

The PAJA Mainstreaming Guide for Organs of State



The Promotion of Administrative Justice Act (PAJA) is a law passed by Parliament, to give effect to the constitutional rights to lawful, reasonable and procedurally fair administrative action, as well as the right to written reasons. The guide offers practical tools on how to mainstream the PAJA into administrative decisions.



the doj & cd

Department:
Justice and Constitutional Development
REPUBLIC OF SOUTH AFRICA



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Putting good governance into practice

FOREWORD

It is a special honour for me to present the PAJA Mainstreaming Guide for organs of state.

The Constitutional values, rights and principles enshrined in the Constitution of the Republic South Africa, 1996, permeate every aspect of government. In this instance the right to administrative justice in section 33 of the Constitution speaks to Parliament, it speaks to Courts, and more importantly to the Executive. The Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000) (PAJA) was enacted to give effect to the four rights in section 33 of the Constitution, uses the concept of administrator to describe an organ of state or any natural or juristic person taking administrative action, it focuses on the administrative action rather than the decision-maker. Thus administrators have to take the right to administrative justice into account in their exercise of a public power or performance of a public function.

The purpose of this Guide is to assist and guide them to do so by:

- providing administrators with assistance on how to systematically integrate the PAJA requirements into administrative decision-making processes; and
- contributing to the creation of an institutional environment that enables organs of state to implement the PAJA requirements.

This Guide is nevertheless only a guide. It is not intended to be a substitute for section 33 of the Constitution, the PAJA itself or any relevant legislation or executive policy (such as the Ministerial Handbook and the Manual on Executive Acts of the President) or departmental policy that may inform an administrative action.

I would like to convey my appreciation to the Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH, members of the Interdepartmental Working Group (IWG) on the PAJA, the South African Social Security Agency, the various national and provincial departments and three local municipalities who made their valuable inputs to the development of this Guide in various forms. Their contributions are a right step from the text of the Constitution and the law to real life practice.



MS TN SINDANE
DIRECTOR-GENERAL: DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT

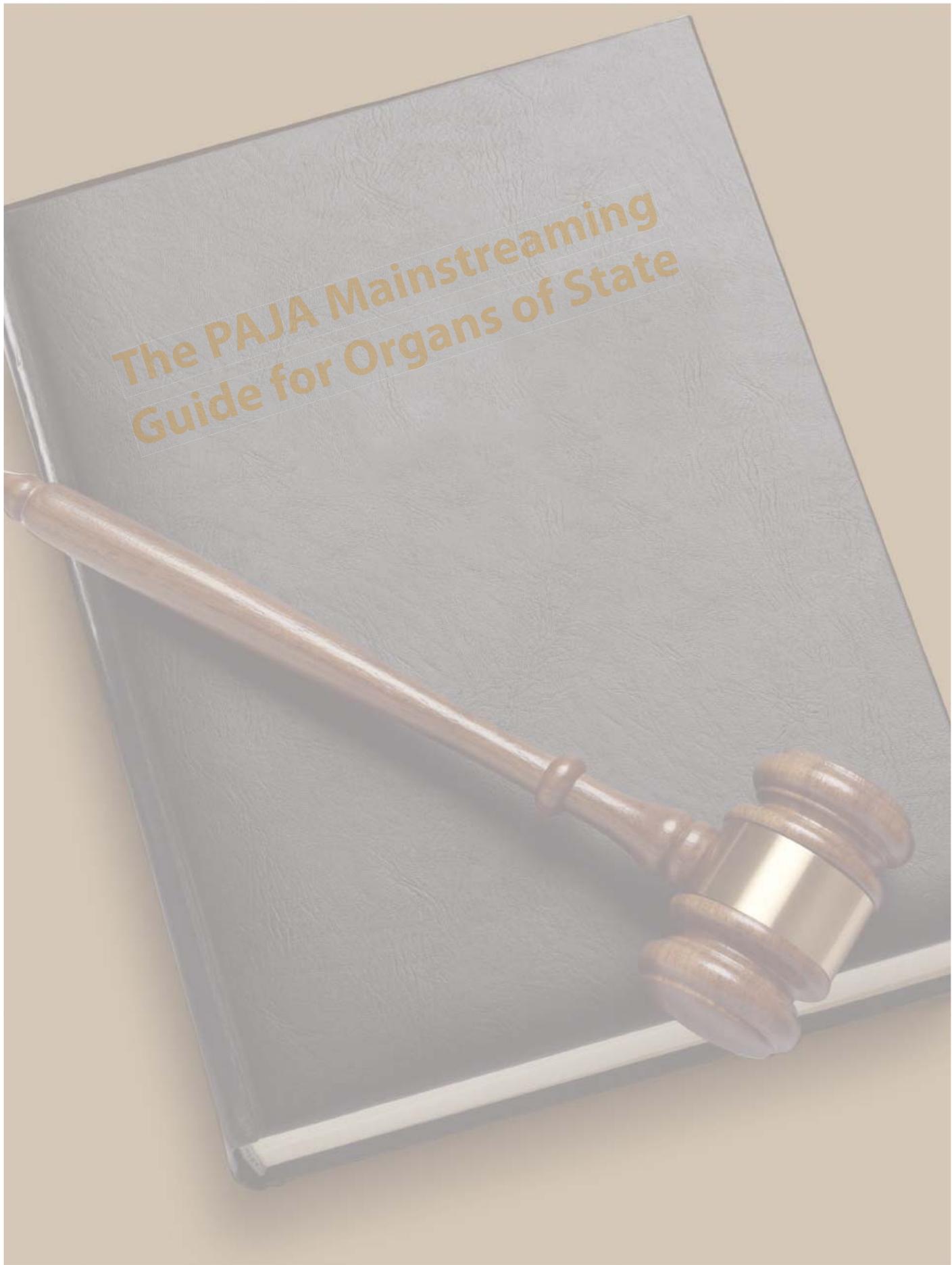


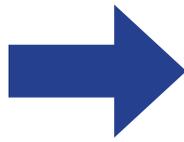


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FINDING YOUR WAY AROUND THE IMPLEMENTATION GUIDE

Chapter 1
Purpose of the guide



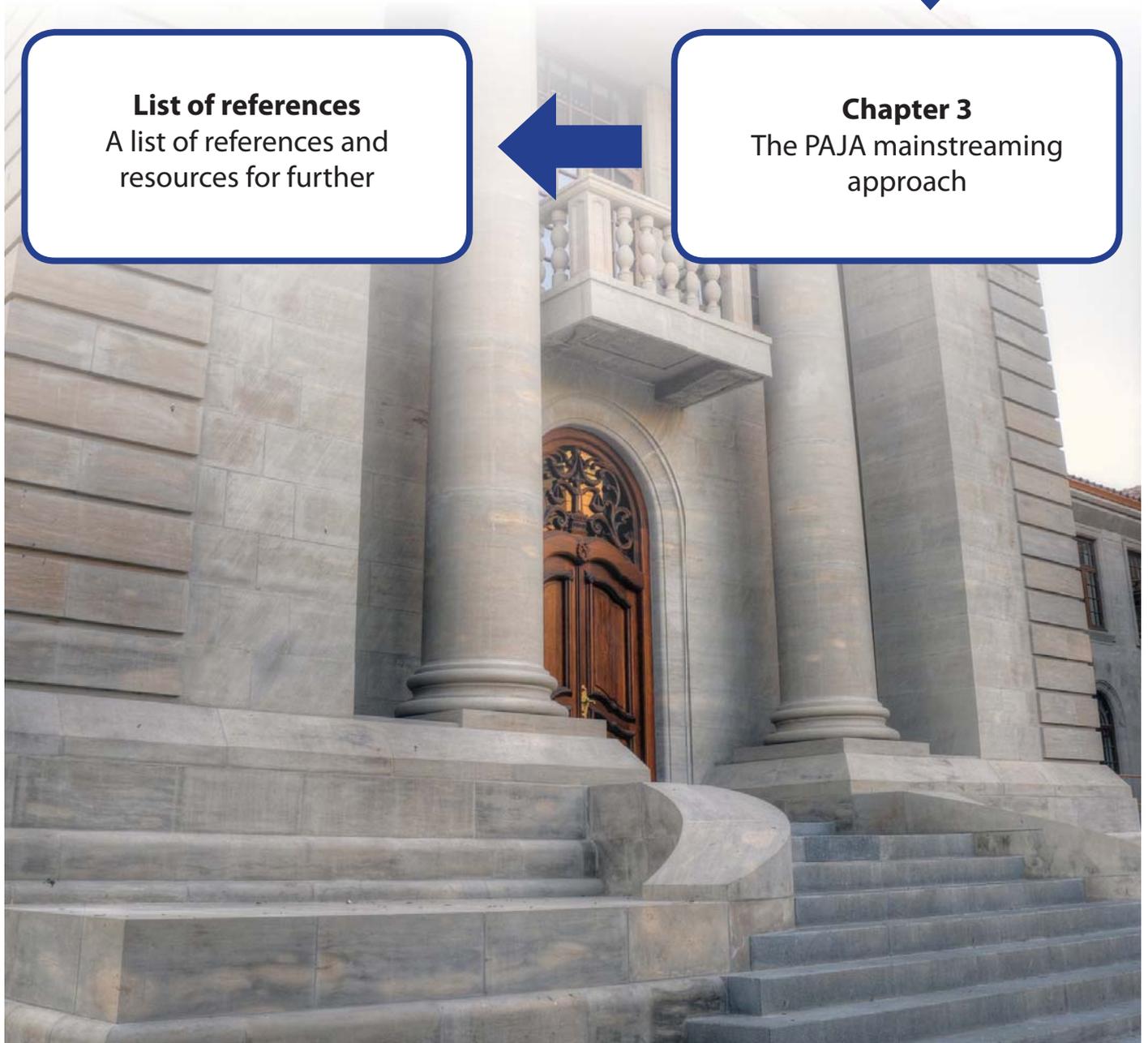
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Why the PAJA mainstreaming
is important to you as an
administrator?



