

This practical guide is based on the Administrators' Guide to the Promotion of Administrative Justice Act written by:

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Part 1

Introduction – about this guide

For most of South Africa's past, administrative decisions have been shrouded in secrecy. Ordinary people have never known why decisions have been taken that go against them or even how such decisions were taken. Not only that, but members of the administration have generally had a very bad reputation amongst members of the public.

Recent legislation (the Constitution and the Promotion of Administrative Justice Act) and policy (the Batho Pele White Paper) has tried to change this.

In this guide, we will look at each of these and how they affect the way members of the administration are expected to act and we will often refer to the Promotion of Administrative Justice Act (the 'AJA'). But this guide is not just about the AJA. Instead, it is really about how to make decisions and to use procedures that will improve the relationship between the administration and the public.

By following the simple procedures set out in this guide, you will be able to comply with the new policy and laws, but more importantly, you will improve the lives of all people in South Africa by making sure that decisions that affect them are properly taken and explained. And you will help to change the way people think about the public service.

Part 2

New law and policy



New laws and policy have attempted to improve the quality of services offered by the administration. We consider these briefly in this part.

Before starting, we need to quickly consider what the terms 'administration' and 'administrators' mean:



'Administration' and 'administrators'

The **administration** does the day-to-day work of government. It is commonly known as the public service and is made up of:

- All government departments at national, provincial and local levels;
- The police and the army; and
- The 'parastatals' (such as Eskom, Telkom and the SABC).

An **administrator** is anybody within the administration who takes decisions that affect the public. This includes Ministers, Directors-General, Directors, Assistant Directors and clerks.

As an administrator, you are required to follow these new laws and policy:

- The Constitution;
- The Promotion of Administrative Justice Act (the AJA); and
- The Batho Pele White Paper.

1. The Constitution

South Africa is governed by the Constitution of the Republic of South Africa, Act 108 of 1996 (**the Constitution**). As the highest law in the country, all laws and all people (including Parliament, the President, the Ministers, the administration and the courts) must follow and obey it.

As you know, the Constitution has a Bill of Rights that protects the rights of **all** people inside the country, and it explains what their obligations and duties are.

The Constitution has an entire Chapter devoted to the administration – Chapter 10. Of the Sections in Chapter 10, the most important is Section 195.



Section 195

Section 195 sets out the “basic values and principles governing the public administration”, that is:

- A high standard of professional ethics must be maintained;
- Resources must be used efficiently, economically and effectively;
- The public administration must be development oriented;
- Services must be provided in a way that is impartial, fair and without bias;
- The administration must cater to people’s needs;
- People must be encouraged to participate in policy development;
- The administration must be accountable and transparent and the public must be given information that is timely, easy to find and accurate;
- There must be good human resource management and career development practices for members of the administration; and
- The administration must be broadly representative of the people of South Africa.

Just as important is the right to Just Administrative Action in Section 33 of the Bill of Rights, which reads as follows:



Just administrative action (section 33)

- (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;
- To be given reasons for administrative action that affects them in a negative way; and
- To challenge decisions that they believe are wrong.

2. The Promotion of Administrative Justice Act (AJA)

You will notice that Section 33(3) in the box above also required Parliament to pass a law to “give effect” to the right to just administrative action. This law, passed in 2000, is the Promotion of Administrative Justice Act (the AJA).

The AJA:

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



Note

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

The AJA allows the Minister to make **regulations** over a wide range of subjects. This guide does not deal with these in detail. Instead, it touches only on those on Fair Administrative Procedures (that deal with how administrators should work). The latest version of these regulations can be found on the following website:

<http://www.doj.gov.za/reg/regadminregs.pdf>

The regulations to the AJA will change from time to time. As a result, you need to check the regulations and the Code of Good Conduct regularly.

3. The Batho Pele White Paper

Since 1 October 1997, the South African public service has been guided by a new service delivery **policy** - the ‘Batho Pele’ White Paper.

The Batho Pele White Paper sets out eight national service delivery principles, which deal with the administration’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 expect;
- **Increase access to services**, especially to those people who find 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);



Batho Pele

‘Batho Pele’ is a SeSotho term meaning ‘People First’.

- **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;
- **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 their taxes are used properly.

Batho Pele is therefore about ensuring that the resources (such as money and people) already used to run the Public Service are geared towards delivering quality services. 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 also gives 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.

Part 3

Making decisions with the AJA



The AJA sets out the rules you need to follow when making decisions. In this part, we will look at how this works for you in practice.

The AJA deals with two types of decisions affecting the public:

- Those affecting individuals (which we look at in section A of this part of the guide); and
- Those affecting sections of the public (which are covered in section B of this part).



Note

The AJA only covers decisions that **adversely affect** people's rights. This means that the decision must **impose a burden** or **have a negative effect**. It 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.

However, in this guide our main focus is on good administrative practice (using procedures that are fair and explain to people what you have done) and good decision-making. Because it is difficult to know before a final decision is made whether that decision will adversely affect anyone's rights, you should follow the procedures that the AJA sets out at all times.



Note on the Promotion of Access to Information Act

Decisions under the **Promotion of Access to Information Act** are not covered by the AJA, since this Act has its own rules about how to make such decisions. The Promotion of Access to Information Act (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.

