

SCHEDULE

CODE OF GOOD ADMINISTRATIVE CONDUCT

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PREFACE

Section 10(5A) of the Promotion of Administrative Justice Act, 3 of 2000, ('PAJA') says that the Minister for Justice and Constitutional Development must publish a code of good administrative conduct. The code must provide administrators with practical guidelines and information to promote an efficient administration and the achievement of the objects of PAJA.

This Code therefore provides guidance to administrators to ensure that the decisions they take are lawful, reasonable and procedurally fair. It also assists administrators to comply with the requirement that reasons must, when requested, be given for decisions. This Code does not impose legal obligations on administrators in addition to those imposed by the Constitution of the Republic of South Africa, 108 of 1996, ("the Constitution") and PAJA. It explains PAJA and the relevant law in the Constitution in order to assist administrators to comply with their legal duties.

The Code assists administrators to identify the basic rules of administrative justice that are applicable to their work. It is not a legal textbook and administrators must seek legal advice in difficult cases. For a list of legal textbooks and other resources dealing with administrative law, see Annexure D. A helpful resource for use by administrators is the website <http://www.aja.org.za>.

Administrators should follow this Code's guidelines as closely as possible. This is because a departure from the guidelines contained in this Code could be an indication that the Constitution and the requirements of PAJA have not been complied with.

This Code has been approved by Parliament and the Cabinet as required by PAJA.

EXECUTIVE SUMMARY

This is a Code of Good Administrative Conduct. Good administrative conduct is conduct that follows the Constitution, the law and the policies of the government that are designed to ensure effective service delivery by the administration.

The Constitution requires administrative action to be lawful and reasonable, and to follow fair procedures.

What are administrative actions? They are decisions by administrators, taken in the course of their official duties with a negative effect on people's rights. Administrative action is dealt with in Chapter 2 of the Code.

Lawfulness means that decisions by administrators that affect people's rights must be authorised by law. This is dealt with in Chapter 3 of the Code.

Fair procedures are rules of procedure designed to ensure that the people who are affected by administrative action are consulted before decisions are taken and are given information about decisions that have been made. Procedural fairness is dealt with in Chapters 4, 5 and 6 of the Code.

Reasonableness means that administrative action must be justifiable as a rational and reasonable decision based on the facts before the administrator. This is dealt with in Chapter 8 of the Code.

Closely related to the requirement of reasonableness is the rule that administrators must give reasons for administrative action when requested to do so. This is dealt with in Chapter 9 of the Code.

The Constitution and PAJA give members of the public important rights to take the administration to court to challenge administrative action on grounds that it is unlawful, procedurally unfair or unreasonable. The power of the courts to review administrative action (called 'judicial review') is dealt with in Chapter 11 of the Code.

CHAPTER 1

GENERAL INFORMATION ABOUT GOOD ADMINISTRATIVE CONDUCT

The Constitution

- 1.1 South Africa is governed by the Constitution. One of the most important things that the Constitution does is to make South Africa a “constitutional democracy” and a constitutional state. This means that the Constitution is the highest law in the country and that government derives its powers from the Constitution. The Constitution contains the Bill of Rights and the rules by which government must function. The powers that government may exercise are limited to those provided for in the Constitution and all branches of government are bound by the provisions thereof. There are two particular provisions of the Constitution that have an impact on good administrative conduct. These are s 33 and s 195.

Section 33 of the Bill of Rights: Just Administrative Action

- 1.2 One of the rights in the Bill of Rights is s 33 – **the right to just administrative action**. Section 33 says that everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
- It also says that everyone has the right to be given written reasons for administrative action.
 - Section 33(3) of the Constitution says that national legislation must be enacted to give effect to these rights. This national legislation is PAJA.

Section 195 of the Constitution: Public Administration

- 1.3 PAJA governs the way administrators carry out their duties and perform their functions. It therefore forms part of the body of laws and policies that deal with the public administration.
- All these laws and policies are also governed by section 195 of the Constitution, which states that the public administration must be governed by the democratic values and principles in the Constitution and sets out the way in which the public administration must operate:
- The public administration must promote and maintain a high standard of professional ethics.
 - Efficient, economic and effective use of resources must be promoted.
 - Public administration must be development-oriented.
 - Services must be provided impartially, fairly, equitably and without bias.
 - People’s needs must be responded to, and the public must be encouraged to participate in policy-making.
 - Public administration must be accountable.
 - Transparency must be fostered by providing the public with timely, accessible and accurate information.
 - Public administration must cultivate good human-resource management and career-development practices to maximize human potential.
 - Public administration must be broadly representative of the South African people.

- 1.4 'Public administration' means the administration in every sphere of government, organs of state and public enterprises such as the Post Office or Eskom.

Batho Pele

- 1.5 The main initiative of the government to improve the quality of administrative conduct and service delivery is the White Paper on Transforming Service Delivery of 1997 ("the Batho Pele White Paper"). The Batho Pele White Paper lists the following eight principles of good public administration:

1: Consultation

Citizens should be consulted about the level and quality of the public services they receive and, wherever possible, should be given a choice about the services that are offered.

2: Service Standards

Citizens should be told what level and quality of public services they will receive so that they are aware of what to expect.

3: Access

All citizens should have equal access to the services to which they are entitled.

4: Courtesy

Citizens should be treated with courtesy and consideration.

5: Information

Citizens should be given full, accurate information about the public services they are entitled to receive.

6: Openness and transparency

Citizens should be told how national and provincial departments are run, how much they cost, and who is in charge.

7: Redress

If the promised standard of service is not delivered, citizens should be offered an apology, a full explanation and a speedy and effective remedy; and when complaints are made, citizens should receive a sympathetic, positive response.

8: Value for money

Public services should be provided economically and efficiently in order to give citizens the best possible value for money.

Promotion of Administrative Justice Act

- 1.6 We saw in paragraph 1.2 above that s 33(3) of the Constitution requires that national legislation be enacted to give effect to the rights of every person to just administrative action.

As required by s 33(3), Parliament passed PAJA and the President signed the Act in February 2000. PAJA, except for s 4 and s10, came into effect on 30 November 2000. The remainder of PAJA, s 4 and s 10, as well as the Regulations on Fair Administrative Procedures, 2002 ("the Regulations"), commenced on 31 July 2002.

- 1.7 PAJA –
- (a) contains rules and guidelines that administrators must follow when making decisions;
 - (b) says that administrators must give reasons for their decisions if they are asked to do so;
 - (c) says that administrators must inform people about their rights to have decisions reviewed or appealed and about their right to request written reasons; and
 - (d) gives members of the public the right to challenge the decisions of administrators in court ('judicial review').

1.8 Administrative law governs the administration. PAJA is a very important part of South Africa's administrative law. There are two important things to note about PAJA:

- PAJA applies *generally*. This means that it applies to and binds the entire government administration – national, provincial and local. It applies to all organs of state and to all public enterprises.
- Because the rules in PAJA are general, they do not give powers to administrators. Instead, PAJA says *how* the powers given to administrators *by other laws* must be exercised.

Example:

Suppose you are the Accreditation Authority in the Department of Communications. A company that sells authentication products and services has approached you for accreditation (this will boost consumer confidence in these products and services).

The specific law that applies to this decision is section 37 of the Electronic Communications and Transactions Act. This allows the Accreditation Authority to accredit authentication products or services.

Must a hearing be held before the decision is taken to accredit or not accredit the company's product or service? Must reasons be given for the decision?

The Telecommunications Act itself does not answer these questions (only the manner of applying for accreditation is prescribed). Instead, you must turn to PAJA, which tells you generally how the specific powers that you have been given by the Electronic Communications and Transactions Act must be exercised.

This shows:

- Before you make a decision you must follow the specific law that applies to your function. (Section 37 of the Electronic Communications and Transactions Act.)
- You must *also* follow PAJA that contains rules about how this decision must be made.

CHAPTER 2

ADMINISTRATIVE ACTION

What is an “Administrative Action”?

- 1.1 We saw in Chapter 1 that section 33 of the Constitution says that everyone has the right to just *administrative action*. PAJA gives effect to this right by setting out rules and guidelines to ensure that *administrative action* is lawful, reasonable and procedurally fair and that reasons are given for *administrative action*.
- 1.2 To understand how PAJA works it is therefore necessary to understand what administrative action is. Section 1 of PAJA defines this expression. The definition can be summarized as follows:

Administrative action is -

(a) a decision . . .

This includes a proposed decision and a failure to take a decision. An administrative decision must be taken without unreasonable delay or within the time period that may be prescribed for the particular administrative action.

(b) . . . of an administrative nature . . .

Most decisions that administrators take as part of their official functions are of an administrative nature.

(c) . . . made under an empowering provision . . .

This is usually a specific law that authorises you to make a decision.

(d) . . . not specifically excluded by the Act . . .

