

9. DECISIONS AFFECTING THE PUBLIC

Section 4 of the AJA

Thus far we have discussed how administrators should make decisions that affect individuals. Section 3 of the AJA, and the regulations, are very clear on how this should happen. However, sometimes administrators are called upon to make **decisions that affect large numbers of people** – for instance deciding where a new railway line from Durban to Johannesburg should run.

It is not always appropriate to use the methods we have discussed this far in the manual. The constitutional principles remain the same:

1. people must be given the **opportunity to state their case** if a decision is going to be made against them;
2. the administrator must make a **fair, reasonable and just decision in a transparent manner**; and
3. people have the **right to know reasons** why the decision was made.

Section 4 of the AJA makes provision for alternative means of achieving this, in a more cost effective and efficient way than the individual first notice – second notice – reasons – appeal process. These ways are:

- A **public inquiry**;
- A **notice and comment** procedure;
- A combination of the two; or
- **Some other fair procedure.**

As yet the regulations attached to the AJA are unspecific as to exactly how these processes should occur, but the regulations can at any time, and as an NGO you should ensure that you are up to date with the most recent regulations.



BY THE END OF THIS SECTION

You will:

- Know when a public, as opposed to individual, process should be used under the AJA;
- Be able to tell when the administration has followed the correct process;
- Understand what role your NGO can play to support communities in decision-making processes with government.



REGULATIONS ON FAIR ADMINISTRATIVE PROCEDURES

These regulations fill in the practical details about how administrators should implement the AJA. The Act is new, and these regulations are liable to change regularly. NGOs should check on a regular basis to ensure that they have the latest regulations.

For the latest version of the regulations, visit:
<http://wwwserver.law.wits.ac.za/aja/index1.htm>

For the latest version of the AJA, visit:
http://www.parliament.gov.za/web_app.app_acts_list2

1. Options for the administrator

As stated above, there are a number of options open to the administration to make decisions affecting the public. A combination of different options can also be used.

a. Notice and comment

A notice and comment procedure involves the administration **publishing a notice** about an impending decision in a public place (newspaper, street posters, government gazette etc.) and **inviting comment** from those affected by the decision. The choice of place to publish the notice must be consistent with the constitutional prerogatives of consultation and fairness.

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. The administrator must **call for comments** on the proposed administrative action, and must allow enough time for those comments to be made.
3. They must **consider** the comments that are received.
4. They must **decide** whether or not to take the proposed administrative action, with or without changes.

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 for people to be notified about the decision taken** at the end of the process and to be told about any internal appeal or review processes they may have.

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

b. Public inquiry

There are four basic steps to a public inquiry procedure.

1. Before the inquiry, the administrator must decide whether to conduct the inquiry themselves or to appoint another person or a **panel** of people to conduct it.
2. The administrator 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, the administrator must compile a written report and **publish a summary of the report**.

Again, the AJA and regulations do not deal with what should happen once the decision is taken. Good administrative practice, though, would require the administrator to publish their decision and the rights the public have to internal appeal or review in the same place that they published the notice of the public inquiry.

c. Which procedure should be followed?

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.

EXAMPLE

A public inquiry would be appropriate where a decision was going to affect a clearly defined community of people – such as a new dam being built in a farming district. People may wish to discuss the matter together at a meeting and allow their voices to be jointly heard.

It is even possible to follow **both**. For example, the administrator may use a notice and comment procedure and then, based on the comments, decide that a public inquiry would also be helpful.

An administrator 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.

d. Overlap between individual & group

Again, what is important here is that the principle of fairness is maintained. Sometimes an administrator may be required to **use both public processes (notice & comment or inquiry), and individual processes (first & second notice), in order to maintain fairness.** This is at the discretion of the administrator, but they may be required to defend their actions in court, and thus need to apply themselves to making good decisions.

EXAMPLE

In the Eastern Cape a couple of years ago it was found that the pensions system in the province was in a great mess – corruption was rampant and the records had fallen into disarray. The provincial government decided to scrap all pensions and make everyone re-apply to sort out the problem.

In this case a public notice and comment or inquiry process would be inadequate. People’s livelihood was at stake, and their rights would thus be badly affected by such a decision. The appropriate action would be to have both public and individual processes. Everyone who is affected would need to be informed in writing of the decision, the reasons for it, and the need to re-apply for their pensions.

4. A role for NGOs

NGOs have a very **important role** to play in decisions affecting the public. Often you will be working with a community or geographical region who will be jointly affected by the impending decision. You can play a constructive role in any of the following ways, by:

- **Educating and informing** the community of the potential impact of the decision;

- Acting as a **facilitator and/or mediator** between the community and the administration
- **Assisting the community to mobilise** itself, to strategise around how to respond to the problem and to present a united front to the administration;
- **Network** the community with other communities experiencing similar situations, and link them up with external resources – such as the media, legal aid services, political and lobbying groups; and
- Help the community prepare for how to **take the matter further** should the decision of the administration go against them.

Section 4 matters involving the public are much less clear-cut than decisions involving individuals – the regulations do not yet clearly state how administrators should give reasons, and there is no provision for internal appeal.

This does also mean, though, that NGOs can be innovative in their responses because the process is more open and loose. Rather than restricting themselves to the formulas prescribed above, a broad-base of pressure can be brought to bear on the administration.