Section A - Decisions affecting the public

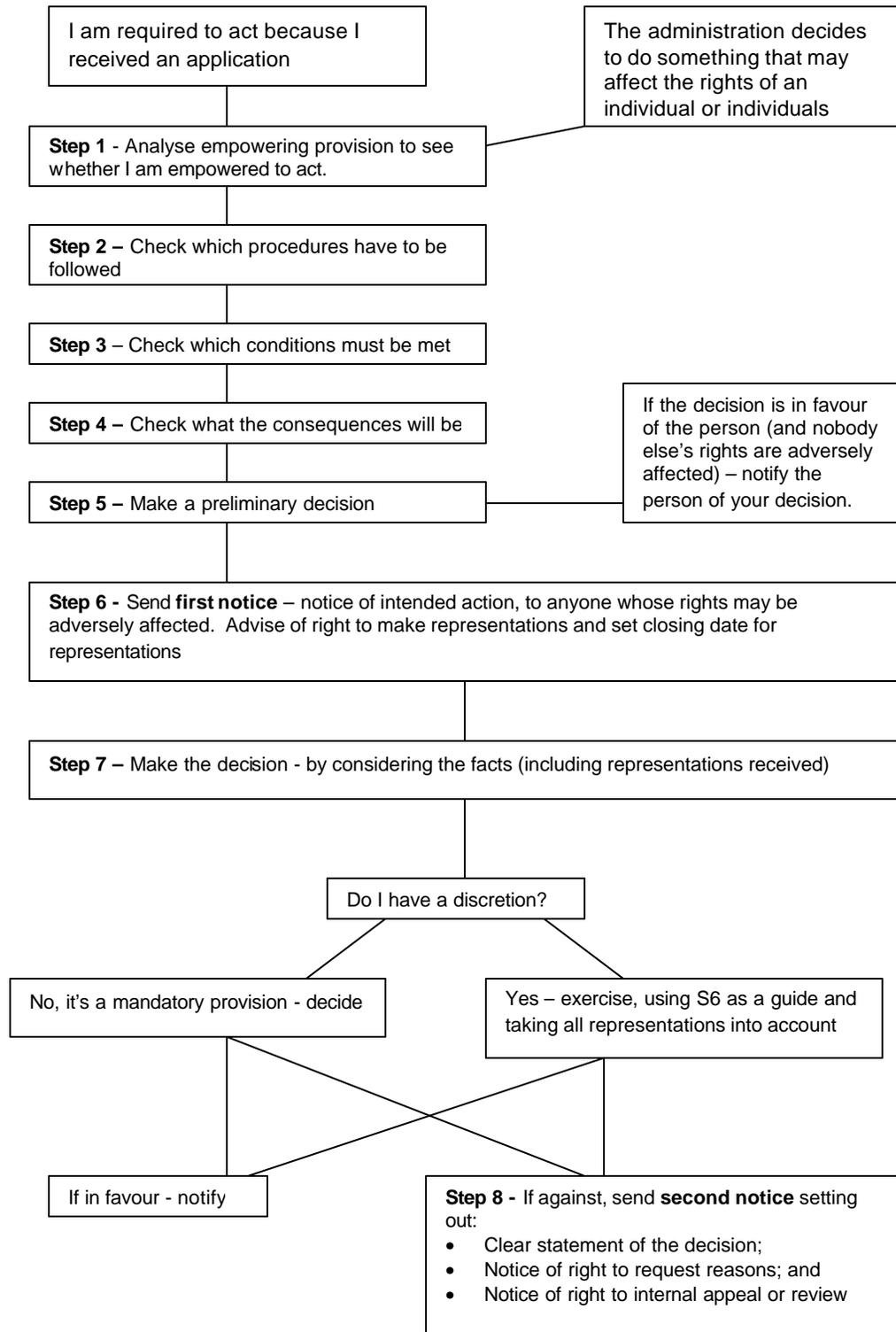
1. Overview

When called on to make a decision, the process is as follows:

- Step 1 – check whether or not you are empowered to act;
- Step 2 – check which procedures must be followed;
- Step 3 – check which conditions must be met;
- Step 4 – check what the consequences will be;
- Step 5 – make a preliminary decision. If this is in favour of the person, notify them of your decision. If not, move to step 6;
- Step 6 – notify anyone whose rights may be adversely affected by the preliminary decision (**the first notice**) and allow them to make representations;
- Step 7 – consider all representations made and make a decision; and
- Step 8 – notify anyone whose rights are adversely affected by the decision (**the second notice**). Also, notify those people in whose favour you have made a decision.

This process is illustrated in **Flowchart 1** on the following page and is described in detail in the pages that follow.

FLOWCHART 1 – GENERAL OVERVIEW



2. The eight-step process

Step 1 – Am I empowered to act?

Whenever you need to decide, the first question is: “am I authorised to make this decision?” To find out, you need to check your **empowering provision**. This will tell you whether the administration in general may act, and will tell you as an administrator whether **you** have the authority to act.

Empowering provisions are what give members of the administration the **authority** to act. Most empowering provisions are found in an **enabling statute**.



'Enabling statutes' and 'empowering provisions'

For example, the Social Assistance Act (SAA) is an **enabling statute**, allowing for a variety of pensions and grants. Section 4 of the SAA is an **empowering provision** that empowers administrators to award old age pensions. Section 5 of the same act empowers the administration to award disability grants, and Section 8 empowers them to award discretionary grants.

Empowering provisions not only give the administration the power to act by describing **what can be done** and **how**. They also deal with **who** is allowed to act and often set out the procedures to be followed by the person acting.

So, an empowering provision may say that the Department of Social Welfare is empowered to award old age pensions of a certain amount to certain people that meet certain requirements.

This provision may say that the person authorised to act is allowed to delegate this authority to someone else. The question will then be whether this power has been properly delegated to you. If the answer to this question is “no”, then you cannot act and should send the application to someone who **is** authorised to act.

When considering whether you have the authority to act, you need to consider:

- Whether the application has been sent to the correct institution. For example, if it is an application for a liquor licence and you work with applications for disability grants, you need to send the application to the right place;
- Whether you are the right person to make the decision. That is, do you personally have the authority to act? If not, you must check whether the authority can be delegated to you and, if so, whether this has been done. If the authority cannot be delegated or has not been properly delegated to you, then you cannot act and must send the matter to someone who **is** authorised to act; and
- Whether the action you are expected to take falls within the geographical area that you are empowered to act in. For example, if an administrator in the Eastern Cape receives an application for an old age pension from someone in Gauteng, they may not act. Instead, they should send the application to the proper department in Gauteng.



Note

In all cases where you send an application to someone else to deal with, you must also notify the person who made the application about what you have done. You should tell them where the application has been sent, why it was sent there, and give them the name, telephone, fax, postal and physical addresses of the person to whom it has been sent.

Step 2 – Check which procedures must be followed

If you are empowered to act, the next step to take is to check what **procedures** need to be followed in taking a decision and whether or not the person making an application has followed the proper procedures. (For example, when applying for a disability grant, a District Surgeon must examine the applicant. If this has not been done, you may not take a decision).

If the procedures have not been followed, you should return the application to the person and advise them what procedures must be followed. If these are still not followed, the application must be rejected and, since this is a decision that adversely affects rights, the person must be notified of the decision (as set out in Step 8).

There may also be procedures in the empowering provision that you as an administrator will have to follow. You need to check carefully what these are and make sure that you have followed them before continuing.

Step 3 – Check which conditions in the empowering provision must be met

Before you can act, you must make sure the conditions in the empowering provision are met. For example, just because someone has followed all the procedures when applying for a disability grant does not mean that they are entitled to the grant. They have to show that they are in fact disabled. Similarly, if someone applies for a pension and follows all the correct procedures when applying, they still need to satisfy the conditions for a pension (that they are over a certain age, earn less than a certain amount of money and so on).

Usually, this is quite straightforward (although there may be many conditions). For example, an empowering provision may say that **if** a person is over 18 and completes a driving test satisfactorily, they must be given a licence.

However, some conditions are quite vague and use words that are difficult to define. These are known as conditions with an **“undefined legal concept”** in them.

Examples of an undefined legal concept are:

“If the person is a **fit and proper person**, then ABC will follow”

OR

“In **exceptional circumstances**, an administrator may decide to do ABC”

OR

“If the administrator finds XYZ **reasonable (or unreasonable)**, then ABC should follow”

Words such as “reasonable” and “exceptional circumstances” have always been difficult to define. As a result, it is not always easy for an administrator to know how to act and whether or not their actions will be allowed.

For administrators to be able to decide whether someone satisfies an undefined legal concept, they will need to give the concept meaning. This is done by setting a standard that others may be measured against. Such a standard needs to be:

- Relevant;
- Fair; and
- Reasonable.