PAJA specifically excludes some decisions of administrators, such as decisions made in terms of the Promotion of Access to Information Act 2 of 2000. This means that PAJA does not apply to those decisions.

(e) . . . made by an organ of state or by a person or body exercising a public power or performing a public function . . .

PAJA applies to all departments of state at national, provincial and local level, to organs of state and to state enterprises such as the Post Office. It also applies when a private company performs public functions such as supplying water on behalf of a municipality.

(f) . . . that adversely affects the rights of any person . . .

This means that the decision must have a negative impact on someone. It is important to remember that giving someone a benefit might have a negative impact on the rights of someone else. (For example, the award of a tender. See the example below.)

(g) . . . that has a ‘direct, external legal effect’.

This means that decisions must be final and have an impact on a person’s rights. ‘External’ usually means that the decision must affect the rights of someone outside the administration. However, sometimes a decision affecting the rights of people within the administration qualifies as administrative action. An example is a decision to discipline a public servant.

To summarise:

Administrative actions are those *decisions* taken by an *administrator* that have a *negative impact* on the *rights* of someone or on a group of people.

This means that:

- When you take a decision in the course of your official duties that has a negative impact on someone's rights, you are performing an *administrative action*.
- Whenever you perform an administrative action you must follow the requirements of the Promotion of Administrative Justice Act to ensure that the decision is lawful, reasonable and procedurally fair.

Note that:

- A decision also includes a failure to take a decision. This is because a failure to take a decision can also have a negative impact on someone's rights. An example is when an administrator fails to decide on someone's application for a social grant.
- Because an administrative action is a decision with a negative impact on someone's rights, not *every* decision that you take in the course of your duties will be an administrative action. (See the practical examples below).

Example 1: Administrative action

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

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

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

BUT

- e. The decision does not adversely affect rights. No determination of anyone's rights has been made and no one has been deprived of his or her rights.
- f. The decision does **not** have a direct external legal effect – it has no effect on the rights of anyone outside of the Department.

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

Example 2: Administrative action

After completing the feasibility study described in example 1, the Department decides to put out a tender to design and install the new system. Is this administrative action?

Points (a) to (d) in example 1 are still the same.

But, again, the decision does not involve an adverse determination or deprivation of anyone's rights. And, the decision does not have direct external legal effect in the sense of finally impacting on anyone's rights.

Therefore, the decision is not an administrative action.

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

Example 3: Administrative action

The request for tenders to design and install the new system is published in the State Tender Bulletin. Ten tenders are received and are considered. Is this an administrative action?

Until a final decision is made on which tender to accept, the department's actions do not adversely affect rights and have no direct, external legal effect.

So, again, this is not an administrative action under PAJA. However, the department must still follow the law regarding tenders.

Example 4: Administrative action

The department accepts tender 1 and rejects tenders 2 to 10. Is this an administrative action?

With regard to tenderer 1 (the person or company given the contract) this is not an administrative action under PAJA 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 PAJA because the decision to award the tender to tenderer 1 and not to the other tenderers adversely affects their rights and has a direct external legal effect on them.

This shows:

- Some decisions have opposite effects on different people.
- As the entire decision-making process (from planning to final decision) cannot be separated, fair procedures have to be followed from the very beginning of the decision-making process to comply with PAJA.

Actions specifically excluded from the scope of PAJA

- 2.3 In terms of the definition of “administrative action” in s 1 of PAJA the following actions are not administrative actions (these powers are specifically excluded from the scope of PAJA):
- (a) The executive powers or functions of the National Executive, including the powers or functions referred to in sections 79(1) and (4), 84(2)(a), (b), (c), (d), (f), (g), (h), (i) and (k), 85(2)(b), (c), (d) and (e), 91(2), (3), (4) and (5), 92(3), 93, 97, 98, 99 and 100 of the Constitution;
 - (b) the executive powers or functions of the Provincial Executive, including the powers or functions referred to in sections 121(1) and (2), 125(2) (d), (e) and (f), 126, 127(2), 132(2), 133(3)(b), 137, 138, 139 and 145(1) of the Constitution;
 - (c) the executive powers or functions of a municipal council;
 - (d) the legislative functions of Parliament, a provincial legislature or a municipal council;
 - (e) the judicial functions of a judicial officer of a court referred to in section 166 of the Constitution or of a Special Tribunal established under section 2 of the Special Investigating Units and Special Tribunals Act, 74 of 1996, and the judicial functions of a traditional leader under customary law or any other law;
 - (f) a decision to institute or continue a prosecution;
 - (g) a decision relating to any aspect regarding the appointment of a judicial officer, by the Judicial Service Commission;
 - (h) any decision taken, or failure to take a decision, in terms of any provision of the Promotion of Access to Information Act, 2 of 2000; or
 - (i) any decision taken, or failure to take a decision, in terms of s 4(1) of PAJA (deciding which consultation procedure to follow where the public is affected).

Exemptions from PAJA

- 2.4 Section 2(1) of PAJA allows the Minister to publish a notice in the *Government Gazette* that exempts some administrative actions from the application of the Act. Any exemption or permission granted must also, before publication in the *Government Gazette*, be approved by Parliament. You should therefore check whether any such exemption has been granted in respect of the functions that you perform.
- 2.5 In view thereof that PAJA allows for fair but different procedures to be followed (see paragraphs 5.12 to 5.14 and 6.27 to 6.28) as well as justifiable deviations (see Chapter 7) it is clear that the Minister should not lightly grant exemptions and that the need for exemptions will only arise in very exceptional cases.

CHAPTER 3

LAWFUL ADMINISTRATIVE ACTION

Concept of “lawfulness”

- 3.1 A fundamental rule of our constitutional democracy is that the government’s power is controlled and limited by law. The government must be given the authority by a law for any action that it takes and it must obey the law. This is the idea behind the constitutional right to lawful administrative action.
- 3.2 To act lawfully means that administrators must have been given authority by a law for the decisions they make. If you act without authority you are acting unlawfully, and the ‘decision’ you take will have no legal effect. It also means that you must obey the requirements of the law and follow any instructions given by the law.

Authority to act

- 3.3 Before administrators can perform an administrative action they must ensure that a provision of law allows them to do it.
- 3.4 The source of authority for administrative action is almost always legislation. This can take the form of an Act of Parliament, provincial legislation or the by-laws of a municipality. It can also take the form of delegated legislation – regulations, for example.

Example: Authority to act

In 1998, a welfare department in one of the provincial governments discovered evidence of widespread irregularities in the social pension system in the province. One problem was so-called ‘ghost’ pensioners. These were beneficiaries who did not exist or had died, but who received benefits which were fraudulently claimed by family members and others.

The department decided that the only way to cure the problem was to suspend pension payments to some 92 000 beneficiaries identified as ‘suspicious’ and require them to re-apply in person for reinstatement of their benefits.

A recipient of a disability grant whose benefits had been suspended challenged the department’s actions in court. The court held that the department had no lawful authority for its actions which had negatively impacted the rights of thousands of people who had turned up on pension day to be told there was no money for them. No provision of an Act of Parliament, of provincial legislation, or regulations allowed the department to suspend the benefits of thousands of people in this manner.

Obeying the law

- 3.5 An administrator must follow the specific empowering provision that grants the authority to take an administrative action. The administrator must comply with all steps or procedures prescribed in the empowering provision. The administrator must also comply with the general rules and procedures that are set out in PAJA. (See particularly, PAJA's requirement to give notice and to hear from someone before taking a decision that will have an adverse impact on him or her - discussed in Chapter 4 below.)
- 3.6 An empowering provision may also grant the authority to take an administrative action subject to certain conditions being met. In such a case the administrator must ensure that the conditions are met before taking the administrative action. If this is not done the administrative action will be unlawful.
- 3.7 What if a specific empowering provision and PAJA seem to be in conflict with each other? Due to the fact that PAJA gives effect to a Constitutional right, PAJA will usually take precedence. However, in such a situation you should seek legal advice.

Delegation of powers

- 3.8 Where an administrator is to act under a delegation of power, that delegation must be authorized by the empowering provision. This means that the person (for example, the Minister) must have the power to delegate the powers that have been conferred on him or her on someone else.

Note that:

- Sometimes the empowering provision will require the delegation to be in writing. Even if this is not required, it is a good practice to ensure that there is a written delegation.
- The person to whom the power has been delegated may not delegate that power to another person (they may not sub-delegate the power). Sometimes, however, an empowering provision does permit sub-delegation.
- Close attention must be paid to the empowering provision which will set out the specific requirements for a lawful delegation.

Example: Delegation of power

In terms of section 7 of the Refugees Act, 130 of 1998, the Minister of Home Affairs may delegate any power granted to, or duty imposed on him or her in terms of the Refugees Act to an officer in the Department of Home Affairs.

To be lawful a delegation of a power or a duty by the Minister has three requirements:

- The Minister and no one else must take the decision to delegate a power or duty; and
- the person to whom the power or duty is delegated must be an officer in the Department of Home Affairs; and
- the power or duty delegated must be one provided for and conferred on the Minister in the Refugees Act.

