

# 3. A LAW TO PROTECT YOUR RIGHTS

## An Introduction to the AJA

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### 1. What is the AJA and where does it come from?

The AJA is an Act of Parliament, passed to ‘give effect to’ the right to just administrative action in Section 33 of the Bill of Rights. Because the rights in Section 33 are very broadly worded, the AJA was passed to explain how the right works in practice and to set out procedures to be followed.

Very briefly, the AJA:

- Requires an administrator to act **lawfully and reasonably**, and to follow **fair procedures** when making decisions;
- Requires an administrator to give **adequate reasons** for their decisions;
- Requires an administrator to inform people about their **rights to appeal or review** and to request reasons;
- Gives members of the public the right to **challenge administrative decisions in court** on a number of grounds; and
- Lays down the **procedures that must be followed** by people seeking judicial review.

If you are not sure about how to interpret something in the AJA, you should remember that:

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



#### BY THE END OF THIS SECTION

You will be able to:

- Understand what the AJA is and where it comes from;
- Describe what is meant by an ‘administrative action’;
- Explain what is meant by ‘procedural fairness’;
- Understand the scope, reach and impact of the AJA.



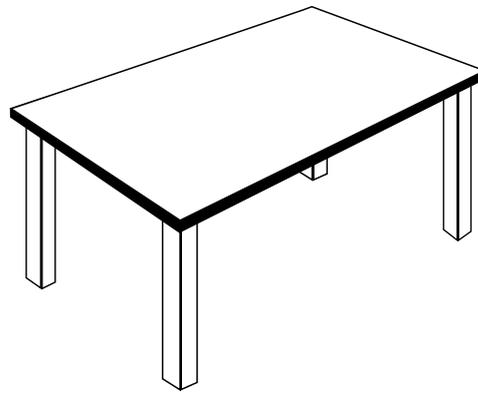
#### GIVING EFFECT TO THE CONSTITUTION

It is not unusual to have an Act of Parliament ‘giving effect’ to the rights in the Constitution in this way. For example, the Labour Relations Act 66 of 1995 provides the details about the labour relations right (Section 23) in the Bill of Rights. And the Promotion of Access to Information Act 2 of 2000 gives effect to the right of access to information in Section 32.

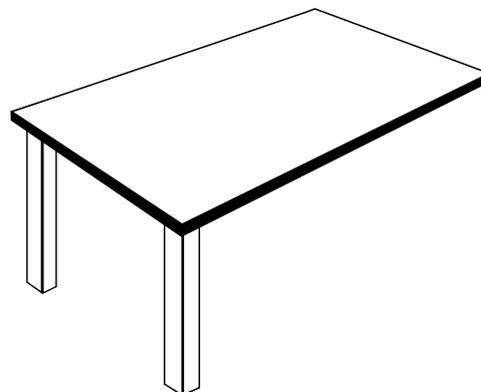
## 2. The definition

There are certain **conditions under which the AJA applies** – you cannot simply use the AJA whenever you like to address any issue with government. As you will see later in this chapter, these conditions can get quite complicated, but for the purposes of your work you can refer back to this very simple definition.

The AJA can be used to deal with any **administrative action** that affects you. Understanding the concept of an administrative action is the key to the AJA. Like a table with four legs, there are **four key aspects** to the definition of an administrative action under the AJA. It is:



1. A **final decision** (or failure to take a decision)
2. Taken **by an organ of state** (or private body performing a public function)
3. **that goes against a member (or members) of the public's rights interests or legitimate expectations;** and
4. that is **not expressly excluded** by the AJA.



A table without all four legs will fall over – in the same way, the definition fails if all four parts are not present.

**EXAMPLE**

You are a 62 year old woman, and a South African citizen. Your application for a pension is turned down, and you are not told why. This is an administrative action because:

1. A final decision has been taken (the refusal of a pension);
2. by an organ of state (Dept. of Social Welfare);
3. that goes against your rights (to have a pension because you are a poor woman, over 60, and a South African citizen);
4. and is not expressly excluded (the awarding of pension is definitely included under the AJA).

All four parts of the definition fit – the case has passed the “litmus test” and you can use the AJA to take it further.

In the second example, you have been turned down for membership of Encounter Medical Aid Society because you are HIV-positive. This is not an administrative action under the AJA, because:

1. A final decision has been taken (you are excluded from the medical aid);
2. but not by an organ of state (a medical aid is a private company, and is not a private body performing a public function);
3. that goes against your legitimate expectations (to pay membership fees and be offered medical insurance);
4. and is not expressly excluded by the AJA (medical services are not excluded by the AJA).

