

The Promotion of Administrative Justice Act

Administrators' Guide

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Part 1 Introduction: The Aim of this guide

The aim of this guide is to provide administrators in the public service with an introduction to the most important requirements of the Promotion of Administrative Justice Act 3 of 2000 ('AJA').

The AJA was passed by Parliament to "give effect" to the rights to just administrative action in s 33 of the Constitution. The AJA also aims at promoting an efficient, accountable, open and transparent administration.



Administrative Law ...

...is the body of law that controls the government and the public administration.

The AJA:

- Sets out the rules and guidelines that administrators must follow when making decisions;
- Requires administrators to give reasons for their decisions;
- Requires administrators to inform people about their rights to review or appeal and to request reasons; and
- Gives members of the public the right to challenge the decisions of administrators in court.



Note

This guide does not include the "Code of Good Administrative Conduct" that the Minister of Justice must still draw up. This Code will include guidelines and information for administrators to assist them to meet the requirements of the AJA.

This guide also does not deal with the **regulations** to the AJA in detail. Instead, it touches only on those dealing with how administrators should work (as they were in June 2001).

The regulations to the AJA will change from time to time. As a result, you will therefore need to look at the regulations and the Code of Good Conduct regularly as well.

Part 2 Important terms And concepts



This part of the guide explains:

Some of the terms and concepts needed to understand the way the AJA works and what it is trying to do. It explains:

- The Constitution;
- The Rule of Law
- The Bill of Rights;
- The State;
- Administrative Law; and
- Judicial Review.

a. The Constitution

South Africa is governed by the Constitution of the Republic of South Africa, Act 108 of 1996 (**the Constitution**). One of the most important things that the Constitution does is to make South Africa a “**constitutional democracy**”. This means that the Constitution is the highest law in the country. It contains the Bill of Rights and the rules how government has to function.



Changing the Constitution

Because the Constitution is the highest law it is more difficult to change than other laws. The Constitution can only be changed by Parliament if it uses special procedures and if two-thirds of the members of Parliament agree to the change.

All laws and all people (including Parliament, the President, the Ministers, the administration and the courts) must follow and obey it.

The Constitution contains the most important rules of our political system. It sets out what institutions make up the South African State, what their powers are, and how they may use their powers.

The Constitution has a Bill of Rights (including the right to Just Administrative Action) that protects the rights of **all** people inside the country, and it explains what their obligations and duties are.

b. The Rule of Law

One of the most important principles contained in the Constitution is the rule of law. To be a constitutional democracy (rather than a dictatorship or a tyranny) the government must act in accordance with the law. This means two things:

- The government (like everyone else in the country) must **obey** the law; and
- The government can only exercise power over people if the law allows it to.

c. The Law

If the government must obey the law and can only act when the law allows it to, where is the law to be found?

The sources of law: Legislation and the common law

i. Legislation

The Constitution is the highest and most important law in South Africa. It has a number of specific legal rules and it gives **legislatures** the power to make written laws (called **legislation**).

Although the Constitution is itself legislation (having been passed by Parliament in 1996), **all** other legislation is subordinate to the Constitution.

This means that legislation will only be valid if it complies with the Constitution.

A lot of legislation is made by administrators. This type of law is called **delegated legislation**. Very often, an Act of Parliament or a Provincial Act, will set out a broad framework and will give (delegate) the power to an administrator to make rules for the administration of the Act. These rules are known as **regulations**.



Legislatures

The Legislature is the part of government that makes new laws; amends (changes) any written laws that need to be changed; and scraps old written laws that are no longer necessary.

In South Africa, we have:

- A national legislature (**Parliament**) to make laws for the whole country. These laws are known as **Acts of Parliament** or simply **Acts**;
- **Provincial Legislatures**, to make laws for their province. These are called **Provincial Acts**; and
- Local legislatures, called **municipal councils** to make laws (called **By-Laws**) for their municipal areas.



Example

The South African Passports and Travel Documents Act 4 of 1994 (the Passports Act) deals with passports. But the Act says nothing about things like:

- What forms must be used when you apply for a passport;
- What the application fee is; or
- How long the passport is valid for and whether it can be renewed.

Instead, the Act gives the Minister of Home Affairs the power to make **regulations** to cover these. These regulations are therefore an important source of law on the subject of passports.

ii. Common Law

This is the law that is not written in legislation, but has been developed by our courts over the last one and half centuries. When a court makes a decision, other courts usually follow this decision when they decide similar cases. In this way, courts develop legal rules.

A legislature can pass a law that overrules or changes the common law. Like all law, it is also subordinate to the Constitution.

d. The Bill of Rights

Our Constitution contains a Bill of Rights (in Chapter 2). The Bill of Rights protects the rights of **all** people in South Africa, not only citizens. The state has to “respect, promote and fulfil” these rights and cannot do anything that goes against these rights.

The particular right that we are concerned with is section 33 of the Bill of Rights, which reads as follows:



Just administrative action (section 33 of the Constitution)

- (1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
- (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.
- (3) National legislation must be enacted to give effect to these rights, and must
 - (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
 - (b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and
 - (c) promote an efficient administration.

Briefly, this means people have a right:

- To fair and reasonable administrative action that is allowed by the law; and
- To be given reasons for administrative action that affects them in a negative way.



Note

Subsection (3) of section 33 says that an Act of Parliament must be passed to:

- Explain how administrators must act; and
- Give people rights that they can enforce in court.

This Act has been passed - it is the **AJA** and is the focus of this guide.

e. The State

The state is the “organised authority” of a country. It manages its public affairs, both inside and outside the country. The state is made up of many **organs of state**. These can be divided into four separate areas:

1. **The legislature.** As we've seen, the legislature is made up of Parliament, the nine provincial legislatures and the municipal councils. Their main function is to make law (called legislation) and they must obey the Constitution when doing so.
2. **The judiciary.** The judiciary is made up of the courts and the judges and magistrates. Their function is to interpret and to enforce the law (including the Constitution).
3. **The executive.** The **National Executive** is made up of the President and the cabinet (the ministers). At **provincial level**, the executive is the Premier of a province and the provincial Executive Council. At **local level**, the executive is the respective district or municipal council. The executive makes **political** decisions. It develops policy and writes legislation which it asks Parliament (or the other legislatures) to consider and pass.
4. **The administration.** The administration does the day-to-day work of government. It is made up of:
 - All government departments at national, provincial and local levels;
 - The police and the army; and
 - The 'parastatals'. These are organisations such as public enterprises and regulatory boards. Examples are Eskom, Telkom and the SABC.



Note

The executive (the President, cabinet ministers, MECs, municipal or district councils etc) can also sometimes act as members of the administration when they perform administrative (rather than political) functions. When a cabinet minister, acting as the head of a government department, makes regulations, he or she is acting as an administrator.

f. Administrative law

This is the branch of the law dealing with the administration. It is made up of:

1. **General administrative law.** This is the law that governs the administration in general, by setting out:
 - General rules and principles that all administrators must follow; and
 - Remedies for people affected by administrative decisions – that is, where administrative powers have not been properly used or where requirements of in the law have not been followed.

2. **Particular administrative law.** This is the body of law governing specific areas of the administration. For example, the law relating to refugees and immigration, vehicle licensing, state tendering procedures, land-use planning or civil aviation.

The AJA is part of general administrative law. It applies to and binds the entire administration – national, provincial and local. The AJA:

- Sets out the general rules for the proper performance of **all** administrative action;
- Says reasons must be given for administrative action in certain circumstances;
- Requires administrators to inform people about their rights to review or appeal and to request reasons; and
- Sets out the remedies that are available if these rules are not followed.

Because the rules in the AJA are general, they do not give powers to administrators. Instead, the AJA says how the powers given to administrators **by other laws** must be exercised.

Before administrators can make decisions that have an impact on another person, they must be allowed to do so by a law. Whether the law allows a particular administrator to make a particular decision depends on the law that applies to that administrator.

Even when administrators have this power, their decisions must also satisfy general administrative law.



