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**The Applicability of the Promotion of Access to Information Act 2 of 2000 and
Promotion of Administrative Justice Act 3 of 2000 to the South African Legal
Practice Council**

by

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I hereby declare that I have read and understood the regulations governing the submission of the LLM dissertations, including those relating to length and plagiarism, as contained in the rules of the University, and that this dissertation conforms to those regulations.

Dated at East London on this 14th day of September 2019

Signed by candidate

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ABSTRACT

Section 33 of the Constitution guarantees to everyone the right to just administrative action that is lawful, reasonable and procedurally fair. The Promotion of Administrative Justice Act 3 of 2000 (“PAJA”) was promulgated to give effect to give effect to this fundamental right as envisaged in s 33(3) of the Constitution.

Section 32 of the Constitution also guarantees to everyone the right of access to information. The Promotion of Access to Information Act 2 of 2000 (“PAIA”) was promulgated to give effect to this fundamental right as contemplated in s 32(2) of the Constitution.

This thesis considers the extent to which the provisions of PAJA may be applicable to the actions of the South African Legal Practice Council (“the LPC”). It also considers the extent to which the provisions of PAIA may be applicable to the records of the LPC.

Some remedial legislative amendments to the provisions of both PAJA and PAIA are recommended with the view of addressing certain identified legal obstacles. The proposed legislative amendments will enhance the exercise, realisation, enforcement and protection of both the right to just administrative action and the right of access to information.

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CHAPTER I

INTRODUCTION

1. Introduction

South Africa is a democratic country with a Constitution¹ and a Bill of Rights² that confers numerous fundamental human rights. The right to just administrative action³ and the right of access to information⁴ are among these fundamental human rights. These two fundamental human rights, which have respectively been given effect to by the Promotion of Administrative Justice Act (“PAJA”)⁵ as envisaged in s 33(3) of the Constitution⁶, and Promotion of Access to Information Act 2 of 2000 (“PAIA”)⁷, as contemplated in s 32(2) of the Constitution⁸, are the focus of this dissertation, specifically their applicability to the South African Legal Practice Council (“the LPC”).⁹ Stated differently, this dissertation examines the applicability of the constitutional right of access to information, which has been given effect to by PAIA, to the records of the LPC. It also examines the applicability of the constitutional right to just administrative action, which has been given effect to by PAJA, to the decisions of the LPC.

1 The Constitution of the Republic of South Africa Act 108 of 1996 (“the Constitution”).

2 Chapter 2 of the Constitution.

3 Section 33 of the Constitution.

4 Section 32 of the Constitution.

5 Promotion of Administrative Justice Act 3 of 2000.

6 Section 33(3) of the Constitution requires national legislation to be enacted to give effect to the fundamental human right to just administrative action. It requires the legislation so enacted to –

- (a) Provide for the review of administrative action by a court or, where appropriate, and independent and impartial tribunal;
- (b) Impose a duty on the state to give effect to the rights in subsection (1) and (2). The rights mentioned in subsec (1) are the right to administrative action that is lawful, reasonable and procedurally fair. The right mentioned in subsec (2) is the right conferred to everyone whose rights have been negatively affected by administrative action to be given written reasons; and
- (c) Promote an efficient administration.

7 Promotion of Access to Information Act 2 of 2000.

8 Section 32(2) requires national legislation to be enacted to give effect to the fundamental human right of access to information. It requires the legislation so enacted to provide for reasonable measures to alleviate the administrative and financial burden on the state.

9 The LPC is a statutory body established in terms of s 4 of the Legal Practice Act 28 of 2014 (“the LPA”).

The LPC is the regulatory and controlling body of the legal profession in South Africa. It replaced the four Law Societies¹⁰ and has taken over the regulation and control of the attorneys' profession from the four Law Societies, as well as the control and regulation of the advocates' profession from the Bar Councils with effect from 1 November 2018.

The interdependence between the right of access to information and the right to just administrative action was eloquently explained in *Aquafund (Pty) Ltd v Premier of the Western Cape* where the court stated that "... a person must be entitled to such information as is reasonably required by him to determine whether his right to lawful administrative action has been infringed or not. If a person is not able to establish whether his rights have been infringed, he will clearly be prejudiced."¹¹ This is the main reason for the combination of these two rights in this dissertation.

A remedy of judicial review is available for the judicial enforcement and protection of the constitutional right to just administrative action¹² and the constitutional right of access to information.¹³ Thus these two constitutional rights are justiciable in the sense a person who feels that his or her rights have been violated, is entitled to approach a court or any other independent and impartial tribunal for appropriate relief.¹⁴ Appropriate relief may only be granted if a violation of any right is found to have occurred.

In examining the applicability of the constitutional right to just administrative action, the substantive requirements for the applicability of this right, including the availability of a remedy of judicial review for the judicial enforcement and protection of this right against the decisions of the LPC, will be explained. These substantive requirements are that (a) the organization must be subject to the

¹⁰ The four Law Societies established in terms of s 56 of the Attorneys Act, as amended by s 21 of the Attorneys Amendment Act 40 of 2014, were The Cape Law Society; The Law Society of the Free State; The Law Society of the Northern Provinces and The Kwa-Zulu Natal Law Society.

¹¹ *Acquafund (Pty) Ltd v Premier of the Western Cape* 1997 (7) BCLR 907 (C) at 916.

¹² In terms of s 6 of PAJA judicial review proceedings may be instituted by any person in a court or a tribunal for the judicial review of an administrative action.

¹³ The right to institute judicial review proceedings in a court of law for an appropriate relief in regard to the constitutional right of access to information is provided in s 78 of PAIA.

¹⁴ W Freedman *Understanding the Constitution of the Republic of South Africa* 1ed (2013) 22.

provisions of PAJA, and (b) the decision challenged must qualify as “administrative action” as defined in s 1 of PAJA.

The definition of what constitute “administrative action” in terms of s 1 of PAJA distinguishes between an organ of state when exercising a public power or performing a public function in terms of any legislation¹⁵, or a natural or juristic person, other than an organ of state, when exercising a public power or performing of performing a public function in terms of an empowering provision¹⁶, among the other elements stated in the definition.¹⁷ Therefore, the question examined in particular is whether the LPC is an organ of state which exercises a public power or performs a public function in terms of any legislation, or a natural or juristic person, other than an organ of state, which exercises a public power or performs a public function in terms of an empowering provision. The conclusion reached after analysing the relevant provisions of PAJA as well as the relevant case law on this specific issue is that the LPC qualifies as an organ of state as defined in s 239 of the Constitution at least when it exercises its disciplinary powers in terms of the LPA.

Furthermore, the actions of the LPC that could possibly qualify as administrative actions and therefore possibly susceptible to judicial review under the provisions of PAJA where it is alleged that the constitutional right to just administrative action in s 33 of the Constitution has been infringed are identified. These actions are (a) the failure of the LPC to take disciplinary steps or a decision in regard to a complaint lodged against a legal practitioner; (b) the failure or refusal of the LPC to issue a legal practitioner with a Fidelity Fund Certificate; or (c) any other adverse disciplinary finding against a legal practitioner other than sanctions that may only be imposed by a court of law, such as suspension, an interdict or striking off of the legal practitioner’s name from the Roll of Legal Practitioners.

¹⁵ Section 1(a)(ii) of PAJA.

¹⁶ Section 1(b) of PAJA.

¹⁷ The other elements of the definition are an organ of state, when exercising a power in terms of the Constitution or a provincial constitution, that the rights of any person should be adversely affected by the decision or failure to take a decision by any of the entities mentioned in the definition, and that the decision or failure to take a decision should have a direct, external legal effect. The LPC does not derive its powers from the Constitution or provincial constitution, hence this element is not the subject matter of this dissertation.

These actions, which the LPC is in terms of the LPA allowed to take, should at all times comply with the elements of the right to just administrative action, namely, lawfulness, reasonableness and procedural fairness.

As has been indicated above, this dissertation also examines the applicability of the constitutional right of access to information to the records of the LPC. The substantive requirements for the applicability of this right will be explained. These are that the organization must either be a public body or a private body as defined in s 1 of PAIA. This is necessary because PAIA distinguishes between the right of access to the records of a public body¹⁸ and the right of access to the records of a private body.¹⁹

PAIA defines what constitute a private body²⁰ and a public body²¹, respectively. The distinction between a private body and a public body is critical as their obligations in relation to the right of access to information are different. Peekhaus points out that the obligations of a public body are more stringent than those of a private body.²² Section 11 of PAIA obliges a public body to grant access to its records once there has been compliance with the prescribed requirements for accessing the required record unless the requested record can be refused in terms of one or more of the mandatory or discretionary grounds of refusal set out in Part 2 of Chapter 4 of PAIA.²³ Section 50 of PAIA, which

¹⁸ Section 11 of PAIA.

¹⁹ Section 50 of PAIA.

²⁰ Section 1 of PAIA defines a private body to mean –

- (a) a natural person who carries or has carried on any trade, business or profession, but only in such capacity;
- (b) a partnership which carries or has carried on any trade, business or profession; or
- (c) or any former or existing juristic person, but excludes a public body.

²¹ Section of PAIA defines a public body to include –

- (a) any department of state or administration in the national or provincial sphere of government or any municipality in the local sphere of government; or
- (b) any functionary or institution when –
 - (i) exercising a power or performing a duty in terms of the Constitution or a provincial constitution; or
 - (ii) exercising a public power or performing a public function in terms of any legislation.

²² W Peekhaus ‘South Africa’s *Promotion of Access to Information Act: An Analysis of Relevant Jurisprudence*’ (2014) 4 *Journal of Information Policy* 570 at 577, available at <http://www.jstor.org/stable/10.5325/jinfopoli.42014.0570>, accessed on 30 November 2018.

²³ Peekhaus op cit (n22) 578. See also *President of the Republic of South Africa v M & G Media Limited* 2012 (2) SA 50 (SCA) at para 59; *My Vote Counts NPC v Minister of Justice and Correctional Services and Another* 2018 (8) BCLR 893 (CC) at para 23.

regulates access to the records of a private body, requires, in addition to compliance with the prescribed procedural requirements, the requester must show that the requested record is “required for the exercise or protection of any rights”, failing which, the requested record may be refused on this ground, this in addition to any mandatory or discretionary ground of refusal among those set out in Part 3 of Chapter 4 of PAIA.²⁴

In the circumstances, the question that is examined in particular is whether the LPC is a public body, an entity duty bound to grant access to the requested record unless the request of access to a record can be defeated by one or more of the recognised mandatory or discretionary grounds of refusal in Part 2 of Chapter 4 of PAIA, or a private body, an entity with respect to which a person seeking access to a record will need to show that the information is required for the exercise or protection of rights. The conclusion reached after analysing relevant provisions of PAIA and case law is that if a record that is requested from the LPC in terms of the PAIA relates to the LPC’s exercise of its powers which are regarded as public in nature, then the LPC, whilst being a corporate body in terms of s 4 of the LPA, it will, however, be regarded as a public body. This will be the case in relation to a record relating to the LPC’s exercise of its disciplinary powers in terms of the LPA. This means that, the LPC, as a public body, would be duty bound to grant access to the requested record unless the request of access to a record can be defeated by one or more of the recognised mandatory or discretionary grounds of refusal in Part 2 of Chapter 4 of PAIA. The LPC would be regarded as a private body in relation to a request of access to record that does not involve the exercise of a power that is public in nature. This would mean that a person seeking access to a record to a record of the LPC as a private body would need to show that the record is required for the exercise or protection of rights. The meaning of this additional requirement “required for the exercise or protection of any rights”, which is applicable to a request of access to a record of a public body, will be explained with reference to case law.

²⁴ Ibid. See also *Unitas Hospital v Van Wyk* 2006 (4) SA 436 (SCA) at para 17.

The application of the mandatory and discretionary grounds set out in Part 2 and Part 3 in Chapter 4 of PAIA will also be explained with reference to case law.

The issue identified to be examined in this dissertation turn essentially on the interpretation of the relevant provisions of PAJA and PAIA. The Constitution encourages consideration of foreign law when any provision in the Bill of Rights is being interpreted.²⁵ The applicability of the Human Rights Act 1998 (“the HRA”) and the Freedom of Information Act 2000 (“FOIA”) specifically to the Law Society of England and Wales in the United Kingdom will be used as a basis of comparison because, as pointed out by Maripe, South Africa is one of the Commonwealth countries that apply English law.²⁶

The value of foreign jurisprudence was recognised by the Constitutional Court in *M & G Limited* where the court stated that foreign jurisprudence “is of value because it shows how courts in other jurisdictions have dealt with the issues” confronting South Africa.²⁷ Additionally, and as stated by Justice Aharon Barak, the two jurisdictions “share common fundamental values”, the institutions in these jurisdictions will often share “corresponding roles and similar legal problems”, thus using the United Kingdom as a basis of comparison will enrich “the options available” for addressing legal problems that are encountered and it will indicate “the successes and failures that may result from adopting a particular legal solution”.²⁸ Furthermore, Corder explains that the development of South African law was left behind because of the international isolation of South Africa before 1994.²⁹ Moreover, the court in the United Kingdom has considered the application of the HRA and FOIA, the two pieces of legislation equivalent to the South African PAJA and PAIA, to the Law Society of England

²⁵ Section 39(1)(c) of the Constitution.

²⁶B Maripe ‘Judicial Review and the Public/Private Body Dichotomy: An appraisal of Developing Trends’ (2006) *University of Botswana Law Journal* 23 at 26, available at <https://journals.co.za/docserver/fulltext/UBLJ/4/12/196.pdf>, accessed on 19 April 2016.

²⁷*President of Republic of South Africa v M & G* supra (n23) at para 16.