If any of these requirements are not met the delegation will be unlawful. In addition, any action taken by the officer concerned who is not properly authorized is unlawful.

CHAPTER 4

FAIR PROCEDURES

What is procedural fairness?

4.1 The Constitution requires administrative action to be procedurally fair.

4.2 There are two parts to the idea of procedural fairness:

- **Consultation**

It is usually unfair for an administrator to make a decision that adversely affects someone without consulting them first. As we know, a judge is not allowed to convict someone of a crime unless they have been given an opportunity to tell their side of the story. Similarly, an administrator should not make a decision that adversely affects someone without first giving them an opportunity to have their say and to raise any concerns they may have about the proposed decision.

- **Bias**

The second part of procedural fairness is that decisions must be made in an even-handed and impartial manner. This means that the decision-making process must be free from any partiality, bias or prejudice. For example, it would be wrong for an administrator to make a decision to grant a licence to a member of his or her family or to a business in which the administrator has shares. (Bias is discussed in more detail in paragraphs 11.12 to 11.15 in Chapter 11 below).

Fair procedures in terms of PAJA

4.3 PAJA and the Regulations set out standard procedures to be followed by administrators when making decisions. These procedures are intended to ensure that administrators make decisions that are fair in that they provide for the affected person to be consulted before the decision is taken.

4.4 There are two types of fair procedures in PAJA. The first is a procedure for making decisions that will affect individuals (s 3 of PAJA). The second is a procedure for making decisions that will affect the public or a part of the public (s 4 of PAJA). The difference between these two types of decisions is explained in the following section.

Impact of the decision: Individual or public?

4.5 PAJA sets out different procedures for consultation, depending on whether the decision will affect individuals or the public in general.

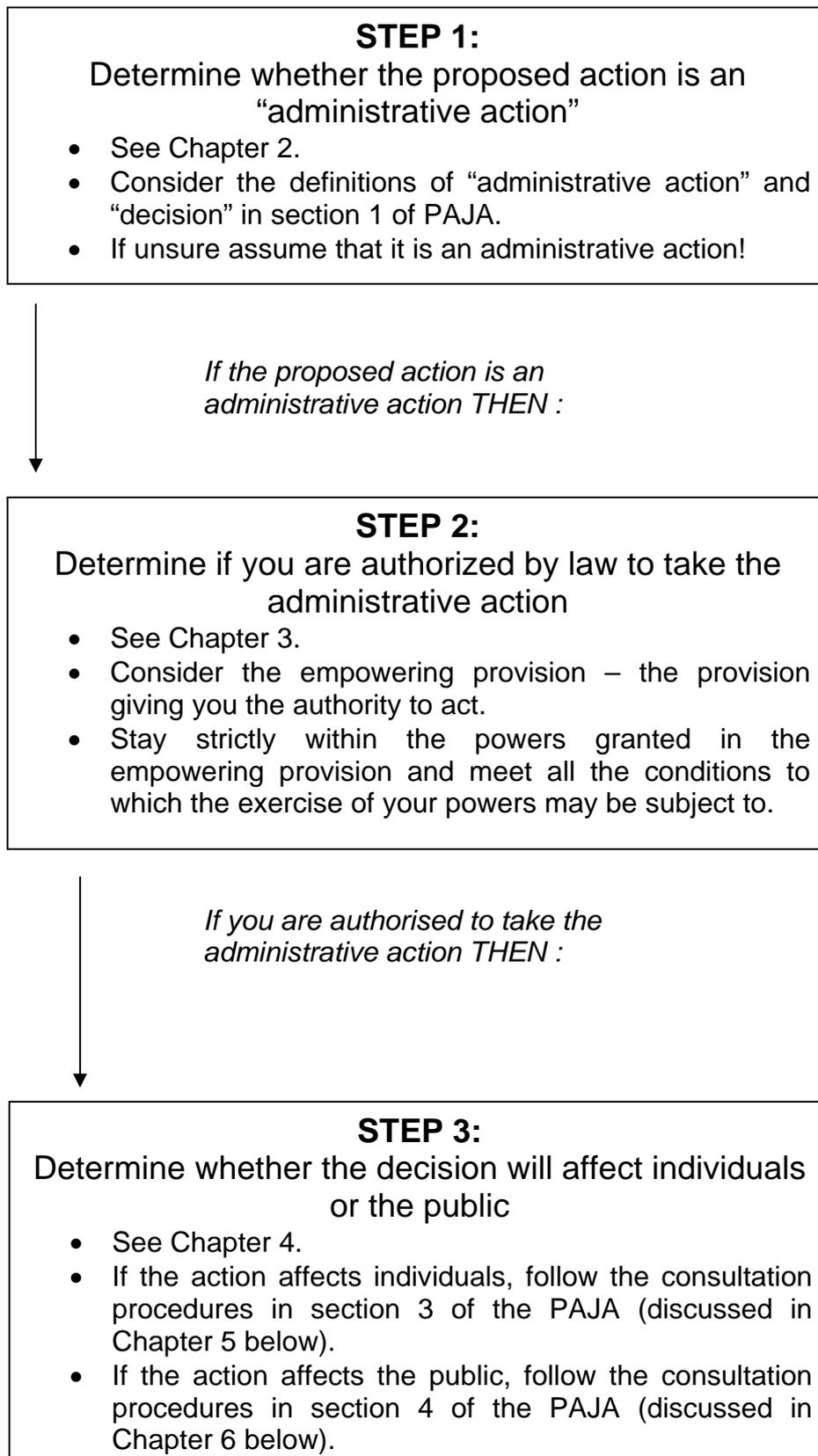
4.6 An individual is affected where the administrative action has a specific impact on that individual. An action affects the public if it has an impact on the public generally or on sectors of the public.

- 4.7 Where an administrative action affects any individual, the procedures provided for in section 3 of PAJA have to be complied with. Typically, a person will be affected as an individual by an administrative action relating to, for example, the granting or withdrawal of benefits, licences and permits.
- 4.8 Note that a juristic person such as a company or a close corporation or a trust is also regarded as a “person” by PAJA. This means that fairness must also be observed in decisions affecting juristic persons.
- 4.9 An administrative action that affects the *public* must comply with one of the procedures provided for in section 4 of PAJA. In terms of section 1 of PAJA, "public" includes any group or class of the public.
- 4.10 An administrator must consider whether a decision will affect the rights of an individual or the public in general before he or she decides which consultation procedure to use.

Example: Individual or public?

- A decision not to award someone a disability grant that they have applied for is a decision affecting a specific person. In this case, section 3 of PAJA will apply.
- A decision to change the criteria in terms of which people qualify for a disability grant or a decision to reduce the value of the grant that is received affects the public generally. In this case section 4 of PAJA will apply.

Flowchart: Initial steps for taking a decision (Chapters 2 to 4 of the Code)



CHAPTER 5

CONSULTATION PROCEDURES WHERE AN INDIVIDUAL IS AFFECTED

Choice of procedures

- 5.1 An administrator has a choice of two consultation procedures before making a decision that will affect an individual:
- *Section 3(2)(b) Procedure*: (Follow a procedure that complies with the requirements of s 3(2)(b) of PAJA); or
 - *Existing Fair but Different Procedure* (s 3(5)): (Follow an existing procedure contained in a law other than PAJA, which is fair but different from the s 3(2)(b) procedure).

Section 3(2)(b) Procedure

Mandatory steps

- 5.2 There are five steps that *must* be taken to ensure that the person who will be affected by a decision is consulted:

(a) Before the decision is taken the affected person must be given-

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

(b) After the decision is taken the affected person must be given-

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

Note that:

It is important to keep and maintain proper records of the procedure you followed and all the steps you have taken in this regard. This way you will have the facts and proof should the administrative action be taken on review on the basis that you did not follow a fair procedure.

Each of these steps set out above will now be considered in more detail.

Adequate notice of the nature and purpose of the administrative action

- 5.3 “Adequate notice” means that the affected person must be informed that an administrative action is being planned. The person must be given enough time to respond to the planned administrative action. The person also needs to be given enough information about the planned administrative action to be able to work out how to respond to the planned action. The person needs to know the nature of the action (*what* is being proposed) and the purpose (*why* the action is being proposed).

Reasonable opportunity to make representations

- 5.4 The length of time a person should be given to make representations will be different in different circumstances. It should be enough time for an ordinary person to raise objections, provide new information, or answer charges.
- 5.5 A “reasonable opportunity to make representations” can sometimes mean that a person affected by administrative action must be given a *hearing* (an opportunity to make a verbal input to decision-makers). Usually, however, it is enough to give an opportunity to the person to submit *written representations* to the administrator who must read and think about them. In simple cases, this could mean giving the person affected a form to fill in with space on it for the person to give his or her point of view.