Example

Suppose officials of the Department of Home Affairs decide to increase the fee for people applying for a passport. This decision affects the public and can only be made if the law allows it. The law here is Section 4(e) of the Passports Act. This allows the Minister of Home Affairs to make regulations relating to the fees payable for a passport. Can the Minister delegate this power to someone else in the Department? Must a hearing be held before the decision is taken to increase the fees? Must reasons be given for the decision to increase the fees? The Passports Act itself does not answer these questions. Instead, one must turn to the AJA, which sets out generally how the powers given to administrators must be exercised.

g. Democracy

The Constitution says South Africa is a 'democratic state' founded on the principle (amongst others) of 'democratic government, to ensure accountability, responsiveness and openness'.

The right to administrative justice in section 33 of the Constitution and the AJA itself is an important part of creating a democratic state.

Democracy has been described as 'government by explanation'. This means that the decisions of government should be **explained** or **justified** to the people that they affect.

The right to just administrative action in the Constitution recognises the importance of justification in the following ways:

- Section 33 (1) provides a right to 'reasonable' administrative action that is 'procedurally fair'. For example, a decision affecting someone should not be made before hearing what that person has to say; and
- S 33 (2) gives people the right to be given reasons for administrative action that affects their rights.

Administrators exercise **public** power. The public has agreed to administrators having power over them but, in a democratic state, administrators are expected to use this power for the public benefit and not for their own private benefit.



Accountability, Responsiveness, Openness and Transparency

1. *Accountability* means that officials must explain the way in which they have used their power. They must be able to justify their decisions.
2. *Responsiveness*. A responsive government is one that listens to the people it governs and responds to their needs. An unresponsive government ignores and shuts itself off from the people. Many of the provisions of the AJA are designed to promote responsiveness. For example, section 4 says administrators must consult the public before important decisions are taken.
3. *Openness*. Openness is the opposite of secrecy. The way government works should be open for all to see. Decisions are more likely to be supported by people if they can see, understand and contribute to the process of decision-making. This is why the AJA says reasons must be given for decisions.
4. *Transparency*. Transparency is mentioned in s 195 of the Constitution as one of the basic principles of the public administration.



Bias and Prejudice

Bias is when you favour one person over others unfairly.
Prejudice is where you are unfairly and without reason, against someone.

Decisions must be made (and must be seen to be made) impartially. By requiring reasonable and procedurally fair administrative action, section 33 makes sure that their decisions are free from any actual or apparent bias or prejudice.

h. Judicial review

Because the government must obey the law it is possible to take the government to court if you believe it has broken **any** law. The power that courts have to decide whether a government decision is allowed by the law is called judicial review. Once the court has heard both sides, it may decide the government's action was unlawful – that is, the action is not permitted by the law and is therefore invalid.

The AJA sets out the procedures and grounds for challenging a particular type of government action - administrative action. If someone feels that a decision by an administrator is unlawful, unreasonable or that fair procedures were not followed, they can approach a court for judicial review of the decision.



Note

Judicial Review is discussed in detail in Part 7 of this guide.

i. Batho Pele

Since 1 October 1997, the South African public service has been guided by a new service delivery approach and framework. This new set of principles guiding the public service is found in the 'Batho Pele' White Paper. These call for a change in systems, procedures, attitudes and behaviour of the public service for the benefit of internal and external customers.

The AJA, having similar objectives, complements and advances the Batho Pele principles by means of legislation.



Batho Pele

'Batho Pele' is a SeSotho term meaning 'People First'. The name was chosen to express the main message of the campaign - that the purpose of the Public Service is to serve all the people of South Africa.

The Batho Pele White Paper sets out eight national service delivery principles, which highlight the public service's need to:

- **Regularly consult** with its customers about the level and quality of services they are receiving and should receive in future;
- **Set service standards**, setting out the level and quality of services that customers can realistically and consistently expect;
- **Increase access to services**, especially to those people who experience barriers to access (such as their race, gender or disability; where they live; how much money they have; their access to modern communication systems; their culture and so on);
- **Ensure higher levels of courtesy** by setting out and sticking to standards of behaviour for the treatment of customers;
- **Provide more and better information about services**, so that customers have full, accurate, relevant and up-to-date information about the services that are available and that they are entitled to receive;
- **Increase openness and transparency** about how services are delivered, how well they perform, the resources they use and who is in charge;
- **Remedy failures and mistakes**, so that when problems occur, there is a positive response and problems are sorted out; and
- **Give the best possible value for money**, so that customers feel that the money they contribute to the state (through various forms of taxes), is used properly and that any savings are used to improve service delivery further.

We need Batho Pele because many of our national and provincial departments are still using outdated systems and procedures that were not designed to put the needs of the people first. Batho Pele is therefore about ensuring that the resources we already use to run the Public Service are geared towards delivering quality services. It is about getting rid of wasteful and expensive internal procedures and using the money saved to provide better services to more people. It is about making sure that the state's priorities for where money should be spent are in line with the public's priorities.

Many improvements that the public would like to see cost nothing – a smile, treating customers with respect, being honest with customers when giving information, and apologising if things go wrong. These are really about adopting different (and better) standards of behaviour.

Batho Pele is not only about putting 'the customer' first. It is also about giving the people who serve the customer - the front-line staff - a major role in the new public service. Front-line staff, whether serving the public directly or providing services to other parts of government, are often best placed to tell managers what needs to be done to improve services for both internal and external customers. Front-line staff and those who support and manage them now have the opportunity to have their say about how to change and streamline systems and procedures that often get in the way of providing a good service.

Part 3

An Introduction to The Promotion of Administrative Justice Act (AJA)



This part of the guide gives:

A brief explanation of the AJA and its basic structures and principles.

a. What is the AJA?

The AJA is an Act of Parliament, passed to give effect to the constitutional rights to lawful, reasonable and procedurally fair administrative action, and to the right to be given reasons for administrative action. That is, it:

- ❖ Is the Act of Parliament mentioned in section 33 of the Constitution;
- ❖ Requires administrators to follow fair procedures when making decisions;
- ❖ Requires administrators to give adequate reasons, when asked to do so, for the decisions that they have taken;
- ❖ Requires administrators to inform people about their rights to review or appeal and to request reasons;
- ❖ Gives members of the public the right to challenge administrative decisions in court on a number of grounds; and
- ❖ It lays down the procedures that must be followed by people seeking judicial review.



Note

Lawful means that administrators must **obey** the law and must be **authorised by** law for the decisions they make.

Reasonable means that the decision taken must be **justifiable** - there must be a good reason for the decision.

Fair procedures means that decisions should not be taken that have a negative effect on people without consulting them first. Also, administrators must make decisions impartially. To ensure fairness, the AJA sets out procedures that administrators must follow before they make decisions.

b. If the rights to administrative justice are already in the Bill of Rights, why is there also an Act?

As we have seen, section 33 of the Constitution required Parliament to pass such an Act. The AJA was passed to “give effect” to the rights in the Constitution – that is, to make them work in practice. The rights in section 33 are very briefly and simply worded. The AJA gives more detail to this right and sets out specific procedures to be followed.



Note

It is not unusual to have an Act of Parliament “giving effect” to the rights in the Constitution in this way. For example, the Labour Relations Act 66 of 1995 provides the details about the labour relations right in the Bill of Rights.

Before the AJA was passed, administrators were only guided by the Constitution. Now, the Constitution has been supplemented by the Act. This means that administrators must first look to the AJA to find out what their general legal obligations are in relation to the powers that they have by law.

But, if administrators are not sure about how to interpret something in the AJA, they should remember that:

- ◆ The AJA is there to give effect to the right to just administrative action in the Constitution; and
- ◆ The AJA is there to help ensure the government is democratic, accountable, open and transparent.

Part 4 Administrative Action



This part of the guide explains:

The type of decisions that are covered by the AJA, namely, decisions that amount to “administrative action”. It describes:

- What is meant by the term “administrative action”; and
- Which of your decisions are administrative actions (and which are not).

What is an administrative action?

The first question we need to consider is, which actions of administrators are governed by the AJA and which are not?

The short answer is that the AJA deals with ‘administrative action’. But what does this mean? Section 1 of the AJA gives a complicated definition of ‘administrative action’ that can be summarised as follows:



Administrative action means ...

- (a) a decision
- (b) that is of an administrative nature made in terms of an empowering provision
- (c) that is not specifically excluded by the AJA
- (d) that is by an organ of state
- (e) that adversely affects rights and
- (f) that has ‘direct external legal effect’

In the following pages, we will look at each of these “elements” in detail.