For example, if an undefined legal concept used the words “in special circumstances”, administrators need to decide what they would regard as special circumstances. They would need to show that the circumstances they regard as special are relevant to the issue, that they are fair and that they are reasonable.

To create such standards, administrators need first to consider the **purpose** of the enabling statute and the **purpose** of the empowering provision. That is, what is the statute trying to achieve? If it is trying to ensure that only people with high moral character and no criminal convictions are admitted as attorneys (by saying only “fit and proper people” may be admitted), then quite clearly a standard can be set that excludes people who fall below this level.

In some cases, there are guidelines about how you should act. The first guideline is to look to how such decisions have been made in the past.

Guidance can be found in:

- How such decisions have been made within your department; and
- How the courts have interpreted these words in the past.



Example

People are only allowed to practice as attorneys if they are “fit and proper”. There are a number of court cases where people have not been admitted as attorneys because they did not satisfy this requirement, or where they have been removed from the roll of attorneys and they have taken the matter to court. As a result, the courts have said people with convictions for crimes involving dishonesty, drug habits and those that have conducted their casework in particular ways are not “fit and proper”.

There may also be circulars, memos and regulations in your department that offer some guidance as well. Even though these may later be challenged in court, they do provide a good starting point.

Sometimes, the Preamble to the enabling Act may also say what the purpose of the Act is. For example, the Preamble of the Special Pensions Act (69 of 1996) makes it clear why the Act was written by saying it is:

“To give effect to Section 189 of the Constitution; to provide for special pensions to be paid to persons who made sacrifices or served the public interest in the cause of establishing a democratic constitutional order; to prescribe rules for determining the persons who are entitled to receive those pensions; to establish a Special Pensions Board and a Special Pensions Review Board; and to provide for related matters.”

There may also be a textbook on the subject that will help you to decide. And, lastly, where you are still unsure, you could check with your departmental legal adviser.

A practical guide to Administrative Justice

Where a person has not supplied either sufficient proof or has not given enough information to meet the conditions in the empowering provision, it is good administrative practice for you to write to that person and request additional information or proof.

An example of such a letter appears on the following page.

Department of Social Development
Private Bag X 61
Johannesburg
0001
Tel: 011-322-7558
Fax: 011-322-7550
Email: abrooks@dsd.gov.gau.za

1 August 2002

Reference: 12345/01

CERTIFIED MAIL

Mrs Dube
PO Box 123
Diepkloof, 0123

Dear Mrs Dube,

RE: Your application dated 20/08/2002

You have applied for an old age pension.

Unfortunately, you have not provided us with proof of your age. Old age pensions are only available to women over the age of 60 and men over the age of 65. As a result, before I can decide whether or not to grant you a pension I need to see a certified copy of:

- Your birth certificate;
- Your identity document; or
- Any other document that proves your age or when you wereborn.

It will probably be easiest for you to take a photocopy of your birth certificate or other documents (**as well as the original document**) to a police station or magistrates' court in your area. These people will certify the document for you.

Once you have a certified copy of such a document, please send it to me at the above address **by 31 August 2002**. If I have not received any proof of your age by that date, I will have to refuse your application. Please make sure to keep the original document in a safe place.

Sincerely

DESIGNER TO INSERT SIGNATURE

B Ntshaba
Applications Clerk, DEPARTMENT OF SOCIAL SERVICES

bn

Your address, telephone number, fax number and email (this will usually be on your letterhead).

Date

Your reference number

Mailing instruction

Applicants name and address

Greeting / salutation

Subject

The problem

What information you need

Helpful advice

Note deadline for documents to be sent (failing which the application will be refused)

Complimentary closing

Signature

Your name, job title and department

Your initials

Step 4 – Check what the consequences will be

Once the conditions have been satisfied, certain consequences will flow from this based on what the empowering provision says. In some cases, the administrator has no choice – they **must** do something. In other cases, the administrator will have a choice, or **discretion** as to what to do.

There are therefore two types of empowering provisions:

- Mandatory provisions; and
- Discretionary provisions.

i. Mandatory provisions

A mandatory provision is one that follows the following formula:

“If XYZ exists, then the administrator **must (or shall)** do ABC”.

OR

“If XYZ exists, then the administrator **must not (or shall not)** do ABC”.

The words **must** or **shall**, and **must not** or **shall not** indicate that the provision is mandatory.

Where a provision is mandatory, you have no choice in the matter. Instead, you must strictly follow the provision.



Example

Section 3 of the Social Assistance Act

Subject to the provisions of this Act, any person **shall** be entitled to the appropriate social grant if he satisfies the Director-General that he -

- (a) is an aged or disabled person or a war veteran;
- (b) is resident in the Republic at the time of the application in question;
- (c) is a South African citizen; and
- (d) complies with the prescribed conditions.

ii. Discretionary provisions

Discretionary provisions give you a choice (or discretion) as to what to do. They have the following formula:

“If XYZ, then the administrator **may** do A **or B or C**.”

OR

“If, **in the opinion of the administrator** the following exist, then the administrator **may** do A **or B or C**”



Example

The Regulations to the South African Passports and Travel Documents Act (4 of 1994) state:

- 3 (a)** A South African passport **may** be issued to an applicant in the Public Service or other government institution **if** –
- (i) It is for an official journey; **or**
 - (ii) Such applicant is stationed outside the Republic and he or she journeys to and from the Republic while on leave.

An empowering provision **never** gives you an **unfettered discretion** – that is, the power to make a decision entirely on your own and without any restriction on what you decide. Instead, it will usually give you some guidance as to how to make the decision.

Even if they don't, the Constitution and the AJA demand that this discretion be exercised **at least** in a way:

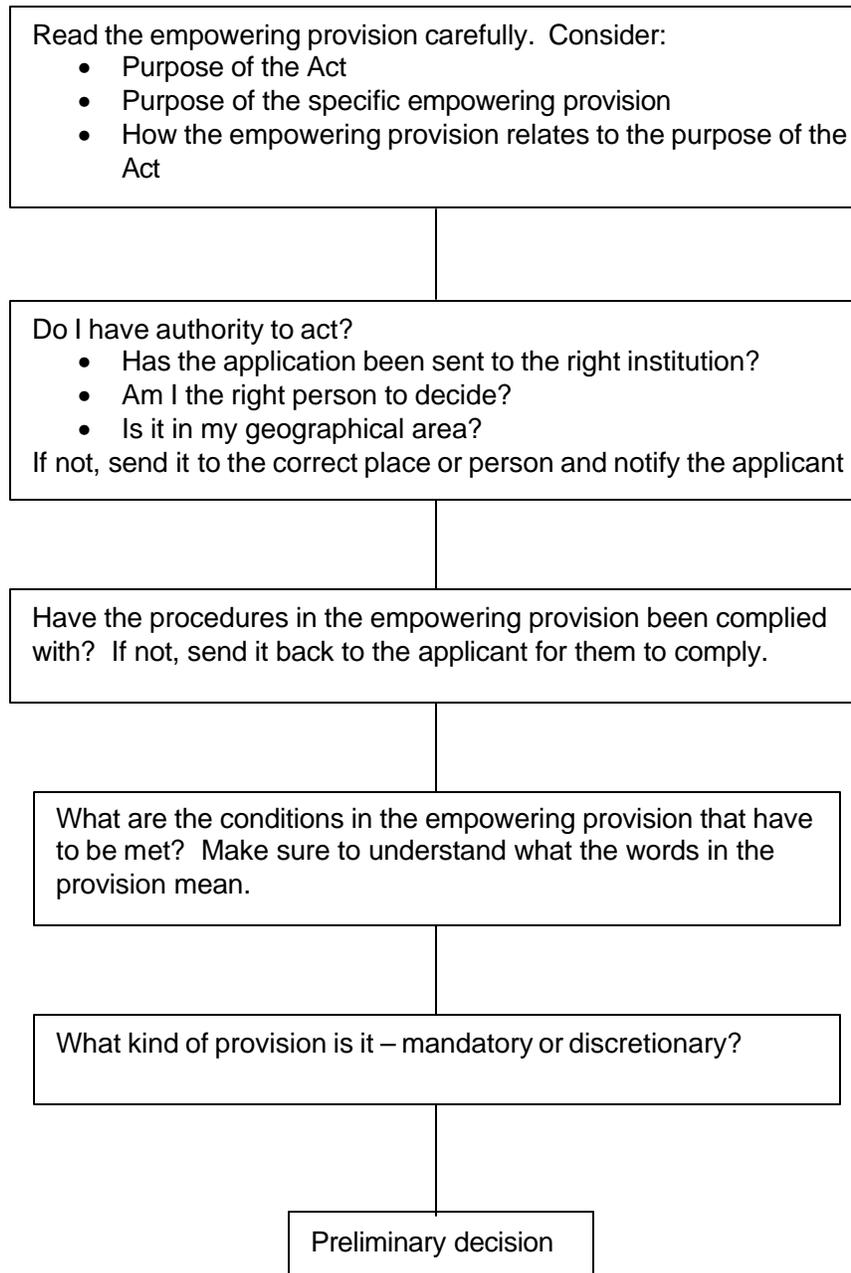
- That is **fair**;
- That takes **relevant** factors into account; and
- That excludes **irrelevant** factors.

You will therefore need to have as much information as possible about the issue before taking a decision.

Steps 1 – 4 are covered in Flowchart 2 on the following page.

FLOWCHART 2

ANALYSING EMPOWERING PROVISIONS



In the space below, fill in your empowering provision and complete the questions that follow:

My Empowering Provision	
My empowering provision is found in the following enabling statute:	<hr/>
It is in Section _____ of the statute and reads as follows:	<hr/>
It sets out the following procedures that must be followed:	<hr/>
Once these procedures have been followed, the following consequences arise:	<hr/>
The empowering provision (mandatory or discretionary) _____	<hr/>

Step 5 – Make a preliminary decision

You must now measure the facts of the matter against the conditions in the empowering provision and come to a **preliminary decision**.

a. If it is clear at this point that:

- The person has complied with all the procedures;
- The person meets the conditions in the empowering provision;
- The person is clearly entitled to what they are applying for; and
- No-one else's rights could be affected by the decision ...

... then you can decide in favour of the person and send them a notice that the decision is in their favour. This notice should give the person any other information they might require (such as where to collect their pension).

b. If anyone's rights may be adversely affected by this decision, a notice must now be sent to the person **before the decision is taken (as set out in Step 6)**



'Adversely affects'

Adversely affects means that the decision must **impose a burden** or **have a negative effect**. It 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.

Step 6 – The first notice

Before taking any decision that might adversely affect someone's rights, you must send them a first notice giving them:

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



NOTE

In **urgent** situations, you might not have to send a first notice. For example, if you were a child welfare officer and came across an unattended child that was clearly neglected and was in a dangerous situation, you could remove the child without first notifying the parents about what you intend to do.

However, once you have acted, you must immediately notify anyone whose rights may be affected about what you have done (as set out in Step 8)

a. Adequate notice of the nature and purpose of the action

“Adequate notice” means more than just informing a person that an administrative action is being planned. You must give the person enough time to respond to the planned administrative action. The person also needs to have enough information 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 the action is being proposed).

b. A reasonable opportunity to make representations

The length of time to allow a person to make representations will be different in different circumstances. Sometimes, this will be set out in your enabling statute or in your guidelines. If not, you should at least allow people enough time to raise objections, provide new information, or answer charges.



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.

You need to make sure that you say in the letter what the **deadline** for making representations will be.

To meet these requirements, your notice should include **at least**:

- **Adequate notice of nature of the decision:**
 - **Who** will take the decision?
 - **What** decision will be taken?
 - **When** will the decision be taken?
 - **Where** will the decision be taken?
- **Adequate notice of purpose of the decision:**
 - **How** is the decision going to be taken?
 - **Why** is the decision going to be taken?
- **Reasonable opportunity to make representations:**
 - **By when** should representations be made (the **deadline**)?
 - **How** should they be made?
 - **To whom** should they be addressed?
 - **Where** should they be sent?

You must **diarise** the matter for the deadline mentioned in the letter. On this date, you must check their file and establish whether or not representations have been received. **If not, you are entitled to proceed with the matter, make your decision and advise the person accordingly (as set out in Step 8).**

An example of what this first notice should look like is on the following page.

Department of Social Development
Private Bag X 61
Johannesburg
0001
Tel: 011-322-7558
Fax: 011-322-7550
Email: abrooks@dsd.gov.gau.za

1 September 2002

Reference: 12345/01

CERTIFIED MAIL

Ms Dube
PO Box 123
Diepkloof, 0123

Dear Ms Dube

RE: Your application dated 20/08/2002

You have applied for an old age pension.

Unfortunately, it seems that you may not be a South African citizen.

The document you sent us to prove your age is a Lesotho birth certificate. It seems that you may not be entitled to an old age pension. As a result, I may not be able to award you a pension.

The reason I would not be able to award you a pension is that only South African citizens qualify for old age pensions from the state. If you are a Lesotho citizen, you will not qualify.

If you do not agree with this decision, you may write to me at the above address explaining why you do not agree. **Please make sure that you do so before 30 September 2002.** If I have not heard from you by then, I will have to turn down your application.

Sincerely



A Brooks
DIRECTOR GENERAL, DEPARTMENT OF SOCIAL SERVICE

ab

Your address, telephone number, fax number and email (this will usually be on your letterhead).

Date

Your reference number

Mailing instruction

Applicants name and address

Greeting / salutation

Subject

The problem

The nature of the decision you may take

The purpose of the decision

Reasonable opportunity to make representations

Complimentary closing

Signature

Your name, job title and department

Your initials

In some cases, you may need to write to a person asking them for further information (as was discussed in Step 3). In such cases, you might be able to combine this request with your first notice as is shown on the following page.

Department of Social Development
Private Bag X 61
Johannesburg
0001
Tel: 011-322-7558
Fax: 011-322-7550
Email: abrooks@dsd.gov.gau.za

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The document you sent us to prove your age is a Lesotho birth certificate. It seems that you may not be entitled to an old age pension. As a result, I may not be able to award you a pension.