²⁸ Aharon Barak “Response to the Judges as Comparatist: Comparison in Public Law” (2005) *Faculty Scholarship Series* 196 available at https://digitalcommons.law.yale.edu/fss_papers/3694 accessed on 17 February 2019.

²⁹H Corder ‘Comparing Administrative Justice Across the Commonwealth’ (2007) 2.

and Wales, the equivalent body of the LPC in South Africa.³⁰ In the circumstances, the use of English law as a basis of comparison will help provide an understanding of the aspects of the South African law necessary to be reviewed in order to enhance the accountability and transparency of organs of state or public bodies and private bodies in South Africa in regard to the performance of their functions.

Lastly, legal obstacles that needs to be addressed for the enhancement of accountability and transparency of organs of state, public and private bodies, and also to facilitate the exercise, realization, enforcement and protection of the constitutional right to just administrative action in s 33 of the Constitution, as well as the constitutional right of access to information in s 32 of the Constitution by the ordinary people in South Africa, without legal representation which can at times be costly and unaffordable, will be identified. Recommendations for the necessary law reforms will be proposed in conclusion of the dissertation.

2. Background to the Study

South Africa is a constitutional democracy that is founded on the rule of law³¹, accountability and openness³², amongst others. These founding values of the Constitution influence interpretation and applicability of laws that have been passed by the Legislature to give effect to the right to just administrative action and the right of access to information. Section 39 of the Constitution requires that, when the Bill of Rights is interpreted, the founding values set out in the Constitution, which underlie an open and democratic society, must be promoted.

The objectives of PAJA, as stated in the preamble, are to “create a culture of accountability, openness and transparency in the public administration or in the exercise of public power or the performance of a public function, by giving effect to the right to just administrative action.” Also, in its preamble, PAIA states that

³⁰*Law Society v Secretary of the State for Justice* [2010] EWHC 352 (QB), 26 February 2010, available at <https://www.employmentcasesupdate.co.uk/>, accessed on 28 June 2016.

³¹ Section 1(c) of the Constitution.

³² Section 1(d) of the Constitution.

it is intended to “foster a culture of transparency and accountability in public and private bodies by giving effect to the right of access to information. Furthermore, the preamble of the LPA states as one of its objective as being to “ensure that the values underpinning the Constitution are embraced and that the rule of law is upheld” and “to ensure the accountability of the legal profession to the public”, amongst the others.

Despite the existence of legislation entrenching and giving effect to the values of transparency and accountability, the now defunct Law Societies had been criticised for lack of transparency and accountability particularly in regard to the exercise of their disciplinary powers against attorneys in terms of the Attorneys Act.³³ There had been calls for the controlling and regulatory bodies of the legal profession to be transparent and accountable for the exercise of their powers and performance of their functions.³⁴

It is important to acknowledge that the Constitution, which is founded on the values of accountability, responsiveness and openness, as well as the Bill of Rights, were not in place when the Attorneys Act, which created the Law Societies, came into effect. Hoexter states that, with the adoption of the Constitution and its recognition as the highest law, it became necessary for the legal profession as well as its regulation “to adapt to a new model of constitutional democracy.”³⁵ As stated above, the LPA, which has replaced the Attorneys Act its entirety, embraces the founding values of the Constitution, namely, accountability, responsiveness and openness.

³³ Attorneys Act 53 of 1959.

³⁴ See W Saunderson-Meyer “Just Trust me, I’m a lawyer ...”*Thought Leader*, 13 April 2013 <https://thoughtleader.co.za/williamsaundersonmeyer/2013/04/13/just-trust-me-im-a-lawyer/>, accessed on 08 December 2015. See also JH Jeffery, MP ‘Keynote Address at the Annual General Meeting of the Kwa-Zulu-Natal Law Society’, 18 October 2013, available at www.justice.gov.za/m_speeches/2013/20131018-dm-kzn-law-society.html, accessed on 08 December 2015.

³⁵ C Hoexter “Administrative Action in the Courts” 2006 *Acta Juridica*, 303.

3. Problem Statement

Legislation that has been passed to give effect to the founding values of the Constitution, specifically PAJA and PAIA, does not necessarily facilitate the realization of accountability, responsiveness and openness in practice. There are legal obstacles that need to be addressed to enhance accountability and openness of organs of state or public bodies and private bodies, and also to facilitate the exercise, realization and enforcement of the fundamental right of access to information in s 32 of the Constitution, as well as the right to just administrative action in s 33 of the Constitution, by ordinary people without legal representation, which can be costly and unaffordable for the majority of people in South Africa.

The major legal obstacle is the meaning of the term “public”. The term “public” is significant in the determination of the applicability of both PAJA and PAIA. It plays a significant role in the determination of organizations that may fall within the category of an “organ of state” as defined in s 239 of the Constitution and those that are not. It plays a crucial role in the determination of actions that fall within the definition of “administrative action” as defined in s 1 of PAJA.

The court in *Cape Metropolitan Council v Metro Inspection Services (Western Cape)* stated that s 33 of the Constitution is not concerned with every act of administration, but was designed to control the conduct of the public administration when it exercises a public power.³⁶ The aggrieved person who cannot show that a specific conduct qualifies as an administrative action as defined in s 1 of PAJA would not be able to exercise the constitutional right to just administrative action. Currie and Klaaren point out that the constitutional right to just administrative action is applicable to the exercise of public power, which means that this right does not apply to the exercise of private power.³⁷

³⁶ *Cape Metropolitan Council v Metro Inspection Services (Western Cape)* CC 2001 (3) SA 1013 (SCA) at para 16.

³⁷ I Currie and J Klaaren *The Promotion of Administrative Justice Act Benchbook* 1ed (2001) 26.

The term “public” is also central in the determination of a distinction between a public body and a private body as defined in s 1 of PAIA. Peekhaus points out that

“the pivotal query for determining whether an entity is a public or private body for purposes of the act would seem to turn on whether the body is exercising a public power or performing a public function in terms of any legislation. Being able to clearly differentiate between public and private bodies is more than just an exercise in accurate categorization.”³⁸

In terms of s 8 of PAIA, an organization may be regarded as either a public body or a private body depending on whether the record that is requested relates to the exercise of a public power or not. It is also significant in the determination of what constitute a “public authority” for the purposes of the HRA and FOIA in the United Kingdom.³⁹

The Constitution, PAJA, PAIA in South Africa, as well as the HRA and FOIA in the United Kingdom, all recognise that, at times, private bodies and public bodies can act in more than one capacity. In other words, the law in South Africa and in the United Kingdom recognises that, at times, a private body may exercise powers that are public in nature, and that public bodies may also at times exercise powers that are private in nature. This position was also recognised by the Supreme Court of Namibia in *Makando v Disciplinary Committee for Legal Practitioners* specifically in regard to the Commonwealth jurisdictions.⁴⁰ It is for this reason that Mwanza expresses the view that the distinction between an organ of state, a public body and a private body has become blurred as private institutions that exercise a public power or perform a public function are subject to the same standards of accountability and transparency in the same way as an organ of state or a public body.⁴¹ Thus the distinction between a private body,

³⁸ Peekhaus op cit (n22) 577.

³⁹ Section 6 of the HRA defines a “public authority” to include any person whose functions are functions of a public nature.

⁴⁰ *Makando v Disciplinary Committee for Legal Practitioners* (SA98/2011) [2011] NASC 26 (6 October 2016) at para 49 available at <https://namiblii.org/>, accessed on 05 December 2016. See also *AAA Investment (Proprietary) Limited v Micro Finance Regulatory Council* 2007 (1) SA 343 (CC) at para 119 where the Constitutional Court recognised that the “courts in South Africa and England have long recognised that nongovernmental agencies may be tasked with a regulatory function which is public in character”, hence “it is true that no bright line can be drawn between ‘public’ and private” functions.

⁴¹ M Mwanza ‘The Public/Private Divide: An Outdated Concept of Governance in English Law’ *Diffusion: the UCLan Journal of Undergraduate Research* 6(1), June 2014, 9, at p. 3, available at <http://bcu.org/journals/index.php/Diffusion/article/viewFile>, accessed on 20 April 2016.

public body or an organ of state is not always as clear cut, as a private body can become a public body or an organ of state, and a public body or an organ of state can also become a private body in certain circumstances. Peekhaus points out that this blurred distinction between a public body and a private body “has become the source of some confusion” for “the record holders and those seeking access to information under the Act”.⁴² It can also be the source of confusion to persons who want to exercise the right to just administrative action.

However, the term “public”, as important as it is for the exercise, enforcement and protection of the right of access to information as well as the right to just administrative action, its meaning has not been defined in the Constitution, PAJA and PAIA. It has also not been defined in the HRA.⁴³ The meaning of the terms has also not been defined in FOIA. The Constitutional Court in *Chirwa v Transnet Ltd* recognised that the determination of what is public or not is a difficult exercise.⁴⁴ This difficulty has also been recognised by Williams regarding the applicability of the HRA in the United Kingdom, pointing out that there is no universal test for determining a public power or a public function.⁴⁵

The meaning of the term “public”, which is not always clear cut, is a legal obstacle which does not facilitate, but restricts the realization of accountability and transparency required from organs of state, public bodies and private bodies. If the nature of the power exercised or the function performed has not been correctly determined, the required accountability, responsiveness and openness could potentially be undermined. The right to just administrative action and the right of access to information may remain unfulfilled promises despite their recognition in the Bill of Rights in Chapter 2 of the Constitution.

⁴² Peekhaus op cit (n22) 576. See also Kate Allan “Applying PAIA: Legal, Political and Contextual Issues” *Paper Wars*, page 148.

⁴³CD Campbell ‘The Nature of Power as Public in English Judicial Review’,(2009) 68(1) *Cambridge Law Journal* 90 at 100 – 102, available at <https://www.jstor.org/stable/40388773>, accessed on 11 June 2016.

⁴⁴*Chirwa v Transnet Limited* 2008 (4) SA 367 (CC) at para 186.

⁴⁵ A Williams ‘Public Authorities: What Constitutes a hybrid public authority under the HRA?’ 04 April 2013, available at <http://dro.dur.ac.uk/>, accessed on 19 April 2016.

As stated above, the courts, as guardians of the Constitution and its values, are required by s 39(1) of the Constitution to promote the values that underlie an open and democratic society when interpreting any legislation. It was stated in *Raduvha v Minister of Safety and Security* that this requires the courts to play a meaningful role in giving content to the fundamental rights enshrined in the Bill of Rights.⁴⁶ Indeed, and as required in terms of s 39(1) of the Constitution, the courts have interpreted and explained the applicability of the constitutional right of access to information and the right to just administrative action. However, the courts' interpretation and explanation of the applicability of these two constitutional rights have not been incorporated into the provisions of PAIA and PAJA. This does not make it easy for ordinary unsophisticated people on their own and without legal representation to exercise and enforce the right of access to information and the right to just administrative action.

It has already been stated above that the right of access to information and the right to just administrative action are justiciable in the sense that a person who feels that his or her rights have been violated by a decision denying or restricting the exercise and fulfilment of the rights, is entitled to approach a court or law or any other independent and impartial tribunal for appropriate relief. Despite the justiciability of these rights, many people who are living in poverty are less likely to have means and resources to approach the courts for the judicial enforcement and protection of these rights. The costs and complexity of court processes often make it difficult, if not impossible, for individuals without adequate financial resources, knowledge and understanding of the applicability of the law, to successfully exercise their constitutional right of access to information and their right to just administrative action, with the result that these rights will, as pointed out by Brems and Adekoya, “remain unfulfilled promises for” the majority of people “despite their recognition in” the Constitution.⁴⁷ Hoexter points out that not everyone has the financial resources required to litigate and that many potential applicants for judicial review are not challenging decisions in a court

⁴⁶ *Raduvha v Minister of Safety and Security* 2016 (10) BCLR 1326 (CC) at para 54.

⁴⁷ E Brems and CO Adekoya ‘Human Rights Enforcement by People Living in Poverty: Access to Justice in Nigeria’ (2010) 54. 2 *Journal of African Law* 258

of law, hence only a small proportion of decisions are challenged in the courts.⁴⁸

4. Scope and Objective of the Study

The dissertation does not deal with all the provisions of PAJA and PAIA. It specifically does not deal with all the recognised grounds of judicial review under the provisions of PAJA.⁴⁹ It also does not deal specifically with the recognised grounds on which a request for access to information may be refused⁵⁰. It also does not deal with the procedural requirements, but only with the substantive requirements for the application of the constitutional right of access to information and constitutional right to just administrative justice.

The dissertation examines the applicability of the constitutional right to just administrative action and the availability of a remedy of judicial review through PAJA to the LPC. It also examines the applicability of the constitutional right of access to information through PAIA to the LPC. It only interprets, with reference to case law, the relevant statutory provisions of PAJA, PAIA and LPA in order to establish whether the LPC is an organ of state which exercises a public power or performs a public function in terms of any legislation, or a natural or juristic person, other than an organ of state, which exercising a public power or performs a public function in terms of an empowering provision. The LPC's exercise of its powers in terms of the LPA which may be regarded as administrative action and therefore susceptible to judicial review under the provisions of PAJA are identified.

The study also seeks to establish whether the LPC is a public body, an entity duty bound to grant access to the requested record unless the request of access to a record can be defeated by one or more of the recognised mandatory or discretionary grounds of refusal in Part 2 of Chapter 4 of PAIA, or a private

⁴⁸ C Hoexter *Administrative Law in South Africa* 2ed (2012) 169.

⁴⁹ The grounds of review are set out in s 6(2) of PAJA.