Note

It is important not to misunderstand the AJA: The definition of administrative action given in the Act is quite narrow – so, if an action does not fit this definition, it could be argued that the rules in the

a. “a decision”

The AJA says administrative action is limited to:

- a decision; or
- a failure to take a decision.



“Decisions”

A decision can be a decision (or a failure to make a decision) relating to:

- (a) making, suspending, revoking (withdrawing) or refusing to make an order, award, or determination;
- (b) giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission;
- (c) issuing, suspending, revoking or refusing to issue a licence, authority or other instrument;
- (d) imposing a condition or restriction;
- (e) making a declaration, demand or requirement;
- (f) retaining (keeping), or refusing to deliver up, an article; or
- (g) doing or refusing to do any other act or thing of an administrative nature.

Failing to make a decision can have a major negative effect (it can “adversely affect”) someone’s rights. An example would be failing to make a decision when someone applies for a passport, since the Constitution gives every citizen the right to a passport. (See section 21 (4) of the Constitution).

b. “that is of an administrative nature made in terms of an empowering provision”

Not every decision a member of the administration takes is “of an **administrative nature**”. Deciding what to have for lunch or what to do after work are obviously not. But decisions that administrators take as part of their job **are** of an administrative **nature**.

However, not all of these decisions are **administrative actions**. To be an administrative action, a decision must be:

- Of an administrative nature;
- Taken by an administrator;
- In terms of an **empowering provision**.

An empowering provision is **usually** a provision of a law that allows an administrator to make a decision.



Example

The Minister of Home Affairs is allowed to increase passport application fees.

The “empowering provision” that gives the Minister the power to make this decision is Section 4(e) of the Passports Act.

c. “that is not specifically excluded by the AJA”

The AJA excludes some of the actions of particular organs of state from the definition of administrative action – and these are therefore not governed by the Act. Most of these actions are governed directly by the Constitution and have their own specific rights, procedures and remedies.

These include:

- Policy decisions of the executive;
- The making of legislation by Parliament, a provincial legislature or a municipal council; and
- The exercise of judicial functions by the officers of courts and some other bodies.

The AJA also excludes decisions taken under the Promotion of Access to Information Act to either allow or deny access to information. The Promotion of Access to Information Act has similar but more detailed rights, procedures and remedies that the state must follow when dealing with a request for information.



Promotion of Access to Information Act

This Act (Act No. 2 of 2000) was passed to “give effect to” the right of “Access to Information” in Section 32 of the Constitution. It allows the public access to information held by the state and to information held by another member of the public if that information is needed to protect one’s rights.

d. “by an organ of state”

As we have seen, “organs of state” include departments at national, provincial or local government level. In Section 239 of the Constitution, organs of state also include “functionaries or institutions exercising a power or performing a function in terms of any legislation”.



Note

Government departments, functionaries and institutions are all covered by the AJA. The AJA goes further though and covers decisions by private individuals and companies when they are “exercising public power”. An example would be when a government department out sources some of its work to a private company, such as when a municipality contracts with a company to supply water to the peoples’ homes.

For purposes of this guide though, we can ignore the application of the Act in the private sphere.

e. “that adversely affects rights”

To be an administrative action, the decision taken must **adversely affect rights**. What does this mean?

Adversely

This means that the decision must **impose a burden** or **have a negative effect**. This includes decisions that:

- Require someone to do something, to tolerate something or not to do something;
- Limit or remove someone’s rights; or
- Decide someone does not have a right to something. This is called an “adverse determination of a person’s rights”.

A **beneficial** decision (one in someone’s favour) would therefore not be administrative action.



Example

Refusing to grant someone a licence is a decision that has an adverse effect on that person, while deciding to grant them a licence does not.

Quite often though, a decision to grant one person a benefit will have an adverse effect on someone else. For example, X and Y apply for the same licence and the administrator decides to give it to X.

Or, when permission is granted to construct a building, this could have an adverse effect on a neighbour whose view may be blocked by the new building.

Affects

There are two ways that a decision can affect a person's rights:

- The decision could **deprive** a person of their existing rights. For example, where an administrator decides to withdraw a license that a person already has; or
- It could affect a person's right by **determining** what those rights are. An example is where someone applies for a license and the administrator decides not to grant it. Here, the decision means the person will not get the rights that go along with the license.

The AJA uses the term in both of these senses. In other words, decisions that **deprive** someone of rights, and those that **determine** what that person's rights will be, are both "administrative action".

Rights

Rights are understood in law as when one person has a right to claim something against another person and that other person has a duty to do something.

Rights can be the rights granted by the Bill of Rights, by contract or by legislation. Rights can even be created by a promise of an administrator.



Example

A person applies to the Department of Social Development for a welfare grant. If the grant is given, the person has a claim against the department for the payment of money and the department has a duty to pay the money. This is a right. If officials of the department turn down the application, an **adverse determination of the applicant's rights** has been made (i.e., it has been decided that the applicant has no **right** to claim the grant).

f. That has a 'direct external legal effect'

This phrase has three components – a decision must have a legal effect, the effect must be direct, and it must be external.

This is another way of saying that to qualify as administrative action, decisions must have a real impact on a person's rights. A short, simple definition would be:

Legal effect

This means that a decision must be a legally binding determination of someone's rights or obligations. In other words, a decision must establish what someone's rights or obligations are, or must change or withdraw them.

Direct effect

This means that the decision must be a final one. If the making of a decision requires an administrator to take several steps or decisions, and only the last step affects a member of the public, then only the last step is said to have direct effect. In such a case, only the last step is an administrative action and can be taken to court for judicial review.

External effect

This means that the decision has to affect someone who is not a part of the organ of state. This will be the case even where people within such an organ of state (such as public servants, students or prisoners) are concerned if they are affected in their **individual rights** - that is, not through measures that are part of the daily business of the organ of state.



Example

The decision to suspend a public servant or to fail a learner in their matric exam affects these people in their individual rights. These decisions are therefore administrative actions.

But a supervisor's instructions to a public servant to perform a specific task or a teacher's decision to fail a learner in an ordinary school test are things that are part of the daily internal operations of the organ of state. These are therefore not administrative actions, because they do not affect the person's rights.

The word 'external' should therefore not be interpreted literally. Even people within an organisation are included by this term if their rights are affected because of the decision.



To Recap

- If an action did not involve a **decision**, it is not an administrative action;
- If a decision was taken, but it was not of an **administrative nature** or was not made in terms of an **empowering provision**, then it is not an administrative action;
- If the decision is one of the type **excluded by the AJA**, it is not an administrative action;
- If the decision is not taken by an **organ of state** it is (usually) not an administrative action;
- If the decision does not **adversely affect** someone's **rights**, it is not an administrative action; and
- If the decision does not have a **direct external legal effect**, it is also not an administrative action.

Over the next few pages, we will consider a long example to see how this works in practice.

A Practical Example

1. **The Department of Social Development is thinking about upgrading the computer software it uses to calculate and pay pensions. It decides to conduct a feasibility study. Is this an administrative action?**

To find out, we need to look at the definition of administrative action.

- a. This is a **decision** because the Department has decided to do something.
- b. The decision is of an **administrative nature in terms of an empowering provision** because it involves deciding how to spend public money to perform the department's job. The power to make this decision is given to the department by the Social Assistance Act.
- c. The decision is **not specifically excluded** by the AJA (it does not fit in any of the section 1 exclusions).
- d. The department is an **organ of state**.

BUT

- e. The decision does **not** adversely affect rights. No determination of anyone's rights has been made and no one has been deprived of their rights.
- f. The decision does **not** have a direct external legal effect – this is only something that is part of the daily business of the Department.

For these reasons, the decision is not an administrative action under the AJA.

This does not mean that the decision is not subject to the Constitution and other laws though. As we have seen, the Constitution and the rule of law require organs of state to obey the law and to have legal authority for everything they do. When the department makes decisions like this, it is not bound by the general rules in the AJA. But it is bound by the particular rules set out in the laws governing the public service and public finance, and by the laws governing social welfare and pensions.