Clear statement of the administrative action

- 5.6 An administrator must inform the affected individual or individuals of the decision that has been made. A person affected by the administrative action must be able to understand what has been decided, and the use of plain and straightforward language will help people to understand. The manner in which a person is to be notified of the decision is set out in Chapter 9 of this Code.

Adequate notice of any right of review or internal appeal

- 5.7 A person affected by an administrative decision can, if the law provides for it, appeal against the decision by going to a higher level within the government, such as a Minister or an appeal board. The person can also, in terms of PAJA, take the matter to court for judicial review. However, if a law makes provision for internal remedies (for example, an internal appeal against or an internal review of a particular type of decision), the affected person can go to court for *judicial* review of the decision only after he or she has made use of these internal remedies. This is because PAJA generally requires all internal remedies to be exhausted before a court can review a decision. However, a court may, in exceptional circumstances, exempt a person from the obligation to exhaust any internal remedies if the court deems it in the interests of justice.
- 5.8 An administrator must tell the person about these remedies (internal remedies and judicial review) without waiting for the person to ask. The administrator must also inform the person about the procedures for making use of any internal remedies. Information should be provided on at least the following:
- To whom the internal appeal (and/or review) can be made;
 - the time-limits for making the internal appeal;
 - the forms and procedures for making the internal appeal; and
 - the existence of a right to judicial review of administrative action in terms of PAJA.

This requirement is discussed further in Chapter 9 of this Code.

Adequate notice of the right to request reasons

- 5.9 People affected by the administrative action must be told that they have the right to request reasons for the decision. The administrator must also inform the person about this right and the procedures for exercising it without waiting to be asked.

- 5.10 At the same time as informing the person of the decision, he or she must be informed of the following:
- Where and to whom a request for reasons can be made;
 - the time-limit for making a request;
 - the information that must be provided when requesting reasons; and
 - where to get assistance.
- This requirement is discussed further in Chapter 9 of this Code.

Note that:

It is important to make notes of your reasons for a decision and keep a proper record thereof. This will enable you to give reasons for your decision at a later stage and will also enable your successor to do so.

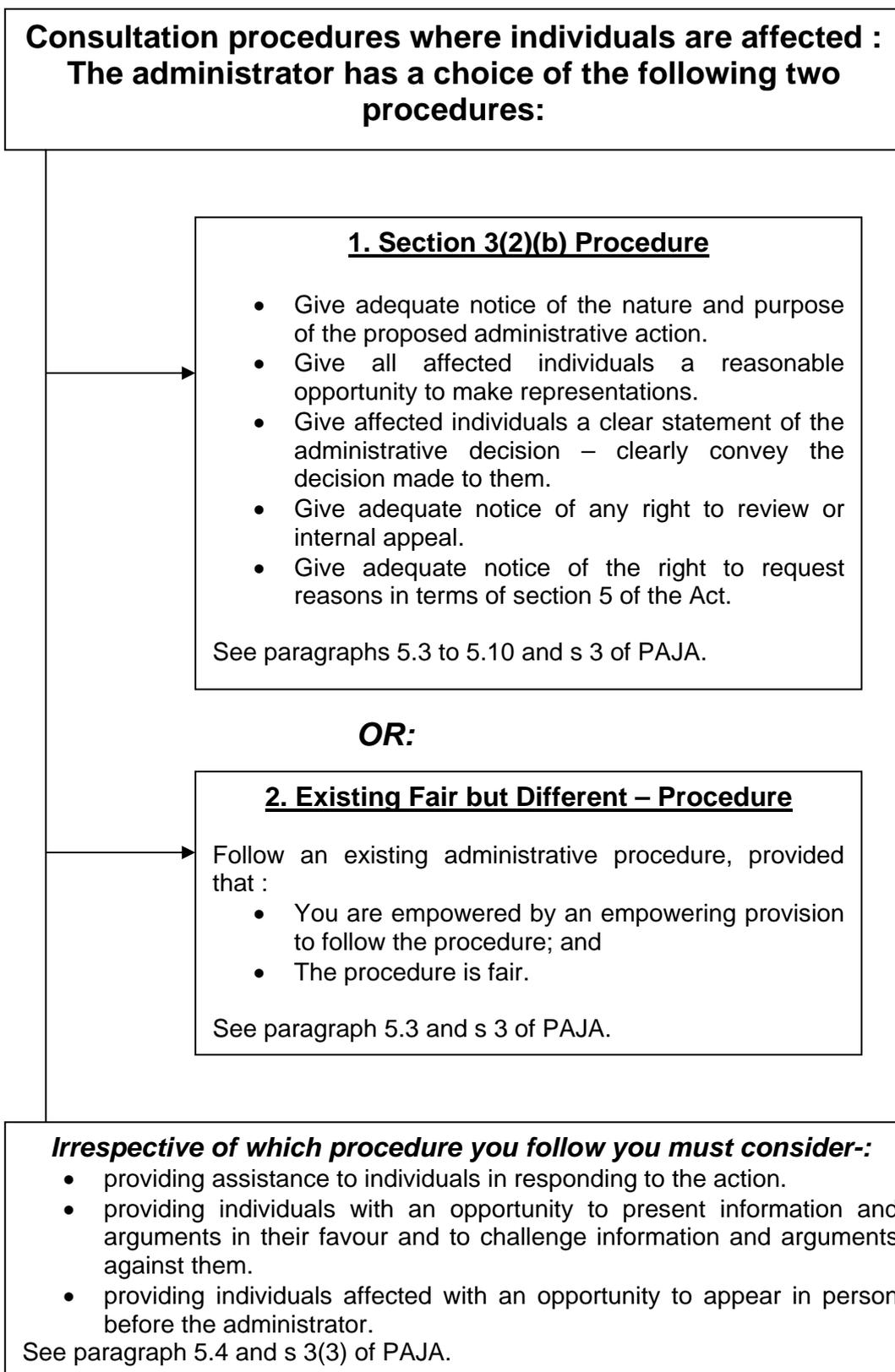
Additional steps

- 5.11 The five steps outlined above are compulsory. In addition to those steps every administrator must consider whether any of the following three extra steps are necessary to ensure that the person affected by a decision is treated fairly:
- Providing extra assistance to help the affected person to respond. This may mean that additional steps have to be taken to ensure that a person who cannot read is informed of the proposed decision. It may also mean that special measures must be taken to obtain and record the response of a person who cannot write. In serious or complex cases, this may mean that a person must be allowed to have legal representation.
 - Persons must sometimes be given an additional opportunity to present information and arguments in their favour and to challenge information and arguments against them. If, for instance, a person indicated in an application form that he or she has not been convicted of a criminal offence but contrary information is obtained from the South African Police Service, that person should be informed of the contrary information and given an opportunity to respond to it.
 - Usually, it is enough to allow someone to state their point of view in writing. In some cases, a person affected may need to be given the opportunity to appear in person before the administrator. For example, if a matter is very complicated it might be fairer to allow the person to explain their point of view in person rather than in writing.

Existing Fair but Different Procedures

- 5.12 Sometimes, the legislation that you are administering will provide a procedure for consulting a person before a decision is made. This procedure might not be the same as that in section 3 of PAJA. Which procedure must you follow?
- 5.13 PAJA says that an administrator may follow the existing procedure provided that this procedure is fair. Fairness means that the existing procedure must give the affected person protection similar to that given by s 3 of PAJA. Therefore, the existing procedure must give the person a reasonable opportunity to be consulted. *You must also ensure that the person is given information about internal remedies and about the right to request reasons.*
- 5.14 Whether the existing procedure is fair will always depend on the specific circumstances of each case. Essentially, persons must be given fair notice of the intended decision and a fair opportunity to respond if they wish.

Flowchart: Consultation procedures where individuals are affected



CHAPTER 6

CONSULTATION PROCEDURES WHERE THE PUBLIC IS AFFECTED

Choice of procedures

- 6.1 S 4 of PAJA says that an administrator must decide which consultation procedure should be followed when an administrative action affects the public in general. These consultation procedures are designed to inform and involve the public in the decision, to provide accountability, and to gather all relevant information to assist the administrator in taking the decision.
- 6.2 The detailed procedures for decision-making where the public is affected are contained in the Regulations. It is essential to consult these Regulations that are contained in Annexure C to this Code.
- 6.3 In terms of s 4 of PAJA an administrator has five choices of procedure in taking the administrative action:
- *Public Inquiry Procedure* (sections 4(1)(a) and 4(2)): This procedure is set out in Chapter 1 of the Regulations; or
 - *Notice and Comment Procedure* (sections 4(1)(b) and 4(3)): This procedure is set out in Chapter 2 of the Regulations; or
 - *Public Inquiry and Notice and Comment Procedure* (sections 4(1)(c), 4(2) and 4(3)): This is a combination of the above-mentioned two procedures. This combined procedure is set out in Chapters 1 and 2 of the Regulations; or
 - *Fair but Different Procedure* (section 4(1)(d)): Follow an existing procedure which is fair but different from the procedures mentioned in section 4(1)(a) - (c); or
 - *Any other procedure that gives effect to s 3* (section 4(1)(e)).

