution of 1947, Articles 32, 226 and 227.

⁷⁵ Pioneered by Bhagwati CJ in, for example, *National Textile Workers Union v P R Ramakrishnan* AIR 1983 SC 75.

⁷⁶ See *The Law of the Constitution* (1885) at 199-200.

⁷⁷ In *ABSK Sangh (Rly) v India* AIR 1981 SC 298 at 317.

collective proceedings, instead of being driven to an expensive plurality of litigations, is an affirmation of participative justice in our democracy.' One of the major features in Indian administrative justice over the past 40 years has been the "tribunalisation of justice."⁷⁸

5.10 Commonwealth Africa

5.10.1 Regrettably, there is only limited evidence of extensive or even selective and effective administrative law reform measures in African members of the Commonwealth, whose jurisprudence in this area tends to be locked into references to English administrative law and practice, often with a time lag. In Botswana, for example, the pattern is very much along the lines of development in the parent jurisdiction, with specialist statutes such as the Statutory Instruments Act, the Commissions of Inquiry Act (Cap 05:02), the Public Authorities Act (Functions) Act, 2005 and the Ombudsman Act, 1995.⁷⁹ A perusal of some judgments shows that the authority cited is overwhelmingly from England, with no distinctive features characteristic of Botswana. Tanzania presents a very similar picture,⁸⁰ as does Nigeria.⁸¹

5.10.2 Notable exceptions to this rather bleak picture are the protection accorded to administrative justice to be seen in the recent constitutions of Namibia, South Africa, Malawi, Uganda and Kenya. Typically, such constitutional provisions either grant the citizen certain rights of fair and reasonable administrative conduct by those who wield public power, or impose a duty which requires compliance with similar standards from public officials. Two very recent examples suffice:

- (i) Constitution of **Zimbabwe, 2013** (Final Draft, January 2013), recently approved in a referendum):

⁷⁸ See A. Datar .*The Tribunalisation of Justice in India* (2006) *Acta Juridica* 288-302.

⁷⁹ For details of these acts, and for a general treatment of administrative law in Botswana, see O. Bethuel and K. Dingake *Administrative Law in Botswana*, 2nd ed. 2008.

⁸⁰ See B D Chipeta *Administrative Law: A Digest of Cases* (2009).

⁸¹ See, for example, B U Eka *Judicial Control of the Administrative Process in Nigeria* (2001), which sets out the main features of the system, with substantial comparative reference to both the UK and the USA. A glance at the final pages, which set out the issues which need reform in Nigeria, however, indicates the extent of the tenacious hold which English law still has on Nigerian law.

(ii) Constitution of **Kenya, 2010**

5.11. Article 68 Right to Administrative Justice (Zimbabwe)

- (1) “Every person has the right to administrative conduct that is lawful, prompt, efficient, reasonable, proportionate, impartial and both substantively and procedurally fair.
- (2) Any person whose right, freedom, interest or legitimate expectation has been adversely affected by administrative conduct has the right to be given promptly and in writing the reasons for the conduct.
- (3) An Act of Parliament must give effect to these rights, and must—
 - (a) provide for the review of administrative conduct by a court or, where appropriate, by an independent and impartial tribunal;
 - (b) impose a duty on the State to give effect to the rights in subsections (1) and (2); and
 - (c) promote an efficient administration.”

5.12. Article 47 Fair Administrative Action (Kenya)

- (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
- (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action the person has the right to be given written reasons for the action.
- (3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall---
 - (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal; and
 - (b) promote efficient administration.”

5.13 While it is still too early to assess the effects of these constitutional rights, it is noteworthy that these more refreshing and innovative measures build on those adopted by South Africa in 1996, that they both require the enactment of supportive legislation, and that they both envisage some role for

independent and impartial tribunals in review of administrative conduct. Indeed, South Africa's experience is likely to be particularly useful in assessing the needs of Namibia in this area, as well as the mistakes not to make in the envisaged process of reform.

5.14 South Africa

5.14.1 The period 1986 to 1994 provided some proposals for statutory regulation of administrative law, chief among them the South African Law Commission's significant 'Investigation into the Courts' powers of review of administrative acts'.⁸² Although limited in scope, because it only dealt with the superior courts' power of judicial review, the proposed Judicial Review Act represented the first formal attempt to codify the grounds of review, provide for the circumstances in which reasons had to be given for administrative decisions, and to define key terms.⁸³ The list of grounds on which judicial review could be sought read very much like the Australian Administrative Decisions (Judicial Review) Act adapted to the provisions of section 24 of the 1993 Interim Constitution.