2. **After completing the feasibility study, the Department decides to put out a tender to design and install the new system. Is this administrative action?**

Points (a) to (d) are still the same. But, again, the decision does not involve an adverse determination or deprivation of anyone's rights. And, the decision does not have direct external legal effect in the sense of finally impacting on anyone's rights.

Therefore, the decision is not administrative.

A Practical Example (contd.)

Once again, the fact that the AJA does not apply here does not mean that the decision is not governed by law. For example, the laws governing public finance management and state tendering procedures require contracts above a certain value to be put out to public tender. If the department decided to ignore these requirements and contract directly with a supplier it would be in breach of the law and its actions (and the contract) would be invalid.

3. The request for tenders to design and install the new system is published in the State Tender Bulletin. Is this administrative action?

The answer remains the same, because:

- The decision still does not adversely affect anyone's rights (by determining those rights or depriving a person of them); and
- The decision has no direct external legal effect - there is no finality and no effect on a person's rights.

4. 10 tenders are received and are considered. Is this administrative action?

Until a final decision is made on which tender to accept, the department's actions do not adversely affect rights and have no direct, external legal effect. So, again, this is not administrative action under the AJA. However, the department must still follow the law regarding tenders.

5. The department decides to accept tender 1 and to reject tenders 2 to 10. Is this administrative action?

With regard to tenderer 1 (the person or company given the contract) this is not administrative action under the AJA because the decision is a **beneficial** one.

However, in relation to the people or companies that were not successful, this is administrative action in terms of the AJA because: The decision to award the tender to tenderer 1 and not to them adversely affects their rights and has a direct external legal effect on them.

This shows: Some decisions have opposite effects on different people. As the entire decision-making process cannot be separated, fair procedures have to be followed from the very beginning to comply with the AJA.

Part 5 Procedural Fairness



This part of the guide explains:

The duties of administrators regarding procedural fairness (as required by the AJA). It describes:

- What “procedural fairness” means;
- When procedural fairness is required;
- The procedure to be followed for decisions affecting an individual; and
- Those required for decisions affecting the public in general.

As we’ve seen, the Constitution says administrative action must be lawful, reasonable and procedurally fair and that reasons must be given for administrative action that adversely affects rights. The AJA gives more detail about how these duties are to be carried out by administrators.



The Administrative Justice Act

- **Section 3** deals with **procedurally fair** administrative action that affects **any person**.
- **Section 4** deals with **procedurally fair** administrative action that affects **the public**.
- **Section 5** deals with the duty to provide **reasons** for administrative action that adversely affects rights.
- **Section 6** deals with the requirement that administrative action must be lawful, reasonable and procedurally fair by providing a **right to judicial review** of administrative action on a list of grounds.

Over the next few pages, we will look at each of these sections, and the duties they place on administrators, in detail. In this part, we will look at the requirements in sections 3 and 4. In Part 6 of this guide, we will look at the duty to give reasons in section 5, and in Part 7, we will look at judicial review.

a. What does 'procedural fairness' mean? (sections 3 and 4)

There are two parts to the idea of procedural fairness:

- The first part is that it is usually thought to be unfair for an administrator to make a decision that adversely affects someone without consulting them first. As we know, a judge is not allowed to convict someone of a crime unless they have been given an opportunity to tell their side of the story. Similarly, an administrator should not make a decision affecting someone without first hearing what they have to say. This idea is covered by the Latin phrase 'audi alteram partem' – which means one should hear what the person who will be affected by the decision has to say before deciding.
- The second part is that the decision-making process must be free from any real or apparent partiality, bias or prejudice. When making a decision, administrators must be seen by everyone to be making the decision fairly and impartially and not because of their own private or personal interest in the matter. As is often said, "justice must both be done and must be seen to be done".

b. The two kinds of administrative action that require procedural fairness

An administrative action is basically a decision that affects the rights of members of the public. Such decisions could have:

- A **particular** impact. That is, they affect the rights of a **particular** individual – for example, a decision to refuse an application for a liquor license; OR
- A more **general** impact. That is, they affect the public – for example, a decision to increase the fee payable by all people applying for liquor licenses.



Example

A decision not to award someone a social pension that they have applied for is a decision affecting a **particular** person. Here, the administrator taking such a decision must follow the procedures in section 3 of the AJA.

A decision to change the age at which people qualify for a social pension affects the public **generally**. The procedures set out in Section 4 of the AJA must therefore be followed before taking such a decision.

The AJA deals with the **procedures** to be followed by an administrator before making decisions that affect both a particular person or people (section 3) and those that affect the public generally (section 4).

c. Decisions affecting any person (Section 3)

Section 3 of the AJA deals with fair procedures when making decisions with a **particular** impact. There are some procedures that an administrator:

- **Must** follow before making a decision (**mandatory** procedures); and
- Some additional procedures that an administrator must **consider** following, but does not **have** to follow (**discretionary** procedures)



NOTE

Remember that, when deciding whether or not to follow one of the optional procedures, both the Constitution and the AJA require decisions to be made fairly. You will therefore need to decide which procedures will, in the circumstances, be fair to the people who will be affected by your decision.

i. Mandatory procedures

There are five mandatory procedures that **must** be followed when performing an administrative action that has a particular impact on a person or persons. These are that the affected person must be given:

Before the decision is taken:

- Adequate notice of the nature and purpose of the proposed administrative action;
- A reasonable opportunity to make representations;

After the decision is taken:

- A clear statement of the administrative action;
- Adequate notice of any right of review or internal appeal; and
- Adequate notice of the right to request reasons in terms of s 5 of the AJA.

We will now consider each of these in detail.

Adequate notice of the nature and purpose of the administrative action

“Adequate notice” means more than just informing a person that an administrative action is being proposed. The person must be given enough time to respond to the planned administrative action. The person also needs to know enough information about the proposed administrative action to be able to work out how to respond to the proposed action. They need to know the **nature** of the action (what is being proposed) and the **purpose** (why is the action being proposed).

A reasonable opportunity to make representations

The length of time a person should be given to make representations will be different in different circumstances. This should include an opportunity to raise objections, provide new information, or answer charges.

A “reasonable opportunity to make representations” can sometimes mean that a person affected by administrative action must be given a hearing where that person can make a verbal input. At other times, it may only mean that a person should be allowed to submit written representations to an administrator who must read and think about them.



NOTE

Even if you think that the decision you want to make will not change, the person must still be given a reasonable opportunity to make representations .

A clear statement of the administrative action

An administrator must clearly state what the administrative action is that will be taken. A person affected by the administrative must understand what is likely to happen. This will assist the person affected to respond to the action. Using plain and straightforward language will help people to understand exactly what is being planned.

Adequate notice of any right to appeal or review

People affected by an administrative action can challenge that action if they think the action was wrong. This could, if the law provides for it, be by going to a higher level within the government, like a supervisor or an appeal board. They can also take the matter to court for judicial review.

An administrator **must** tell the person that they have these rights. The administrator must also inform the person about the details and procedures for exercising this right in advance - that is, without waiting for the person to ask. Information should be provided on at least the following:

- Where the appeal can be made;
- When it must be made; and
- How to make the appeal.

Adequate notice of a person's right to request reasons

People affected by the administrative action **must** be told that they have the right to request reasons for that action. The administrator must also pro-actively inform the person about the details and procedures to exercise this right – that is, without waiting for them to ask.

- Where the request can be made;
- When it must be made;
- How to request reasons; and
- Where to get assistance.



NOTE

Part 6 of this Guide explains **how** to write reasons.

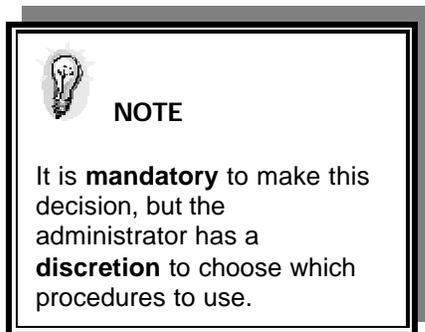
ii. Discretionary procedures

In addition to the mandatory procedures outlined above, to ensure fairness, every administrator must consider the following three additional procedures.

- Providing assistance in responding to the action. In serious or complex cases, this may mean that a person must be allowed to have legal representation.
- A person should be given an opportunity to present information and arguments in their favour and to challenge information and arguments against them.
- A person affected may need to be given the opportunity to appear in person before the administrator.

d. Decisions affecting the public (Section 4)

Section 4 of the AJA says that the administrator has to decide which **public procedures** should be followed when administrative action has a general impact.