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A list of references and
resources for further



Chapter 3
The PAJA mainstreaming
approach



LIST OF ABBREVIATIONS

Abbreviations	Description
PAJA	The Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000)
DoJ&CD	Department of Justice and Constitutional Development
MPAT	Monitoring Performance Assessment Tool
OPSC	Office of the Public Service Commission
NGOs	Non-Government Organisations/ Non-profit Organisations
SOPS	State of the Public Service
PALAMA	Public Administration for Leadership and Management Academy
G&A	Governance and Administration Cluster
DPSA	Department of Public Service and Administration

LIST OF SYMBOLS AND WHAT THEY MEAN

Meaning	Symbol
Example	
Implementation Tools	
Information Sheet	
Process/steps in the mainstreaming	
Important considerations	



GLOSSARY OF TERMS

Terms	Description
Administrative action	Means any decision taken, or any failure to take a decision, by— <ul style="list-style-type: none">(a) an organ of state, when—<ul style="list-style-type: none">(i) exercising a power 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; or(b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect, but does not include, the following; (for example) Executive powers and functions, Legislative powers and functions and Judicial functions.
Administrator	Means an organ of state or any natural or juristic person taking administrative action. Examples include, ministers, managers and supervisors in organs of state participating in the administrative decision-making process.
Business Unit	Means a work unit or department within an organ of state.
Decision	Means any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision
Empowering Provision	Means 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
Fair procedure	Means that administrators should follow a procedure that will enable consultation, representation and communication of a decision and rights. To ensure this, the PAJA sets out procedures that administrators must follow before and after they make decisions.
Institutional arrangements	Means the management and coordination arrangements agreed within an institution to implement the PAJA mainstreaming process
Lawful	Means that a decision allowed by law, taken by an authorised administrator acting within the scope of the authorisation.
Mainstreaming	Means an approach that can be adopted to integrate the PAJA requirements into the business processes of an organ of state. The integration implies systemically transforming the way administrative decisions are made.
Organ of State	Means- <ul style="list-style-type: none">(a) any department of state or administration in the national, provincial or local sphere of government; or(b) any other functionary or institution-<ul style="list-style-type: none">(i) exercising a power or performing a function in terms of the Constitution; or(ii) exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer.
Project Team	Means people nominated to co-ordinate or lead the PAJA mainstreaming process within an organ of state.
Reasonable	Means that the decision taken must be justifiable—there must be a good reason for the decision.



CHAPTER 1

INTRODUCTION

This section contains the following

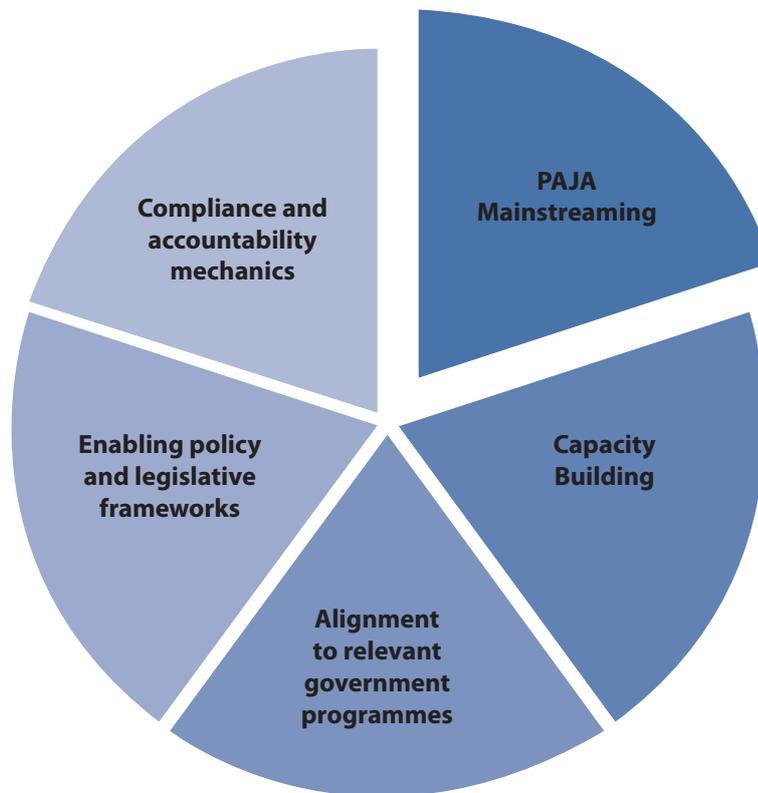
- 1.1 PAJA implementation and the mainstreaming guide
 - 1.1.1 The purpose of the Mainstreaming Guide
 - 1.1.2 How the mainstreaming guide was developed

1.1 PAJA IMPLEMENTATION AND THE MAINSTREAMING GUIDE

The successful implementation of the PAJA (reflected in the diagram below) is a process that requires a multi-pronged approach, which includes elements that go beyond the PAJA mainstreaming approach, such as:

- Establishment of compliance and accountability mechanisms
- Alignment and integration with relevant government programmes;
- Capacity building strategies; and
- Enabling policy and legislative framework.

Elements of the PAJA Implementation



The mainstreaming guide must therefore be viewed in the context of the broader implementation elements, noting the specific contribution that it makes.

1.1.1 THE PURPOSE OF THE MAINSTREAMING GUIDE

This guide aims to contribute to the creation of an institutional environment that enables organs of state to make administrative decisions that are lawful, reasonable and procedurally fair and provide written reasons, by providing:

- easy to follow, step-by-step guidelines and recommendations;
- practical tools and strategies;
- experiences and lessons learnt from the PAJA mainstreaming pilot processes; and
- assistance on how to systematically integrate the PAJA requirements into administrative decision-making processes.



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 PAJA sets out procedures that administrators must follow before they make

1.1.2 HOW THE MAINSTREAMING GUIDE WAS DEVELOPED

The guide is based on a culmination of experiences and lessons derived from PAJA implementation initiatives in general and from the PAJA mainstreaming pilot process in particular. The latter was executed through a project based approach in 15 organs of state (11 departments, 1 state agency and 3 local municipalities) in the three spheres of government. The pilot process aimed to create a decision-making environment that is PAJA compatible by aligning/ integrating the PAJA requirements into business processes of organs of state.

This pilot project yielded lessons that have shaped the development of an approach to PAJA mainstreaming. That approach will provide administrators with relevant, practical, effective guidelines to PAJA mainstreaming.



The PAJA Mainstreaming Guide for Organs of State





CHAPTER 2

WHY THE PAJA MAINSTREAMING IS IMPORTANT TO YOU AS AN ADMINISTRATOR

This section contains the following

- 2.1 The purpose of the PAJA in relation to your role as an administrator
- 2.2 How does the PAJA affect administrative decision-making?
- 2.3 What does mainstreaming of the PAJA into business processes mean?
- 2.4 The PAJA mainstreaming approach
 - 2.4.1 Roles and responsibilities of Key stakeholders in the PAJA mainstreaming approach
 - 2.4.2 Core PAJA mainstreaming implementation principles

2.1 THE PAJA IN RELATION TO YOUR ROLE AS AN ADMINISTRATOR

Administrators in organs of state make thousands of decisions on a daily basis that affect the lives of citizens. These decisions are subject to conditions set-out by the PAJA. It is therefore critical that administrators understand the PAJA requirements and ensure that decision-making processes, decisions and applicable internal remedial processes are all aligned to the PAJA requirements.

The PAJA applies to and binds organs of state, governing all decision making activities that impact on citizens.

In applying the PAJA, administrators achieve the following:

- Facilitate the ability of citizens to access their constitutional rights to just and fair administrative action;
- Enable citizens to actively participate in the decision-making process;
- Ensure that organs of state are accountable and transparent; and
- Promote lawful, reasonable and procedurally fair decision making processes.

2.2 HOW DOES THE PAJA AFFECT ADMINISTRATIVE DECISION-MAKING?

The diagram illustrates the PAJA requirements that must be integrated into an administrative decision-making process to achieve mainstreaming of the PAJA:

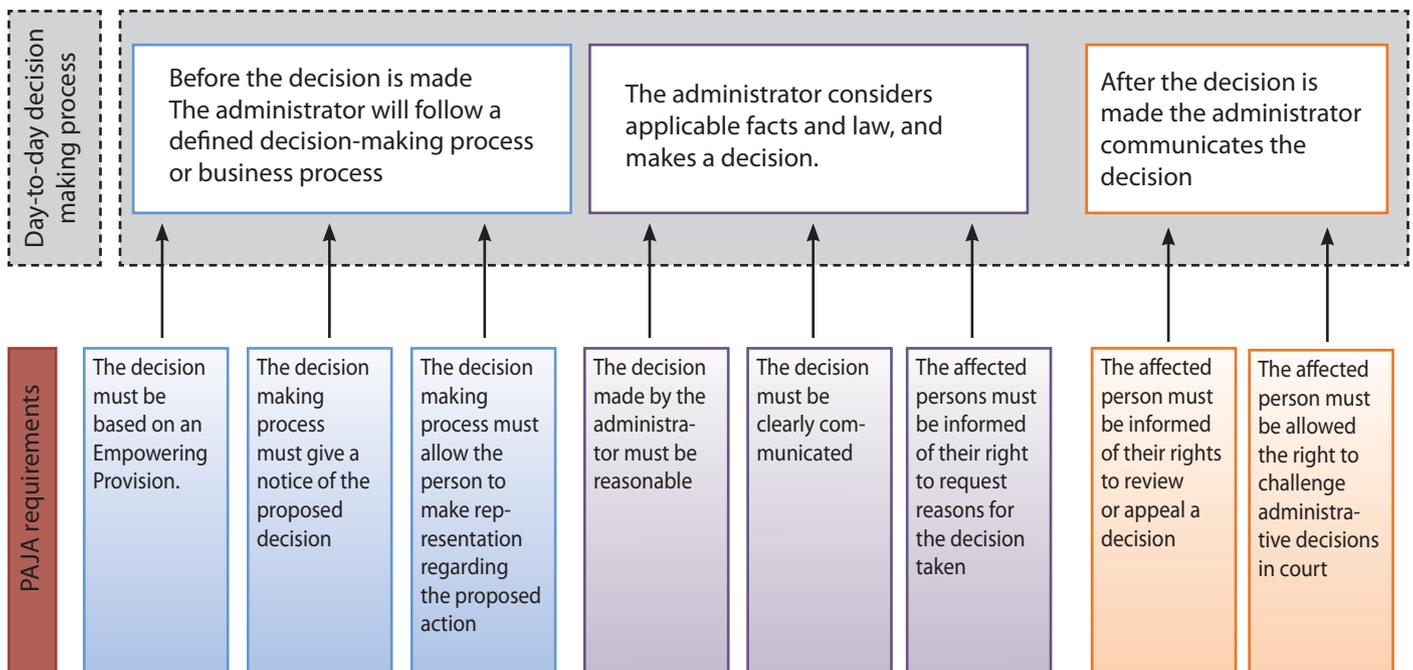
- Before taking a decision; and
- After the decision is made.

The example that follows on page 9 will reflect this integration process in practice.



As you review the process below reflect on your institutional decision-making processes. Are they aligned to the PAJA requirements?

Administrative decision-making within an Organ of State



The administrative decision-making process should also be accessible. Processes should, as far as possible, be understandable and user-friendly to citizens. People should be helped to understand the decisions that have been taken about them, and provided with proportionate and transparent means of redress that empower them to resolve their problems as quickly as possible.

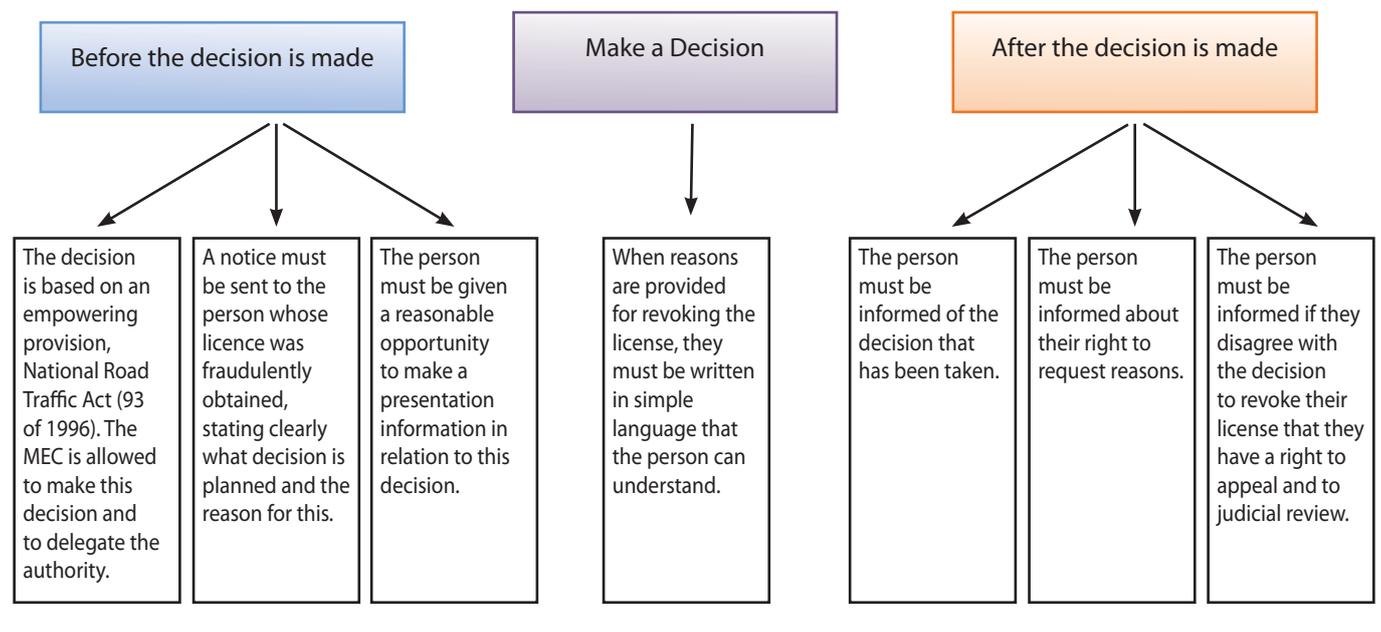


The example below illustrates the implications of the PAJA for decision making procedures

The Department of Transport, based on investigations conducted has identified driver's who have obtained their licences fraudulently.

In terms of the National Road Traffic Act (93 of 1996), the MEC is allowed to request a person that has obtained their licence contrary to the Act to return it. The MEC is allowed to delegate this power within the department and it has been delegated.

In order to ensure that the departments' processes are aligned to the PAJA, they will need to ensure the following are evident in the business procedures, forms and letters.



2.3 WHAT DOES MAINSTREAMING THE PAJA INTO BUSINESS PROCESSES MEAN?

The systematic integration of the PAJA requirements into existing decision-making processes to ensure that administrative decisions are lawful, reasonable and procedurally fair and provide a public member access to reasons for those decisions.

The mainstreaming process implies critically reviewing each step in a business process not only from the perspective of that business process activity, but also from the perspective of embedding the attributes of lawfulness, reasonableness and of fair procedures as prescribed by the PAJA. Through this process the PAJA requirements become embedded and entrenched into the institutions procedures. The PAJA requirements then become part of the way institutions take decisions and how they exercise the power delegated to them through other laws.

Let's reflect on the example above. The administrators involved in this decision making process would need to:

- Map out all the steps (activities) before, when and after a decision has been taken;
- Consider whether the PAJA requirements are applied at each step in the decision making process;
- Identify gaps in relation to the PAJA;
- Amend the decision-making process if there are any gaps, i.e. where the process is not aligned to the PAJA requirements; and
- Implement the changed or amended process.

The amended business process would therefore have the PAJA requirements mainstreamed into the decision-making process itself.

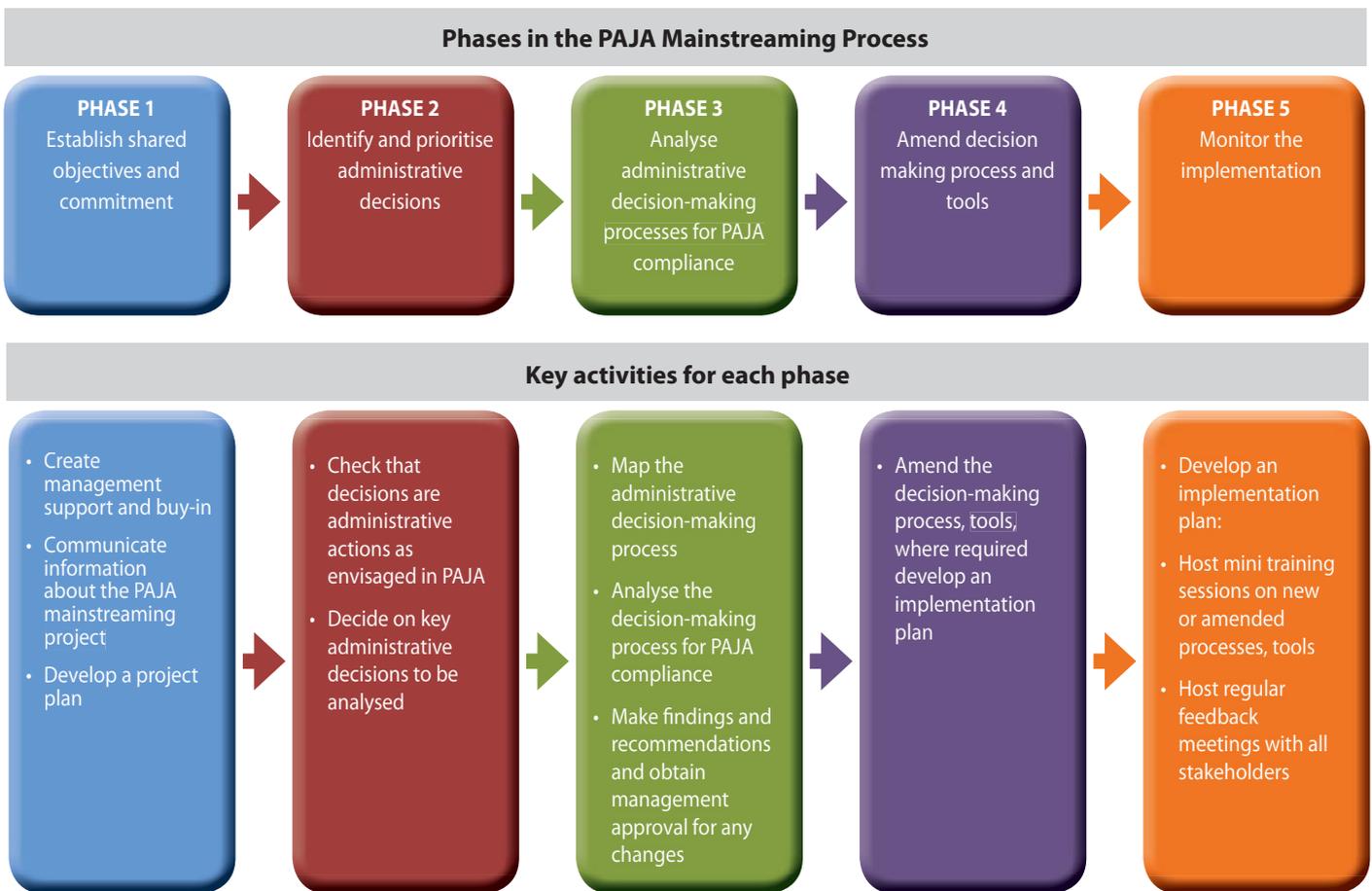
In this way the application of the PAJA requirements would change:



2.4 THE PAJA MAINSTREAMING APPROACH

The diagram below reflects the PAJA mainstreaming approach. This approach will offer administrators the opportunity to mainstream the PAJA into their administrative decision-making processes.