The reason I would not be able to award you a pension is that only South African citizens qualify for old age pensions from the state. If you are a Lesotho citizen, you will not qualify.

If you have a document that shows that you are a South African citizen, please send it to me at the above address as soon as you can. It will probably be easiest for you to take a photocopy of this document (**as well as the original document**) to a police station or magistrates' court in your area. These people will certify the document for you. Once you have a certified copy of such a document, please send it to me at the above address.

If you do not agree with this decision, you may write to me at the above address explaining why you do not agree. **Please make sure that you do so before 30 September 2002.** If I have not heard from you by then, I will have to turn down your application.

Sincerely



A Brooks
DIRECTOR GENERAL, DEPARTMENT OF SOCIAL SERVICE

ab

Your address, telephone number, fax number and email (this will usually be on your letterhead).

Date

Your reference number

Mailing instruction

Applicants name and address

Greeting / salutation

Subject

The problem

The nature of the decision you may take

The purpose of the decision

REQUEST FOR FURTHER INFORMATION

Reasonable opportunity to make representations

Complimentary closing

Signature

Your name, job title and department

Your initials



Standard letters and forms

While standard forms are not encouraged, some of the information that you will provide in your first notices will always be the same. To save time, you could use a template (that is, a standard letter where you fill in additional information) or even a photocopied form for some information. For example:

Have another look at the two versions of the first notices on the preceding pages. You will notice that the following information will usually always be the same:

- Your address block;
- How representations should be made (for example, in writing); and
- To whom they should be sent (including that persons address).

As a result, you may be able to draw up a template that includes this as standard. Or you may be able to make a photocopied form setting out how to make representations and attach this to each notice you send out.

However, the date by which representations must be made will always change. You must therefore be careful to make sure you change this in each new notice or you should use terms such as 'within four weeks of receiving this notice' or 'within two months of the date on which this notice was sent' in your photocopied forms.

Step 7 – Making the decision

Once all representations have been received (or once the deadline set for them has passed), you must now **decide** (taking all the representations you have received into account).

The actual process of making a decision involves comparing the facts presented by an applicant with the conditions that are set in the empowering provision. Where the provision is **mandatory**, this will be quite a simple process. For example, the law relating to pensions says anyone who is over a certain age (60 for women and 65 for men) and who satisfies certain other requirements will be able to receive a pension. If a woman over 60 applies for a pension (and she satisfies all the other requirements), she must be given a pension.

However, where the empowering provision is **discretionary**, you will have to consider the facts and check what the empowering decision allows you to do. Some empowering provisions will allow only for decisions in favour or against the person. Others though will allow for a decision in favour (with conditions) or against (with conditions). For example, a disability grant can be given for a fixed period only and will be **conditional** on the level of disability that the person has after the period has passed.

Section 6 of the AJA is very important at this stage, because it says what a court will look at when a case is taken on review. As such, it gives you excellent guidance on how to make such a decision.

Section 6 of the AJA says that you:

- Can only take a decision if you are authorised to do so by the empowering provision (or if the authority has been properly delegated to you);
- Must not make biased decisions;
- Must follow all of the procedures and conditions in the empowering provision;
- Must not allow any ulterior motives to influence your decision;
- Must consider all relevant factors when deciding;
- Must ignore all irrelevant factors when deciding;
- Must not allow any one else to influence your decision;
- Must act in good faith when deciding;
- Must act reasonably.



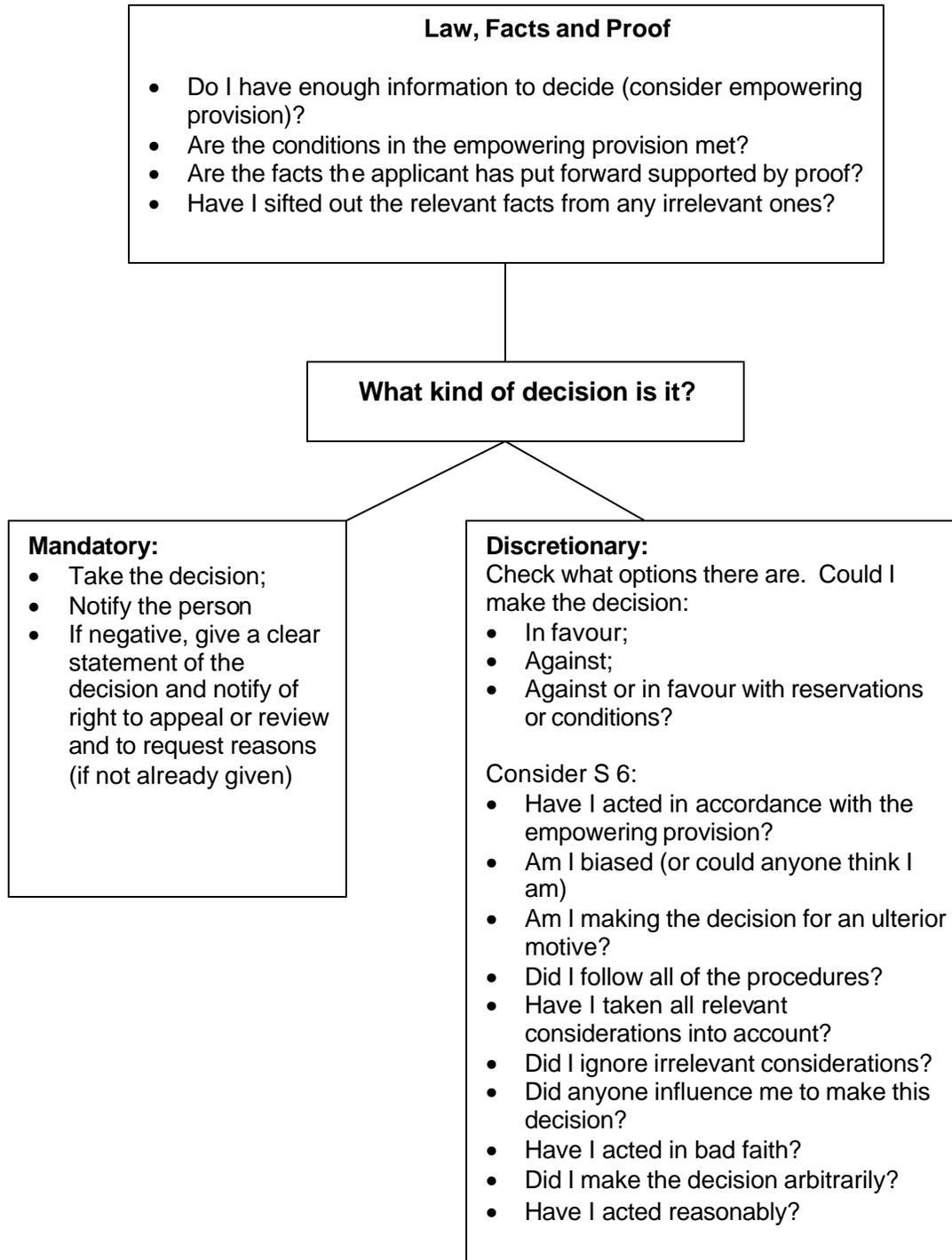
NOTE

At the back of the guide, you will find a **Checklist** based on Section 6 that you can use to help you when making decisions.