These public procedures are designed to involve the public in the decision, to provide accountability, and to gather information to help the administrator. They are:

- A public inquiry
- A notice and comment procedure; or
- Another fair procedure.

i. Notice and comment

There are four basic steps to a notice and comment procedure:

1. The public must be given enough information about the proposed administrative action to allow them to make meaningful representations. That is, a **notice** must be given, which sets out enough information on the proposed action.
2. You must **call for comments** on the proposed administrative action, and you must allow enough time for those comments to be made.
3. You must **consider** the comments that you receive.
4. You must **decide** whether or not to take the proposed administrative action, with or without changes.



Draft regulations to the AJA

The draft regulations to the AJA provide the details of this procedure. For example, they say:

- ◆ The notice must be published in the Government Gazette if the action affects the rights of people throughout South Africa. If they affect people in one province, the notice must be in the Provincial Gazette. And, if they affect only people in a specific area, it must be in a newspaper that is distributed in that area.
- ◆ People must be given at least 30 days after publication of the notice to make their comments.
- ◆ The notice must be published in English and at least one other official language. If the people affected are from one province or area, the other official language used must be one that is commonly used in that area.

As we have said though, the regulations will change from time to time. If you are planning a notice and comment procedure, check the regulations to make sure that you follow them carefully.

ii. Public inquiry

There are four basic steps to a public inquiry procedure.

1. Before the inquiry, you must decide whether to conduct the inquiry yourself or to appoint another person or a panel of people to conduct it.
2. You must give notice of the inquiry. This must include details and information about the matter and issues being investigated in the public inquiry.
3. A public hearing must be held.
4. After the inquiry, you must compile a written report and publish a summary of the report.



Draft regulations to the AJA

Once more, the draft regulations provide the details of this procedure. For example:

- ◆ They set out similar rules for the notice of the public inquiry as those for a notice and comment procedure.
- ◆ They deal with special assistance that must be given to communities that have a lot of people who cannot read or write.
- ◆ They deal with the notice of the hearing itself – which must be published in newspapers covering the country or the particular area concerned.
- ◆ And they deal with the procedure to be used at public hearings.

Again, these regulations will change from time to time. Anyone planning to use this procedure should check the regulations carefully before beginning.



Which procedure should I follow?

The **notice and comment** procedure is a good choice when the impact of administrative action is general.

The **public inquiry** procedure is a good choice when there are issues impacting on a specific community or when a specific issue keeps coming up again and again.

It is even possible to follow **both**. For example, you may have a notice and comment procedure and then, based on the comments, decide that a public inquiry will also help.

You may also follow a **different** procedure as provided for in other legislation as long as it complies with the **fairness** requirements of section 33 of the Constitution.

Part 6 Giving Reasons



This part of the guide deals:

With the requirement in the AJA that people affected by administrative action have the right to request reasons. It explains:

- When you need to give reasons;
- Who can ask for them;
- What “adequate reasons” are; and
- What your reply to a request for reasons should include.

a. When should I give reasons for my decisions?

It is generally good administrative practice to give reasons for **all** decisions. The Constitution says the administration must be accountable for its use of public power. This means being able to explain decisions to the people who are affected by them.

According to the AJA, the request for reasons must be made within 90 days of the date on which the person became aware (or should have become aware) of the administrative action. You must then give adequate reasons, **in writing**, within 90 days.



NOTE

According to the AJA, administrators must give reasons for their administrative action to a person who **requests** them. Of course, an administrator can give reasons immediately with the decision. Sometimes this can help settle potential disputes already at the very beginning.

Sometimes a request for reasons will be made months after the decision has been taken. It is good administrative practice to make a note of the reasons for a decision at the time that it is made. Having made a note, you will easily be able to provide reasons when requested to do so.

b. Who can request reasons?

Anyone whose rights have been adversely affected by administrative action can request written reasons. This includes someone whose rights have been specifically affected.



Draft regulations to the AJA

Please note that the draft regulations deal with the formalities that a person requesting reasons must follow. Generally, these must be in writing and sent by post, fax, email or delivered by hand.

However, if you receive a verbal request from someone who cannot write or needs any other assistance, you must help that person to make their request in writing.

Once you receive the request, you must acknowledge receipt. If you decide **not** to give reasons, you must still write to the person and tell them **why** you are refusing to give reasons for your decision.

Again, these regulations will change from time to time.

c. What are adequate written reasons?

You must provide a **satisfactory explanation** of why a decision was taken. This does not mean that the reasons have to convince the person that the decision was correct. Instead, your reasons must have enough detail to explain why the administrative action was taken. It is not enough to just repeat the relevant sections of the empowering provisions in your reply.

If the person requesting reasons has raised specific questions, these should be answered as far as possible.

The reasons should be written in a language that the requester will understand. For example, do not use technical terms unless you know the person will understand these.

Generally, the length of your statement will depend on the complexity, nature and importance of the decision that it explains. The more complex or serious, the better motivated your statement should be.

d. Structure of reasons

In Part 8 you will find a detailed example of how reasons should be written.

Part 7 Judicial Review



This part of the guide deals:

With the right that people have to ask a court to review administrative action that they do not agree with. It explains:

- What “judicial review” means;
- What “exhaustion of internal remedies” means;
- The “grounds” on which someone can ask for judicial review; and
- What the administrator must do if an administration action is taken to court.

a. Introduction

For the rights to just administrative action to be more than just rights on paper, there must be a way to enforce them. The most important way in which these rights can be enforced is by **judicial review**. This means that any person who is unhappy with an administrative decision can challenge the decision in court. There, they can argue that the decision is a violation of the rights to just administrative action. If the court finds that the decision is unlawful, unreasonable or procedurally unfair it can make any of a number of possible orders to rectify the situation. These include:

- An order declaring the administrator’s decision invalid;
- Ordering the administrator to reconsider the decision;
- Replacing the decision with the court’s own decision; and
- Ordering the government to pay damages to the affected person.

b. Exhaustion of internal remedies

Before someone can ask a court to review an administrative action, there is an important rule in the AJA that must be complied with – the rule of **exhaustion of internal remedies**. This means that, where **the law** sets out procedures allowing someone to review or appeal a decision of the administration, these must be used up before an affected person can approach a court. A person can therefore only ask for judicial review as **a last resort**. This is dealt with in section 7 (2) of the AJA.



Section 7 (2) of the AJA

(2)(a) Subject to paragraph (c), no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has

Internal remedies are ways of correcting, reviewing or appealing administrative decisions using the administration itself. The difference between internal remedies and the remedy of judicial review is that the judicial review is review by a court, which is **independent** from the administration.



Example

Agnes fled the civil war in the Democratic Republic of the Congo. She came to South Africa and applied for asylum. She attended a hearing before a Refugee Status Determination Officer who rejected her application as unfounded in terms of the Refugees Act 130 of 1998. She believes that this decision is unreasonable and wants to challenge it.

In terms of s 26(1) of Act 130 of 1998, asylum seekers who are unhappy with such decisions can appeal to the Refugees Appeal Board. This is a three-member board appointed by the Minister that can confirm, set aside or substitute any decision taken by a Refugee Status Determination Officer.

This procedure is an internal remedy. So Agnes can only ask a court to review this decision if the Appeal Board also finds against her.

This law does allow this procedure to be left out in 'exceptional circumstances' and if it is 'in the interest of justice'. If she wants to leave out this internal remedy, Agnes will have to show the court why her circumstances are exceptional and why it is in the interests of justice to do so.

c. What is the time limit for judicial review?

One of the most important rules in the AJA is that an application for judicial review must be made **within 180 days** of the date on which all internal remedies were exhausted.

Where there are no internal remedies available, the application must be made **within 180 days** of the date on which the applicant became aware of the decision (or could reasonably be expected to have become aware of the decision).

A person who asks for judicial review after this period will not be successful, unless they can convince the court to that it is “in the interests of justice” to allow it.

d. The grounds on which administrative action can be reviewed

The Constitution says administrative action must be lawful, reasonable and procedurally fair. Section 6 of the AJA gives more detail about these requirements. It sets out a list of “grounds” on which courts can review administrative action.