The PAJA mainstreaming approach consists of 5 phases, reflected in the diagrams. The first diagram shows the phases, while the second lists the key activities in each phase.



2.4.1 ROLES AND RESPONSIBILITIES OF KEY STAKEHOLDERS IN THE PAJA MAINSTREAMING APPROACH



Several lessons have emerged from the PAJA mainstreaming pilot project. The four lessons below are highlighted with regard to the roles and responsibilities of key stakeholders. The involvement of stakeholders in the PAJA mainstreaming process is critical to ensure success and sustainability of the mainstreaming efforts, as will be reflected in Chapter 3.

The lessons can be summarised as follows:

1. There is a need to have multi-stakeholder teams.

The PAJA cuts across all business units and therefore impacts on every administrator involved in the administrative decision-making process. It is therefore important that the PAJA mainstreaming teams consist of both legal services personnel as well as administrators involved in the decision-making process.

2. Management support is vital in the process.

Pilots that achieved successful mainstreaming of the PAJA indicated consistent and active management involvement throughout the project. Management committees/teams within institutions need to drive the mainstreaming process.

3. Engagement in the mainstreaming activities of all administrators involved in a business process from beginning to end.

Since administrative decision-making processes can be staggered, in that the final decision taken can be affected by processes that come before, such as assessments and elimination of stakeholders. It must be noted that different administrators can influence the final decision, not only one administrator can take a final decision. Therefore all administrators involved in the decision-making process should be engaged in the mainstreaming efforts.

4. The need for a project champion or project team to drive and steer the PAJA mainstreaming project.

A “driver” of the mainstreaming process in the form of a project champion or project team ensures that the project is initiated, momentum is maintained, that progress is monitored and that there is communication with all key stakeholders.

Stakeholders	Role and responsibilities in the process
Senior Management	<ul style="list-style-type: none"> • Nominate the Project Team. • Communicate with all stakeholders about the PAJA mainstreaming process in order to get support and communicate the management objectives. • Receive progress reports and status updates. • Approve changes to decision-making procedures or related processes.
Project Team	<ul style="list-style-type: none"> • Initiate the project. • Meet with Administrators from respective business units. • Develop the project plan. • Monitor the mainstreaming activities. • Offer support and unblock barriers where possible. • Provide reports to the management on a regular basis.
Administrators of business units that are responsible for decisions related to core business processes	<ul style="list-style-type: none"> • Conduct introductory training on the PAJA mainstreaming process. • Lead and guide the business units through the phases of the PAJA mainstreaming process. • Conduct practical working sessions with stakeholders involved in the respective business processes. • Compile the data and information emanating from the working sessions. • Report on progress. • Table change requests at management meetings. • Manage implementation of changes to business processes in partnership with respective personnel.
Legal Services Personnel	<ul style="list-style-type: none"> • Participate in the PAJA mainstreaming project teams. • Provide legal input and advice as required. • Support the implementation of the mainstreaming changes. • Conduct training of personnel on the PAJA mainstreaming process, when needed. • When needed, check and review decision-making flows once amended for PAJA compliance.
Personnel involved in the business process (The staff involved at any point in the business process)	<ul style="list-style-type: none"> • Participate fully in all the phases of the PAJA mainstreaming process. • This will include: Identifying administrative decisions, Mapping decision-making processes, Analysing these processes for alignment to the PAJA, Identifying the gaps, Suggesting changes to close the gap, Implementing the changed procedures, forms, letters.

2.4.2 CORE PAJA MAINSTREAMING IMPLEMENTATION PRINCIPLES

The principles outlined in the table below are essential in the PAJA mainstreaming approach; these principles should underpin all activities undertaken during the process. The principles have been derived from the PAJA mainstreaming piloting process.

Core principles	Implications for the mainstreaming implementation process
Involvement of key role-players	<ul style="list-style-type: none"> • Wherever possible it is strongly advised that the people involved in the business processes being analysed are involved in the PAJA mainstreaming process. This will enable: <ul style="list-style-type: none"> • ownership of any changes, • understanding of the reasons and purpose of changes and • build capacity to understand the process and enable a continuous improvement approach
Communicate consistently	<ul style="list-style-type: none"> • Communication allows people to understand the purpose, it builds awareness and understanding, and it helps people to ask questions, it creates commitment. • Communication is important at all phases in the mainstreaming process at the beginning when it is initiated, in the middle when business processes are analysed and amended and at the end when changed processes are being implemented. • Communicate with all parties: Management need to understand about the purpose, progress and outcomes; Staff needs to understand about their role, expectations and how process will unfold.
Adopt a project management approach	<ul style="list-style-type: none"> • A project-based approach offers the opportunity to ensure a planned and organised approach to the mainstreaming. • Determine activities and set time-frames for these. For example you may want to identify the two most important administrative decisions made in your business unit, then set time-frames for each of the steps in the mainstreaming process, with a clear end date. • Monitor and review your progress consistently.
Build knowledge and understanding of PAJA across the department at all levels	<ul style="list-style-type: none"> • To enable Administrators to participate in the mainstreaming process it is important to constantly build their knowledge about PAJA. This can be achieved by having short presentations or enrolling staff for PAJA training courses-offered by PALAMA and Justice College.
Identify opportunities for continuous improvement	<ul style="list-style-type: none"> • While the PAJA mainstreaming process is about facilitating compliance, it presents an opportunity to highlight challenges, inefficiencies and shortcomings in the current business processes. • Use this opportunity if appropriate to improve your overall business processes, this could include streamlining a process or improving the flow of communication.



CHAPTER 3

THE PAJA MAINSTREAMING APPROACH: IMPLEMENTATION GUIDELINES AND TOOLS

This section contains the following

3.1 Guide to understanding the mainstreaming phases

3.2 The 5 phases of the PAJA implementation model

- Phase 1: Establish shared objectives and commitment
- Phase 2: Identify and prioritise administrative decisions
- Phase 3: Analyse administrative decision-making processes for PAJA compliance
- Phase 4: Amend decision-making processes and tools
- Phase 5: Implement and monitor the PAJA mainstreaming implementation

For each phase:

- Guidelines
- Resources:
- Information Sheets
- Implementation Tools

3.1 GUIDE TO UNDERSTANDING THE MAINSTREAMING PHASES

The following information will be presented in each phase

Phase purpose

This section describes the rationale for the phase, and will assist you to understand the basis of the activities during the phase.

! Remember, communicating the purpose of a phase at the beginning of that phase will assist in building buy-in and creating motivation.

Key activities for the phase

These are the activities that should be undertaken during the phase.

! These activities should be considered when doing your project plan.

Resources	
Information Sheets	Implementation Tools
<p>These sheets contain information on key concepts that underpin the phase.</p> <p>! It is important for teams working on the mainstreaming process to read and understand the information sheets since these will assist them to use the tools provided. Furthermore, these sheets will also be useful when conducting presentations or mini-training sessions.</p> <p>! Please note that the Information Sheets provide introductory information that will assist you to work through the phase. <i>They are however not exhaustive. You are welcome to deepen your understanding by consulting the List of References and Resources in page 34.</i></p>	<p>The practical tools will support teams through the processes / activities. These provide a detailed step-by-step guide to implementation.</p>

Self-assessment at the end of the phase, check your progress before moving on to the next phase

3.2 5 PHASES OF THE PAJA IMPLEMENTATION MODEL

PHASE 1: Establish shared objectives and commitment



Phase purpose

The purpose of phase 1 is to:

Establish the building blocks for the successful implementation of the PAJA mainstreaming. These building blocks include aspects such as getting management support, buy-in from key stakeholders that will participate in the process, communicating information about the process, establishing a project manager and/or project team.

Key activities and resources for phase 1

Key activities	Resources available
Create management support and buy-in	Implementation Tool 1: Agenda Template Implementation Tool 2: PowerPoint Presentation
Communicate information about the PAJA mainstreaming project to create support	Information Sheet 1: About getting collaboration and active involvement Information Sheet 2: About managing change
Establish a project team	! Remember the core implementation principles and the roles and responsibility Example: Project steering mechanism
Develop a project plan	Implementation Tool 3: Project plan template



Implementation Tool 1:

Management meet agenda template

The template below aims to highlight the key areas of discussion in your meeting with management to initiate the PAJA mainstreaming process.



The following assumptions are made about the use of this tool:

- that you will amend and adapt the agenda to fit your needs;
- the initiation of the PAJA mainstreaming may be an agenda item of a management committee meeting, not the specific focus of the meeting; and
- that the issues listed below may be dealt with over several meetings.



Meeting purpose: Initiate the PAJA mainstreaming project

Date: XXX

Venue: XXX

Agenda Item	Action Required	Responsible
1. Presentation on PAJA mainstreaming process	Questions	
2. Institutional arrangements	Decisions on the project management approach	
3. Nomination of Project Champion or Project Team	Nomination of team members Please remember to consult the roles and responsibilities in Section X	
4. Date to develop the project plan	Agree on a date for the project team to meet and develop a project plan.	