⁵⁰ Part 2 of Chapter 4 of PAIA sets out grounds of refusal in relation to a record required from a public body. The grounds of refusal in relation to a record held by a private body are set out in Part 3 of Chapter 4 of PAIA.

body, an entity with respect to which a person seeking access to a record will need to show that the information is required for the exercise or protection of rights.

The study will hopefully be useful for people wishing to exercise and enforce the right of access to information and the right to just administrative action against the LPC. It is of paramount importance that people have a clear understanding of when the provisions of PAJA may become applicable to the conduct of the LPC. Similarly, it is important to also have a clear understanding of which provisions of PAIA may be applicable to the records of the LPC.

5. Methodology of Research

The study relies on the relevant applicable legislative provisions of the Constitution, LPA, the HRA, FOIA, case law, textbooks and journal articles pertaining to the issues set out above as the main objectives of this dissertation.

6. Description of Chapters

The study comprises of four chapters.

Chapter 1 introduces the issues that are being examined by the study; explains the importance of the subject matter of the study, sets out the background to the study, the statement of the problem, scope and objectives of the study and the methodology of research used and relied upon to address the issues identified for examination in this dissertation.

Chapter 2 examines the applicability of the constitutional right to just administrative action and the availability of judicial review in terms of PAJA to the powers and functions of the LPC. The ultimate objective is to establish whether the LPC is organ of state which exercises a public power or performs a public function in terms of any legislation, or a natural or juristic person, other than an organ of state, which exercising a public power or performs a public function in terms of an empowering provision. The LPC's powers that may be

regarded as administrative action and therefore susceptible to judicial review under the provisions of PAJA are identified.

Chapter 3 examines the applicability of the constitutional right of access to information as provided in terms of PAIA to the LPC. The ultimate objective is to establish whether the LPC is a public body, an entity duty bound to grant access to the requested record unless the request of access to a record can be defeated by one or more of the recognised mandatory or discretionary grounds of refusal in Part 2 of Chapter 4 of PAIA, or a private body, an entity with respect to which a person seeking access to a record will need to show that the information is required for the exercise or protection of rights.

Chapter 4 concludes the study and some legislative amendments to the provisions of both PAJA and PAIA are proposed with the view of addressing the identified legal obstacles. The proposed legislative amendments will enhance the exercise, realisation, enforcement and protection of both the right to just administrative action and the right of access to information. Once effected, there will certainly be a culture of openness, responsiveness and accountability among organs of state or public bodies and private bodies.

CHAPTER 2

APPLICABILITY OF PAJA TO THE SOUTH AFRICAN LEGAL PRACTICE COUNCIL

1. Introduction

This Chapter examines the applicability of the constitutional right to just administrative action and the availability of a remedy of judicial review in terms of PAJA against decisions of the LPC. The substantive requirements for the applicability of PAJA are discussed. The decisions of the LPC that may be susceptible to judicial review under the provisions of PAJA are identified. The applicability of PAJA to the LPC in South Africa is compared to the applicability of the HRA to the Law Society of England and Wales in the United Kingdom.

2. Substantive Requirements for the Applicability of PAJA

The court in *Pennington v Friedgood* stated that administrative action is the required jurisdictional fact for the application of the constitutional right to just administrative action and availability of judicial review under the provisions of PAJA which gives effect to this constitutional right.⁵¹ As pointed out by Currie and Klaaren, PAJA is not applicable to any action or conduct that is not administrative action as defined in s 1 of PAJA.⁵² In other words, the conduct complained of must constitute administrative action.

The aggrieved person who cannot show that the action or conduct qualifies as an administrative action as defined in s 1 of PAJA is not able to exercise the constitutional right to just administrative action in s 33 of the Constitution as well as the right of access to justice which is guaranteed in s 34 of the Constitution. Stated differently, this jurisdictional requirement may preclude access to courts as an aggrieved person may not be heard in a court of law or

⁵¹ *Pennington v Friedgood* (2002 (2) SA 251 (C) at 263B-D. See also I Currie *The Promotion of Administrative Justice Act: A Commentary* 2ed (2007) 49.

⁵² I Currie and J Klaaren op cit (n37) 35.

tribunal if the conduct that complained of does not qualify as administrative action.

The HRA, which regulates judicial review in the United Kingdom, is applicable to a “public authority” which has been defined in s 6(3)(b) of the HRA to include “any person certain of whose functions are functions of public nature”.

Whilst s 33 of the Constitution does not define what is meant by “administrative action”, this concept is defined in s 1 of PAJA. According to Hoexter, the definition of administrative action in s 1 of PAJA sets out certain substantive requirements that must exist for the constitutional right to just administrative action and the remedy of judicial review to be applicable and these are, namely, (a) the organization must be subject to the provisions of PAJA; (b) the administrative action must materially and adversely affect rights and (c) the administrative action must have a direct, external legal effect.⁵³

Furthermore, s 33(1) of the Constitution identifies the aspects of the right to just administrative action and these are lawfulness, procedural fairness and reasonableness. These three elements of the right to just administrative action are also some of the grounds of review in terms of s 6 of PAJA.

In *Chirwa* the court stated that the onus to establish compliance with these substantive requirements in an application for judicial review in terms of PAJA is on the applicant. This requires the applicant in judicial review proceedings that are brought in terms of PAJA to provide evidence that the body that took the decision sought to be reviewed is either an organ of state which has exercised a power in terms of the Constitution or a provincial constitution; or exercised a public power or performing a public function in terms of any legislation; or a natural person or juristic person, other than an organ of state, which has exercised a public power or performed a public function in terms of an empowering provision. The court stated further that it is incumbent on the applicant in judicial review proceedings to identify specifically the right or rights that have been

⁵³ Hoexter op cit (n48) 197.

adversely affected by the decision as well as the external, direct legal effect of the decision.⁵⁴

3. Is the LPC subject to PAJA?

One of the substantive requirements for the applicability of the constitutional right to just administrative action and the availability of a remedy of judicial review through PAJA is that an administrative action must be taken by an organ of state which exercises a power in terms of the Constitution or a provincial constitution; or exercises a public power or performs a public function in terms of any legislation; or a natural person or juristic person, other than an organ of state, which exercises a public power or performs a public function in terms of an empowering provision. Therefore, both organs of state and private entities can take an administrative action. Thus, PAJA is applicable to the actions of both private bodies and organs of state which are administrative in nature.

Accordingly, this section will examine whether the LPC is an entity that can take an administrative action. In other words, it will be established whether or not the LPC is an organ of state which exercises a power in terms of the Constitution or a provincial constitution; or exercises a public power or performs a public function in terms of any legislation; or a natural person or juristic person, other than an organ of state, which exercises a public power or performs a public function in terms of an empowering provision. According to Currie and Klaaren, this element of the definition looks at the person taking the decision as opposed to the subject matter of the decision.⁵⁵

The examination of this question will also entail the determination of what is meant by an “organ of state” and the term “public” which is significant in the determination of the applicability of PAJA and the availability of the remedy of judicial review. The term “public” also plays a significant role in the

⁵⁴*Chirwa v Transnet Limited* supra (n44) at para 13.

⁵⁵Currie and Klaaren op cit (n37) 69.

determination of the applicability of the HRA and the availability of the remedy of judicial review in the United Kingdom.

The LPC is not a natural person, but a body corporate in terms of s 4 of the LPA. It was explained by the Constitutional Court in *My Vote Counts NPC v Minister of Justice and Correctional Services* that the attributes of a juristic person include the legal capacity of an organization to sue and to be sued in its own name and that such legal personality status is conferrable either by legislation or the common law.⁵⁶ In terms of s 6(1)(a)(v) of the LPA, the LPC has the legal capacity to sue and to be sued in its own name.

Section 1 of PAJA defines an “organ of state” with reference to s 239 of the Constitution.⁵⁷ An “organ of state” is defined in s 239 of the Constitution to mean any department of state or administration in the national, provincial or local sphere of government;⁵⁸ or any other functionary or institution exercising a power or performing a function in terms of the Constitution or a provincial Constitution,⁵⁹ or exercising a public power or performing a public function in terms of any legislation.⁶⁰

It is important to note that the definition of an “organ of state” in terms of s 239 of the Constitution does not only mean government departments but it also includes other institutions exercising a public power or performing a public function in terms of the Constitution, a provincial constitution or in terms of any legislation. Also, in the United Kingdom, private bodies that are performing public functions are treated as public authorities for the purposes of judicial review in terms of the HRA.⁶¹

The LPC is not a department of state or administration in the national, provincial or local sphere of government. It neither exercises power nor performs

⁵⁶ *My Vote Counts NPC v Minister of Justice and Correctional Services* supra (n23) at para 64.

⁵⁷ See section 1(ix) of PAJA.

⁵⁸ Section 239(a) of the Constitution.

⁵⁹ Section 239(b)(i) of the Constitution.

⁶⁰ Section 239(b)(ii) of the Constitution.

⁶¹ A Williams ‘Public Authorities: What Constitutes a hybrid public authority under the HRA?’ 2, 10, 04 April 2013, available at <http://dro.dur.ac.uk/>, accessed on 19 April 2016.

functions in terms of the Constitution of a provincial Constitution. It is a creature of statute established in terms of s 4 of the LPA. It derives its powers and functions from the LPA. An institution qualifies as an ‘organ of state’ in terms of s 239 if it exercises a public power or performs a public function in terms of legislation. As stated by Currie and Klaaren, the focus is on the public nature or not of the function or power.⁶² According to Currie and De Waal, this provision requires an institution to derive powers from a statute or perform a function in terms of a statute. It also requires that the nature of the power or function (and not the nature of the functionary or institution) must be public.⁶³ Hoexter points out that “the ‘public’ or ‘private’ nature of the entity is by no means decisive and the focus thus falls mainly on nature of the power being exercised or the function being performed” and this is the position applicable in English Law as well.⁶⁴

In the circumstances, the question that requires examination is whether the powers or functions of the LPC as derived from the LPA are public in nature.

The term “public” is significant in the determination of the question whether the LPC falls within the definition of an “organ of state” in s 239 of the Constitution. It is also central in the determination of the question whether the Law Society of England and Wales is a public authority as defined in s 6 of the HRA. Currie and De Waal point out that the term “public”, as important as it is, has not been defined in the Constitution⁶⁵ and PAJA. It has also not been defined in the HRA. Campbell points out that the law provides no means of determining when the function is public for the purposes of subjecting an institution to judicial review under the provisions of the HRA in the United Kingdom.⁶⁶ The Constitutional Court in *Chirwa* recognised that the determination of what is public or not is a difficult exercise.⁶⁷

⁶² Currie and Klaaren op cit (n37) 70.

⁶³ I Currie and J De Waal *The Bill of Rights Handbook*, 6ed (2013) 43-44.

⁶⁴ Hoexter op cit (n49) 3.

⁶⁵ Currie and De Waal op cit (n63) 44.

⁶⁶ CD Campbell ‘The Nature of Power as Public in English Judicial Review’, *Cambridge Law Journal* 68(1), March 2009, 90 at 100 – 102, available at <https://www.jstor.org/stable/40388773>, accessed on 11 June 2016.

⁶⁷ *Chirwa v Transnet Limited* supra (44) at para 186.

The courts, as guardians of the Constitution and the values it espouses, have, as required in terms of s 39(1) of the Constitution, interpreted and explained the applicability of the constitutional right to just administrative action through PAJA. The Constitutional Court in *President of the Republic of South Africa v South African Rugby Football Union* explained that the applicability of the constitutional right to just administrative action and the availability of judicial review through PAJA is not determined so much by the nature of the institution but by the nature of the power exercised or the function performed, which must be administrative in character. Therefore, the right question to be asked is whether the power exercised, or the function performed is administrative or not. The considerations in that regard include the source of the power exercised or the function performed; the subject matter of the power exercised or the function performed, whether it involves the exercise of a public duty, and how closely it is related on the one hand to policy matters which are not administrative, and on the other hand to the implementation of legislation, which is.⁶⁸

It was further explained in *Makando* that

“the source of the power to perform the task will be an important pointer. An administration is primarily concerned with the implementation of legislation, and the tasks and functions of administrative bodies are in most cases provided in the statutes. Accordingly, where the source of a task is statutory, it is more likely that the task will be administrative in nature. If the task is one performed in the interest of the public or a section of the public, as opposed to a private interest, it again is more likely that the task will be administrative in character”.⁶⁹

Hoexter states that some of the factors which have found acceptance by the courts include the extent of state involvement and control over the power or function, that public funding could provide a significant clue in this regard as well and has also featured as a factor in several cases. She states that public power has rightly been associated with a duty to act in the public interest or in pursuance of a public duty rather than for private purposes.⁷⁰ Currie and Klaaren point out that it is the public character of a decision that is determinative and that

⁶⁸*President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA (CC) at paras 141-143.

⁶⁹*Makando v Disciplinary Committee for Legal Practitioners* supra (n40) at para 52.

⁷⁰Hoexter op cit (n48) p.4.

“decisions of a private nature that do not entail the exercise of public power are not subject to the constitutional administrative right or to PAJA”.⁷¹

The courts in the United Kingdom have also played a significant role by providing guidance to assist in the identification of functions that are public in nature. The factors as developed by the courts in United Kingdom, which are to be taken into consideration in the determination of the functions that are public include the duty of a body to act in the public interest, the provision of public funding to the body and possession by the body concerned of statutory powers.⁷² According to Campbell, a public authority may either be an authority that is in itself governmental or an authority which, while non-governmental, nonetheless exercises government function along with its non-governmental functions. A body which performs only public functions is referred to as a core public authority, and the one which performs both governmental and non-governmental function is referred to as a hybrid public authority.⁷³ Kilroy and Chambers also point out that the courts have indicated that a statutory authority for the performance of functions as well as the extent of control by a public authority over a particular body are additional considerations when determining whether the function performed is public or not. They also mention that the courts have recognised that there is no single test of universal application given the diverse nature of governmental function and the variety of means by which these functions are discharged. They describe the test that looks at the nature of the function that is performed as opposed to the nature of the institution that performs a function as a “functional test”.⁷⁴

Therefore, whether the LPC is an organ of state or a juristic person other than an organ of state or a body corporate, is not an overriding consideration for the application of the constitutional right to just administrative action and the availability of the remedy of judicial review. It is important that the task is

⁷¹ Currie and Klaaren op cit (n37) 47-48.