Which procedure should be chosen?

- 6.4 The choice of procedure depends on the circumstances. There are no hard-and-fast rules. Your duty as an administrator is to follow the procedure that, in the circumstances, will be the most fair to the members of the public involved taking into account the efficiency and resources of your administration.
- 6.5 The consultation procedure that is likely to be most fair depends on the type of decision you have to make. A notice and comment procedure is most appropriate when you are making rules and regulations, when you want to get comments from as many people as possible or when the matter is not very complex. A public inquiry will be most appropriate where the decision concerns a particular geographical area or a particular sector of the public; an environmental decision that will affect a particular town, suburb or industry is a good example.
- 6.6 A public inquiry has to include a public hearing, whereas a notice and comment procedure does not necessarily have to include public meetings. Sometimes you might want to use both the notice and comment and the public inquiry procedures – for example, if your decision involves a very important public policy issue. Or you could decide that it is better to use an existing procedure provided in the empowering legislation. PAJA allows you to choose any of the consultation procedures mentioned above.

6.7 Here are some guidelines to help you choose between notice and comment procedures and public inquiries.

A notice and comment procedure will be most appropriate where-

- the decision affects very large numbers of people or the whole country.
- it is necessary or at least possible to put the proposed decision in writing.
- there is enough time for people to consider the proposed decision and to respond in writing. (Remember that a notice and comment procedure can include public meetings where necessary.)

A public inquiry will be most appropriate where-

- the decision affects particular stakeholders.
- the decision affects a particular geographical area.
- the decision will benefit from being debated at a public hearing.
- many of the people concerned are unlikely or unable to submit written comments.

Public Inquiry

6.8 A public inquiry procedure, involves four basic steps:

- (a) Before the inquiry, you must decide whether to conduct the inquiry yourself or to appoint another suitably qualified person or a panel of people to conduct it.
- (b) You must give notice of the inquiry. This must include details and information about the matters and issues to be investigated in the public inquiry.
- (c) A public hearing must be held as part of the public inquiry.
- (d) After the inquiry, you must compile a written report and publish a summary of the report.

Each of these steps will now be considered in more detail.

Conducting the inquiry yourself or appointing someone else

6.9 An administrator should first decide whether he or she will conduct the inquiry or whether he or she should appoint another person or panel of persons to conduct the inquiry. The nature and complexity of the matters and issues to be investigated should guide the administrator in this regard. An administrator remains responsible for ensuring that PAJA is complied with where a person or panel is appointed.

Giving notice of the public inquiry

6.10 Information concerning the proposed administrative action must be published by way of notice in at least two of the official languages. The Regulations provide detailed rules dealing with publication of notices in the relevant *Gazettes* and newspapers as well as the content of notices.

Note that:

- The Regulations must be consulted before conducting a public inquiry.
- In order to reduce the cost of notices, the Regulations allow notices published in a newspaper to contain less detail than notices in a *Gazette*.

6.11 The notice of a public inquiry not only informs the public of a proposed administrative action but is also an important tool for an administrator to ascertain the degree of interest in the matter. Feedback received on the notice will indicate the number of public hearings to be held and the location of such hearings as well as the length of the hearings and the accommodation needed therefor.

Additional measures to publish the proposed administrative action

6.12 In order to ensure that a proposed administrative action is brought to the attention of a community consisting of a considerable proportion of people who cannot read or write or who otherwise need special attention-

- a notice must be publicised in a manner that will bring the matter to the attention of the community at large; and
- the administrator must take special steps to obtain the views of members of that community.

6.13 Special steps to obtain the views of members of a community may include-

- the holding of public or group meetings where the matter to be investigated and the possible consequences are explained, questions are answered and views from the audience are minuted;
- a survey of public opinion in the community on the matter to be investigated;
- provision of a secretarial facility in the community where members of the community can state their views on the matter to be investigated; or
- secretarial assistance to persons who wish to submit requests for permission to testify or to make oral representations.

6.14 In order to ensure that a proposed administrative action is brought to the attention of the public, you may, in addition, publish the information contained in the notice by way of communications through the printed or electronic media, including by way of press releases, press conferences, the Internet, radio or television broadcasts, posters or leaflets.

Closing date and comments

6.15 Written comments or representations in reply to a notice may be in any official language and must be accepted by the administrator.

6.16 An administrator may, however, refuse to accept comments or representations received after the closing date specified in the notice. The administrator may condone the late submission of comments or representations but is not obliged to do so. Condonation for late submission may be granted on good cause shown, provided that it will not lead to unnecessary delays in taking the administrative action or otherwise prejudice the public interest.

6.17 The administrator may extend a closing date for comment specified in a notice. However, any extension of a closing date for more than a month must be published by notice on the same basis as the original notice informing the public of the proposed administrative action.

Public hearing

- 6.18 A public hearing is an essential part of the public inquiry procedure. The Regulations contain detailed rules about how notice of the hearing must be given and about the procedures to be used at the hearing.

Note that:

The Regulations must be consulted before conducting a public hearing.

Concluding the public inquiry

- 6.19 An administrator, or a person or panel conducting a public inquiry, must compile and publish a written report on the inquiry and give reasons for any administrative action taken or recommended without unreasonable delay. When a panel reports on a public inquiry it must also report any minority view.
- 6.20 It is recommended that, where a recommendation on the administrative action to be taken is made following a public inquiry, the administrator should wait for the publication of the report before making the final decision. This will ensure that the basis for the decision taken by the administrator is clear and that the reasons for the decision are available to the public.

Notice and Comment Procedure

- 6.21 A notice and comment procedure involves four basic steps:
- (a) You must give members of the public enough information about the proposed administrative action to allow them to make meaningful representations. In other words, a **notice** must be given that sets out enough information on the proposed action.
 - (b) You must **call for comments** on the proposed administrative action and you must allow enough time for comments to be made.

After taking steps (a) and (b):

- (c) You must **consider and evaluate** the comments that you have received.
- (d) You must **decide** whether or not to take the proposed administrative action, with or without changes.

Giving notice of the proposed administrative action

- 6.22 The Regulations contain detailed rules about the manner in which information concerning the proposed administrative action must be published by way of notice in the *Government Gazette* or *Provincial Gazette* and in local newspapers. A notice must be in at least two of the official languages. Where the administrative action affects the rights of the public in a particular province or area, the language preferences and uses in that province or area must

be taken into account when selecting the two official languages in which the notice must be published.

- 6.23 The notice published must include an invitation to members of the public to submit comments in connection with the proposed administrative action to the administrator concerned on or before a date specified in the notice. This date may not be earlier than 30 days from the date of publication of the notice. Sufficient information about the proposed administrative action must be given to enable members of the public to submit meaningful comments.
- 6.24 The Regulations have detailed rules to ensure that a proposed administrative action is brought to the attention of communities consisting of a considerable proportion of people who cannot read or write or who otherwise need special attention. Special steps to obtain the views of members of a community may include-
- the holding of public or group meetings where the proposed administrative action and the possible consequences are explained, questions are answered and views from the audience are minuted;
 - a survey of public opinion in the community on the proposed administrative action; or
 - the provision of a secretarial facility in the community where members of the community can state their views on the proposed administrative action.

An administrator may, in addition, publicise the information contained in the notice by way of communications through the printed or electronic media, including by way of press releases, press conferences, the Internet, radio or television broadcasts, posters or leaflets.

Note that:

The Regulations must be consulted before a notice and comment procedure is followed.

Public Inquiry and Notice and Comment Procedure

- 6.25 An administrator may in particular circumstances choose to follow the notice and comment procedure in addition to the public inquiry procedure. For example, you may follow a notice and comment procedure and then, based on the comments received, decide that a public inquiry will also help. Where the proposed action affects the public in general but also a number of individuals specifically both these procedures may also be appropriate.

A procedure that complies with s 3

- 6.26 An administrator may also follow the consultation procedure set out in s 3(2)(b) of PAJA when making a decision that will affect the public. This procedure is discussed in paragraphs 5.2 to 5.10 in Chapter 5 of this Code.

Existing Fair but Different Procedure

- 6.27 PAJA also allows an administrator to follow an existing administrative procedure, when making a decision that will affect the public, provided that-
- the administrator is empowered by an empowering provision to follow the procedure; and
 - the procedure is fair.
- 6.28 This means that as long as a properly authorized existing procedure is fair, the administrator can follow the existing procedure. However, the prescribed procedures in PAJA will be indicative of the fairness of any existing procedure. Administrators should therefore evaluate existing procedures against those specifically prescribed in PAJA and the Regulations. To be fair, a procedure must give the members of the public who will be affected by the decision a fair warning of what is being contemplated, a real and meaningful opportunity to have their say on the matter, and information about what has been finally decided.