Information Sheet 1-

About getting collaboration and active involvement

1	Have a clear goal in mind. Share the purpose and goal of the mainstreaming process, to enable team members to believe that the process is worthwhile. NOTE: The overarching goal of collaboration is to achieve something together that you would not be able to achieve alone.
2	Establish ways of communicating. Decide on regular meeting times, ways of documenting issues raised and decisions made. Reach agreement on how the senior management team will be kept in the loop. The active endorsement of senior management is important for organisational acceptance of change initiatives.
3	Define the roles of team members. One way to approach this is to write down all the tasks that need to be carried out. Allocate each task to the team members. Remember that in your working sessions when you analyse the administrative decisions it will be important to have a facilitator in the group.
4	Establish ways to monitor progress and provide feedback. Periodically, meet together to discuss ways to improve on the project. The project plan developed by the team should be used to monitor your progress.
5	Establish a common, agreed approach. The guide will provide the team with detailed guidance on how to proceed on the PAJA mainstreaming process. However, it is still important that the team to discuss this and agree on the best way to continue for your environment.



Information Sheet 2- About managing change



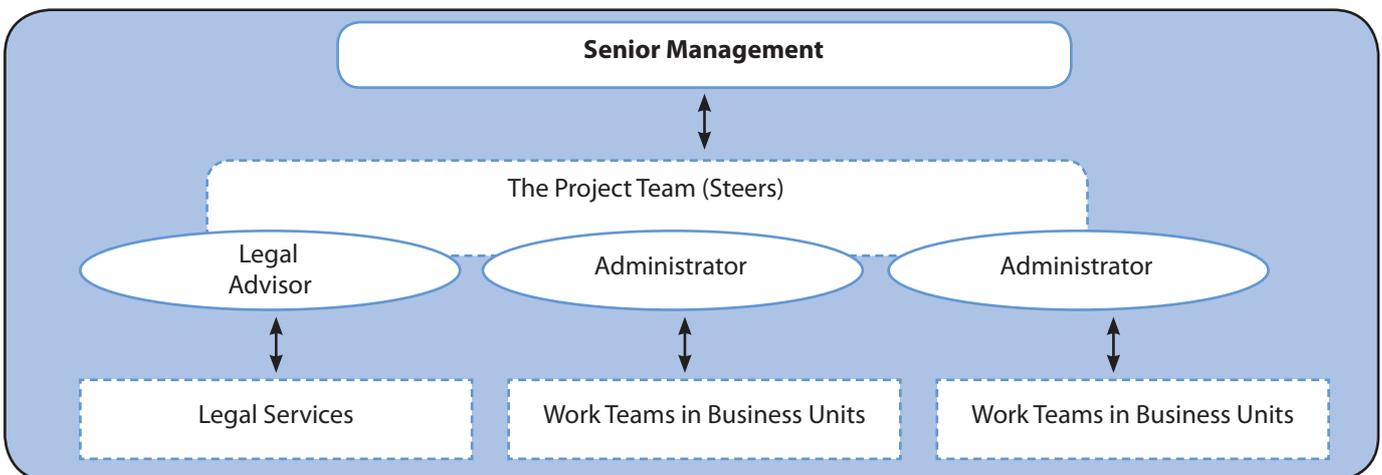
The PAJA mainstreaming process has a strong potential to result in change. When the administrative decision-making processes have been analysed, any gaps identified will need to be addressed. In order to address the gaps, teams are likely to need to change either a business process, change steps in a process, change forms that people complete, change letters etc. The principles below will assist the team to manage the change process.

1	You cannot impose change People and teams need to be empowered to find their own solutions and responses. It is therefore important to create opportunities for involvement of staff at all levels. Identify key stakeholders and ensure that they are involved and their contribution is valued.
2	People need to understand the purpose and intentions behind the change Presentations and information that explain the purpose of PAJA mainstreaming are important.
3	Create a simple plan of action The plan should clearly define roles and responsibilities. Get people involved in the plan, especially if they are directly affected by it. Make sure that the plan is built in small, achievable chunks.
4	Develop an “enabling environment” Recognise what needs to happen to support the change. Training workshops, communication sessions, team meetings that are aligned to the PAJA mainstreaming process will help people understand the reasons for the change, and create buy-in to the process.
5	Celebrate achievements Communicate and recognise progress to maintain motivation and stakeholder interest, and give confidence that the PAJA mainstreaming is achievable.
6	Communicate Communicating effectively can motivate, overcome resistance, lay out the pros and cons of change, and give staff a stake in the process.



Project steering mechanism

The diagram below is an example of a project steering mechanism that an organ of state can adopt to steer the mainstreaming process. The Senior Management appoints a project team to oversee the process; the team will be made-up of administrators from each of the business units participating in the project.



Consider the list of roles and responsibilities provided in Chapter 2. Ensure that you discuss how your team would like to adapt these to suit your circumstances. Reach an agreement and monitor the implementation.

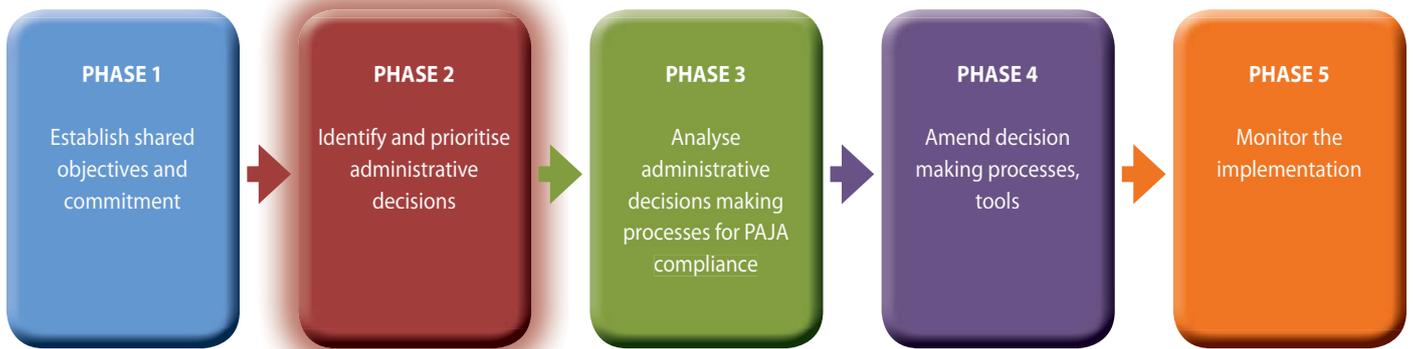


SELF-ASSESSMENT FOR PHASE 1

Use the self-assessment tool to check that you have achieved important progress indicators for phase 1 before moving to phase 2.

	Progress indicator	√
1	Management has nominated a project team.	
2	The project team consists of legal services personnel and administrators.	
3	The project team has met to discuss roles and responsibilities and develop a project plan.	
4	The project team has met with management to discuss the project purpose, objectives, process and time-frames.	
5	The project team has communicated information about the mainstreaming process to all stakeholders who will be affected by it.	
6	Support and buy-in exists for the project.	

PHASE 2: Identify and prioritise administrative decisions



Phase purpose

The purpose of phase 2 is to:

1. Create active participation and collaboration amongst administrators of various business units and legal services personnel.
2. Establish a common information base about the PAJA mainstreaming process. Build knowledge about which administrative decision are regarded as administrative actions by the PAJA. Encourage critical reflection about empowering provisions.
3. Ensure administrative decisions are lawful.

Key activities and resources for phase 2

Key activities	Resources available
Check that administrative actions are envisaged by the PAJA	<ul style="list-style-type: none"> • Information Sheet 3- Elements that define an administrative action • Implementation Tool 4-Identifying administrative decisions
Decide on key administrative decisions to be analysed	



Information Sheet 3- Elements that define an administrative action

An important starting point in the process of analysing administrative decisions for PAJA compliance is to identify which types of decisions are covered by the PAJA. It must be noted that not every decision that an administrator takes is governed by the PAJA. The PAJA applies to decisions that are referred to as administrative actions.

 Please note that content below will be reflected in the first practical tool that you will use: Implementation Tool 1- **Identifying administrative decisions**. It is beneficial to understand this content as it will assist you to use this tool.



So how does the PAJA define an administrative action?

There are 6 key elements that help establish an administrative action; these are reflected in the diagram below.



Let's look at what each of the elements mean.

If a decision satisfies the elements described in the table below then that decision is considered an administrative action governed by PAJA

<p>1. A decision</p> <p>According to the PAJA an administrative action is:</p> <ul style="list-style-type: none"> • A decision; or • A failure to take a decision. <p> Failing to make a decision can have a major negative effect and can adversely affect someone's rights.</p>	<p>2. That is of an administrative nature made in terms of an empowering provision</p> <p>Decisions that administrators take as part of their job are of an administrative nature.</p> <p>These decisions must be in terms of an empowering provision. This is usually a provision of a law that allows an administrator to make a decision. This ensures that decisions are lawful and within the scope of the administrators powers.</p>	<p>3. That is not specifically excluded by the PAJA</p> <p>Excluded decisions include:</p> <ul style="list-style-type: none"> • 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 officers of courts and some bodies.
<p>4. That is made by an organ of State</p> <p>Organs of state are:</p> <ul style="list-style-type: none"> • Departments at national, provincial and municipalities; • Functionaries or institutions exercising the power or performing a function in terms of any legislation; and • Private individuals and companies when they are exercising public power. 	<p>5. That adversely affects rights;</p> <p>A decision adversely affects the rights of someone or a group when it has a negative effect.</p> <p>It will include decisions that:</p> <ul style="list-style-type: none"> • Require someone to do something, or not to do something, or to tolerate something; • Limit or remove someone's rights; or • Decide someone does not have a right to something. <p> A beneficial decision would therefore not be an administrative action.</p>	<p>6. That has "direct external legal effect"</p> <p>There are three components to this:</p> <p>Legal effect: The decision must be legally binding.</p> <p>Direct effect: The decision must be the final one. If the making of a decision requires an administrator to take several steps or decisions, and only the last steps effects a member of the public, then only the last step is an administrative action.</p> <p>External effect: This means that the decision has to affect someone who is not part of the organ of state</p>



Implementation Tool 4: Identifying administrative decisions

Guidelines on how to use this tool

This resource will assist you to:

- Identify and list administrative decisions
- Determine whether administrative decisions are administrative actions
- Prioritise the administrative decisions to be analysed.