⁷²CD Campbell ‘The Nature of Power as Public in English Judicial Review’, *Cambridge Law Journal* 68(1), March 2009,90 at 100 – 102, available at <https://www.jstor.org/stable/40388773>, accessed on 11 June 2016.

⁷³ Ibid.

⁷⁴C Kilroy and M Chambers ‘Local authorities and the Human Rights Act 1998’, 1, available at https://www.ihrec.ie/download/doc/paper20041016_echr_kilroy.doc, accessed on 05 December 2016.

administrative in nature. Quinot and Maree point out that the focus of administrative law takes a functional approach as opposed to an institutional approach, where it is the function of a public administration rather than the nature of the institution that is determinative of the applicability of the constitutional right to just administrative action and the availability of a remedy of judicial review.⁷⁵ As indicated above, this is also the approach followed in the United Kingdom.

According to Hoexter, the implementation of legislation is an administrative act.⁷⁶ Currie and Klaaren states that, in order for a decision to qualify as administrative action it must be made under an empowering provision. The LPC is a creature of statute and as such it derives its powers and functions from the LPA which is the governing statute. The LPA's preamble states that it had been passed to regulate the legal profession in the public interest and not in the interest of legal practitioners. It is therefore different from a voluntary legal association which is created by lawyers to advocate the interest of its members.

The LPC is in terms of the LPA empowered to investigate complaints of misconduct against legal practitioners and to take necessary disciplinary action.⁷⁷ The applicability of the constitutional right to just administrative action to the Law Society's exercise of its disciplinary powers in terms of the Attorneys Act was considered by the court in *Graham v Law Society of the Northern Provinces* where the court concluded that

“where the Law Society takes disciplinary steps against a legal practitioner, it does so as an organ of state in the exercise of a public power and in the performance of a public function in terms of the Act. The decision to institute a disciplinary enquiry on a practitioner constitutes an administrative action as defined in section 1 of PAJA”.⁷⁸

Thus, when the LPC exercises its disciplinary powers or performs its disciplinary functions in terms of the LPA, it will be subject to the provisions of PAJA as an

⁷⁵ G Quinot & P Maree “Administrative Action” in G Quinot (ed) *Administrative Justice in South Africa* (2015) 66-694. See also *Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works* 2005 (6) SA 313 (SCA) at para 24; *Chirwa v Transnet Limited* supra (n44) at para 15.

⁷⁶ Hoexter op cit (n49) 54. See also *President of the Republic of South Africa v South African Rugby Football Union* supra (n68) at 142.

⁷⁷ Section 40 of the LPA.

⁷⁸ *Graham v Law Society of the Northern Provinces*. 2014 (4) SA 229 (GP) at para 80.

organ of state. The exercise of the disciplinary powers or the performance of the disciplinary functions by the LPC would be properly characterised as administrative in nature as the main objective of the LPC's power of discipline against legal practitioners is to protect the interest of the public, hence the disciplinary function of the LPC is likely to attract judicial review in terms of PAJA where it is alleged that the constitutional right to just administrative action has been infringed. In other words, the LPC, when it exercises its disciplinary powers, it would be subject to the provisions of PAJA. Judicial review proceedings would be available to challenge a disciplinary decision of the LPC where it is claimed that the LPC acted unfairly in the exercise of its disciplinary powers or the performance of its disciplinary functions in terms of the LPA. The implication of the finding that the LPC is an organ of state when it exercises its disciplinary powers in terms of the LPA is that the Bill of Rights not only binds the state and all its organs, but also places a positive obligation or duty on the state to "respect, protect, promote, and fulfil the Rights in the Bill of Rights".⁷⁹

The question whether the Law Society of England and Wales is a public authority when it performs its disciplinary functions against solicitors was considered in the matter between *Law Society v Secretary for Justice*. The court held that, whilst the Law Society of England and Wales is institutionally not a public authority,⁸⁰ the performance of regulatory functions that are intended "to protect the public by bringing to account practitioners whose services fall below acceptable standard can be said to be administrative rather than anything else", hence the Legal Complaints Service of the Law Society of England and Wales would be properly characterised as a public administrative authority whose decision was susceptible to judicial review under the provisions of the HRA.⁸¹

4. Decision Adversely Affecting Rights

The other substantive requirement for the applicability of the constitutional right to just administrative action and the availability of a remedy of judicial review through PAJA is that the decision must adversely affect someone's rights.

⁷⁹ Section 7(1) of the Constitution.

⁸⁰*Law Society v Secretary of the State for Justice* supra (n30) at para 83.

⁸¹*Law Society v Secretary of the State for Justice* supra (n30) at paras 66, 69 and 79.

According to Currie and Klaaren, this requirement focuses on the consequence or effect of a decision.⁸² They state that this would include a decision removing someone's rights or making an adverse determination of rights.⁸³ They point out further that the decision must have an adverse impact on the rights to qualify as administrative action.⁸⁴

The Namibian Supreme Court in *Makando* recognised that the exercise of disciplinary powers or the performance of disciplinary functions affects the rights and interests of the members of the public.⁸⁵ It was recognised in *Graham* that a disciplinary finding against the complainant in favour of a legal practitioner could adversely affect the complainant's rights, hence such a decision could, at the instance of the aggrieved complainant, give rise to a review by the court of its decision. The court also recognised that the failure to take disciplinary steps or a decision regarding a complaint against a legal practitioner could also adversely affect the complainant's rights, hence the failure to take disciplinary steps or a decision regarding complaints against legal practitioners could be amenable to judicial review under the provisions of PAJA.⁸⁶ Also, an adverse disciplinary finding against a legal practitioner and frivolous or fabricated complaints against legal practitioners could damage professional reputations or careers of legal practitioners, thus adversely affecting the rights of the legal practitioners to practice their chosen trade, occupation and profession.⁸⁷ An adverse disciplinary finding against a legal practitioner could also be amenable to judicial review under the provisions of PAJA.

In terms of s 84, read with s 85 of the LPA, the LPC is empowered to issue legal practitioners who practise for their own account, in partnership or as directors of a legal practice which is a juristic legal entity, with the prescribed requirements a Fidelity Fund Certificate on compliance with the prescribed requirements. In terms of s 93(8) of the LPA, a legal practitioner who practises without a Fidelity Fund Certificate commits an offence making him or her "liable on conviction to

⁸² Currie and Klaaren op cit (n37) 75.

⁸³ Ibid.

⁸⁴ Currie and Klaaren op cit (n37) 79.

⁸⁵ *Makando v Disciplinary Committee for Legal Practitioners* supra (n40) at para 49.

⁸⁶ *Graham v Law Society of the Northern Provinces* supra (n78) at para 80.

⁸⁷ Section 22 of the Constitution.

a fine or imprisonment for a period not exceeding two years or to both such fine and imprisonment”.⁸⁸ A legal practitioner is also “liable to be struck off the Roll”.⁸⁹ Additionally, the legal practitioner “is not entitled to any fee, reward, or reimbursement in respect of the legal services rendered”.⁹⁰ It was held in *Law Society of the Northern Provinces v Le Roux* that the refusal to issue a legal practitioner with a Fidelity Fund Certificate would adversely affect the rights of the legal practitioners as they would not be able to practise their chosen trade, occupation and profession without it. The court also held that such a decision qualified as an administrative action made by an organ of state or juristic person exercising a public power and performing a public function in terms of an empowering provision, hence it would be susceptible to judicial review under the provisions of PAJA.⁹¹

The LPC is empowered in terms of s 87(2)(a) of the LPA to “inspect the accounting records of any trust account practice”. In *Law Society of the Northern Provinces v Maseka* the court held that an inspection of the legal practitioner’s books does not adversely affects the rights, hence the constitutional right to just administrative action and the remedy of judicial review through PAJA are not applicable in such instances.⁹²

5. Direct, External Legal Effect Decision

The other requirement for the applicability of the constitutional right to just administrative action and the availability of a remedy of judicial review is that the decision must have a direct, external legal effect. The meaning of this requirement has been explained by the court in *Van Zyl v New National Party* where it was held that it required a decision by an administrative body to be final.⁹³ Currie points out that the definition of an administrative action in terms of PAJA for the applicability of the constitutional right to just administrative

⁸⁸ Section 93(8)(a) of the LPA.

⁸⁹ Section 93(8)(b) of the LPA.

⁹⁰ Section 93(8)(c) of the LPA.

⁹¹ *Law Society of the Northern Provinces v Le Roux* (185/2015) [2015] ZASCA 168 (26 November 2015) at para 17.

⁹² *Law Society of the Northern Provinces v Maseka* 2005 (6) SA 372 (BH) at 25.

⁹³ *Van Zyl v New National Party* 2003 (10) BCLR 1167 (C) at para 85. See also Currie op cit (n52) 2.

action and the availability of a remedy of judicial review under the provisions of PAJA excludes “preliminary determinations taken prior to the final decision being made.”⁹⁴ It is therefore clear that the constitutional right to just administrative action and the remedy of judicial review under the provisions of PAJA is not applicable to every conduct of the administration.⁹⁵

Chapter 3 of the LPA provides for the admission and enrolment of legal practitioners. Section 24(2) of the LPA confers the right to admit and to authorise the enrolment of legal practitioners on the High Court.⁹⁶ Furthermore, in terms of s 40(3) of the LPA, a disciplinary committee of the LPC is empowered to impose various penalties upon a legal practitioner found guilty of misconduct. The penalties include temporary suspension of a legal practitioner “from practising or from engaging in any particular aspect of the practice of law” pending the finalisation of a court application⁹⁷, and making an application to the High Court for the name of the practitioner to be struck off the Roll.⁹⁸ In terms of s 40(8) of the LPA the LPC is required to “give effect to the advice and decision of a disciplinary committee”.

The provisions of s 40 of the LPA also confer the right to suspend and to strike off from the Roll of legal practitioners on the court. It has been explained in *Bothma v Law Society of the Northern Province* that where the right for admission and removal of legal practitioners has been conferred on a court, the controlling and regulatory body of the legal profession may oppose an application for the admission of a legal practitioner or for the removal of a legal practitioner from the Roll of legal practitioners and in so doing, it may bring certain facts to the attention of the court, but it does not have the authority to

⁹⁴ Currie op cit (n52) 51-54.

⁹⁵ *Cape Metropolitan Council v Metro Inspection Services (Western Cape)* supra (n36) at para 16.

⁹⁶ Section 24(2) of the LPA reads: “The High must admit to practise and authorise to be enrolled as a legal practitioner, ... any person who, upon application, satisfies the court that he or she –

(a) is duly qualified as set out in section 26;

(b) is a -

(i) South African citizen;

(ii) permanent resident in the Republic;

(c) is a fit and proper and proper person to be admitted; and

(d) has served a copy of the application on the Council, containing the information as determined in the rules within the time period determine in the rules.”

⁹⁷ Section 40(3)(a)(iii) of the LPA.

⁹⁸ Section 40(3)(a)(iv)(aa) of the LPA.

admit, suspend or to strike off from the Roll the name of a legal practitioner.⁹⁹ Thus the decision of the LPC against the admission and enrolment of a legal practitioner is not final, hence the right to just administrative action and the remedy of judicial review through PAJA will not be available to a practitioner who has been aggrieved by the LPC's decision in that regard. It is not the LPC that must make a final decision on the matter. The ultimate decision is that of the court. The LPC's decision to bring a court application does not affect the rights of a legal practitioner as in so doing the LPC is not making any finding by bringing an application to court for the striking of the legal practitioner's name from the Roll of legal practitioners. This also applies in respect of a court application for the suspension of a legal practitioner.

In terms of s 37 of the LPA, the LPC is empowered to "establish investigating committees, consisting of a person or persons appointed by the Council to conduct investigations of all complaints of misconduct against legal practitioners". It was held in *Viking Pony Afrika Pumps v Hydro-tech systems* that a decision to investigate and a process of investigation do not amount to an administrative action. It is only when a decision is taken following the investigation the action could have an adverse effect on the rights of any person.¹⁰⁰ Thus, the decision to investigate and a process of investigation is excluded from the definition of an administrative action as such actions are not final and as such they cannot adversely affect the rights of any legal practitioner being investigated. It was also held in *Graham* that a court would not ordinarily interfere with the disciplinary process until after it has been finalised.¹⁰¹

It was held in *Le Roux* that a decision against issuing a legal practitioner with a Fidelity Fund Certificate which, as already stated above, would adversely affect the practitioner's rights to practice his or her chosen trade, occupation or profession, complies with the requirement for a decision to have a direct external legal effect in order for the right to just administrative justice and the remedy of

⁹⁹*Bothma v Law Society of the Northern Provinces: In re Law Society of the Northern Provinces* (33739/2016) [2017] ZAGPHC 208 (25 May 2017) at para 9.

¹⁰⁰*Viking Pony Afrika Pumps v Hydro-tech Systems* 2011 (1) SA 327 (CC) at para 38. See also *Omar v Law Society of the Northern Provinces* (42471/2013) [2014] ZAGPPHC 179 (9 April 2014) at paras 22-23.