Section 6 of the AJA

6. (1) Any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action.
- (2) A court or tribunal has the power to judicially review an administrative action if—
- (a) the administrator who took it—
 - (i) was not authorised to do so by the empowering provision;
 - (ii) acted under a delegation of power which was not authorised by the empowering provision; or
 - (iii) was biased or reasonably suspected of bias;
 - (b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;
 - (c) the action was procedurally unfair;
 - (d) the action was materially influenced by an error of law;
 - (e) the action was taken—
 - (i) for a reason not authorised by the empowering provision;
 - (ii) for an ulterior purpose or motive;
 - (iii) because irrelevant considerations were taken into account or relevant considerations were not considered;
 - (iv) because of the unauthorised or unwarranted dictates of another person or body;
 - (v) in bad faith; or
 - (vi) arbitrarily or capriciously;
 - (f) the action itself—
 - (i) contravenes a law or is not authorised by the empowering provision; or
 - (ii) is not rationally connected to—
 - (aa) the purpose for which it was taken;
 - (bb) the purpose of the empowering provision;
 - (cc) the information before the administrator; or
 - (dd) the reasons given for it by the administrator;
 - (g) the action concerned consists of a failure to take a decision;
 - (h) the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function; or
 - (i) the action is otherwise unconstitutional or unlawful.

We will now look at some of these grounds in more detail:

i. Lack of authority and unlawful delegation - Section 6(2)(a)(i) and (ii)

Administrators must obey the law and must have authority in law for their decisions. If administrators make decisions that are not allowed by law, they have acted “unlawfully”

and their decisions will be invalid. In most cases, administrators need to be able to show a specific law that gives them the authority to perform an administrative action. In general, without legislative authority, administrators are not authorised to make decisions and take administrative action.

The law will often put certain conditions on this authorisation. Many laws require a decision to be made by an official of a certain rank or with certain qualifications. If such a decision is made by someone without these qualifications, they will have acted without authority. For example, if a law says an official who makes a particular decision must have a legal qualification, a decision made by someone without a legal qualification will not be authorised.

Unauthorised **delegation** is a similar idea. If a law says a decision must be made by a particular official, then only that official can make that decision. This official cannot delegate the power to make the decision to anyone else.



Example

The law governing public schools says the **principal** must decide to start disciplinary proceedings against learners. The principal cannot give this function to anyone else. If, for example, a teacher decides to start disciplinary proceedings against a learner, the decision (which is an administrative action as it adversely affects the rights of the learner) will be unauthorised and invalid and can be set aside by a court.

ii. Bias - Section 6 (2)(a)(iii)

Administrators must use their power without bias. "Bias" means that the person making the decision is unfairly slanted towards or in favour of a particular person or decision. It means too that the person making the decision is not independent and impartial.

There are two types of bias: **actual** bias and **apparent** bias. Both types make an administrative decision invalid. This is explained by the saying that "justice must not only be done but must also be seen to be done". Even if you are not actually biased against a particular person or decision, you will act without authority if it **reasonably appears** that you are biased. That is, if a reasonable member of the community **could think** that you are biased, this will be apparent bias and procedural fairness will not have been complied with.

The circumstances that usually create such an impression are where there is a **conflict of interest**. This could be a monetary interest,



Monetary interest, personal interest and prejudice

Monetary interest: If there is the possibility that a decision-maker could make money out of the decision, it is reasonable to suspect that they will be biased.

Personal interest: Decision-makers will have a

a personal interest or a prejudice.

Where it could appear that a particular administrator might be biased, it is best to get some other administrator to make the decision.

iii. Failure to comply with a mandatory and material procedure – Section 6 (2)(b)

Empowering provisions often require certain procedures to be followed, or certain conditions to be met, before action is taken. If this is not done, any further decisions will not be authorised. For example, if a law says that notice must be given to a licence-holder before the licence is withdrawn, it will not be lawful to withdraw the licence unless notice has been given.

iv. Procedural fairness – Section 6 (2)(c)

We have already looked at procedural fairness in detail when we looked at the requirements of Sections 3 and 4 of the AJA. Failure to follow fair procedures before taking a decision will allow people affected by it to ask a court to declare the decision invalid.

v. Error of law – Section 6 (2)(d)

Where administrative action is based on a mistake about what the law requires, a court may set the action aside.

vi. Review of the decision-making process – Section 6 (2)(e)(i) – (vi)

Discretionary powers must be used within the law. They must also be used for the purposes that they were given. Decisions can only be taken for reasons allowed by law and not for other reasons.



Example

Mr Ndlovu is suing the local council for damaging his property. While this case is waiting to be heard, he applies to the same local council for planning permission to add a new room to this home.

The local council officials cannot refuse to give him the planning permission unless he

When using your discretion, you can only take relevant factors into account. If relevant factors are not considered, or you take irrelevant factors into account, then your decision will not have been taken for good reason. In such a case, a court can review your decision.

Discretionary powers must be used by the person given these powers and not by others.



Example

The Refugees Act says that a Refugee Status Determination Officer decides whether or not an asylum-seeker applicant will be given refugee status. Another Department of Home Affairs Official cannot make this decision, nor can they tell the Refugee Status Determination Officer to make that decision in a particular way.

vii. Rationality and reasonableness - Section 6(2)(f) and (h)

Administrative action must be reasonable and rational. Briefly, this means that the action taken must make sense given the information that is available to the person who makes the decision to take the action.

e. What must an administrator do when an administrative action is taken to court?

The person who takes the administrative action to court (the Applicant) will issue a “notice of motion”. This is a notice to the other side (the Respondent) that a court action is being started. The Applicant will attach affidavits and other relevant documents to the notice of motion. This notice of motion will be served on the administrator (who will be the Respondent in this matter).

There can be more than one Respondent in any matter. For example, they might be the relevant Minister, the Director-General, and the person who made the decision.

The Respondent (or Respondents) must deliver all documentation and records regarding the administrative action to the relevant registrar or clerk of the court within 15 court days (working days).

As the decision maker, you may also be required to make an affidavit explaining the circumstances and factors that you took into account when making the decision.

CONCLUSION

The AJA gives effect to and promotes the constitutional rights to administrative justice and aims to promote democracy and the values and principles of the Constitution. These values and principles include openness, accountability, responsiveness and transparency.

The AJA requires that:

- Administrators obey the law;
- Administrators have authority in law for their actions;
- Administrative action is performed in a procedurally fair way;
- There must be good reasons for taking a particular administrative action; and that
- Administrators provide reasons and information about available remedies to persons affected by an administrative action.

Part 8

A practical example



This part of the Guide applies:

In a practical case which so far has been described in more general terms. It outlines the whole structure of a decision-making process from the application to the final decision. It concludes with a kind of template for decisions.

It shows:

- The AJA complements the provisions of particular administrative law as far as fair procedure is concerned;
- It gives helpful guidance for structuring efficient and lawful decision-making processes;
- It can be changed to fit other areas of particular administrative law so that organs of State can customize it to their particular needs.

An Example



Note

This example does not deal with all the details of the area of law used in the example or with the complex decision-making process. Instead, it focuses on the impact of the AJA on the decision-making process, which is:

- The application (or where you act on your own authority without receiving an application);
- Applying the law to the facts of the matter;
- Correspondence with the person who may be affected by a decision before the decision is taken. Then, re-applying the law to the facts in the light of the representation received;
- Taking and issuing of a clear decision;
- Giving reasons or informing the person of the right to reasons, and of any legal remedies, when the decision is negative or qualified.

You are an administrator in a provincial Department of Social Development. You are required to evaluate applications for social assistance grants. You have the authority to refuse the application or to grant it on behalf of the Director General.

Step 1: The Application

Ms Dube applies for an old age pension. She provides you with the following information:

- She is 70 years old and a widow;
- She is a South African citizen;
- She lives in Diepkloof; and
- She states that she has no assets.

All necessary forms have been completed, fingerprints taken and so on.



Procedure manual for Social Assistance

The national Department of Social Development has developed a 'Procedure Manual for Social Assistance'. This manual provides a useful insight into this specific area of public administration. However, it was developed before the AJA came into operation and the AJA must now be followed as well when making these decisions.