Additional steps

- 6.29 In addition to the steps of each procedure an administrator must consider whether any of the following extra steps are necessary to ensure that the people affected by a decision are treated fairly, especially where affected communities consist of a considerable number of people who cannot read or write or who otherwise need special assistance:
- Additional steps may have to be taken to ensure that the proposed action is brought to the attention of the community at large. Such steps may include the holding of public or group meetings, a survey of public opinion and the provision of a secretarial facility to record community members' views. Furthermore, the notice of the proposed action can also be publicised by way of, amongst others, press releases, press conferences, the Internet, radio, television, posters and leaflets.
 - In serious or complex cases consideration should be given to allow a person, community or group of people to have legal representation.

Flowchart: Consultation procedures where the public is affected

Fair procedures where public rights affected by the proposed administrative action.

The administrator has a choice of the following 5 procedures:

1. Public Inquiry Procedure

The 4 main steps are:

- Decide whether to conduct the inquiry yourself or to appoint another person or a panel of people to conduct it.
- Give notice of the inquiry.
- Hold a public hearing as part of the inquiry.
- Compile a written report and publish a summary of the report.

(See paragraphs 6.8 to 6.20, s 4 of PAJA and Chapter 1 of the Regulations.)

OR

2. Notice and Comment Procedure

The 4 main steps are:

- Give adequate notice of the nature and purpose of the action.
- Call for comments and give a reasonable opportunity for responses.
- Consider all comments received.
- Decide whether to take the action with or without changes.

(See paragraphs 6.21 to 6.24, s 4 of PAJA and Chapter 2 of the Regulations.)

OR

3. Public Inquiry and Notice and Comment Procedure

Follow the steps of both the Public Inquiry Procedure as well as the Notice and Comment Procedure.

(See paragraph 6.25, s 4 of PAJA and Chapters 1 and 2 of the Regulations.)

OR

4. Procedure that complies with s 3

Follow the steps of the procedure prescribed for administrative actions affecting individual rights.

(See paragraph 6.26 and s 3 of PAJA.)

OR

5. Existing Fair but Different Procedure

Follow an existing procedure, provided that you are empowered by an empowering provision to follow the procedure and the procedure is fair.

(See paragraphs 6.27 to 6.28 and s 4 of the Act.)

Irrespective of which procedure is followed consider additional required and discretionary steps that are required to ensure fairness and consider the granting of special assistance.

(See paragraph 6.29.)

CHAPTER 7

REASONABLE AND JUSTIFIABLE DEPARTURES

Urgent administrative decisions

- 7.1 In both individual and public cases, s 3(4) and s 4(4) of PAJA allow an administrator to depart from any or all of the consultation procedures if it is reasonable and justifiable in the circumstances.
- 7.2 These provisions are there to cover cases where an administrator has to act quickly and decisively, and therefore cannot follow the full consultation procedure. For example, after a flood it may be necessary to close a public road for safety reasons. In such a case, it would not be necessary to hold a public inquiry or follow a notice and comment procedure first.
- 7.3 Justification for the departure will usually be an over-riding public interest that must be protected, such as the safety of road users in the example above.
- 7.4 The requirement of reasonableness means that the least intrusive action should be taken in order to achieve the desired purpose.
- 7.5 Even in urgent cases, it will be difficult to justify departing from some of the requirements for individual decisions, such as giving a clear statement of the decision and information about the right to request reasons and to review or appeal the decision.

Purpose of the action

- 7.6 A departure from any or all of the consultation procedures may also be reasonable and justifiable in order to give effect to the purpose of the administrative action. An example of such an administrative action is the granting of a direction to intercept the communications of a suspected criminal in order to obtain evidence with regard to a serious offence. If the suspected criminal is informed of the proposed action and given an opportunity to make representations, the purpose of the action will be defeated.
- 7.7 In the example above the departure will be reasonable if it is the only effective and practical means by which the desired evidence can be obtained. The departure will be justifiable since it is supported by the public interest in the combating of crime.

Determining if departure is reasonable and justifiable

- 7.8 In determining whether a departure is reasonable and justifiable, an administrator must take into account all relevant factors, including-
- the objects of the empowering provision;
 - the nature, purpose and likely effect of the administrative action concerned;
 - the urgency of taking the administrative action or the urgency of the matter; and
 - the need to promote an efficient administration and good governance.

CHAPTER 8

REASONABLENESS

Reasonableness

- 8.1 The Constitution and the Administrative Justice Act require administrators to make decisions that are procedurally fair, lawful and reasonable. It also gives individuals the right to challenge decisions that do not comply with these requirements in court.

“Reasonableness” requires that:

- The information available to an administrator supports the decision made.
 - The decision is supported by sound reasons.
 - The decision makes logical sense in relation to the available information.
- The empowering provision and other relevant provisions are correctly understood and applied.
- The adverse effect of the decision must be proportionate to the objective sought to be achieved – there should not be a less restrictive means to achieve the purpose of the decision.

Note that:

The grounds for judicial review set out in paragraphs 11.19, 11.23 and 11.24 of Chapter 11 of this Code also give guidance to an administrator with regard to the making of a reasonable decision.

Applying your mind to the matter

- 8.2 As an administrator you must take all relevant factors, comments, inputs, representations, information and evidence into account before making a decision. You must also, after considering any comments or representations by the affected person or persons, decide whether or not to change the administrative action that was initially proposed.

Rational

- 8.3 Administrative action must be rational. Briefly, this means that your decision must make sense given the information that was available to you.

Error in law

- 8.4 Where administrative action is based on a mistake about what the law requires, a court may set the action aside. This means that if, for example, a provision of an Act was incorrectly interpreted in coming to a decision, that decision may be set aside by a court.

CHAPTER 9

INFORMING PEOPLE OF THE DECISION

Communicating the decision

- 9.1 After a decision has been taken the administrator must convey the decision to the public or to the individuals that are affected by it.
- 9.2 PAJA and Chapter 3 of the Regulations require that an administrator must inform a person or people affected by an administrative action of the decision taken in writing. This notice must be a clear and understandable statement of the decision. It is also possible (but not required) to give reasons for the decision at the same time as informing people of the decision. (See further Chapter 10 below.)
- 9.3 The notice informing a person or the public of the decision must also inform them of any right of review or internal appeal, if applicable, including-
- the period, if any, in which the review or appeal proceedings must be instituted;
 - the name and address of the person with whom proceedings for review or appeal must be instituted; and
 - any other formal requirements in respect of the proceedings for review or appeal.
- 9.4 Finally the notice must also inform the person or public of the right to request reasons for the action including-
- the formal requirements applying to a request for reasons; and
 - assistance that will be given in requesting reasons. (See also Chapter 10 below.)
- 9.5 If your particular department uses template forms for review or appeal proceedings or for requests for reasons, these forms should be attached to the notice.
- 9.6 If the administrative action affects both the rights of the public and the rights of some individuals in particular, you should, in addition to informing the public, also specifically inform those individuals of the decision.

Conveying the decision after a public inquiry

- 9.7 There are special rules that apply to decisions affecting the public that are made after a public inquiry.
- 9.8 An administrator, or a person or panel conducting a public inquiry, must compile a written report on the inquiry and give reasons for any administrative action that is taken or recommended, without unreasonable delay. When a panel reports on a public inquiry it must also report any minority view.

- 9.9 An administrator, person or panel must as soon as possible after compiling the report-
- publish in English and in at least one of the other official languages, in the *Government Gazette* or relevant *Provincial Gazette*, a notice containing a concise summary of the report and the particulars of the places and times at which the report may be inspected and copied; and
 - convey by such other means of communication which the administrator considers effective, the mentioned information to the public concerned.
- 9.10 The “concise summary” of the report must contain sufficient detail to allow a reader to understand the basic ambit, evidence, rationale, findings and reasons for the administrative action taken or recommended.
- 9.11 If only a recommendation is made the administrator must convey the eventual decision made in accordance with the guidelines in paragraphs 9.1 to 9.6 above.

CHAPTER 10

GIVING REASONS FOR DECISIONS

When should I give reasons for my decisions?

- 10.1 It is generally good administrative practice to give reasons for **all** decisions when you inform people of the decision. The Constitution says that the administration must be *accountable* for its use of public power. This means being able to explain decisions to the people who are affected by them.
- 10.2 According to PAJA, administrators must give reasons for their administrative action to a person who **requests** them. Of course, administrators need not wait for someone to request reasons. They can give reasons at the same time as they inform the person of their decision. Sometimes this can help prevent potential disputes from arising.
- 10.3 In terms of PAJA, the request for reasons must be made within 90 days of the date on which the person became aware of the administrative action. You must then give adequate reasons, **in writing**, within 90 days.
- 10.4 Sometimes a request for reasons will be made months after the decision has been taken. It is good administrative practice to make a note of the reasons for a decision at the time that it is made. Having made a note, you will easily be able to provide reasons when requested to do so and this will also enable your successor to provide reasons.
- 10.5 Where an administrator is empowered by any empowering provision to follow a procedure that is fair but different from the requirement to give adequate written reasons within 90 days, the administrator may follow that different procedure. It is important to note that any different procedure must be authorised by an empowering provision and must be fair in the circumstances of each particular case.