¹⁰¹*Graham v Law Society of the Northern Provinces*. supra (n78) at paras 78-80.

judicial review through PAJA may be applicable. This is so because the decision, said the court, remains binding until such time that it is set aside on review by a court.¹⁰²

6. Lawful, Reasonable and Procedurally Fair Decision

Section 33(1) of the Constitution confers on everyone the right to just administrative action that is lawful, reasonable and procedurally fair. Section 2 of the Constitution states that the “Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.” As such, all the conduct of the LPC which qualifies as administrative action as defined in s 1 of PAJA must comply with the provisions of the Constitution, specifically the requirements set out in s 33(1) of the Constitution. In other words, the administrative action of the LPC must be lawful, reasonable and procedurally fair. Any administrative action which is unlawful, unreasonable and procedurally unfair will be inconsistent with the Constitution and, therefore, it will be invalid.

Kotzé states that s 33(1) of the Constitution is intended to (a) eliminate possible abuse of power, (b) ensure that voices of individuals affected by the decision are heard and taken into consideration when a decision is made, and (c) ensure that reasons are given in order to justify any decision taken, which ensures that there is accountability to those who may be interested and/or affected by the decision.¹⁰³

As it has been stated above, the LPC’s exercise of its disciplinary powers or performance of its disciplinary function in terms of the LPA amounts to an administrative action as defined in s 1 of PAJA.¹⁰⁴ The identified actions of the LPC that are properly characterised as administrative actions in that regard include the failure to take disciplinary steps or a decision regarding complaints

¹⁰² *Law Society of the Northern Provinces v Le Roux* supra (n91) at para 17.

¹⁰³ LJ Kotzé ‘The Application of Just Administrative Action in the South African Environmental Governance Sphere: An Analysis of some Contemporary Thoughts and Recent Jurisprudence’ (2004) 7 *PER/PELJ* 58 at 67.

¹⁰⁴ See *Graham v Law Society of the Northern Provinces* supra (n78) at para 80.

against legal practitioners; an adverse disciplinary finding against a legal practitioner other than a court-imposed sanction such as suspension, interdict and removal of the legal practitioner's name from the Roll of legal practitioners and the LPC's refusal to issue a legal practitioner with the Fidelity Fund Certificate. These actions, which constitute administrative action as defined in s 1 of PAJA, must be lawful, reasonable and procedurally fair as required in terms of s 33(1) of the Constitution. A decision which fails to meet the requirements of lawfulness, reasonableness and procedural fairness will be susceptible to judicial review on any of the grounds listed in s 6(2) of the PAJA.¹⁰⁵

The subsequent paragraphs explain the content and meaning of the constitutional requirements of lawfulness, reasonableness and procedural fairness of an administrative action.

6.1 Lawful Administrative Action

The requirement of lawfulness in s 33(1) of the Constitution encourages compliance with the principle of the rule of law. The rule of law is one of the founding values of the Constitution.¹⁰⁶ According to Hoexter, lawfulness requires the exercise of power or the performance of a function that constitute administrative action as defined in s 1 of PAJA to be authorised by law.¹⁰⁷ In other words, institutions should be authorised by law to make an administrative action.¹⁰⁸ This means that, in order for a court of law or tribunal to intervene and exercise its power of review, the decision challenged must have been taken in terms of an "empowering provision" which is defined in s 1 of PAJA as "a law, a rule of common law, customary law, or an agreement, instrument or other document in terms of which an administrative action was purportedly taken."

Therefore, it follows that, the LPC, as the creature of statute, does not have inherent powers and functions. Its powers and functions are derived from the

¹⁰⁵ The grounds of review of an administrative action as listed in s 6(2) of PAJA include unlawfulness, irrationality, unreasonableness and procedural unfairness, amongst the others.

¹⁰⁶ Section 1(c) of the Constitution.

¹⁰⁷ Hoexter *supra* (n48) 253.

¹⁰⁸ Hoexter, *supra* (n48) 224

LPA. Any administrative action that is not authorised by its governing statute will be unlawful. An unlawful administrative action or an exercise of power that is *ultra vires* i.e. that the LPC is not authorised to take in terms of the LPA, will be susceptible to judicial review in terms of s 6(2)(a)(i) or (ii) which empowers a court to review administrative action that is not authorised by law. Such administrative action will be invalid.

6.2 Reasonable Administrative Action

Relevant considerations to determine compliance with the requirement of reasonableness in s 33(1) of the Constitution were set out by the Constitutional Court in *Bato Star Fishing Ltd v The Minister of Environmental Affairs and Tourism*, and these include the nature of the decision, reasons for the decision, nature of competing interests involved and the impact of the decision on the lives and wellbeing of those whom the decision affects.¹⁰⁹ Hoexter states that rationality and proportionality are the important elements of reasonableness.

The court in *Carephone (Pty) Ltd v Marcus NO* explained that the requirement of reasonableness requires that there should be a rationale connection between the decision made, the facts on which the decision is based and the reasons provided for the decision.¹¹⁰ It therefore means that the LPC should be able to justify an administrative action by giving reasons thereof with reference to the information at its disposal, failing which the administrative decision may be challenged on the grounds of rationality as set out in s 6(2)(f)(ii)(aa) to (dd) of PAJA.

According to Hoexter, the requirement of proportionality requires a balance between the facts of each case and the decision made.¹¹¹ In other words, the circumstances of each case will determine whether an administrative action is reasonable or not. If the decision is not proportional, it may be susceptible to

¹⁰⁹*Bato Star Fishing (Pty) Ltd v The Minister of Environmental Affairs and Tourism* 2004 (4) SA 490 (CC) at para 45.

¹¹⁰*Carephone (Pty) Ltd v Marcus No* 1999 (3) SA 304 (LAC) at para 37.

¹¹¹Hoexter *supra* (n48) 304.

judicial review in terms of s 6(2)(h) of PAJA if the exercise of the power was so unreasonable that no reasonable person could have exercised the power.

6.3 Procedurally Fair Administrative Action

Section 3 of PAJA prescribes a procedure to be followed for an administrative action to be compliant with the requirement of procedural fairness in s 33(1). In terms of s 3(2)(b) of PAJA a person to be affected by an administrative action must be given adequate notice of the nature of administrative action to be taken and a reasonable opportunity to make representations.

According to Hoexter, the requirement of procedural fairness gives a person to be affected by the decision an opportunity to make submissions prior to a final decision being taken to possibly influence the outcome, however, the *audi alteram partem* principle does not entitle a person to be affected by the decision to actively participate in the consideration of the matter and the decision-making process.¹¹² Hoexter states that it is important that the person to be affected by the decision be advised of the outcome of the proceedings, when the decision was made and by whom the decision was made.¹¹³

The provisions of ss 38, 39 and 40 of the LPA provide for a complaints procedure to be followed in the exercise of the LPC's powers of discipline or performance of disciplinary functions. The provisions of this section incorporate the requirements of procedural fairness set out above. For instance, s 38(3) requires the allegations of misconduct, the members of the disciplinary committee, legal practitioners involved in the dispute and the outcome including the sanction imposed to be published on the LPC's website and to be available for inspection by members of the public during business hours of the Council. In terms of s 39(6) a legal practitioner who has been charged with misconduct is entitled to be present at the hearing of the proceedings¹¹⁴ and has the right to be heard.¹¹⁵ In terms of s 40, a legal practitioner who has been found guilty of misconduct must

¹¹² Hoexter supra (n48) 363.

¹¹³ Hoexter supra (n48) 376.

¹¹⁴ Section 39(6)(a)(i) of the LPA.

¹¹⁵ Section 39(6)(a)(iii) of the LPA.

be informed of the finding ¹¹⁶ and can address a disciplinary committee in mitigation of the sanction that may be imposed.¹¹⁷

7. Conclusion

This Chapter has examined the applicability of the constitutional right to just administrative action and the availability of a remedy of judicial review in terms of PAJA to the LPC's exercise of its powers and performance of its functions in terms of the LPA. The substantive requirements for the applicability of this right for the availability of a remedy of judicial review against the decisions of the LPC were explained. These substantive requirements are that, (a) the decision must qualify as administrative action as defined in s 1 of PAJA; (b) the organization must be subject to the provisions of PAJA; (c) the decision must adversely affect rights; (d) the decision must have a direct, external legal effect.

The Constitutional Court in *SARFU* explained that the nature of the institution is not an important consideration when determining the applicability of the right to just administrative action and the availability of a remedy of judicial review under the provisions of PAJA. The court stated that what is an important consideration is the nature of the power exercised or function performed, which should be administrative in character. The considerations to determine the administrative character or not, as developed by the Constitutional Court in *SARFU*, include (a) the source of the power or function; (b) the subject matter of the power exercised or function performed, whether it involves the exercise of a public duty, and how closely it is related on the one hand to policy matters which are not administrative, and on the other hand to the implementation of legislation, which is administrative.

It has been determined that the constitutional right to just administrative action in terms of PAJA impacts on certain decisions of the LPC and that a remedy of judicial review in terms of PAJA may be available against such decisions. The courts have confirmed that the right to just administrative action and the remedy

¹¹⁶ Section 40(1)(b) of the LPA.

¹¹⁷ Section 40(2) of the LPA.

of judicial review through PAJA may be applicable to the LPC's exercise of its disciplinary powers or performance of such functions in terms of the LPA. The identified actions that could possibly qualify as administrative actions include (a) the failure to take disciplinary steps or a decision regarding complaints against legal practitioners; (b) failure or refusal to issue a legal practitioner with a Fidelity Fund Certificate and (c) adverse disciplinary findings against legal practitioners other than the sanctions that may be imposed only by the courts such as suspension, interdict and removal of the legal practitioner's name from the Roll of legal practitioners.

It is important that any conduct of the LPC that may be regarded as administrative action as defined in s 1 of PAJA must be lawful, reasonable and procedurally fair as required in terms of s 33(1) of the Constitution. The content and meaning of these three requirements, which are applicable to an administrative action, have been explained. For an administrative action to be considered lawful, the LPC's exercise of its powers or performance of its functions must be authorised by law. For an administrative decision to be considered reasonable, the LPC must be able to justify an administrative decision by giving reasons with reference to the information at its disposal. It is also important that an administrative decision is proportional to the facts at the LPC's disposal. To ensure that an administrative action is procedurally fair, there must be compliance with the requirements set out in s 3 of PAJA, some of which have been incorporated in the provisions of the LPA. Any decision of the LPC which does not meet the requirements of lawfulness, reasonableness and procedural fairness, as set out in s 33(1) of the Constitution; will be susceptible to judicial review on any one of the several grounds of review listed in s 6(2) of PAJA.

CHAPTER 3

APPLICABILITY OF PAIA TO THE SOUTH AFRICAN LEGAL PRACTICE COUNCIL

1. Introduction

This Chapter examines the applicability of the constitutional right of access to information under the provisions of PAIA to the records of the LPC. The substantive requirements for the applicability of this right in terms of the provisions of PAIA are explained, namely that an organization must either be a public body or a private body as defined in s 1 of PAIA. Peekhaus states that the distinction between a public body and a private body “is critical because, although PAIA sets legislative rights of access to information held by both public and private bodies, the obligations that attach to the former are more stringent than for the latter”¹¹⁸ This is so because of s 32(1)(b) threshold requirement for a record to be “required for the exercise or protection of any rights”.

The right of access to the records of a public body is regulated by s 11 of PAIA, and the right of access to the records of a private body is regulated by s 50 of PAIA. Section 11 of PAIA obliges a public body to grant access to its records once there has been compliance with the prescribed requirements for accessing the required record unless the requested record can be refused in terms of one or more of the mandatory or discretionary grounds of refusal set out in Part 2, Chapter 4 of PAIA.¹¹⁹ Section 50 of PAIA, which regulates access to the records of a private body, requires additional compliance with the prescribed procedural requirements in that the requester must be able to show that the requested record is “required for the exercise or protection of any rights”, failing which, the requested record may be refused on this ground, in addition to any mandatory or

¹¹⁸ Peekhaus op cit (n22) 577.

¹¹⁹ See *President of the Republic of South Africa v M & G Media Limited* supra (n23) at para 59; *My Vote Counts NPC v Minister of Justice and Correctional Services* supra (n23) at para 23.

discretionary ground of refusal among those set out in Part 3, Chapter 4 of PAIA.¹²⁰

In the circumstances, the specific question that is examined in particular is whether the whether the LPC is a public body– and thus an entity duty bound to grant access to the requested record unless the request of access to a record can be defeated by one or more of the recognised mandatory or discretionary grounds of refusal in Part 2,Chapter 4 of PAIA - or a private body, in which case it is an entity with respect to which a person seeking access to a record will need to show that the information is required for the exercise or protection of rights.

Furthermore, the applicability of PAIA to the records of the LPC in South Africa will be compared to the applicability of FOIA to the records of the Law Society of England and Wales in the United Kingdom.

The conclusion reached after analysing relevant provisions of PAIA and relevant case law is that if a record that is requested from the LPC in terms of the PAIA relates to the LPC's exercise of its powers which are regarded as public in nature, in a functional sense, then the LPC, whilst being a corporate body in terms of s. 4 of the LPA, would be regarded as a public body. This will be the case in relation to a record relating to the LPC's exercise of its disciplinary powers in terms of the LPA. This means that, the LPC, as a public body, would be duty bound to grant access to the requested record unless the request of access to a record can be exempted on one or more of the recognised mandatory or discretionary grounds of refusal in Part 2 of Chapter 2 of Chapter 4 of the LPA. The LPC would be regarded as a private body in relation to a request of access to a record that does not involve the exercise of a power that is public in nature, which, in turn, would mean that a person seeking access to a record to a record of the LPC as a private body would need to show that the record is required for the exercise or protection of rights.

¹²⁰ See *Unitas Hospital v Van Wyk* supra (n24) at para 17.