Step 2: Understanding the request and first identification of the problem

In our example this is easy to establish - Ms Dube is requesting an old age pension. She has submitted all relevant information. Ms Dube expects you to come up with a decision.

Sometimes it can be more difficult to understand the person's request. For example, the application may not be clear or the matter may be very complex.

Step 3: Identification of relevant legal provisions and helpful material

You will need to know the relevant law and any internal policies (including whether any powers have been delegated). You should look for material that may have been developed to make your work easier, such as manuals, forms and templates for decisions.

In our example, the most relevant law is the **Social Assistance Act 59** of 1992 (“the SAA”). However, it is in the **regulations** to this Act that you will find the detail on the procedures to be followed and on substantive matters like the required age, the amount of money to be paid and so on.

As mentioned, there is also a **manual** that gives additional guidance to administrators (see above).

Lastly, there are **forms** and even **software programmes** to assist you in making this kind of decision.

The following sets out the information you will need to find:

- Am I competent to take a decision? Has the authority to take the decision been delegated to me?
- Am I potentially biased?
- Are there procedural requirements?
- What are the substantive requirements?
- Are there any other issues?

Once you have the information you will need, the next step when applying the law is to get an understanding of the **purpose** of the empowering provision. With this knowledge, it will be possible to avoid a too rigid, too technical and sometimes even incorrect application of the law.

Step 4: Applying the law to the case or facts

You now need to apply the law to the facts.

a. The Law

- **Competency and delegation.** The SAA and other documents (regulations, delegations and so on) will say whether you are competent to make the decision. (The AJA itself does not deal with competency and similar issues in each case because the AJA is part of general administrative law).
- **Potentially biased.** Since you do not know the applicant, it is unlikely that you could be biased. However, as will be seen later, you **do** have certain information about Ms Dube that you might have to take into consideration and that will affect your decision.
- **Procedural requirements in the SAA.** You will need to consider whether the procedures (in the Act, in the regulations and in other policies) have been followed.

There may be some procedural steps that, if not followed, will not necessarily lead to an unlawful decision. These are procedures that have been put in place to ensure efficient internal operations. Examples are procedures on how to register an application, filing systems and so on.

- **Substantive requirements in the SAA** and the respective regulations. The SAA says the applicant (amongst other things) must be:
 - A certain minimum age (65 years for males and 60 years for females);
 - A South African Citizen;
 - Live in South Africa; and
 - In need of state support. The law sets out the monetary limits that a person who applies for a grant can earn or hold as assets. This calculation is rather complicated and changes from time to time. Let's presume for our case that the limit for assets is R5 000.00.



Note

The AJA focuses on fair procedures. Although decisions can be reviewed in terms of s 6 (2) of the AJA also because of the reasons you took into account (as opposed to the procedures you followed), this will really depend on whether you have properly applied the empowering provisions of the particular administrative law (here the SAA).

b. The Facts

What are the corresponding facts in our case?

- **Competency and delegation.** You are an official of the competent provincial government department. You have delegated power to decide on the application.
- **Potentially biased.** You live in Ms Dube's neighbourhood and, by coincidence, a reliable person told you that Ms Dube was recently awarded R100 000.00 in an out of court settlement. The case involved an old dispute relating to the death of her husband 10 years ago as a result of vanadium poisoning at his former workplace. As this will most probably be a relevant fact to be considered, you have to be careful to avoid bias. But although you are Ms Dube's neighbour and you may want to take facts into consideration that came to your attention through rumours, this will not result in bias as long as you deal openly and fairly with these issues.
- **Procedural requirements in the SAA.** Let's presume that they are all complied with.

- **Substantive requirements in the SAA** and the respective regulations. Mr Dube is:
 - Within the age limit as she is 70 years old;
 - A South African citizen;
 - Has residence (lives) in South Africa; and
 - She says that she does not have any assets. However, you are not sure whether this statement is correct. As described above you live in Ms Dube's neighbourhood and you were told that she was recently awarded R100 000.00 in an out of court settlement.If Ms Dube has in fact got this amount of money she will not qualify for a state pension, not even a reduced one. In this case you would have to decline the application.

Now we can see the particular relevance of the AJA, because you may have to reject Ms Dube's application. Since this would **adversely affect her rights** and also have a **direct, external, legal effect**, the provisions of the AJA apply.

Your decision is clearly an administrative action (since it meets all the aspects of the definition of "administrative action" in the AJA). As a result, the AJA requires you to inform Ms Dube of your planned decision so that she can make representations (see section 3 of the AJA). The communication with Ms Dube can be done in writing, on the telephone, or by using any other appropriate communication channels. In most cases it is best to use written down procedures.



Notes

a. Positive decisions

At first sight, the AJA appears only to apply to 'negative' decisions (those which adversely affect rights). But, a too narrow understanding may lead to unlawful decisions even where you grant an application. For example, section 3 (2) (c) states that there must be a clear statement of the administrative action. So, even if you decide to approve Ms Dube's application, you have to inform her of this decision. Your letter must say that you have granted the pension and how much money she will receive. Otherwise, Ms Dube could sue you for failure to take a (clear) decision.

b. Temporary awards

In case of temporary awards (such as giving someone a disability grant for a fixed period), the AJA applies as well because this decision will affect the person's rights if they had applied for a permanent grant.

c. Acting out of your own authority

If you are not responding to an application but out of your own authority, you need to give 'adequate notice of the nature and purpose of the proposed administrative action' so that, again, the person can make representations. For example, if Ms Dube already had a pension and you found out she had received a huge out-of-court settlement, you have to withdraw her old age pension. In such a case, you need to give Ms Dube a chance to make representations.

Step 5: Communicating with the applicant – the Audi alteram partem rule

To make sure Ms Dube has a chance to explain her side of the story, you will probably need to write to her, explaining what you have found out and what decision you plan to take. The letter you write to her may look like this one:

Department of Social Development
Private Bag X 61
Johannesburg
0001
Tel.: 011/3227558

10 October 2001

Reference: 12345/01

By Registered Mail

Mrs A Dube
PO Box 123
Diepkloof, 0123

Dear Mrs Dube,

RE: Your application for a pension grant dated 20/09/2001

I refer to your application for an old age pension. Regulation 13 of the regulations to the Social Assistance Act 66 of 1992 says that a pension can only be given to a person who (amongst other things) does not have savings exceeding R5,000.00.

It has come to our knowledge that you have recently received an amount of R100,000.00 Rand as an out-of-court settlement relating to the death of your late husband 10 years ago. If this is so, you will not qualify for an old age pension.

Please let us know whether this in fact the case and, if it is, how much money you actually received. Please let us have your reply by 15 November 2001 or I will have to reject your application.

Sincerely

A Brooks
Deputy Director: Social Grants
dm

The Administrator's
address

Date

Reference number

Mailing instruction, if any

Recipient's name and
address.

Salutation

Subject

State the problem by
referring to explaining the
relevant legal provisions (in
as simple language as
possible).

State the corresponding
facts of the case as well as
your conclusions for the
possible decision.

Complimentary closing

Signature
Your name
Your job title and
department
There are no enclosures to
this letter – if there were,
you would indicate this here.
The writer's initials

Step 6: The decision with reasons and information on legal remedies

You have waited until 30 November 2001 without having receiving a response.

If you had no doubts that your understanding of the legal and factual issues on which you want to base your decision is correct, you could now come up with the final decision.

However, in our example your information is based on hearsay – that is, you have heard that Ms Dube has this money but you do not know this for sure yourself. News like this can sometimes be spread without any factual basis. Ms Dube lives in your neighbourhood. It should therefore be easy for you to contact her directly. As a good administrator, you may want to visit Ms Dube to remind her to answer your request for information. Even though the law does not require this, an administrator, in line with the Batho Pele principles that demand customer-oriented service delivery, sometimes should go the 'extra mile'.

However, even though you visited her house, she was not there. While talking to one of her neighbours, she tells you as well about the out-of-court settlement and the money Ms Dube received. As a result, and since Ms Dube has never written back to you, you decide to turn down her application.

This section explains:

- What your decision might look like;
- What should be included in your written reasons (or what information you should provide on the right to request reasons); and
- What the information on possible legal remedies should look like.

It provides a 'template' or structure for you to follow. You may want to change the template to suit your needs. For example, if you are not responding to an application but instead are acting on your own authority (perhaps by terminating an existing grant).