This process is represented in Flowchart 3 on the following page.

FLOWCHART 3

MAKING DECISIONS



If the decision is now in favour of the person and no one else's rights will be affected, you may take it and notify the person. You should also provide the person with any other information they might need (such as where to collect their pension). The AJA does not apply to this, since it is not a decision that **adversely** affects rights.

If the decision adversely affects anyone's rights, a second notice needs to be sent to them as set out in Step 8.

Step 8 – The second notice

If **anyone's** rights are adversely affected by the decision, you need to send all of these people a second notice setting out:

- A clear statement of what was decided;
- Notice of the person's rights to appeal or review; and
- Notice of their right to request written reasons.

a. A clear statement of the decision

You must state clearly what was decided. For example, you might say: "I have decided not to award you a disability grant."

b. Adequate notice of any right to appeal or review

Anyone adversely affected by a decision can challenge it if they think the decision was wrong. In some cases, this might be an appeal to a supervisor or an appeal board. If there is no such internal appeal though, the person can take the matter to court for the court to decide. This is known as **judicial review**.

You **must** tell the person that they have these rights without waiting for the person to ask. If there is an internal appeal in your department, you must state at least the following:

- The name and address of the person or body to which the appeals must be made;
- When it must be made (the deadline or time period in which it must be made);
- The formal requirements of the appeal (such as that it must be in writing or that it must be on a special form. If it must be on a special form, **please remember to include a copy of the form with the notice**).

If there is no internal appeal, then you must tell the person:

- That they can take the matter on re view;
- When and how to do so, that is, to which court and within 180 days (about 6 months) of the person receiving your notice or, where there is an internal appeal, within 180 days of the final decision.

c. Adequate notice of a person's right to request reasons

Anyone adversely affected by a decision is allowed to request written reasons for the decision and **must** be told that they have this right. You should at least state:

- Where the request can be made;
- When it must be made (what the deadline is); and
- To whom the request should be made.

The regulations on Fair Administrative Procedures to the AJA say that you should also say:

- That the request must be:
 - In writing;
 - Addressed to the person who took the decision;
 - Sent by post, fax or electronic mail, or that it may be hand delivered;
- Where the person can get assistance if they cannot write;
- That the person must say in their request:
 - Which decision they are asking for reasons for;
 - Which of their rights have been affected;
 - What their full name and postal (and email) addresses are; and
 - What contact telephone or fax numbers they may have.



NOTE

We will look at **how** to write reasons in part 4 of this Guide.

In other words, your second notice should include **at least** the following:

- **A clear statement of the decision:**
 - **Who** took the decision?
 - **What** decision was taken?
 - **When** was the decision taken?
 - **Where** was the decision taken?
 - **How** was the decision taken?
 - **Why** was the decision taken?



NOTE

While the AJA does not say that you have to provide reasons for your decision, it is very good administrative practice to do so at this point. This will help people to understand why decisions have been taken and will reduce the number of requests for reasons too.

- **Adequate notice of the right to internal appeal (if there is one):**
 - **To whom** the appeal should be made;
 - **When** the appeal should be made;
 - **Where** the appeal should be made;
 - **How** it should be made; and
 - **What** form the appeal should be in (in writing or by using a special form).

- **Adequate notice of the right to review**
 - **Where** (to what court)?
 - **How** (by making application to court)?
 - **When** (180 days after receipt of this notice OR after internal remedies exhausted).

- **Adequate notice of right to reasons:**
 - **When** should they be requested (90 days)
 - **Where** should request be sent?
 - **To whom** should it be sent?
 - **How** should request be made?
 - **The information required by the regulations.**

An example of a second notice appears on the following page.

Department of Social Development
Private Bag X 61
Johannesburg
0001
Tel: 011-322-7558
Fax: 011-322-7550
Email: abrooks@dsd.gov.gau.za

4 October 2002

Reference: 12345/01

CERTIFIED MAIL

Ms A Dube
PO Box 123
Diepkloof, 0123

Dear Ms Dube

RE: Your application dated 20/08/2002

You have applied for an old age pension. Unfortunately, I have had to decide not to award you an old age pension.

On 1 September, I wrote to you to advise you that it seemed you might not be a South African Citizen. In that letter (copy attached), I pointed out that only South African citizens are entitled to old age pensions from the State. I mentioned that the birth certificate you sent me showed that you were born in Lesotho and I asked whether you were able to prove that you are a South African. I also asked you to please send me this proof, or anything else you wanted to tell me, by 30 September 2002. It is now 4 October and I have still not heard from you. As a result, I must refuse to grant you an old age pension.

If you believe my decision is wrong, you can appeal to our Board of Appeals to have it changed. You will need to make this appeal in writing within 30 days of receiving this letter and **using the attached form**. This appeal must be sent to the following address:
Old Age Pension Appeal Board
ATTENTION: Ms X Khumalo
Private Bag X56
Johannesburg
2000

You also have the right to request written reasons for my decision from me. If you would like written reasons, you must send me a request for these, in writing, to my address above. You may send it by mail, fax or email, or you can deliver it personally. The request must reach me though within **90 days** of you receiving this letter. Please note that if you have any difficulty writing this request, you can go to any of our offices and the staff there will help you.

Please remember to quote my reference number (12345/01) in your request for reasons and to provide me with your address and any contact telephone or fax numbers you may have.

Sincerely



A Brooks
DIRECTOR GENERAL, DEPARTMENT OF SOCIAL SERVICE

Enclosure
ab

Your address,
telephone number,
fax number and
email

Date

Your reference
number

Mailing instruction

Applicants name
and address

Greeting / salutation

Subject

The decision

Clear statement of
the decision /
administrative action

Notice of the right to
internal appeal –
notice that the
appeal form must be
attached to your
letter

Notice of the right to
request written
reasons (and how to
go about doing this)

Signature

Your name, job title
and department

Notice of enclosure
Your initials



Standard letters and forms

Again, standard forms are not encouraged. However, much of the information that you will provide in your second notices will always be the same. To save time, you could use a template (that is, a standard letter where you fill in additional information) or even a photocopied form for some information. For example:

Have another look at the second notice on the preceding page. You will notice that the following information will usually always be the same and could be in your template or on a form that you attach to your second notice every time:

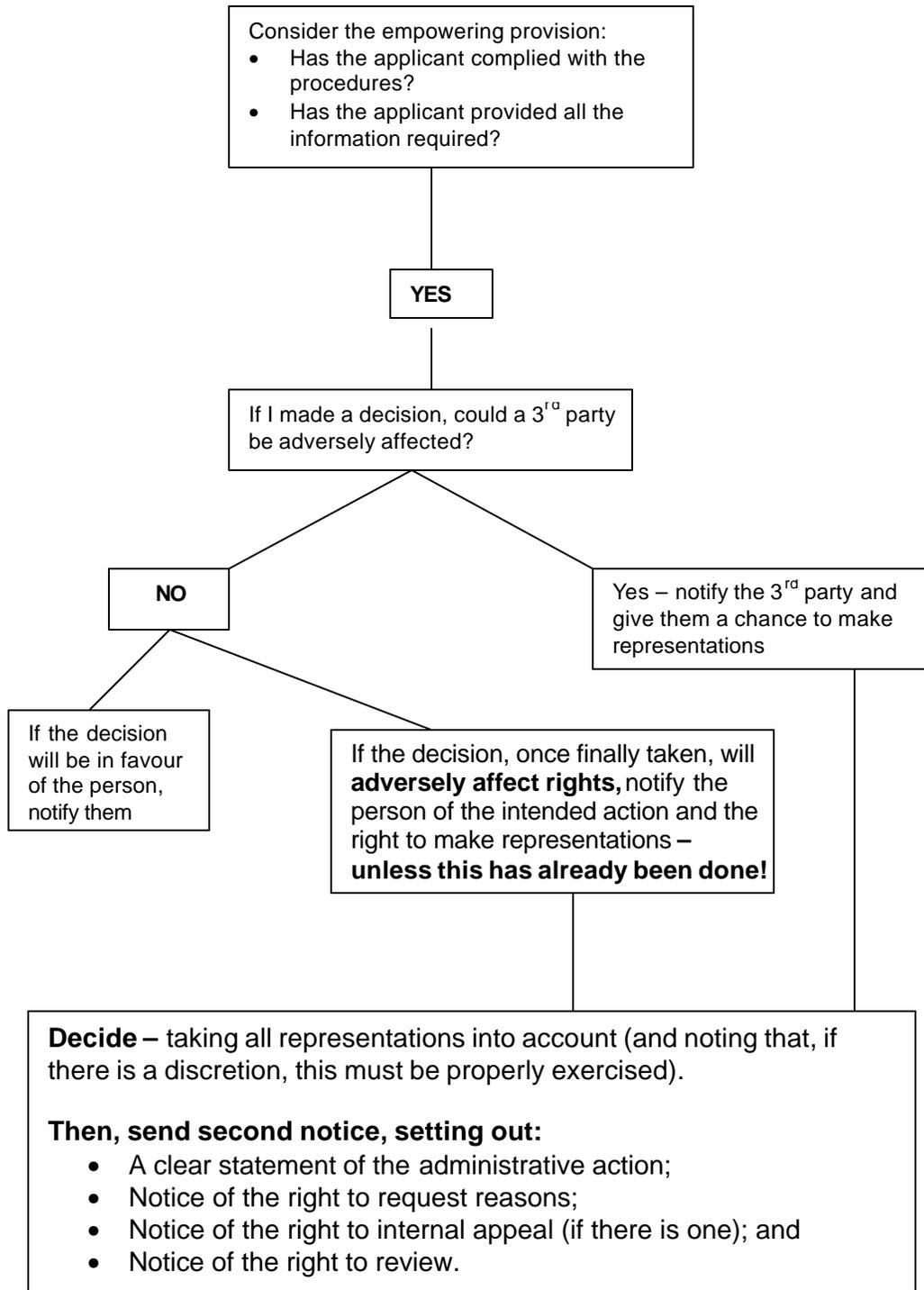
- Notice of the right to request reasons and how to do so;
- Notice of the right to an internal appeal; and
- Notice of the right to review.

However, the date by which the request for reasons must be received and the dates by which internal appeals and review procedures must be started will usually be different. You must therefore be careful to make sure you change this in each new notice or on any form you use. Or, if you are using a photocopied form, you could say 'within 4 weeks of receiving this notice' or similar words, depending on your circumstances.

The process involved in Steps 5 – 8 is represented in Flowchart 4.

FLOWCHART 4

SECTION 3 NOTICE PROCEDURES



3. Procedure when the administration initiates a decision

Up to now, we have focused on the procedure when someone applies for something. However, there will be situations where you decide to act without having received an application from a member (or members) of the public.



Example

Ms Mchunu has a licence to run a small restaurant in Soweto. It is so successful that the patrons queue around the block to eat there. Part of its appeal seems to be that Ms Mchunu sells liquor after hours.

The local council is concerned and decides to withdraw Ms Mchunu's licence.

The procedure is essentially the same as when someone applies for something. That is:

- Step 1 – check whether or not you are empowered to act;
- Step 2 – check which procedures must be followed;
- Step 3 – check which conditions must be met;
- Step 4 – check what the consequences will be;
- Step 5 – make a preliminary decision. If this is in favour of the person, notify them of your decision. If not, move to step 6;
- Step 6 – notify anyone whose rights may be adversely affected by the preliminary decision (**the first notice**) and allow them to make representations;
- Step 7 – consider all representations made and make a decision; and
- Step 8 – notify anyone whose rights are adversely affected by the decision (**the second notice**). Also, notify those people in whose favour you have made a decision.

Go back and have a look at Flowchart 1 to see how this works.

The major difference is that the first notice will obviously use different language (because you are planning to take a decision rather than reply to someone's request for something).

Have a look at the first notice on the following page to see how this is done. (CHECK)

Orlando West Local Council
Private Bag X 61
Soweto
2045
Tel: 011-377-8790
Fax: 011-377-8700
Email: amkhize@dsd.gov.gau.za

1 September 2002

Reference: 12345/02

CERTIFIED MAIL

Ms Mchunu
PO Box 978
Soweto, 0123

Dear Ms Mchunu

RE: Withdrawal of your licence

You have a licence to operate a restaurant in Orlando West.

It has come to our attention that you are serving liquor at your restaurant. As you know, your licence to run a restaurant does not allow you to serve liquor. As a result, we are considering withdrawing your licence.

If you do not agree with this decision, you may write to me at the above address explaining why you do not agree. **Please make sure that you do so before 30 September 2002.** If I have not heard from you by then, I will have to withdraw your licence.

Sincerely



A Mkhize
Orlando West Local Council

am

Your address, telephone number, fax number and email (this will usually be on your letterhead).

Date

Your reference number

Mailing instruction

Applicants name and address

Greeting / salutation

Subject

The problem and the nature of the decision you may take

Reasonable opportunity to make representations

Complimentary closing

Signature

Your name, job title and department

Your initials



Discretionary procedures in Section 3

In addition to the mandatory procedures, to ensure fairness you are expected to consider 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.

When deciding whether or not to follow one of these 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.

Section B - Decisions affecting the public

Section 4 of the AJA sets out the procedures to follow when making decisions that may adversely affect the public.



Example

An example would be where the administration is planning something that may affect the whole community, such as when a local council decides to build a new sports field on land that has, until then, been used as communal grazing land.

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

The detail about how to follow these procedures is set out in the regulations on Fair Administrative Procedures to the AJA.



NOTE

Please note that these regulations will change from time to time and that, before using any of these procedures, you should first check the regulations. You can find the latest copy of the regulations on the following website:

<http://www.doj.gov.za/reg/regadminregs.pdf>

1. Notice and comment

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

1. 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.