Who can request reasons?

- 10.6 Anyone whose rights have been materially and adversely affected by administrative action can request written reasons.

Administrator's duties

- 10.7 If an administrator receives an oral request for reasons from a person who cannot write or otherwise needs assistance, the administrator or a person designated by the administrator must give reasonable assistance to that person to submit such request in writing.
- 10.8 An administrator to whom a request for reasons is made must first of all acknowledge receipt of the request.

10.9 The administrator must then either –

- accede to the request and furnish the reasons in writing; or
- decline the request.

If an administrator declines a request for reasons the administrator must still give reasons in writing to the person who made the request why the request for reasons was declined.

What are adequate written reasons?

- 10.10 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.
- 10.11 If the person requesting reasons has raised specific questions, these should be answered as far as possible.
- 10.12 The reasons should be written in a way that the requester will understand. For example, do not use technical terms unless you know the person will understand these.
- 10.13 Generally, the length of your statement of reasons and the detail that you need to provide 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.

Automatic furnishing of reasons

- 10.14 Section 5(6)(a) of PAJA provides that, in order to promote an efficient administration, the Minister may, at the request of an administrator, by notice in the *Government Gazette* publish a list specifying any administrative action or a group or class of administrative actions in respect of which the administrator concerned will automatically furnish reasons to a person whose rights are adversely affected by such actions, without such person having to request reasons in terms of this section.

Note that:

- The purpose of s 5(6) is to promote an efficient administration.
- Administrators who wish to automatically furnish reasons should submit a request in this regard to the Minister responsible for the administration of justice.
- Administrators must know whether the administrative actions for which they are responsible are listed in the *Government Gazette* for the purposes of s 5(6) of PAJA.

Grounds for refusing to give reasons

- 10.15 An administrator may depart from the requirement to furnish adequate reasons if it is reasonable and justifiable in the circumstances, and must immediately inform the person making the request of such departure.
- 10.16 In determining whether a departure is reasonable and justifiable, an administrator must take into account all relevant factors, including-
- the objects of the empowering provision;
 - the nature, purpose and likely effect of the administrative action concerned;
 - the nature and the extent of the departure;
 - the relation between the departure and its purpose;
 - the importance of the purpose of the departure; and
 - the need to promote an efficient administration and good governance.

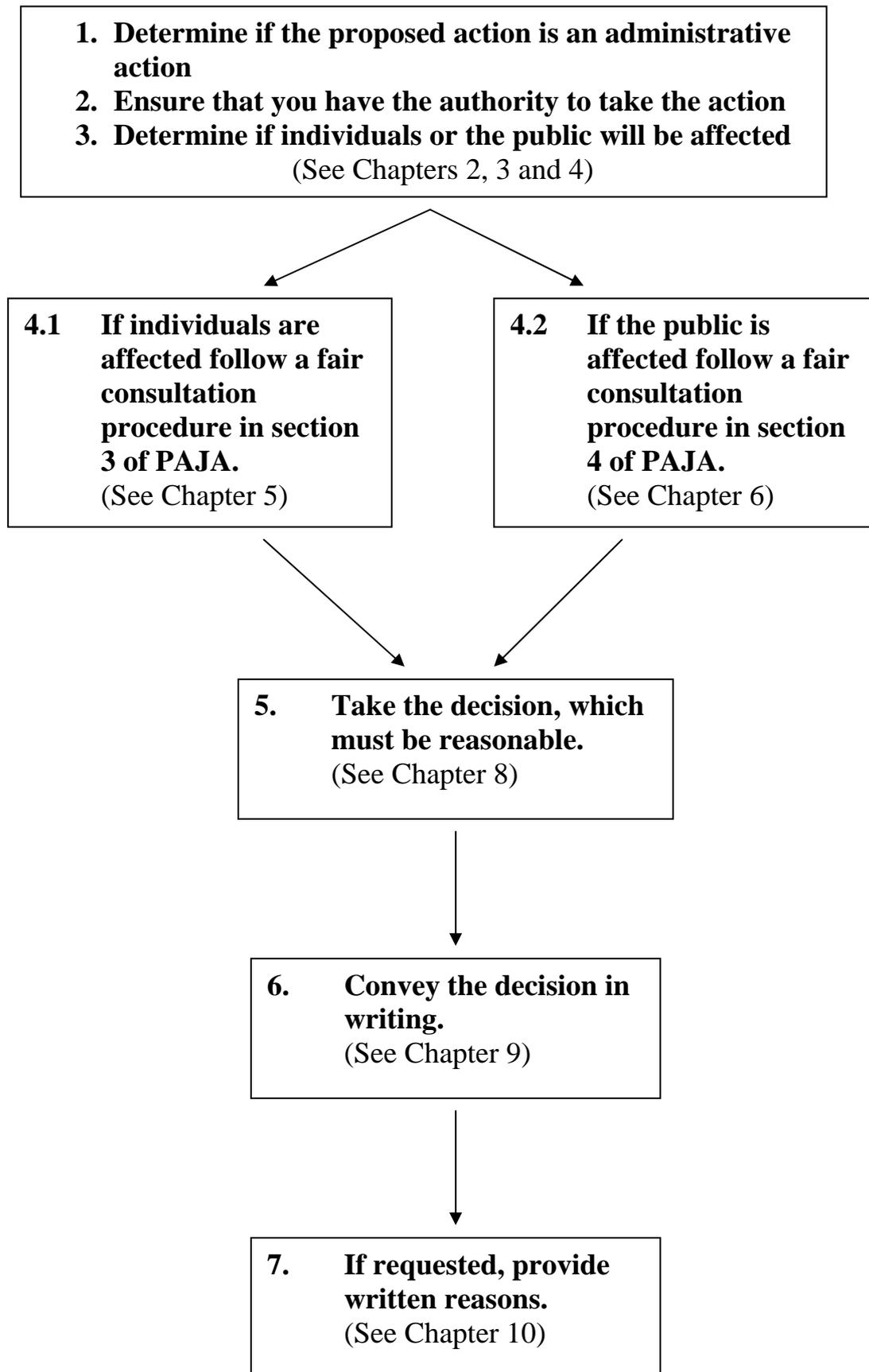
Note that:

A departure from the requirement to give adequate reasons will only in exceptional cases be reasonable and justifiable.

Consequences of failing to give adequate reasons

- 10.17 If an administrator fails to furnish adequate reasons for an administrative action it will in the absence of proof to the contrary, be presumed in any proceedings for judicial review that the administrative action was taken without good reason.
- 10.18 This means that where an administrator failed to give any reasons or gave inadequate reasons, that administrator will have to prove that the administrative action concerned was taken with good reason (in other words, that it was not unreasonable).

Flowchart: Complete administrative process



CHAPTER 11

JUDICIAL REVIEW OF ADMINISTRATIVE ACTION

What is judicial review?

- 11.1 For the right to just administrative action to be more than just a right on paper, there must be a way to enforce it. The most important way in which this right can be enforced is by **judicial review**. This means that any member of the public who is unhappy with the decision of an administrator can challenge the decision in court. There, they can argue that the decision is a violation of the right to just administrative action. If the court finds that the decision is unlawful, unreasonable or procedurally unfair it can make any of a number of possible orders to rectify the situation. These include-
- an order declaring the administrator's decision invalid;
 - ordering the administrator to reconsider the decision;
 - replacing the decision with the court's own decision; and
 - ordering the government to pay damages to the affected person.

Exhaustion of internal remedies

- 11.2 Before someone can ask a court to review an administrative action, there is an important rule in PAJA that must be complied with – the rule of **exhaustion of internal remedies**. This means that, where **the law** sets out procedures allowing someone to review or appeal a decision of the administration, these must be used up before an affected person can approach a court. A person can therefore only ask for judicial review as **a last resort**. This is dealt with in section 7(2) of PAJA. In exceptional circumstances a court may exempt a person from the obligation to exhaust internal remedies if it deems it in the interest of justice.
- 11.3 Internal remedies are ways of correcting, reviewing or appealing administrative decisions within the administration itself. The difference between internal remedies and the remedy of judicial review is that judicial review is review by a court, which is independent from the administration.

Example: Internal review

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

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

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

- 11.4 PAJA does allow internal remedies to be left out and allows someone to approach a court directly in ‘exceptional circumstances’ and if it is ‘in the interest of justice’. In the example above, if she wants to leave out this internal remedy, Agnes will have to show the court why her circumstances are exceptional (extreme urgency, perhaps) and why it is in the interests of justice to do so.

What is the time-limit for judicial review?