Just because one part of the definition does not fit – in this case the organ of state/private body carrying out a public function – this means that the definition is not complete and the AJA does not apply.

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### 3. Unpacking the terms

Let us look in more detail at the key terms in the four-part definition that we have outlined above:

#### a. 'a final decision'

The AJA says administrative action is limited to:

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

However, the AJA requires an administrator, as we shall see later, to inform the member of the public of their intention to take a decision – the administrative action is when the administrator **makes the final decision**, after considering what they have to say, and communicates it to the person.

**Failing to make a decision** can have a major adverse (negative) effect on someone's rights – for example, an administrator failing to make a decision when someone applies for a passport 'adversely affects' the right to a passport given in the Constitution.

#### b. 'taken by an organ of state'

As we mentioned in the previous section, 'organs of state' are all the different 'parts' of government, including:

- Departments at national, provincial or local government level;
- The national, provincial and local legislatures;
- The national and provincial executives; and
- The judiciary (or courts); and
- 'Parastatals', such as Eskom and Telkom.

In other words, decisions of any of these, unless excluded, will usually be covered by the AJA if they amount to administrative action.

Also falling under the definition of an administrative action are **private bodies performing a public function**. These bodies may be specifically contracted to fulfil a function of government (e.g. paying out pensions), or they may be private bodies that

fulfil a function of government (e.g. education, or regulation of an official function).

**EXAMPLE**

The following are examples of private bodies carrying out a public function who would be subject to the AJA:

- *Hopewell Private School*, because it is providing education – a public function;
- *Medical Council*, because it is regulating the behaviour of doctors – even though it is a private association and not a government body;
- *Thuso Pension Payments*, because they have been contracted to pay out pensions in rural areas on behalf of government.

Note: these organisations are subject to the AJA in their dealings with the public, when they carry out the functions outlined above. Internal decisions (e.g. about payment of staff, or selection of a medical aid) would not be considered subject to the AJA.

**c. ‘that goes against your rights’**

To be an administrative action in terms of the AJA, the decision taken must **adversely affect the rights, or legitimate expectations of members of the public**. This means that the decision must impose a burden or have a negative effect on someone. 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. This is called an “adverse determination of a person’s rights”.

A **beneficial decision** (one in someone’s favour) would therefore not be an administrative action in terms of the AJA.

A decision that is in one party’s favour may, however, have an **adverse effect on someone else**, and in this case it becomes an administrative action.

EXAMPLE

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

Quite often though, a decision to grant one person a benefit will have an adverse effect on someone else. For example, when permission is granted to construct a building, this could have an adverse effect on a neighbour whose view may be blocked by the new building.

Where any party is negatively affected, the rules in the AJA must be followed.

A **legitimate expectation** could be created if, for example, the government announced that all people would be given access to clean and safe drinking water. If, two years later, no taps had been installed in an informal settlement on the outskirts of Alexandra, Johannesburg, the people living there could take the matter up under the AJA.

**d. 'that is not expressly excluded by the AJA'**

The AJA says some actions by particular organs of state are **not administrative actions** and are therefore not covered by the Act. Most of these actions are governed directly by the Constitution and have their **own specific rights, procedures and remedies**. These 'excluded actions' include:

- Policy decisions of the national executive (the President and the Ministers) and provincial executives (Premiers and MECs);
- The making of legislation by Parliament, a provincial legislature or a municipal council; and
- The exercise of judicial functions by the officers of courts and some other bodies.

The AJA also excludes decisions to either allow or deny access to information taken under the **Promotion of Access to Information Act**. This is because this Act has similar but more detailed rights and procedures that the state must follow when dealing with a request for information. It also has its own



**PROMOTION OF ACCESS TO INFORMATION ACT**

This Act 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 anyone else if that information is needed to protect one's rights.

remedies for people who are not satisfied with these decisions. A brief introduction to the AIA is part of this training, and there is a section later in this manual on the AIA.

### **e. Other technical aspects of the definition**

When you read the Act itself, you will see that the definition of an administrative action looks quite different to the one we have given you. We have simplified the definition down to the core elements that are important for your work as NGOs. What follows is a brief explanation of the other terms you will find in the Act.