Please remember that the PAJA does not apply to all decisions. The PAJA promotes good administrative practices and should therefore be applied irrespective.



Steps to be taken

1. List all administrative decisions made in your business unit. Think about the core business processes that your team is involved in.
2. Determine whether the listed administrative decisions are regarded as administrative actions according to the PAJA. The table below contains a list of six questions that will assist you in this process. If you answer YES to these questions then the decision is an administrative action.
3. Prioritise the administrative decisions to be analysed.

You are encouraged to consult the legal advisors in your institution should you require support in answering these questions.

<p>1. A decision</p>	<p>2. That is of an administrative nature made in terms of an empowering provision</p>	<p>3. That is not specifically excluded by the PAJA</p>
<p>4. That is made by an organ of State</p>	<p>5. That adversely affects rights; someone or a group?</p>	<p>6. That has “direct external legal effect”</p>

 Remember you can use Information Sheet 3 and the example to assist you.



Let's test it for the following example.

A departmental unit has a need to procure goods in excess of R1 million. It puts out a tender to purchase the goods and has therefore to award the tender. The department receives 8 tenders; it considers these and appoints a successful bidder. Is this an administrative action?

<p>1. A decision</p> <ul style="list-style-type: none"> It is a decision because the department decided to do something. 	<p>2. That is of an administrative nature made in terms of an empowering provision</p> <ul style="list-style-type: none"> 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 Public Finance Management Act (PFMA). 	<p>3. That is not specifically excluded by the PAJA</p> <ul style="list-style-type: none"> The decision is not specifically excluded by the PAJA (it does not fit in any of the section 1 exclusions).
<p>4. That is made by an organ of State Organs of state are:</p> <ul style="list-style-type: none"> The department is an organ of state. 	<p>5. That adversely affects rights;</p> <ul style="list-style-type: none"> X With regard to the contractor whose tender won this is not an adverse decision, it is a favourable and therefore not regarded as an administrative action by the PAJA. However this is regarded as an administrative for the 7 contractors that were not successful right to something. 	<p>6. That has "direct external legal effect"</p> <p>The decision does have a direct external legal effect – on the unsuccessful contractors. The decision is final and will affect their rights.</p>

This decision is therefore an administrative action for the unsuccessful contractors under the PAJA.



Did you know? It is considered unfair for an administrator to make a decision that adversely affects someone without consulting him or her first. We will look at this in the next phase.

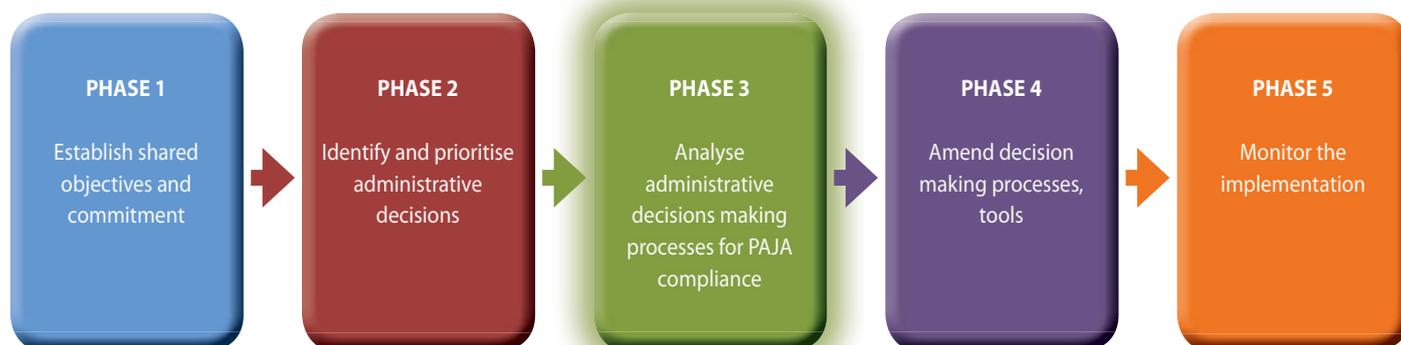
We will come back to this example in the next phase.

SELF-ASSESSMENT FOR PHASE 2

Use the self-assessment tool to check that you have achieved important progress indicators for phase 2 before moving to phase 3.

	Progress indicator	√
1	Work team understands the elements that define an administrative action, refer to Information Sheet 3.	
2	The work teams are comfortable with the examples provided.	
3	Administrative decisions taken have been identified.	
4	Implementation tool 4 has been used to determine whether the administrative decisions are regarded as administrative actions.	
5	Key administrative decisions have been decided on.	

PHASE 3: Analyse administrative decision making processes for PAJA compliance



Phase purpose

The purpose of phase 3 is to:

1. Ensure that administrative decisions are reasonable, procedurally fair and that reasons are provided.
2. Identify any gaps in the business processes in relation to the PAJA requirements.
3. Improve efficiency in the business process, by making recommendations to address the identified gaps.

Key activities and resources for phase 3

Key activities	Resources available
<ul style="list-style-type: none"> • Map the administrative decision-making process; • Analyse the process for PAJA compliance ; and • Make findings and recommendations and obtain management approval for any changes 	<ul style="list-style-type: none"> • Information Sheet 4- PAJA mandatory procedures for decision-making • Implementation Tool 5-Analysing administrative decision-making processes



Information Sheet 4- PAJA mandatory procedures for decision making

Congratulations, by completing the Implementation Tool 4: Identifying administrative decisions, you have tested your administrative decisions to determine whether these decisions are:

- administrative actions under the PAJA; and
- lawful by checking the conditions in the empowering provision.

In this phase we focus on the rules and principles related to whether administrative decisions are reasonable and procedurally fair.

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

Fair procedures: means that administrators should follow a procedure that will enable consultation, representation and communication of a decision and rights. To ensure this, the PAJA sets out procedures that administrators must follow before and after they make decisions.

The PAJA stipulates 5 mandatory procedures that must be followed before and after making a decision. Successfully integrating these procedures into your decision making processes will facilitate the achievement of reasonable and procedurally fair decisions.



Let's review these mandatory procedures, before you apply them to your decision-making processes. The procedures can be divided into two broad areas- before the decision is taken and after the decision is taken.

Before the decision is taken

The principles of consultation and representation are important and need to be reflected in the procedure.

Adequate notice of the nature and purpose of the proposed administrative action

- The person must know the nature of the action (what is being proposed) and why it is being proposed.

A reasonable opportunity to make representations

- The person should be given an opportunity to make representation before the decision is made. This can include providing new information raise objections or answer charges.

After the decision is taken

The principles of the right to request reasons, appeal and review are important and need to be reflected in the procedure. The Constitution says that administrators must be accountable for its use of public power. This means that as an administrator you must be able to explain decision made to the affected people.

A clear statement of the administrative action

- The person must be informed about what decisions has been made
- The statement must clear and easy for the person to understand
- Plain and straightforward language should be used

Adequate notice of the right to request reasons in terms of Section 5 of the PAJA

- Written communication explaining a person's right to request reasons
- Provide information on where, when and how to request reasons.

Appeal adequate notice of the right of the internal or review

- Written communication explaining the right to review or appeal a decision. This must be provided before the citizen asks for reasons.
- Provide information on where , when and how to review or appeal a decision.



Implementation Tool 3: Analysing administrative decisions

Guidelines on how to use this tool

This resource will assist you to:

- Analyse the decision-making process in relation to the PAJA requirements;
- Identify the gaps in your current decision-making process;
- Highlight the steps required to close these gaps.



Steps to be taken

1. Work with the decisions that you identified as an administrative actions in the Phase 2.
2. Map out the current process, that is, the process known and followed by the personnel involved in the process.

Important to consider the following:

- Does the empowering provision set out a particular procedure or steps to be followed? If it does, check that there is consistency between what is currently practiced and what the empowering provision requires.
- Is the decision-making process mapped in any formal format in the institution? These could include a standard operating procedure or electronic system.



It is important to align procedures to enable efficiency in the decision making process.

The mapped process should include the following:

Process or activity	Symbol
Ovals show input to start the process or output at the end of the process.	
Boxes or rectangles show tasks or activities performed in the process. Usually there is only one arrow out of an activity	
Arrows show process direction	
Diamonds show points in the process where yes/no questions are asked or a decision is required.	
Deliverables should be clearly indicated if it is a detailed procedure map.	



Please note that you will encounter several other symbols and more complex processes in business process mapping. We are just using these basic processes for purpose of the PAJA mainstreaming. On the DPSA website you will find a full guide on Organisational Structuring Processes. Please consult this guide for more in-depth information on business process mapping, if you wish to.