Peekhaus points out that “the meaning and scope” of the additional requirement “required for the exercise or protection of any rights...has been left to the courts to interpret” as it has not been defined by PAIA.¹²¹ Therefore, the application of this requirement will be explained with reference to case law. Additionally, the application of the mandatory and discretionary grounds set out in Part 2 and Part 3 in Chapter 4 of PAIA will also be explained with reference to case law.

2. Section 32(1) of the Constitution

Section 32(1) of the Constitution guarantees everyone a right of access to “any information held by the state.”¹²² This section also guarantees everyone a right of access to “any information that is held by another person and that is required for the exercise or protection of any rights.” What is meant by a “state” is not defined anywhere in the Constitution. The Constitutional Court explained in *My Vote Counts NPC* that the words “everyone” and “another person”, which are used in the provisions of s 32(1) of the Constitution, are “wide enough” to cover “both a juristic and a natural person”.¹²³

In terms of s 32(1) of the Constitution, the requirements for the applicability of this right to “the state” are different to the requirements for its applicability to any other person that is not the state. The applicability of the right of access to information held by the state is unqualified, hence the requested information “must be readily availed” by the state.¹²⁴ However, access to information “held by another person” is conditional. Therefore, the state has a general obligation to be transparent and accountable, however, another person other than the state, has no general obligation.

The rationale for the distinct requirements for the exercise of the constitutional right of access to information against “the state” and “another person” has not been explained anywhere in the provisions of the Constitution. It was explained

¹²¹ Peekhaus op cit (n22) 578.

¹²² Section 32(1)(b) of the Constitution

¹²³ *My Vote Counts NPC v Minister of Justice and Correctional Services* supra (n23) at para 20.

¹²⁴ *My Vote Counts NPC v Minister of Justice and Correctional Services* supra (n23) at para 23.

by the Constitutional Court in *My Vote Counts NPC* that the purpose for the justification of a request for access to information held by another person other than the state is to exclude “unnecessary or spurious requests” for information. To comply with this requirement in order to be granted access to the required information, the requester is required “to disclose the right(s) that the requester seeks to exercise or protect.”¹²⁵

3. The Importance of the Right of Access to Information

The importance of the constitutional right of access to information, specifically for the media and journalists, some of whom had been very critical about the lack of transparency, accountability, responsiveness on the part of the now defunct provincial Law Societies in regard to the exercise of their disciplinary powers and performance of their disciplinary functions attorneys¹²⁶, has been explained by the Constitutional Court in *Brümmer v Minister for Social Development*.¹²⁷ In *Brümmer*, the Constitutional Court explained that that right of access to information allowed the media to exercise the right to freedom of expression enshrined in s 16 of the Constitution, which includes freedom of the press and other media¹²⁸ and freedom to receive or impart information.¹²⁹ The court explained that access to information by the media and journalists is “crucial” for their “accurate reporting” and conveyance of “accurate information to the public”.¹³⁰

The now defunct provincial Law Societies had been criticised for their lack of transparency, accountability and responsiveness regarding their exercise of their disciplinary powers against attorneys. The criticisms levelled against the Law Societies followed a request made by a columnist, Saunderson-Meyer, for access to the disciplinary records of attorneys. The information requested included the names of attorneys, the nature of disciplinary complaints against attorneys as

¹²⁵Ibid.

¹²⁶ See Saunderson-Meyer, William *supra* (n35). See also JH Jeffery, MP *supra* (n35).

¹²⁷ *Brümmer v Minister for Social Development* 2009 (11) BCLR 1075 (CC).

¹²⁸ Section 16(1)(a) of the Constitution.

¹²⁹ Section 16(1)(b) of the Constitution.

¹³⁰ *Brümmer v Minister for Social Development* *supra* (n127) at paras 62 – 63

well as the disciplinary findings made against attorneys. In his application, Saunderson-Meyer indicated that he required the information to make it available for public scrutiny. Saunderson-Meyer's request was refused in that no response was given.¹³¹

The Honourable Deputy Minister of Justice & Constitutional Development, JH Jeffery MP, when addressing the Annual General Meeting of the Kwa-Zulu Natal Law Society on 18 October 2018, stated that the Law Societies were the guardians of the Constitution and its values of transparency, openness and accountability, and that when these institutions failed to give access to the disciplinary records of attorneys requested by Saunderson-Meyer, they placed the "interests of legal practitioners above transparency" in contravention of the Constitution and its values.¹³²

Whilst the publication of the disciplinary records of legal practitioners could cause a reputational harm, the court in *M & G Media Limited v 2010 FIFA World Cup Organising Committee South Africa Limited* stated that access to information is a "tool of trade for journalists." As such, it is important that journalists are granted access to information especially if the requested information is in the public interest. To enable journalists to perform their function of reporting to the public responsibly and accurately, it is important that they "have access to reliable sources of information" and would be able to successfully defend any "claim for damages" even if the information that has been published is inaccurate, if "they can show that publication ... was reasonable".¹³³

It is important to acknowledge that the Constitution which is founded on the values of accountability, transparency and openness, as well as the Bill of Rights which contains fundamental human rights including the right of access to

¹³¹Saunderson-Meyer supra (n34). In terms of s 27 of PAIA, "if an Information Officer fails to give the decision on a request for access to information within the prescribed 30 day period, then such a request is deemed a refusal.

¹³²Jeffery, MP supra (n34).

¹³³*M & G Media Limited v 2010 FIFA World Cup Organising Committee South Africa Limited* 2011 (5) SA 163 (GSJ) at paras 343 to 344.

information and the right to freedom of expression, which includes freedom of the press and other media, as well as freedom to receive or impart information, were not in place when the Attorneys Act which created the Law Societies came into operation. As stated by Hoexter that, with the adoption of the Constitution and its recognition as the highest law, it became necessary for the legal profession as well as its regulation “to adapt to a new model of constitutional democracy”.¹³⁴

The LPA, which has replaced the Attorneys Act as from 1 November 2018 embraces the founding values of the Constitution, namely, accountability, transparency and openness. The preamble of the LPA states as one of its objectives as being to “ensure that the values underpinning the Constitution are embraced and that the rule of law is upheld” and “to ensure the accountability of the legal profession to the public”, amongst the others.

4. Distinction Between Public and Private Bodies

Section 1 of PAIA defines a private body as a natural or partnership that conducts (or has conducted) any trade, business or profession and it includes a juristic person but excludes a public body. A public body is also defined in s 1 of PAIA to include national and provincial departments and municipalities, as well as any functionary or institution exercising a power or performing a duty in terms of the Constitution or a provincial constitution or exercising a public power or performing a public function in terms of any legislation. Moreover, s 8 of PAIA states that any institution may be considered either a public body or a private body depending on whether the record in question relates to the exercise of a power or performance of a function by an institution as a public body or a private body.¹³⁵

In the United Kingdom, access to information is regulated in terms of the provisions of FOIA. According to Holsen and Amos, FOIA is applicable only to

¹³⁴ Hoexter C “Administrative Action in the Courts” (2006) *Acta Juridica* 303.

¹³⁵ See Peekhaus op cit (n22) 575.

organizations that qualify as public as public bodies.¹³⁶ A “public authority” for the purposes of the applicability of FOIA is defined in s 3 and it refers to “anybody which, any other person, or the holder of any office which is listed in schedule 1¹³⁷, or is designated by an order under section 5¹³⁸, or a public-owned company as defined in section 6”.¹³⁹ Schedule 1 of FOIA lists bodies that are regarded as public authorities by name or type. According to Holsen and Amos, ‘over 400 bodies are individually named’ in Schedule 1 of the Act. Furthermore, s 5 of FOIA empowers the secretary of the State to designate further bodies which appear to be exercising or performing public functions or are providing services to a public authority.

Thus, in both jurisdictions, namely, South Africa and the United Kingdom, a fundamental question for determining the applicability of PAIA and FOIA, respectively, would turn on the question whether a body has exercised a public power or performed a public function in relation to the required information.¹⁴⁰ Answering this question is vital in the determination of the applicability of the constitutional right of access to information through PAIA to the records of the LPC. It is also vital in the determination of the applicability of FOIA to the records of the Law Society of England and Wales in the United Kingdom.

The phrases “public power” and “public function”, as important as they for determining the applicability of the constitutional right of access through PAIA, have not been defined in the South African Constitution and PAIA. The meaning of the phrase “functions of public nature” has also not been defined in FOIA. The court in the matter between *Institute for Democracy in South Africa v The African National Congress* stated that the considerations to be taken into account

¹³⁶S Holsen and J Amos ‘A Practical Guide to the UK Freedom of Information Act 2000’ October 2004, available at <http://www.ucl.ac.uk/political-science/publications/unit-publications/115.pdf>, accessed on 17 September 2018.

¹³⁷ Section 3(1)(a)(i) of FOIA.

¹³⁸ Section 3(1)(a)(ii) of FOIA.

¹³⁹ Section 3(1)(b) of FOIA.

¹⁴⁰ See *Mittalsteel South Africa Limited v Hlatshwayo* 2007 (1) SA 66 (SCA) at paras 10 and 12. See also *M & G Media Limited v 2010 FIFA World Cup Organising Committee South Africa* supra (n133) at para 149 and 150, *Institute for Democracy in South Africa v The African National Congress* 2005 (5) SA 39 (C) at paras 47-49.

to determine whether the exercise of power or the performance of a function is public or not include the source of the power, the nature of the power, its subject matter, whether it involves the exercise of a public duty.¹⁴¹

Maripe mentions further that the test for the determination of whether the power is public or private

‘usually combines a determination of the nature of the body itself, and the nature of the function it exercises. It seems therefore that a public body ... must necessarily be set up to exercise some function with a public benefit or to discharge a public duty. The traditional tests used would be to enquire into the following: (a) the nature of the body (that is, how it is created or constituted); (b) the source of its powers (whether they derive from statute or some other source); (c) whether it falls under the control of a recognised public authority); (d) whether public money is one of the body’s sources of funding); (e) whether it is exercising some “governmental function”; and (f) whether its actions, decisions or its field of operations has implications for the public.’¹⁴²

The meaning of the phrases “performing a public function” and “the exercise of public power” have received further consideration by the court *FIFA 2010 Local Organising Committee South Africa*. The court stated that the considerations to be taken into account to determine whether a body is a public body or a private body include the composition of the body itself, specifically whether or not it includes officers of government; how the organization is funded, specifically whether public or state funds are used to fund the operations of the organization; the source of the power or function which must be a statute and whether the power is exercised in the public interest.¹⁴³

5. Is the LPC a Public or Private Body?

Klaaren and Penfold state that the court decisions on the meaning of an organ of state as defined in s 239 of the Constitution may be of assistance in addressing

¹⁴¹*Institute for Democracy in South Africa v The African National Congress* supra (n130) at para 44.

¹⁴²Maripe op cit (n26) 33-35. See also Hoexter op cit (n48) 4-5.

¹⁴³*M & G Media Limited v 2010 Local Organising Committee South Africa* supra (n133) at paras 239, 245, 252, 258-260, 291 and 322.

this question¹⁴⁴. The court in *Hlatshwayo* held that an organ of state as defined in s 239 ‘of the Constitution is essentially a ‘public body’.’.¹⁴⁵

As stated in *Graham*, the exercise of the LPC’s power of discipline against legal practitioners in terms of the LPA would be properly characterised as public in nature.¹⁴⁶ Therefore, whilst the LPC is in terms of s 4 of the LPA established as a corporate body, it would be properly characterised as a public body in relation to the exercise of its disciplinary powers or performance of its disciplinary functions in terms of the LPA for the purposes of PAIA. This is so because the definition of a public body in s 1 of PAIA also takes a functional approach as opposed to an institutional approach particularly in regard to the institutions that are not government departments in the national, provincial or local sphere of government, where it is the nature of the power exercised or the function performed in relation to a record that is required that is decisive rather than the nature of the institution. Thus, the question whether the LPC is a public body or a private body as defined in s 1 of PAIA depends on the public nature or not of the power exercised or the function performed in relation to the record requested.

The other consideration is the composition of the LPC. It comprises of not only legal practitioners but officers of government as well.¹⁴⁷ The composition of the LPC indicates that it is a public body as stated in *2010 FIFA World Cup Local Organising Committee South Africa*.

According to Maripe, one of the considerations is whether an institution that is not a government department in the national, provincial or local sphere of government, falls under the control of a recognised public authority. The Minister of Justice and Constitutional Development (“the Minister”) is empowered in terms of s 14 of the LPA to dissolve the LPC if he or she “loses

¹⁴⁴J Klaaren and G Penfold “Access to Information” *Constitutional Law of South Africa* [2nd ed – OS 2002] 62 at 12, available at <https://wiser.wits.ac.za/sites/default/files/chap62-63.pdf>, accessed on 20 April 2016.

¹⁴⁵*Mittalsteel South Africa Limited v Hlatshwayo* supra (n140) at para 8. See also *M & G Media Limited v 2010 Local Organising Committee South Africa* supra (n133) at para 142.

¹⁴⁶*Graham v Law Society of the Northern Provinces* supra (n78) at para 80. See also *Law Society of the Northern Provinces v Le Roux* supra (n91) at para 17.

¹⁴⁷Section 7(1) of the LPA.

confidence in the ability of the Council to perform its functions and efficiently ...” The Minister is further empowered to prescribe the requirements of community service as part of practical vocational training of candidate legal practitioners.¹⁴⁸ In addition, the LPC is required in terms of s 6(5)(h) of the LPA to report annually to the Minister on its operations. Thus, the LPC falls under the control of a recognised public authority, which is the Department of Justice and Constitutional Development, hence in that regard it would be properly recognised as a public body as defined in s 1 of PAIA.