#### **i. ‘a decision that is of an administrative nature’**

Not every decision a member of the administration takes is of an **administrative nature**. Deciding what to have for lunch or what to do after work are obviously not. But decisions that an administrator takes as part of their job are ‘of an administrative nature’. You don’t have to worry about this, because all decisions that an administrator takes that affect you will be of an administrative nature.

#### **ii. ‘made in terms of an empowering provision’**

To be an administrative action, a decision must be taken in terms of an **empowering provision**, but this is technical jargon that is only appropriate for administrators. For the most part clerks have very little free will in making decisions – they must act according to the laws and regulations that tell them how to do their jobs. These laws are called empowering provisions, and are usually part of an **enabling statute** that allows an administrator to make a decision.

#### **EXAMPLE**

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

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

You do not need to be very concerned about empowering provisions – the administrator does. If a matter goes to judicial

review, your lawyer will also worry about empowering provisions, to see if the administrator did their job correctly. You only need to worry about your rights and legitimate expectations.

Although a decision will not be regarded as an administrative action in terms of the AJA if it is not made in terms of an empowering provision, you should note that such a decision can still be set aside by a court in terms of the AJA. This is because Section 6 of the AJA says a court can set aside a decision if it was not taken in terms of an empowering provision (see below).

**iii. 'that has a direct external legal effect'**

This is another way of saying that to qualify as an administrative action, decisions must have a real impact on a person's rights. This is effectively part of our definition already.

## **4. Applying the definition**

You should now have a very clear understanding of what an administrative action is under the AJA. This is the heart of the Act. If a decision of action by government is an administrative action, then the Act applies; if it isn't, the Act doesn't... it's that simple! This real-life situation will help you understand the theory:

**EXAMPLE**

- 1. The Department of Health has been inundated with demands by experts, health practitioners and the general public to introduce, on a national scale, an anti-retroviral HIV/AIDS drug programme. The department is not sure of logistical burden that will result from such a national roll out of the service. It decides to appoint a task team to conduct a feasibility study relating to the national roll out of the service. Is this an administrative action?**

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

- a. This is a final decision (appointment of the task team).**
- b. The department is an organ of state.**

- c. The decision is not specifically excluded by the AJA.

**BUT**

- d. The decision does not adversely affect anyone's rights.

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

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This does not mean that the decision is not subject to the Constitution and other laws though. The Department is still bound by the particular rules set out in the laws governing the public service and public finance, and by the laws governing the health service.

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- 2. After completing the feasibility study, the Department decides to put out a tender for a drug company to make the drugs and provide them to hospitals and clinics. Is this administrative action?

Points (a), (b) & (c) are still the same. But, again, the decision does not involve an adverse determination or deprivation of anyone's rights.

Therefore, the decision is not an administrative action in terms of the AJA.

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Once again, this does not mean the law does not govern the decision. For example, the laws governing public finance management and state tender procedures require contracts above a certain value to be put out to public tender. If the Department decided to ignore these requirements and contract directly with a supplier it would be acting outside the law and its actions (and the contract) would be invalid.

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- 3. The request for tenders to design and make and distribute the drugs is published in the State Tender Bulletin. Is this an administrative action?

The answer remains the same, because:

- The decision still does not adversely affect anyone's rights.

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

Until a final decision is made on which tender to accept, the Department's actions do not adversely affect rights. So, again, this is not administrative action under the AJA. However, the Department must still follow the law regarding tenders.

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

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

However, in relation to the people or companies that were not successful, this is an administrative action in terms of the AJA because: The decision to award the tender to tenderer 1 and not to them may have adversely affected their right to a fair and equitable decision.

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

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## **5. Procedural fairness**

Both the Constitution and the AJA say that administrative actions must be lawful, reasonable and **procedurally fair** (and that reasons must be given for administrative action that adversely affects rights).

There are two parts to the idea of procedural fairness:

- ⊙ The first part is that administrators should not make decisions that adversely affect people without **consulting** them first.
- ⊙ The second part is that the decision-making process must be **free from any real or apparent partiality, bias or prejudice**. When making a decision, administrators must be seen by everyone to be making the decision fairly and impartially and not because of their own private or personal interest in the matter.

The AJA says all administrative actions must be procedurally fair. It then goes on to set out the rules that make sure all administrative action is procedurally fair. In the following chapters of this Workbook, we will show you how to make sure that the administrators you are dealing with follow these rules when making decisions and that they follow the correct procedures when decisions have been made.