A useful process to map your procedure is:

- Nominate a facilitator to manage the discussion and achieve the goal. The facilitator can either be someone in the team or someone from outside the unit. It can be useful to have someone in the room that does not know the process well, since they can often make fewer assumptions and ask good questions.
 - It is recommended that your team use A4 paper and prestick, to note the steps in the business process and arrange these on the wall. The use of the A4 paper will make it easy to rearrange the steps whenever necessary.
3. Once the process "current or as-is" has been mapped, work systematically through the questions in the table below to:
 - Analyse the extent to which the process meets the PAJA requirements.
 - Identify the gaps



The mapping process is seldom linear. The facilitator must be prepared to go back and change steps as different ideas are raised.



Consider the following:

- As you identify gaps in the decision-making process, think about ways to overcome them.

! *The example on inserted page provides an example of how to apply this tool and Information Sheets 4 & 5.*

Step 1-Administrative decision

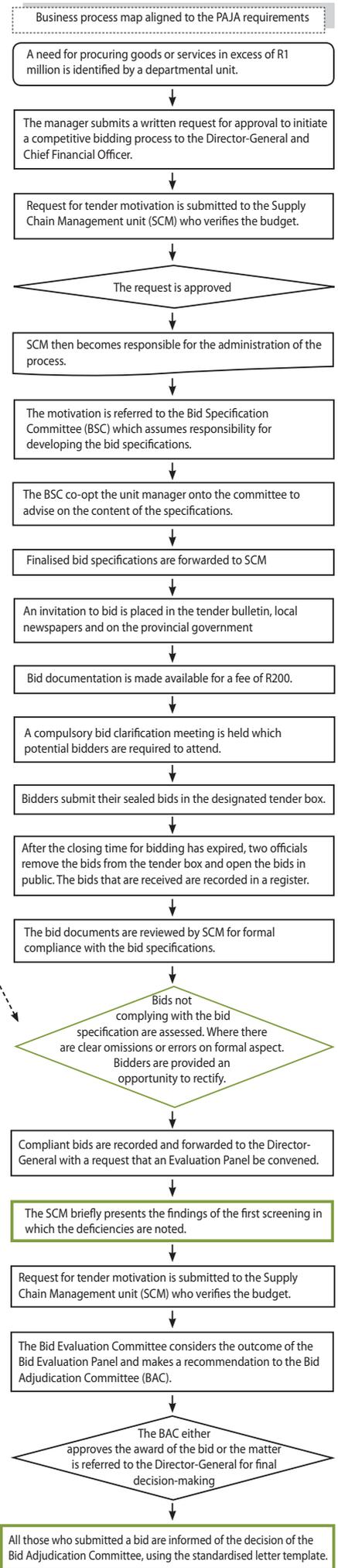
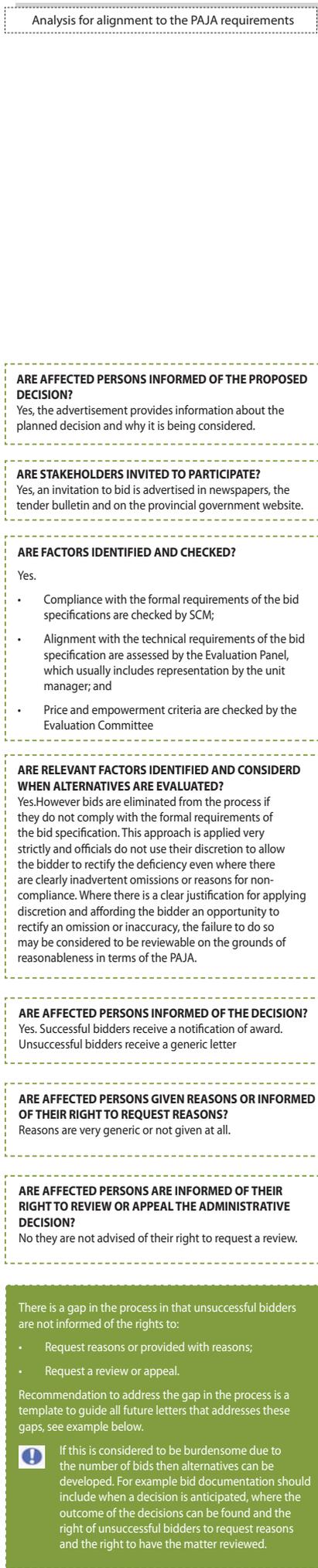
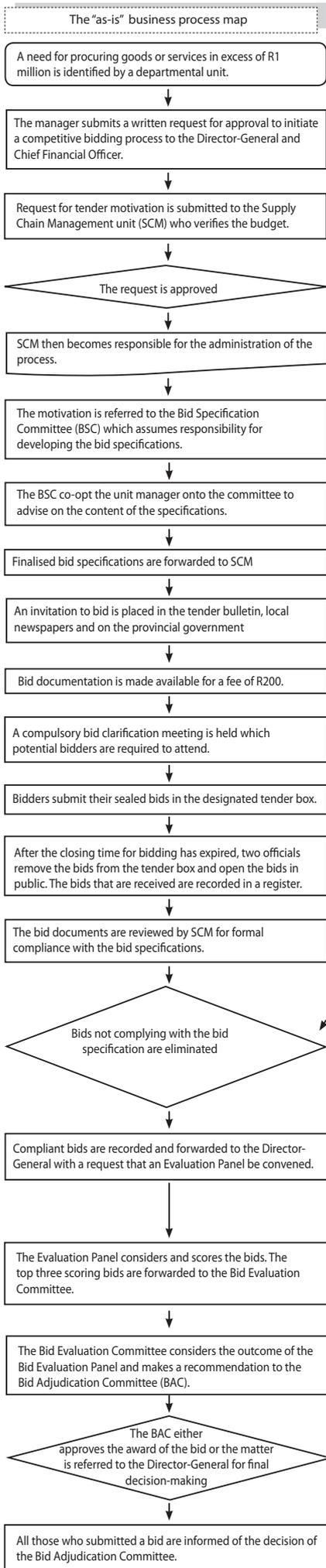
Step 2 Map the decision-making process	Step 3 Identify the gaps by checking for PAJA compliance	Step 4 Remedy the process
BEFORE THE DECISION	<p>Is the affected person informed of the proposed decision to be made?</p> <p>Is there clear information about:</p> <ul style="list-style-type: none"> • What decision is being planned? • Why it is being considered? <p>Check the communication given to the applicant: letters; forms to be completed.</p> <p>Is the affected person informed of how to participate?</p> <p><i>Remember that participation means an opportunity to raise an objection, or provide new information, etc.</i></p> <p>Is there a clear timeframe for this process? The timeframe should be reasonable and will differ depending on the circumstances. These provisions, with clear guidelines should however be written into the decision-making.</p>	

Step 2 Map the decision-making process	Step 3 Check for PAJA compliance	Step 4 Identify the gaps
THE DECISION	<p>An important principle in the PAJA is that decisions must be reasonable. This means that the decision made must be justifiable by providing good reasons. To ensure that decisions are reasonable the process of decision-making should be thorough.</p> <ul style="list-style-type: none"> • Are factors identified and checked; • Are relevant factors taken into account when making the decision? 	

Step 2 Map the decision-making process	Step 3 Check for PAJA compliance	Step 4 Identify the gaps
AFTER THE DECISION	<p>Does the written communication inform of the following:</p> <ul style="list-style-type: none"> • Is the decision communicated in a clear and understandable way? It is expected that the communication will be written in a manner that the applicant will understand. • The applicant's right to request reasons. It is good practice to provide reasons at the time of communicating the decision. • If however they are not provided at that time, is the affected person informed of the right to request reasons? And are they informed of how long they have to request reasons? • Is the affected person informed of their right to appeal or review a decision they are not satisfied with? • Does your institution have an internal appeal process? If so have you communicated how the applicant can use it? You should provide information on what steps they should take, where they can make the appeal, what forms they need to complete, and the timeframes within which this appeal should be made. • If however there is no internal appeal process, is the applicant informed of their right to take the matter for a judicial review to court? Are they informed of which they should go to? Are they informed of the timeframes within which to do this? 	



The processes outlined below is an example of the PAJA mainstreaming process



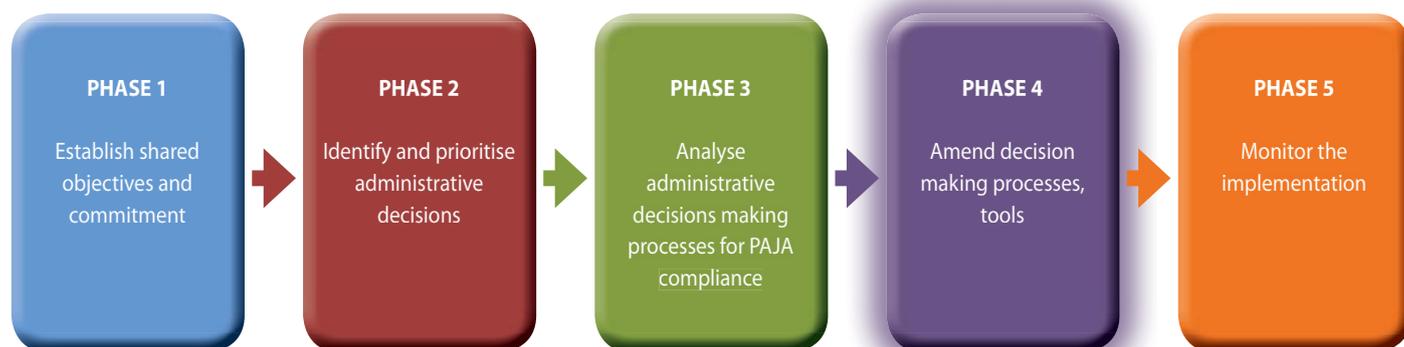


SELF-ASSESSMENT FOR PHASE 3

Use the self-assessment tool to check that you have achieved important progress indicators for phase 3 before moving to phase 4.