The other consideration is the source of the LPC’s income to fund its operations. The source of LPC’s income for the funding of its operations comprises of subscriptions, fees, levies or other charges payable by legal practitioners¹⁴⁹ . There is no provision for government to contribute to the funding of the operations of the LPC. It is financed by lawyers at no costs to the public or to government.

As mentioned above that Schedule 1 to FOIA lists bodies that are recognised as public authorities and such organizations are listed by name or type. The Law Society of England and Wales is not among the types of bodies listed in Schedule 1 of FOIA. Section 5 of FOIA empowers the Secretary of the State to designate further bodies that appear to be performing functions of public nature. Thus, s 5 of FOIA also takes a functional approach as opposed to an institutional approach to determine institutions that qualify as public authorities, where it is the nature of the function that is performed that is decisive rather than the nature of the institution. The question whether the Law Society is a public authority has received consideration by the court in *Law Society v Secretary of the State for Justice* and held that it is not, but a private sector body.¹⁵⁰ In its website, the Law Society of England and Wales states that it has voluntarily chosen to subscribe to

¹⁴⁸Section 29 of the LPA.

¹⁴⁹Part II of the Rules for the South African Legal Practice Council. These Rules were published in the Government Gazette No. 41781, dated 20 July 2018.

¹⁵⁰*Law Society v Secretary of the State for Justice* (n30) at para 83.

the provisions of FOIA despite the provisions of this legislation being not applicable to it.¹⁵¹

6. Applicability of PAIA to the LPC as a Public Body

The applicability of PAIA to organizations that are regarded as public bodies as defined in s 1 of PAIA is regulated by s 11 of PAIA, read with the specific mandatory and discretionary exemption contemplated in Part 2 of Chapter 4 of PAIA. In terms of s 11 of PAIA, public bodies have an obligation to grant access to their records after compliance with all the prescribed procedural requirements, unless the record is exempted from disclosure in terms of one or more of the grounds of refusal set out in Part 2 of Chapter 4 of PAIA.¹⁵² It is bound by a constitutional obligation to conduct its operations transparently and accountably. Requests for access to the records of public bodies do not require any reason to be given to justify the request.¹⁵³ The Constitutional Court in *M & G Media Ltd* held that the disclosure of information requested from a public body is a rule and that the refusal of the requested information on any one or more of the grounds of refusal set out in Part 2 of Chapter 4 of PAIA is an exception than a rule.¹⁵⁴ Thus the LPC, in the exercise of its disciplinary functions in terms of the LPA, is required to be transparent as possible about all the decisions and actions taken, including the reasons therefor, required in terms of both the Constitution and the provisions of s 11 of PAIA.

In order facilitate access to information by the public in regard to the LPC's exercise of its disciplinary powers against legal practitioners, s 38 of the LPA requires particulars of all disciplinary hearings, including the allegations of misconduct being dealt with; the name of legal practitioners involved; the outcome thereof and any sanction imposed following a disciplinary process

¹⁵¹ Law Society of England and Wales, <http://www.lawsociety.org.uk/get-in-touch/freedom-of-information/>, accessed on 05 December 2015.

¹⁵² See *President of the Republic of South Africa v M & G Media Limited* supra (n23) at para 59; *My Vote Counts NPC v Minister of Justice and Correctional Services and Another* supra (n23) at para 23, *Transnet Ltd v SA Metal Machinery Co (Pty) Ltd* 2006 (6) SA 285 (SCA) at para 59.

¹⁵³ Section 11(3) of PAIA.

¹⁵⁴ *President of the Republic of South Africa v M & G Media Ltd* supra (n23) at para 59. See also *M & G Media Limited v 2010 FIFA Local Organising Committee South Africa* supra (n133) at para 415.

against a legal practitioner to be published on the website of the LPC and to be made available for inspection by members of the public during business hours of the LPC and PCs. The publication policy enables the members of the public to make informed choices about whom among the lawyers to entrust with their legal matters. It helps maintain public confidence in the provision of legal services by legal practitioners. Indeed, it is in the public interest to publicise details and outcomes of complaints. Section 38 also provides for the disciplinary hearings to be open to the public, unless the chairperson of a disciplinary committee directs otherwise, on good cause shown, on application by a person having an interest in the matter.

Indeed, the provisions of s 38 of the LPA give expression to the founding values of the Constitution as they are intended to create a culture of openness and accountability in the LPC's exercise of its disciplinary functions in terms of the LPA by ensuring that the disciplinary decisions and any other information relating to the disciplinary processes of the LPC is available to the public. Having said that, it must be recognised that frivolous or fabricated complaints could damage the reputation, careers and businesses of legal practitioners. The right of legal practitioners to practise their chosen trade, occupation and profession, which is guaranteed in s 22 of the Constitution, may be adversely affected by the publication of frivolous or fabricated complaints. To address this concern, s 38 of the LPA seems to permit publication and public examination of complaints against legal practitioners after finalisation of the investigation and disciplinary processes, however, this does not appear to be the case in regard to the disciplinary hearings which are open to the public unless on good cause shown the chairperson of a disciplinary committee otherwise after consideration of an application by a person having an interest in the matter.

7. Applicability of PAIA to the LPC as a Private Body

When the LPC's exercise of powers or performance of functions in terms of the LPA is not public in relation to a record, the LPC will qualify as a private body as defined in s 1 of PAIA. Access to records of private bodies is regulated by s 50 of PAIA. In addition to the prescribed procedural requirements, a requester

is required to show that a record is “required for the exercise or protection of any rights”. Additionally, the record required must not be subject to refusal under any of the mandatory or discretionary grounds of refusal set out in Part 3 of Chapter 4 of PAIA.¹⁵⁵ A private body is allowed to refuse a request for access to its record on the basis that the request failed to meet the requirement in s 50(10)(a), namely that a record is required for the exercise or protection of any rights. In circumstances where a private body is unable to refuse a request for access to its record on this basis, it is allowed a further opportunity to consider whether any of the discretionary or mandatory grounds of refusal is applicable to a request.

The meaning of the phrase “required for the exercise or protection of any rights” has been clarified in several court decisions. It was held in *Claase v Information Officer, South African Airways (Pty) Ltd*¹⁵⁶ that a person seeking access to a record held by a private body is required to provide necessary information in his or her application which indicates the right the person wishes to exercise or protect¹⁵⁷. In *Metro Inspection Services (Western Cape)* the court stated that a requester should indicate specifically the right the requester wishes to exercise or protect; the information that is required and to explain how the required information would be of assistance to the person’s exercise or protection of his or her rights.¹⁵⁸ It was held in *Unitas Hospital* that a requester who fails to provide the required information as stated above would not be entitled to receive the required record of a private body.¹⁵⁹

Thus, it is important for any person who requests access to a record of the LPC which does not relate to the exercise of powers or performance of functions of public nature in terms of the LPA not only to ensure compliance with the prescribed procedural requirements in s 50, but to provide the necessary information indicating specifically (a) the right the person wishes to exercise or protect; (b) the information that is required and (c) to explain how the required

¹⁵⁵ See *Unitas Hospital v Van Wyk* supra (n24) at para 17

¹⁵⁶ *Claase v Information Officer, South African Airways (Pty) Ltd* 2007 (5) 469 (SCA)

¹⁵⁷ *Claase v Information Officer, South African Airways (Pty) Ltd* supra (n156) at para. 8.

¹⁵⁸ *Cape Metropolitan Council v Metro Inspection Services (Western Cape)* supra (n95) at para 28.

¹⁵⁹ *Unitas Hospital v Van Wyk* supra (n24) at para 17.

information would be of assistance to the person's exercise or protection of his or her rights, failing which the request may be refused. The SCA in *Clutchco (Pty) Ltd v Davis* confirmed that "required" means "reasonably required", which in turn means that the requester must be able to show that he or she will accrue a 'substantial advantage' by accessing the record.¹⁶⁰ The SCA in *Unitas Hospital* held that the question whether access to a record "is 'required' for the purpose of protecting or exercising the right concerned, can only be answered with reference of the facts' of each case.¹⁶¹

8. Application of Mandatory and Discretionary Grounds of Refusal of Access to Information

Section 14 of the Constitution recognises and protects the right to privacy. Furthermore, s 36 of the Constitution allows the exercise of any right among the fundamental contained in the Bill of Rights in Chapter 2 of the Constitution to be limited "in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom taking into account all relevant factors including (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relationship between the limitation and its purpose".¹⁶² Therefore, the fundamental rights contained in the Bill of Rights in Chapter 2 of the Constitution are not absolute as their exercise may be restricted in terms of the law of general application.

PAIA provides for grounds of refusal of access to information in Part 2 of Chapter 4 in relation to records of public bodies. The grounds of refusal in relation to the records of private bodies are set out in Part 3 of Chapter 4 of PAIA. Some of the grounds are mandatory in the sense that the Information Officer of a public body or private body must refuse the request if one ground of refusal applies to a request for a record, whilst others are discretionary in the sense that the Information Officer may refuse the request. Robinson points out

¹⁶⁰ *Clutchco (Pty) Ltd v Davis* 2005 (3) SA 486 (SCA) at para 13.

¹⁶¹ *Unitas Hospital v Van Wyk* supra (n24) at para 18.

¹⁶² Section 36(1) of the Constitution.

that the grounds of refusal in Part 2 and Part 3 of Chapter 4 of PAIA could serve as a shield to avoid constitutional obligation of both public and private to be transparent and accountable about their operations.¹⁶³ There is a possibility that discretionary powers could be misused. In that regard, any person who feels aggrieved by the exercise of discretionary powers is entitled to approach a court of law or an independent and impartial tribunal for an appropriate relief.

The courts have, in their exercise of the power of review in terms of s 78 of PAIA¹⁶⁴, and using the provisions of s 80¹⁶⁵, held that reasons should be given to substantiate non-disclosure of the requested record on any one of the mandatory or discretionary grounds of refusal set out in Part 2 and Part 3 of Chapter 4 of PAIA.

Section 81(3) of PAIA governs the onus of proof in all applications instituted under s 78 of PAIA. This section makes it clear that whenever a request for access is refused, the onus to show that the refusal is justified rests on the body that has refused the request. This is necessary because, as stated by the court in *M & G Limited*, the holder of the requested record is better placed to justify non-disclosure of the requested record than a requester who is not in possession of, and who does not have access to the required record.¹⁶⁶ It was also held in *M & G Limited* that the giving of reasons will discourage abuse of mandatory and discretionary grounds of refusal set out in Part 2 and Part 3 of Chapter 4 of PAIA.¹⁶⁷

It is therefore important that when an application for access to any record of the LPC is refused, the ground of refusal among those set out in Part 2 and Part 3 in

¹⁶³RM Robinson *Access to Information* (2016) 82.

¹⁶⁴In terms of s 78 of PAIA, a requester who is not satisfied by the reasons given for the refusal of a request for access to information may “by way of an application” apply to court for appropriate relief.

¹⁶⁵Section 80 of PAIA allows a court hearing an application to access any information that has been refused to decide whether the refusal is justified or not. It was held in *President of the Republic of South Africa v M & G Limited* supra (n23) at paras 52-53 that the purpose of s 80 of PAIA “is to test the argument for non-disclosure by using any record in question to decide the merits of the exemption claimed and the legality of the refusal to disclose the record. In this sense, it facilitates, rather than obstructs, access to information.”

¹⁶⁶*President of the Republic of South Africa v M & G Limited* supra (n23) at para 15.

¹⁶⁷*President of the Republic of South Africa v M & G Limited* supra (n23) at paras 52-53.

Chapter 4 of PAIA should be identified and a reason be given to justify non-disclosure of the required records based on the identified ground of refusal. The failure to give reasons for non-disclosure of the required record will be subject to review by a court in terms of s 78 of PAIA at the instance of the aggrieved requester. A court, in the exercise of its powers of review, may require access to the required record to determine whether non-disclosure is justified. For instance, in *CCII Systems (Pty) Ltd v Fakie NO*¹⁶⁸ a requester was refused access to a record on the grounds of refusal recognised in Chapter 4 of PAIA. The court ordered the party from whom the record was requested to (a) provide all the documents and records in respect of which there was no objection to the requester, (b) provide a list of all the documents and records in respect of which access was refused and set out clearly and concisely (i) a description of the document or record, (ii) the basis for the objection, (iii) an indication whether or not the objection related to the whole document or only portion thereof and if so, (iv) to which portions.

9. Third Parties ‘Access to the Records of the LPC

The information in possession of the LPC, obtained during the investigation of a complaint against a legal practitioner and/or in the exercise of the LPC’s disciplinary functions, may include information that belongs to legal practitioners and complainants. This information may be the subject of a request by third parties in terms of the provisions of PAIA. The question is whether the LPC may allow third parties access to information in its possession which has been disclosed by legal practitioners and complainants. Stated differently, can the LPC use the information it has obtained from legal practitioners and complainants in the exercise of its disciplinary powers for any other purpose than the disciplinary investigation. There may be issues of legal professional privilege involved. In other words, the LPC may be in possession of communication between a legal practitioner and the complainant which may contain legal advice.

¹⁶⁸*CCII Systems (Pty) Ltd v Fakie NO* 2003 (2) SA 325 (T).