## 6. Overview of the Act

We are pleased to tell you that compared to other legislation, the AJA is quite short, with only a Preamble and 10 sections. These are dealt with briefly below.

Since you now have an understanding of the Act and the concept of an administrative action under the Act, you should read the Act. The understanding of an administrative action that you already have should make it simple to understand.

### Preamble

The 'Preamble' of an Act is like the introduction to it in that it sets out why the Act has been written. The Preamble to the AJA says that it was written to 'give effect to' Section 33 of the Constitution and to:

- Promote an efficient administration and good governance; and
- Create a culture of accountability, openness and transparency in the public administration.

## Section 1 – Definitions

Section 1 defines some of the words used in the Act, for example:

- ‘Administrative action’;
- ‘Decision’; and
- ‘Organ of state’.

## Section 2 – Application of the Act

This section says that some types of decisions may be exempted (excluded) from the AJA. However, before this is allowed, those wanting to be excluded from the AJA must apply for an exemption and Parliament must agree to it. Up until early 2003, no applications for exemption had been received or agreed to by Parliament.

## Section 3 – Procedurally fair administrative action affecting any person

This section deals with what is meant by “procedurally fair administrative action” that has a negative effect on any individual.

## Section 4 – Administrative action affecting the public

This section has the rules about decisions affecting a group of people.

## Section 5 – Reasons for administrative action

This section deals with what written reasons for decisions should say and when they must be given.

## Section 6 – Judicial review of administrative action

This section sets out the grounds on which a court can set aside an administrative action.



### LAWFUL, REASONABLE AND FAIR PROCEDURES

Lawful means that administrators must obey the law and must be authorised by the 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. To ensure fairness, the AJA sets out procedures that you must follow before you make decisions.

## **Section 7 – Procedure for judicial review**

This section sets out the procedure for taking a matter on review.

## **Section 8 – Remedies in proceedings for judicial review**

This deals with what a court hearing a judicial review matter can decide to do.

## **Section 9 – Variation of time**

In some cases, the time limits for certain things under the AJA can be extended. Section 9 sets out when this is possible.

## **Section 10 – Regulations**

Section 10 gives the Minister of Justice and Constitutional Development the power to draw up regulations about, amongst other things:

- The procedures to be followed during public inquiries;
- The procedure to be followed in notice and comment procedures; and
- The code of good administrative conduct that will be drawn up.

Now that you have a good understanding of the Act you should be able to apply it to real-life situations.

## **EXERCISE 3 – IS THIS AN ADMINISTRATIVE ACTION?**

Examine the scenarios outlined on the next page, and for each of them answer the question: “Does this situation fall under the ambit of the AJA, and why?”

**1. School governing body**

A governing body of a public school decides to change the school colours. This decision means that the school uniform is going to change. Each parent is expected to provide new school uniforms for their children by the beginning of the new year. The school has 1000 pupils.

Does this problem fall under the AJA? **YES / NO**

WHY?

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**2. No payment for pensioners**

Parliament decides to pass an Act aimed at exempting all pensioners from paying for public services. The President has to announce the date of commencement of the Act in a gazette. The President decides to delay the announcement. This delay leaves thousands of pensioners unsure of where they stand and without services

Does this problem fall under the AJA? **YES / NO**

WHY?

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**3. Good & Easy Payment Systems**

Good & Easy Payment Systems, a private company contacted by the Department of Social Development to dispense social grants payments on its behalf, decides that it will only make payments on Saturdays and Sundays of the second week of each month. There is chaos as the company cannot deal with the numbers of beneficiaries needing service on these days. Many of them go home without being paid.

Does this problem fall under the AJA? **YES / NO**

WHY?

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**4. Kokolaola Town Council**

The Town council of Kokolaola makes a decision to evict those that have not paid rent, and to disconnect the water and lights of those who have not paid their bills.

Does this problem fall under the AJA? **YES / NO**

WHY?

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**5. Department of Health**

The Department of Health decides to introduce an essential health service in some districts of the country and not the others. This leaves people in the excluded districts without an essential service, and suffering from the very ailments that the service was meant to cure.

Does this problem fall under the AJA? **YES / NO**

WHY?

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**6. Forest road**

The Department of Transport wants to build a national road through the forest on a piece of land neighbouring Westbrook residential area. The forest is a source of livelihood for the community, as people go there to collect fire wood, and water from the river. It also serves as an important water retention system. If the road is built, it will completely destroy the forest.

Does this problem fall under the AJA? **YES / NO**

WHY?

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