	Progress indicator	√
1	The work team understands the PAJA mandatory decision making procedure, reference Information Sheet 4.	
2	The work team understands the process to be followed, as outlined in Implementation Tool 4.	
3	The work team have mapped each step in the decision making process.	
4	All input that affect the final decision have been considered.	
5	The process has been analysed for PAJA compliance	
6	Gaps to PAJA compliance are identified.	
7	Recommendations to address the gaps have been identified.	
8	Approval has been obtained to effective the recommendations	

PHASE 4: Amend decision making processes, tools



Phase purpose

The purpose of phase 4 is to:

- Amend decision-making processes, forms and letters to ensure PAJA compliance.

Key activities and resources for phase 4

Key activities	Resources available
Amend decision-making processes, tools	Information Sheet 5- Examples of wording for templates Information Sheet 6- Database of examples of administrative decision-making processes and tools Example

! You have now analysed your decision-making processes, you have identified gaps and made recommendations to address these gaps. You now have to turn the recommendations into amended processes, tools (where these are required).



Information Sheet 5-

Examples of wording for templates

(NB. These may be customised to fit your institutions needs)

The lists of examples below were developed during the piloting process and are based on the principles and rules of the PAJA. You can use these in conjunction with the database of examples of administrative decision making processes and tools.

Remember the following guidelines:

1. It is good administrative practice to give reasons at the time the decision is communicated to the person affected.
2. According to the PAJA, the request for reasons must be made within 90 days of the date on which the person became aware of the administrative action.
3. You must then give adequate reasons, in writing, within 90 days upon receipt of the request.

Where reasons are provided:



Notice of the right to internal appeal

If you believe my decision is incorrect, you have the right to appeal, in writing and within XXX days of receipt of this notice, to:

Insert name and address to which the appeal must be sent

Please make sure to include your name, telephone number and mailing address in your request.

Where reasons are not provided



Notice of the right to request reasons

You have the right to request reasons for my decision within 90 days of receipt of this notice as follows:

- Your request must be in writing. If you cannot write and cannot find someone to assist you, you can visit our offices at the address above and we will assist you.
- Your request must be addressed to: (INSERT NAME AND TITLE OF DECISION MAKER)
- It can be sent by email, fax, registered mail or delivered by hand to the following address:

INSERT address (including email address where appropriate) and fax numbers

Please make sure to include your name, telephone number and mailing in your request.

Notice of the right to internal appeal



If you believe my decision is incorrect, you have the right to appeal, in writing and within XXX days of receipt of this notice, to:

Insert name and address to which the appeal must be sent

Please make sure to include your name, telephone number and mailing address in your request.



Information Sheet 6-

Database of examples of administrative decision making processes and tools



Refer back to the example in phase 3. A recommendation was made to have a standardised letter template to be used to communicate with unsuccessful bidders about their rights to:

- Request reasons or be provided with reasons;
- Request a review or appeal.

The letter below is an example that addresses this recommendation.

(Organ of State details to be inserted)

Tel: XXX...

Fax: XXX ...

Enquiries: *(insert contact name an details)*

Date: *(insert date)*

Reference: *(insert reference)*

_____ *(insert the contact name of the bidder if the bidder is a legal person – i.e. a (Pty) Ltd or CC)*

_____ *(insert the bidder's name)*

_____ *(insert the bidder's postal address if the letter is to be sent by post or physical address if the letter will be hand delivered)*

Fax no: _____ *(insert bidder's fax number if the letter is to be sent by facsimile)*

PER FACSIMILE / REGISTERED MAIL / HAND *(delete the items that are not applicable)*

Dear Sir/ Madam *(delete whichever is not applicable)*

RE: SUBMISSION OF TENDER/ ... *(insert tender details and date)*

You submitted a proposal for the abovementioned tender. The evaluation and adjudication process has now been completed and we regret to advise you that your proposal was not successful.

Use the paragraph below if reasons are provided -

The reasons for rejecting your proposal are the following –

(i)... *(Insert the reasons why the proposal was not successful).*

(ii)...

(iii)...

If reasons are not provided use the two paragraphs below

You have the right to request reasons for this decision within 90 days of receipt of this notice. Any request that you make must be in writing. If you cannot write and cannot find someone to assist you, you can visit our offices at the address above and we will assist you.

Your request must be addressed to: *(insert name and title of decision maker)*. It can be sent by email, fax, registered mail or delivered by hand to one of the following -



Postal address: *(insert details)*
 Physical address: *(insert details)*
 Fax number: *(insert details)*
 E-mail: *(insert details)*

Any submission that you make for reasons to be provided must include your name, telephone number and address.

If you believe that the Department made a procedural or technical error in reaching this decision or that it was biased, you are entitled to take the decision on review to the High Courts in terms of the Promotion of Administrative Justice Act, 2000 (Act 3 of 2000). Such an application must be made to the Court within 180 days (6 months) of receipt of this notice.

Yours faithfully

_____ *(insert name and position of person signing the letter)*

Received: _____

Date: _____

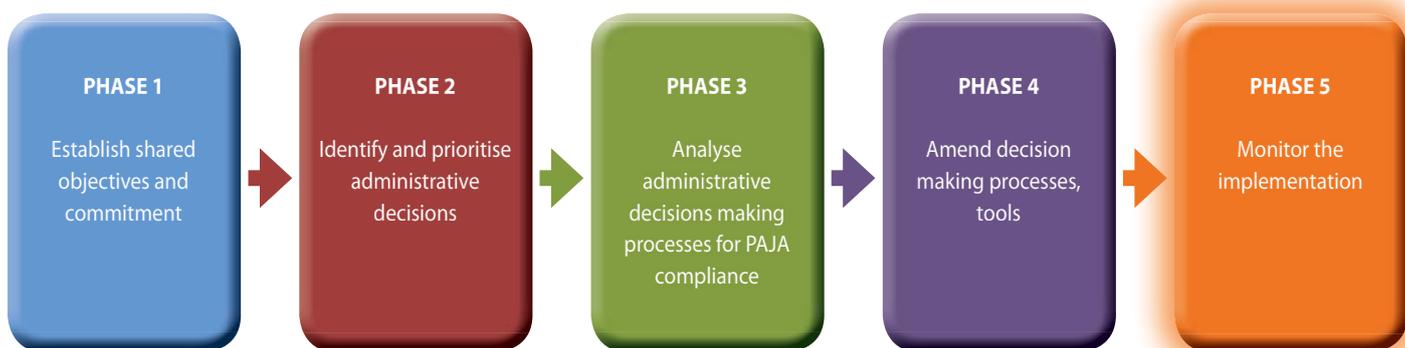
This should be included so that it can be proved when the letter was received if it was delivered by hand. If not delivered by hand, the facsimile transmission report or registered post slip must be retained.

SELF-ASSESSMENT FOR PHASE 4

Use the self-assessment tool to check that you have achieved important progress indicators for phase 4 before moving to phase 5.

	Progress indicator	✓
1	The work teams have reviewed the database with several examples of decision making processes, letters and forms.	
2	Legal services personnel have supported the process of developing new tools.	
3	Amended decision making processes, letters and forms are available.	

PHASE 5: Monitor the implementation



Phase purpose

1. Implement the PAJA mainstreaming business processes, ensuring that key stakeholders understand the changes and amends.
2. Build capacity of the staff implementing the decision making process to implement the changes.
3. Monitor the PAJA mainstreaming and continually find ways to improve

Key Activities and resources for phase 5

Key activities	Resources available
Develop an implementation plan	Implementation Tool 6- Implementation Planning Template
Host mini training sessions on new or amended processes, forms and letters	Amended business processes, forms and letters from the PAJA Mainstreaming Work Teams
Host regular feedback meetings with all stakeholders	Information Sheet 7- Management performance assessment tool



Information Sheet 7- Management performance assessment tool (MPAT)

Management performance assessment tool (MPAT)

In October 2010 Cabinet mandated the Department of Performance Monitoring and Evaluation (DPME) to work with transversal departments and Offices of the Premier to develop and pilot the implementation of a management performance assessment tool (MPAT). The MPAT assesses the quality of management practices across a comprehensive range of management areas, from supply chain management to strategic planning. In each management area, performance is assessed against the management standards established by the relevant transversal departments (e.g. National Treasury for financial management; and the DPSA for human resource management and development).

There are four Key Performance Areas in MPAT:

- Strategic Management
- Governance and Accountability (includes PAJA implementation)



- Human Resource Management
- Financial Management

The MPAT standards, evidence requirements and moderation criteria for the PAJA performance area include areas such as:

- The department follows the prescribed procedures of PAJA when making administrative decisions
- Department makes administrative decisions in terms of empowering legislation.
- Department's administrative decisions are made by those with delegated authority.
- Department makes administrative decisions that are procedurally fair.
- Department follows prescribed procedures for communicating its administrative decisions
- Department provides the opportunity to request reasons.
- Department periodically reviews and improves its processes to ensure that they comply with PAJA.
- Department engages in on-going process of awareness and capacity building of staff on PAJA.

As PAJA is a new performance area in MPAT, it was decided that self-assessments on PAJA will not be moderated in the 2012/2013 MPAT cycle. The DoJ&CD is expected to participate in the moderation for the 2013/2014 MPAT cycle.

The results from MPAT can be used by the DoJ&CD to assess annually, the extent to which the Outcome in the PAJA implementation results chain is met.



LIST OF REFERENCES

A list of references and resources for further reading

1. The Promotion of Administrative Justice Act, 2000
2. Administrators Guide, 3rd edition 2009
3. The PAJA Flyers in 11 official languages
4. The Promotion of Administrative Justice Act; A Commentary- by Ian Currie and Jonathan Klaaren 2nd edition 2007
5. The Right to Know- Claudia Lange and Jakkie Wessels, 2007

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