5.14.2 On the academic front, two important workshops were held in Cape Town with the focus on administrative law reform.⁸⁴ Among the papers published after the first of these events,⁸⁵ two are particularly germane to the present discussion. On the subject of rule-making by administrative agencies, both O'Regan⁸⁶ and Baxter⁸⁷ provided detailed and well-substantiated agendas for reform. Among the necessary features of a

⁸² A Working Paper in this project (No 24) was published in 1986, and the Report appeared in November 1992. Subsequent to the coming into force of the 1993 Constitution, the Minister of Justice requested the Commission to review its Report in the light of that Constitution (Act 200 of 1993) and particularly section 24. The Commission's recommendations are contained in a Supplementary Report of October 1994.

⁸³ See clauses 3, 2 and 1 respectively, at 24, 23 and 22 of the *Supplementary Report*.

⁸⁴ 'Administrative Law for a future South Africa' in February 1993, and 'Controlling Public Power in Southern Africa' in March 1996.

⁸⁵ See 1993 *Acta Juridica*, also published as *Administrative Law Reform* (1993), and Corder and McLennan (eds) *Controlling Public Power* (1995).

⁸⁶ See Catherine O'Regan 'Rules for Rule-Making: Administrative Law and Subordinate Legislation' 1993 *Acta Juridica* at 168-175.

⁸⁷ See Lawrence Baxter 'Rule-making and Policy Formulation in South African Administrative-law Reform' 1993 *Acta Juridica* at 184-196.

future system mentioned by O'Regan⁸⁸ were the following: a central drafting office; periodic review of subordinate legislation; a national register of subordinate legislation; legislative scrutiny of administrative rule-making; interest-group representation on rule-making institutions; a process for public consultation (including notice and comment procedures and public inquiries); and proper scope for judicial review of administrative rule-making.

5.14.3 While Namibia was the pioneer in constitutionalising a right to administrative justice, South Africa has arguably taken the matter further, in the form of sections 24 and then 33 of the interim and final Constitutions, respectively. One critical difference between the interim and final provisions was the requirement in the latter of the drafting of an Act of Parliament not only to provide structures and procedures to realize the rights accorded in the Constitution, but also to seek to enhance the efficiency of the public service: some measure of balance between these two desirable outcomes is always in issue. The outcome is the Promotion of Administrative Justice Act 2000, No 4 of 2000 (the PAJA), which was the outcome of an investigation of the South African Law Commission, whose draft bill⁸⁹ was then significantly revised by Parliament. The major changes were the omission of two parts, Chapter 3 dealing in detail with the processes for making, publicising, reviewing and the lapsing of “rules and standards” (the area of subordinate law-making), and Chapter 5 which envisaged the establishment of an Administrative Review Council, a standing body whose function it would have been to monitor the “health” of the administrative justice system and propose further reforms to government. The PAJA provides further guidance for the Namibian investigation, both from its strengths as well as its weaknesses. Even more, the various judgments of the South African superior courts, particularly the Constitutional Court and the Supreme Court of Appeal, illuminate some of the problems which may arise when a constitutional and statutory overlay

⁸⁸ O'Regan *loc cit.*

⁸⁹ Project 115, Administrative Justice Revised and Annotated Administrative Justice Bill (May 1999).

is imposed on the pre-existing common law of judicial review.⁹⁰

5.14.4 To conclude this summary overview of many foreign legal systems in the area of administrative justice, it is as well to heed a warning given at the Breakwater Conference in 1993, probably the most important single such event in the sub-continent. Baxter concluded with a somewhat prescient comment, as follows⁹¹:

'Moreover, the system should be built into the new constitutional framework of government at the outset, *before the tradition of bureaucrat and political arrogance and complacency - so long a part of South Africa's history - has an opportunity to re-assert itself.*'

5.15 Ultimately, therefore, what is needed is a change of culture, towards greater accountability.

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⁹⁰ For an excellent account of the current state of the system, see Cora Hoexter *Administrative Law in South Africa* (2ed) 2012.

⁹¹ *Op cit* note 83 at 196, emphasis in the original.

CHAPTER 6

6. RECOMMENDATIONS FOR THE STRUCTURE AND CONTENT OF AN ADMINISTRATIVE JUSTICE AND APPEALS TRIBUNAL ACT (AJATA) FOR NAMIBIA

6.1 Without going into any detail regarding the actual provisions proposed under each heading, and at the risk of repeating some of what appears immediately above, the following matters seem **essential parts** of any future statute promoting and regulating the achievement of administrative justice in Namibia, given both the constitutional mandate and the concerns expressed during the consultative phase outlined above.

6.2. Administrative conduct

6.2.1. A “gatekeeping” device is needed, some form of limitation of the scope of the review power of an outside body, such as “administrative action”, “administrative decision”, or “administrative conduct”. Given the inordinate difficulties created in South Africa by the narrow and convoluted definition given to “administrative action”, the adoption of a relatively broad term, such as the “administrative conduct” used in Zimbabwe, is recommended. This would allow the courts to continue to regulate access, aware as the judges are of the importance of maintaining the doctrine of the separation of powers.

6.2. Definitions

6.2.1. Further important terms used in the statute need careful definition at the outset of the statute. A list of such terms can only effectively be drawn up once the statute has been drafted.