Regulations

The regulations on Fair Administrative Procedures 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.

Neither the AJA nor the regulations say what should be done at the end of this process. In terms of good administrative practice though, it is important to notify people about the decision taken at the end of the process and to tell them about any internal appeal or review processes they may have.

Generally, such a notice should be published in the same place that your original notice was published. So, if you used a local newspaper to notify people about your intended action, then you should use the same newspaper to notify them of your decision and their rights to review and appeal.

2. 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. It must also state where and when the inquiry will be held.
3. A public hearing must be held.
4. After the inquiry, you must compile a written report and publish a summary of the report.



Regulations

The regulations on Fair Administrative Procedures 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, the AJA and these regulations do not deal with what should happen once the decision is taken. Good administrative practice though would require you to publish your decision and the rights the public have to internal appeal or review in the same place that you published your notice of the public inquiry.

3. Which procedure should I follow?

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

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 also a good choice where it makes better sense to hear oral submissions from members of the public.

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 4 Giving Reasons



The AJA requires you to give written reasons for any decision you take that adversely affects anyone's rights. In this section, we will look at when and how to provide written reasons.

1. Who can request reasons?

Anyone whose rights have been adversely affected by a decision can request written reasons.

2. When should I give reasons?

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

The AJA says you must give reasons for your decisions to a person who **requests** them. Of course, you can give reasons at the same time you notify people of your decisions. Sometimes this can help settle potential disputes before they arise.

Sometimes a request for reasons will be made months after the decision has been taken. If you do not give reasons at the same time as telling the person the decision, it is a good idea to make a note of the reasons at the time the decision is made and to file this note in the person's file. Having made a note, you will easily be able to provide reasons when requested to do so.



Regulations

The regulations on Fair Administrative Procedures deal with the formalities that a person requesting reasons must follow. Generally, these must be in writing and sent by post, fax or email, or delivered by hand. They must also say what decision the person is asking about and must provide their address and contact telephone and fax numbers.

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, please remember that the regulations will change from time to time and you need to check them regularly.

3. 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 can 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.

4. Structure of reasons

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

- A clear decision must be set out, which also includes your particulars (as the person who took the decision);
- Adequate reasons for the decision must be given; and
- You must provide information on any legal remedies available.

In general, your reply 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 disability 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. Explain 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 you 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.
 - f. If you have a discretion:
 - i. State that you are using a discretionary power;
 - ii. Say what the scope of the discretion is;
 - iii. Say which alternative you chose, and
 - iv. Why you chose it.
 - g. If the provision is mandatory, say that it is mandatory (and that you don't have a choice).
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, 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.

v. Advice on legal remedies

1. If there is an internal appeal available:
 - a. Give the contact details of the person responsible for the internal appeal (including their name, physical address, email address, fax number and telephone number);
 - b. Set out the period of time that they have to lodge the appeal or the date by which it must be lodged; and
 - c. Explain any prescribed or special forms that must be used for the internal appeal. Attach copies of these forms as an enclosure.
2. If there is no internal appeal:
 - a. Say which Court has jurisdiction to hear a review; and
 - b. 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 about it appear on the following page.



Standard letters and forms

Again, although standard forms are not encouraged, you will notice that the ‘advice on legal remedies’ will always be the same. As a result, you could draw up a template of a letter where this information is always the same, or you could print this on a separate document, photocopy it, and send it with each set of written reasons you produce.

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:
We have rejected your application since it appears that your assets exceed an amount of R5 000. Having assets of this amount excludes you from a social pension.

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

ab

Your address

Date

Reference number

Mailing instruction

Recipient's name and address.

Salutation

Subject

The purpose of the application

The main decision in one sentence,

The history (facts) of the matter.

The facts on which the decision is based and the empowering provision.

Apply the law to the facts.

Advice on any legal remedies available

Complimentary closing
Signature

Your name, job title, department

Your initials

Part 5 Judicial Review



Anyone who is not satisfied with your decision (or who has exhausted all internal appeals and is still not satisfied) may take the matter to court for review. This is known as 'judicial review' and your role in this is briefly discussed.

1. 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 believes an administrative decision is wrong can challenge the decision in court.

2. 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**.

3. Time limit

One of the most important rules in the AJA is that an application for judicial review must be made **within 180 days** (approximately 6 months) 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).

4. Your role in judicial review

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). 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. The attorney or advocate handling the matter for your department will assist you to do this.

Checklist

The following checklist can be photocopied and used by you to help you when taking decisions. **When you use it, remember to place the completed form on the file to which it applies. This will assist you greatly if you need to write reasons at a later date or if the matter is taken on review.**

Am I authorised to take this decision by the empowering provision? That is:

- What is the empowering provision? Write it down in the following space: _____
- Has the application or request been sent to the right department?
- Am I the right person to take this decision?
- Is the matter in my geographical area?

Did I act under an authorised delegation of power? If so ...

- Is the delegation in writing?

Am I impartial?

- Do I have any personal interest in this matter?
- Do I have any financial interest in this matter?
- Do I personally know any of the parties involved?
- Do I have any prejudice against any of the parties involved?

Did I comply with all procedures set out in the empowering provision?

Did I follow the prescribed procedure?

If I did not follow the prescribed procedure, does the empowering provision allow me to follow a different but fair procedure or is it a justified departure (for example, if the matter was urgent)? If you followed a different procedure, write down what you did in the following space and why you did it:

Did I give notice to all parties whose rights may be adversely affected by my decision? Fill in their names in the space below:

Did I give them an opportunity to make representations?

Did I consider all of the representations before I made my decision?

A practical guide to Administrative Justice

- Did I take the decision based on the correct information - factually and legally? What are the facts?

- What is the law that I took into account?

- What factors did I consider as relevant when I made my decision?

- What factors did I disregard as irrelevant factors / considerations when I made my decision?

- Did I take the purpose of the empowering provision into account in making my decision? What is the purpose of the empowering provision? Write it down:

- Did I make my decision in good faith?

- Is this my decision, and not a decision that I made because I was influenced or told to do it in this way by others?

- What is the connection between the decision I took and the purpose for which it was taken?

- Did I make my decision within the prescribed time or within a reasonable time (if there is no prescribed time)? How long did it take me?

Recent laws and policy have attempted to change the way the public service works and to improve the lives of all in South Africa. In this book, these new laws and policies are looked at in some detail.

Of particular importance to the way the public service is now expected to work is the Promotion of Administrative Justice Act 3 of 2000 (the AJA). This book looks at the impact of the AJA on the public service and on individual administrators. It explains what the AJA is and what it means for the way that administrators work. It is written in very plain language and offers useful examples and ideas that you as an administrator can follow.

By following the simple rules and procedures set out in this book, you will make sure that you comply with the law. But more importantly, you will make sure that everyone whose rights may be affected by your decisions knows why you took your decision and what they can do if they disagree with it. In this way, you will contribute to a truly open and democratic South Africa.

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For more copies of this book, or for other publications on the AJA, please contact either GTZ or Justice College at the following addresses:

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