Often decisions are very simple and short. For example, there may be no cost order necessary or the decision itself was quite simple. The more difficult and complex a decision is, the greater the need for a more detailed and sophisticated decision and for more detailed reasons. In all cases though, you must comply with the following minimum requirements:

- A clear decision must be set out, which also includes your particulars;
- Adequate reasons must be given (or you must provide information on the right to request reasons); and
- You must provide information on any legal remedies available.

In general, the decision should include the following parts:

i. Address block

Make sure to include:

- Your address (which will usually be on the letterhead you use);
- The date of the letter;
- Your file reference number;
- Any special mailing instruction, if necessary (such as “By Registered Mail”; or “By Fax”);
- The name of the person to whom you are writing;
- Their address;
- The name of the particular person you want to see the letter if you are writing to a department or business (for example, “Attention: Ms P Ndlovu”);
- Your salutation (such as “Dear Ms Mkhize” or “Dear Sir”); and
- The subject of the letter (such as “RE: Your application for a liquor licence”).

ii. The problem

Re-state the purpose of the application and say why you are writing (for example, “I am writing in connection with your application for a pension grant”). This will indicate that you understood the nature of the proceedings.

iii. The decision

This is where you state exactly what decision has been taken without yet giving reasons for the decision:

1. State the main decision in one sentence only, but do not give any reasons for the decision here. The purpose of this sentence is for the recipient to get a clear and simple answer to the question: “Did I succeed in my application?” or “What does the Department want from me?”

Where you are acting on your own authority (and where you can't refer to an application), you can test whether your decision is clear and complete by checking to see that it answers the question: Who has to do what, when and where?

2. State all the subordinate decisions. Every subordinate decision must be stated in one sentence only, without giving any reasons for it. Remember that you are only allowed to make subordinate decisions if the empowering provision allows it. Subordinate decisions include:
 - a. Conditions attached to the main decision.
 - b. Time limits attached to the main decision.
 - c. Exceptions attached to the main decision.
 - d. Exemptions to the main decision.

3. Make a cost order, if the empowering provision allows or requires it. State the amount that must be paid, who must pay it, and by what date the amount should be paid. If you have to issue an assessment before the amount can be paid, attach the assessment as an enclosure.

iv. Reasons for the decision (and any subordinate decisions)

1. For the main decision:

- a. State the jurisdiction or authority of the decision-maker. That is, say why you have authority to make this particular decision (in simple cases, where there is no dispute about your authority, it may not be necessary to elaborate on this requirement).

- b. State the facts of the matter. Two sets of facts are important:

- i. The **history** of the matter.

1. If the matter arose from an application by someone, say who applied for what and when.

In some cases, you may have given other people a chance to comment or make representations before taking your decision. If this is the case, you must say who you informed and what their responses were.

If you have already sent these responses to the original applicant and they have replied to them, you must also mention this.

2. If the State initiated the matter, say why your Department decided to start an investigation. Set out who was informed of the investigation and what their responses were.

- ii. List all the **facts on which the decision is based**.

- c. Give the reference of the empowering provision – that is, say what provision covers decisions on these types of facts.
- d. State the purpose of the empowering provision. List the conditions that must be met before an administrator may exercise the powers in the empowering provision. If you rely on a Court's interpretation of the section, give the reference of the case and explain what impact this decision has had on the section.
- e. Apply the law to the facts listed.

2. Repeat the process for each of the subordinate decisions **and** any cost order.



Note

This structure sets out all the elements of a sound motivation for a decision. Of course, as in our example, you can keep it short and simple in clear cases. This applies in particular to situations where, after having read the party's representations, you know that the actual dispute focuses on one very specific issue. In such a case, it is important to address this topic and keep the rest very brief.

What to do if you are not allowed to give reasons

In some cases, the policy of a particular department or organ of State may be not to give reasons automatically with the decision. In such a case, the AJA requires you to inform the person of the right to request reasons afterwards. The draft regulations describe the formal requirements of a request as well as the corresponding duties of an administrator.

In such a case you will therefore have to include a paragraph where you explain the right to request reasons. This should be done before you explain the person's rights to legal remedies.



Example

A person makes an application to your department. You decide to reject the application, but your department's policy is not to give reasons unless these are requested from you. After your actual statement of the decision you should now add a paragraph such as the following:

'As set out in section 3 (2) (e) of the Promotion of Administrative Justice Act 3 of 2000 (and its regulations) you can request reasons for this decision within 90 days of receiving this letter.

If you would like reasons for this decision, please send your request to the above-mentioned address. In your letter, please refer to this decision. You must also tell us which of your rights, in your opinion, have been adversely affected. You must also provide us with your full name, postal address and, if available, a telephone and fax number where you can be contacted.'

v. Advice on legal remedies

- a. If there is an internal appeal available:
 1. Give the contact details of the person responsible for the internal appeal (including their name, physical address, fax number and telephone number);
 2. Set out the period of time that they have to lodge the appeal or the date by which it must be lodged; and
 3. Explain any prescribed or special forms that must be used for the internal appeal. Attach copies of these forms as an enclosure.

- b. If there is no internal appeal:
 1. Say which Court has jurisdiction to hear a review; and
 2. State the time limit within which the review has to be lodged.

vi. Ending off

- Write a complimentary closing (such as “Yours sincerely”);
- Sign the letter;
- Write your name and job title **clearly** underneath your signature;
- Say what department you are from;
- If you will be sending enclosures, say how many there are (for example, “Encl. (3)”);
- Include the writer’s initials (if the letter is typed on your behalf); and
- Indicate who complimentary copies will be sent to (for example, “CC: Dr P D Smith”)

Remember to include:

- Your assessment for any fees payable; and
- An internal appeal form (if prescribed).

AN EXAMPLE OF SUCH A LETTER AND EXPLANATORY NOTES

APPEARS ON THE FOLLOWING PAGE

Department of Social Development
Private Bag X 61
Johannesburg
0001
Tel.: 011/3227558

1 December 2001

Reference: 12345/01

CERTIFIED MAIL

Mrs Dube
PO Box 123
Diepkloof, 0123
ID. Number:

Dear Mrs Dube,

RE: Your application dated 20/09/2001

You have applied for an old age pension.

Decision:

Your application for an old age pension dated 20/09/01 has been rejected.

Reasons:

In your application for an old age pension, you stated that you do not have any assets.

Our decision is based on the following facts and legal opinion:

It has come to our knowledge that you have recently received R100 000.00 in an out-of-court settlement relating to the death of your late husband 10 years ago. On 10 October 2001, we wrote to you asking whether or not this was true and, if so, how much money you received. You have not responded to this letter. One of our officers tried in vain to contact you at your house on 25 and 30 November to discuss the matter with you. On one of these occasions, one of your neighbours confirmed our information with regard to the above stated out-of-court settlement.

Amongst other conditions, regulation 13 of the regulations to the Social Assistance Act 66 of 1992 says that your assets may not exceed an amount of R5 000.00. Since your assets are around R100 000.00, you do not qualify for a pension grant or for a reduced grant.

Based on these facts and the relevant legal provisions your application had to be rejected.

Advice regarding legal remedies:

Under section 10 of the Social Assistance Act, you have the right to appeal against this decision. It must be done in writing within ninety (90) days of receiving this letter. The appeal may be lodged at your nearest District/Service Office.

Sincerely



A Brooks
DIRECTOR GENERAL, DEPARTMENT OF SOCIAL SERVICE
dm

The Administrator's address

Date

Reference number

Mailing instruction

Recipient's name
and
address.

Salutation

Subject

State the purpose of the
application

The main decision in one
sentence, without reasons. (In
this example, there are no
subordinate decisions)
State the authority of the
decision-maker (not necessary
in our case as this is not a
problem).

The history (facts) of the matter.
Since no third party was
involved in this example, there
is no need to inform anyone
else of the application.

The facts on which the decision
is based.

The empowering provision; if
unclear or relevant to avoid
dispute, state the reason for the
empowering provision.
Apply the law to the facts.

Advice on any legal remedies
available.

Complimentary closing

Signature
Your name, job title,
department
(There are no enclosures to this
letter – if there were, you would
indicate this here.)
The writers/ initials