6.2. Public and private Power

6.2.1. The issue of which types of power are to be subjected to administrative review must be spelled out as clearly as possible, recognising that not every action by a public administrator will fall to be reviewed in terms of administrative justice, while there may similarly be conduct of nominally private bodies which does amount to the exercise of public power.

6.3. State-owned Enterprises and similar bodies

6.3.1. The application of this statute to SoEs and other bodies which perform public functions or exercise public power must be specifically countenanced, and a position clearly adopted, most likely subjecting them to the obligations applicable to all public administrators, with some variations where it is thought to be necessary.

6.4. Procedural fairness

6.4.1. The statute must provide greater particularity about what is expected of those subject to the duty to act fairly, spelling out both minimal levels of fair process as well as desirable criteria which need to be met in this sphere. Procedural fairness requirements when the administrative conduct affects the public at large may well differ from those required when the conduct only affects an individual, and this amount of detail must be provided. Explicit confirmation of the duty to give reasons for administrative conduct must also be included.

6.5 Grounds of review

6.5.1. The grounds of review currently known to Namibian administrative law, as well as additional grounds which must be included to ensure compliance with the provisions of Article 18, must be stipulated, but it must be made clear that the list of such grounds is not closed nor

exhaustive, to allow for continuing development of such grounds through judicial interpretation.

6.6. Reasonableness

6.8.1. One of the areas requiring special attention is the legislative expression given to the requirement that administrative officials and bodies act “reasonably”. This criterion for valid administrative conduct necessarily implies a degree of engagement by the reviewing body with the merits of the issue in dispute, and so may appear to cross the line between appeal and review. This is not a necessary consequence of the reasonableness requirement, so the limits of such review authority must be carefully crafted.

6.7. Process

6.7.1. Detailed provisions must be laid down relating to various processes integral to the idea of administrative review, such as the steps required to obtain reasons for administrative conduct, and to initiate an application for review in either a court or a tribunal, and the rules which a reviewing body must follow in such process.

6.8. Remedies

6.8.1. The range of remedies available to a reviewing body, having found that the administrative conduct is not valid, must again be clearly set out, while retaining an overall flexibility for the reviewer to fashion a remedy that not only does justice between the parties but also attends to the need for efficiency in the public administration.

6.10. Codes and Guidelines

6.10.1. The statute should stipulate the necessity for pre-emptive action to improve administrative compliance with its constitutional obligations, such as providing for the drafting of codes of conduct to guide administrators

towards good governance standards, and setting standards for good subordinate rule-making. Some body within the responsible central government departments concerned with administrative justice must be mandated to pursue widespread training programmes for all those involved in the public administration about their authority and their duties.

16.11. Internal appeal and review

6.12.1. Provision should be made for internal appeal and review mechanisms, within the administrative entity whose conduct falls to be reviewed, thus improving access to administrative justice in a speedy and inexpensive manner: whether such internal avenues should have to be exhausted before others are resorted to is also a question which needs to be answered in advance.

6.12 Alternative Dispute Resolution

6.12.1 Similarly, the possible advantages of the various methods of alternative dispute resolution should be explored and, if found to have the potential both to improve standards of administration as well as access to administrative justice, such methods should be provided for.

6.13. Administrative Appeals Tribunals

6.13.1 In a further attempt to widen access to administrative justice and to improve administrative efficiency, some form of administrative appeals tribunal structure seems imperative, both to ensure greater levels of “fairness and reasonableness” and to relieve the burden currently placed almost solely on the High Court as the primary reviewing body. Again, there are choices to be made here, between a tribunal of general jurisdiction, or one with specialist divisions; between a single centrally located tribunal or one with a decentralized structure; between a tribunal presided over by non-

lawyers (such as experienced public administrators) and excluding lawyers from appearing or a tribunal which depends on lawyers for its functioning; and so on.

6.14. Residual review

6.14.1. What is imperative is that any such tribunal structure should itself be subject to review, probably to the High Court, although a specialist body which could sit on a part-time basis could be established to ensure greater flexibility and expedition of resolution.

6.15 Continuing Reform

6.16.1. The setting up of a very small unit (such as the Administrative Review Council in Australia and the Administrative Justice Tribunal Council in the UK) to monitor progress in compliance with administrative justice across all levels of government, to investigate persistent shortcomings, and to advise the Minister of Justice about possible improvements to the system, would be a desirable element of any such statute. It may well be appropriate that such a body also monitor the intensive process of training of public servants, and of those in elected office who authorise administrative action, which will be an indispensable counterpart to the introduction of such a new statute-based regime of administrative justice.

The drafting and adoption into law of such a statute and the establishment of such a system, and its nature and structure, are matters for urgent attention. A decision is necessary, in principle, at the level of the Law Reform and Development Commission, before any further planning and detailed recommendations can occur.

End.