The issue received consideration by the Constitutional Court in *Biowatch Trust v Registrar Genetic Resources*.¹⁶⁹ The Constitutional Court held that it is important for the holder of the record to deal with the request objectively and impartially. This requires that a decision of the holder of a record must not be aligned to the views of the person who furnished the information or a requester but that the holder of a record must make own independent assessment of the request and decision, considering whether there are issues of public interest involved.¹⁷⁰

10. Conclusion

This Chapter examined the applicability of the constitutional right of access to information and the availability of a remedy of judicial review through PAIA for the exercise and enforcement of this right against the LPC's records. The substantive requirements for the applicability of this right have been explained, namely, that the organization must be a public body or a private body. The distinction between a public body and a private body determines the requirements to be complied with for the exercise and enforcement of the constitutional right of access to information, hence it is fundamental when determining the applicability of the constitutional right of access to information and the availability of a remedy of judicial review for the enforcement of this right through PAIA. For instance, the exercise of the constitutional right of access to information against the records held by a public body is unqualified in the sense that a requester is not required to show that the record is required for the exercise or protection of any rights, whereas a requester of a record held by a private body is required to comply with this requirement in addition to the prescribed procedural requirements.

It has been determined that the question whether the LPC is a public body or a private body depends on the nature of its powers or functions. If a record requested in terms of the provisions of PAIA relates to the LPC's exercise of its

¹⁶⁹*Biowatch Trust v Registrar Genetic Resources* 2009 (6) SA 232 (CC).

¹⁷⁰*Biowatch Trust v Registrar Genetic Resources* supra (n166) at para 45.

powers or performance of functions which are public in nature, then the LPC, whilst being a corporate body in terms of s 4 of the LPA, it will be regarded as a public body.

The considerations for determining the public nature or not of the powers exercised or the functions performed in relation to a record sought in terms of the provisions of PAIA include the source of the powers or functions; the subject matter of the power exercised or function performed in relation to a record sought; the composition of the organization and its source of funding for its operations.

This Chapter concludes that the LPC would be properly regarded as a public body in relation to a record that concerns the exercise of its disciplinary powers or functions in terms of the LPA. The other consideration which supports this conclusion is that the composition of the LPC includes officers of government. The LPC would be regarded as a private body in relation to a request for access to a record that does not involve the exercise of a power or performance of a function that is not public in nature. It would then become a question of whether the requester can show that the record is 'required' which means that the record will of assistance.

This Chapter also explained the meaning of the additional requirement "required for the exercise or protection of any rights" which is applicable to requests of access to a record held by a private body. This requirement, as explained by the courts, requires a requester of access to a record of a private body to (a) indicate specifically a right a request wishes to exercise or protect; (b) provide an explanation of how the required record of a private body would be of assistance to the requester's exercise or protection of his or her rights, failing which the requester would not be entitled to have access to the requested record of a private body. The requester would need to first receive and examine a record to determine if it will be of assistance. Therefore, it will be difficult for the request to comply with this requirement prior to the receipt and examination of the record. Thus s 32(1)(b) threshold requirement for a record to be "required for the

exercise or protection of any rights” is more stringent than the requirements of access to a record held by a public body.

The application of the mandatory and discretionary grounds of refusal set out in Part 2 and Part 3 in Chapter 4 of PAIA has also been explained. The courts have held that reasons to justify non-disclosure of the requested record must be given to the requester. The refusal or non-disclosure of the requested record may be subject to a remedy of judicial review in terms of s 78 of PAIA at the instance of the aggrieved requester. In exercising its powers of review, the courts are in terms of s 80 of PAIA, also empowered to have access to the requested record and may order the holder of a record to (a) provide all the documents and records in respect of which there is no objection to access being granted to a requester; (b) provide a list of documents and records in respect of which access is refused and to set out clearly (i) a description of the document; (ii) the basis for the objection; (iii) an indication whether or not the objection relates to the whole document or only to a portion thereof, and if so, (iv) to which portions. By so doing, the courts are facilitating the realization and protection of the right of access to information.

CHAPTER 4

CONCLUSION AND RECOMMENDATIONS

1. Introduction

The dissertation has examined the applicability of the constitutional right to just administrative action and the availability of a remedy of judicial review, through PAJA, against the decisions of the LPC that are made in the exercise of its statutory powers and functions in terms of the LPA. The substantive requirements for the applicability of this right and for the availability of a remedy of judicial review against the decisions of the LPC were explained. These substantive requirements are that: (a) the organization must be subject to the provisions of PAJA and (b) that the decision must qualify as administrative action as defined in s 1 of PAJA.

The dissertation has also examined the applicability of the constitutional right of access to information, through PAIA, to the records of the LPC. The substantive requirements for the applicability of this right have been explained, namely, that the organization must be a public body or a private body as defined in s 1 of PAIA.

The application of the HRA and FOIA to the Law Society of England and Wales in the United Kingdom was used as the basis of comparison mainly because South Africa is one of the Commonwealth countries that apply English Law. Therefore, English Law can provide alternative available options that can be used for addressing identified legal obstacles so as to enhance South African law.

2. LPC as an Organ of State for the purposes of PAJA

The question examined in this dissertation was whether the LPC is organ of state which exercises a public power or performs a public function in terms of any legislation, or a natural or juristic person, other than an organ of state, which

exercising a public power or performs a public function in terms of an empowering provision. The conclusion reached after analysing relevant provisions of PAJA and case law, specifically *Graham*'s decision, is that the LPC is an organ of state when it exercises its disciplinary powers in terms of the LPA. Thus, the LPC will be subject to the provisions of PAJA as an organ of state when it exercises its disciplinary functions in terms of the LPA.

3. Administrative Actions of the LPC

The identified actions of the LPC that could possibly qualify as administrative actions as defined in s 1 of PAJA and therefore susceptible to judicial review where it is alleged that the constitutional right to just administrative action in s 33 of the Constitution has been infringed include: (a) the failure to take disciplinary steps or a decision regarding complaints against legal practitioners; (b) failure or refusal to issue a legal practitioner with a Fidelity Fund Certificate; (b) adverse disciplinary findings against legal practitioners other than the sanctions that may be imposed only by the courts such as suspension, interdict and removal of the legal practitioner's name from the Roll of legal practitioners. These actions of the LPC are always lawful, reasonable and procedurally fair as required in terms of s 33(1) of the Constitution. This requires the LPC to ensure that these actions, which it is authorised by the law to take, are also justified in terms of reasons for its decision to be considered reasonable, and that the decision taken is proportional with reference to information at its disposal. To ensure that an administrative action is procedurally fair, there must be compliance with the requirements set out in s 3 of PAJA, some of which have been incorporated in the provisions of the LPA. Any decision of the LPC which does not meet the requirements of lawfulness, reasonableness and procedural fairness, as set out in s 33(1) of the Constitution; will be susceptible to judicial review on any one of the several grounds of review listed in s 6(2) of PAJA.

4. LPC as a Public Body or Private Body for the purposes of PAIA

It has been determined in this dissertation that the question whether the LPC is a public body or a private body for the purposes of the application of PAIA depends on the public or private nature of the powers exercised in relation to the requested record. If a record requested in terms of the provisions of PAIA relates to the LPC's exercise of its powers or performance of functions which are public in nature, then the LPC, whilst being a corporate body in terms of s 4 of the LPA, will be regarded as a public body.

The considerations for determining the public nature or not of the powers exercised or the functions, performed in relation to a record sought in terms of the provisions of PAIA, as explained by the court in include the source of the powers or functions; the subject matter of the power exercised or function performed in relation to a record sought; the composition of the organization and its source of funding for its operations.

This dissertation concluded that the LPC would be properly regarded as a public body in relation to a record that concerns the exercise of its disciplinary powers or functions in terms of the LPA. The other consideration which supports this conclusion is that the composition of the LPC includes officers of government. This means that the LPC, as a public body, would be duty bound to grant access to the requested record unless the request of access to a record can be defeated by one or more of the recognised mandatory or discretionary grounds of refusal in Part 2, Chapter 4 of PAIA.

The LPC would be regarded as a private body in relation to a request for access to a record that does not involve the exercise of a power or performance of a function that is not public in nature. This means that a person seeking access to a record of the LPC as a private body would need to show that the information is required for the exercise or protection of rights. The meaning of the additional requirement "required for the exercise or protection of any rights", which is applicable to requests of access to a record held by a private body, as explained by the courts, requires a requester to (a) indicate specifically a right a request

wishes to exercise or protect; (b) provide an explanation of how the required record of a private body would be of assistance to the requester's exercise or protection of his or her rights, failing which the requester would not be entitled to have access to the requested record of a private body.

5. Justification of Refusal of Requests for Access to Information

The application of the mandatory and discretionary grounds of refusal set out in Part 2 and Part 3 in Chapter 4 of PAIA has also been explained. The courts have held that reasons to justify non-disclosure of the requested record must be given to the requester. The refusal or non-disclosure of the requested record may be subject to a remedy of judicial review in terms of s 78 of PAIA at the instance of the aggrieved requester. In exercising its powers of review, the courts are in terms of s 80 of PAIA, also empowered to have access to the requested record and may order the holder of a record to (a) provide all the documents and records in respect of which there is no objection to access being granted to a requester; (b) provide a list of documents and records in respect of which access is refused and to set out clearly (i) a description of the document; (ii) the basis for the objection; (iii) an indication whether or not the objection relates to the whole document or only to a portion thereof, and if so, (iv) to which portions. By so doing, the courts are promoting transparency, openness, accountability and openness in the operations of both private and public bodies.

6. Legal Obstacles

The dissertation has also identified certain legal obstacles that needs to be addressed so as to enhance accountability, transparency and openness of organs of state, private and public bodies, and also facilitate the exercise, realization and enforcement of the fundamental right of access to information in s 32 of the Constitution as well as the fundamental right to just administrative action in s 33 of the Constitution by the ordinary people in South Africa without legal representation. The major obstacle identified herein concerns the meaning of a term "public". The term "public" is significant in the determination of PAJA and PAIA. It is central in the determination of organizations that are organs of

state as defined in s 239 of the Constitution and those organizations that are not. It is significant in the determination of actions that fall within the definition of “administrative action” in s 1 of PAJA. An aggrieved person who cannot show that the conduct or act qualifies as administrative action as defined in s 1 of PAJA is not able to exercise the constitutional right to just administrative action. The term “public” also plays an important role in the determination of a distinction between a private body and a public body as defined in s 1 of PAIA. It is also critical in determinations of organisations that are public authorities for the applicability of both the HRA and FOIA in the United Kingdom. The Constitution, PAJA, PAIA, HRA and FOA all recognise that private bodies and public bodies can act in more than one capacity. In other words, the law in South Africa and in the United Kingdom recognise that, at times, a private body may exercise powers that are public in nature, and that public bodies may also at times exercise powers that are private in nature. Thus, the distinction between a private body and a public body has become blurred in terms of their definition in s 1 of PAIA, with the result that the distinction between a public body and a private body is not always clear cut as a private body can become a public body and a public body can also become a private body in certain circumstances, and this can be confusing to the requesters of information.

However, the term “public”, as important as it is for the exercise, enforcement and protection of the constitutional right of access to information as well as the right to just administrative action, has not been defined in the Constitution, PAJA and PAIA. It has also not been defined in the HRA and FOIA. The Constitutional Court in *Chirwa* recognised the difficulty of determining what is public and not public for the purposes of the applicability of PAJA and PAIA.

The legal obstacle that has been identified does not facilitate, but restricts the realization of accountability, transparency and openness required from both public and private bodies in the exercise of their powers and performance of their functions. If the nature of the power has been incorrectly determined, the required accountability, transparency and openness may potentially be undermined. The constitutional right to just administrative action as well as the

constitutional right of access to information may remain unfulfilled promises despite their recognition in the Bill of Rights in Chapter 2 of the Constitution.

The judiciary, which is the guardian of the Constitution and its values and which is required in terms of s 39(1) of the Constitution to promote the values of the Constitution when interpreting any right in the Bill of Rights, has defined and explained the applicability of the right to just administrative action and the right of access to information. However, the courts' interpretation and explanation of the applicability of these two fundamental rights have not been incorporated into the provisions of PAJA and PAIA. This does not make it easier for ordinary unsophisticated people to, on their own and without legal representation, exercise and enforce their constitutional right of access to information and the right to just administrative action.

A remedy of judicial review is available for the enforcement and protection of the constitutional right to just administrative action and the constitutional right of access to information. Thus, these two constitutional right are justiciable in the sense that the aggrieved person, that is a person who feels that his or her rights have been violated, is entitled to approach a court or any other independent and impartial tribunal for appropriate relief, which may only be granted if a violation of any right has been found to have occurred. Despite the justiciability of the right of access to information and the right to just administrative action, many people who are living in poverty are less likely to have the means and resources to approach the courts for judicial enforcement and protection of these rights. As pointed out by Hoexter, not everyone has the financial resources to litigate and many potential applicants are prevented by this requirement from challenging decisions in a court of law, hence only a small proportion of decisions are challenged in court.

7. Recommendations

It is recommended that, in order to enhance responsiveness, openness and accountability in South Africa, both PAJA and PAIA be amended to incorporate the guidelines developed by the courts to determine when the power or function

would be considered public for the purposes of the application of these two statutes. Furthermore, the approach in the United Kingdom listing the public authorities by name or type be adopted, and that the functions which are considered to be in the public interest when they are performed by institutions in terms of legislation be included in the proposed list. The list of companies that are considered to be public and the functions considered to be performed in the public interest do not have to be exhaustive but should be given as examples.

The proposed amendments to legislation are necessary particularly in light of the fact that the applicants for judicial review and access to information are required to establish that the requirements for the application of PAJA and PAIA, respectively, to the private institutions, as set out by the courts, are all met, failing which they would not be entitled to the required relief.

These proposed amendments would facilitate the enjoyment of the constitutional rights to administrative justice that is lawful, reasonable and procedurally enshrined in s 33 of the Constitution, and the constitutional rights of access to information enshrined in s 32 by all people, specially unsophisticated persons who may not have the resources or means to easily use the legal mechanisms created by PAJA and PAIA.

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