- 11.5 One of the most important aspects in PAJA is that an application for judicial review must be made **within 180 days** of the date on which all internal remedies were exhausted.
- 11.6 Where there are no internal remedies available, the application to court 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).
- 11.7 A person who asks for judicial review after this period will usually not be successful, unless they can convince the court to that it is “in the interests of justice” to hear the case even though it was not brought inside the time-limits.
- 11.8 In some cases the specific law that allows you to take an administrative action will also provide for review of the action by a court of law and may stipulate a different time-limit in which the action may be taken on review, for example within 60 days of the action. Where there is such a conflict of time-limits between the specific law and PAJA you should seek legal advice.

Grounds on which administrative action can be reviewed

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

We shall now look at some of these grounds in more detail.

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

- 11.10 We saw in Chapter 3 above, that administrators must obey the law and must have authority in law for their decisions. If administrators make decisions that are not allowed by law, they act “unlawfully” and their decisions are invalid. In most cases, administrators need to be able to show that there is a specific law that gives them the authority to perform an administrative action. In general, without legislative authority, administrators are not authorised to take administrative action.
- 11.11 The law will often put certain conditions on this authorisation. Many laws require a decision to be made by an official of a certain rank or with certain qualifications. If someone without these qualifications makes such a decision, they will have acted without authority. For example, if a law says an official who makes a particular decision must have a legal qualification, a decision made by someone without a legal qualification is unauthorised.

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

Example: Unauthorised delegation

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

Bias - S 6(2)(a)(iii) of AJA

- 11.13 Administrators must use their power without bias. “Bias” means that the person making the decision is unfairly slanted towards or in favour of a particular person or decision. It also means that the person making the decision is not independent and impartial.
- 11.14 Even if you are not actually biased against a particular person or decision, you will act unlawfully if it **reasonably appears** that you are biased. This is explained by the saying that “justice must not only be done but must also be seen to be done”. In other words, if a reasonable member of the community **could think** that you are biased, procedural fairness will not have been complied with. For example, most people would think that an administrator who made a decision should not decide an appeal against that decision. Even if the administrator is not actually biased it is reasonable to think that he or she could be.
- 11.15 The circumstances that usually create an impression of bias are where there is a **conflict of interest**. This could be a monetary interest, a personal interest or a prejudice.

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

Personal interest: Decision-makers will have a conflict of interest and could be reasonably suspected of bias if they make decisions about someone with whom they have a personal or family relationship.

Prejudice: It is a form of prejudgment of an issue. A decision-maker will be reasonably suspected of prejudice if, for example, he or she have expressed strong views on a particular subject in the past

- 11.16 Where it could reasonably appear that a particular administrator might be biased, it is best that, if permitted by law, arrangements are made for some other administrator to make the decision.

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

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

Procedural fairness – Section 6 (2)(c)

- 11.18 We have already looked at procedural fairness in detail when we looked at the requirements of s 3 and s 4 of PAJA in Chapters 5 and 6 above. Failure to follow fair procedures before taking a decision will allow people affected by it to ask a court to declare the decision invalid.
- 11.19 Where the procedure followed was not fair the fact that the eventual decision was lawful and reasonable will not matter or rescue the administrative action from being invalid.

Error of law – Section 6(2)(d)

- 11.20 Where administrative action is based on a mistake about what the law requires, for example a provision of an Act was incorrectly interpreted, a court may set the action aside.

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

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

Example: Discretionary powers

Mr Ndlovu is suing the municipality for damaging his property when they cut down some trees near his house. While this case is waiting to be heard, he applies to the same local council for planning permission to add a new room to this home.

The local council officials cannot demand that he withdraws the case against them before they will agree to give him permission to add a new room. This is because the town-planning laws say decisions must be taken on the basis of town-planning principles and not for any other reason.

- 11.22 When using your discretion, you can only take relevant factors into account. If relevant factors are not considered, or you take irrelevant factors into account, then your decision will not have been taken for good reason. In such a case, a court can review your decision.
- 11.23 Discretionary powers must be used by the person given these powers and not by anyone else.

Example: Discretionary powers

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

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

- 11.24 Administrative action must be reasonable and rational. Briefly, this means that the action taken must make sense given the information that is available to the person who takes the administrative action.
- 11.25 There must be a rational connection between the information available to the administrator and the decision taken.

Failure to take a decision - Section 6(2)(g)

- 11.26 For the purposes of PAJA an “administrative action” not only means any decision taken but also any failure to take a decision. An administrative decision must be taken without unreasonable delay or within the period that may be prescribed for the taking of the particular administrative action. Failure to take a decision without unreasonable delay or within the prescribed period is a ground for the review of the administrative action.

CHAPTER 12

GOOD ADMINISTRATIVE CONDUCT PRACTICAL EXAMPLE

Practical example

- 12.1 This Chapter describes a practical case. It outlines the whole structure of a decision-making process from the application to the final decision. It concludes with a template for good decision-making.
- 12.2 The example-
- shows that PAJA complements the provisions of particular administrative law as far as fair procedure is concerned;
 - gives helpful guidance for structuring efficient and lawful decision-making processes;
 - can be changed to fit other areas of particular administrative law so that organs of State can customize it to their particular needs.
- 12.3 This example does not deal with all the details of the area of law used in the example or with the complex decision-making process. Instead, it focuses on the impact of PAJA on the decision-making process, which includes-
- the application (or where you act on your own authority without receiving an application);
 - applying the law to the facts of the matter;
 - correspondence with the person who may be affected by a decision before the decision is taken. Then, re-applying the law to the facts in the light of the representation received;
 - taking and issuing of a clear decision; and
 - giving reasons or informing the person of the right to reasons, and of any legal remedies, when the decision is negative or qualified.

The facts:

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

Step 1: The Application

Ms Dube applies for an old age pension. She fills in a form providing you with the following information:

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

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

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

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

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

Step 3: Identification of relevant legal provisions and helpful material

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

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

There is also a **manual** that gives additional guidance to administrators in the Social Welfare Department.

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

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

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

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

Step 4: Applying the law to the case or facts

(a) The Law

- **Competency and delegation.** The SAA and other documents (regulations, delegations, etc) will say whether you are competent to make the decision. (PAJA itself does not deal with competency and similar issues in each case because PAJA is part of general administrative law).
- **Potentially biased.** Since you do not know the applicant, it is unlikely that you could be biased. However, as will be seen later, you **do** have certain information about Ms Dube that you might have to take into consideration and that will affect your decision.
- **Procedural requirements in the SAA.** You will need to consider whether the procedures (in the SAA, the regulations and other policies) have been followed. There may be some procedural steps that, if not followed, will not necessarily lead to an unlawful decision. These are procedures that have been put in place to ensure efficient internal operations. Examples are procedures on how to register an application, filing systems and so on.
- **Substantive requirements in the SAA and the respective regulations.** The SAA says the applicant (amongst other things) must be-
 - ❑ a certain minimum age (65 years for males and 60 years for females);
 - ❑ a South African Citizen;
 - ❑ live in South Africa; and
 - ❑ in need of state support. The law sets out the monetary limits that a person who applies for an old age pension can earn or hold as assets. This calculation is rather complicated and changes from time to time. Let us presume for our case that the monetary limit for assets is R5 000.00.

Note that:

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

(b) The Facts

What are the corresponding facts in our case?

- **Competency and delegation.** You are an official of the competent provincial government department. You have delegated power to decide on the application.
- **Potentially biased.** You live in Ms Dube's neighbourhood and, by coincidence, a reliable person told you that Ms Dube was recently awarded R100 000.00 in an out of court settlement. The case involved an old dispute relating to the death of her husband 10 years ago as a result of vanadium poisoning at his former workplace. As this will most probably be a relevant fact to be considered, you have to be careful to avoid bias. But although you live in Ms Dube's neighbourhood and you may want to take facts

into consideration that came to your attention through rumours, this will not result in bias as long as you deal openly and fairly with these issues.

- **Procedural requirements in the SAA.** Let us presume that they are all complied with.
- **Substantive requirements in the SAA and the respective regulations.** Ms Dube is-
 - within the age limit as she is 70 years old;
 - a South African citizen;
 - resident in South Africa; and
 - according to her, is without any assets. However, you are not sure whether the last statement is correct. As described above you live in Ms Dube's neighbourhood and you were told that she has recently been awarded R100 000.00 in an out-of-court settlement.If Ms Dube has in fact got this amount of money she will not qualify for an old age pension, not even a reduced one. In this case you would have to decline the application.

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

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

Note that:

- **Positive decisions**

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

In the case of a temporary award (such as giving someone a disability grant for a fixed period), PAJA applies as well because the decision to grant a temporary award will affect the person's rights if that person applied for a permanent grant.
- **Acting out of your own authority (your own initiative)**

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

Step 5: Communicating with the applicant – the fair procedure rules

To make sure Ms Dube has a chance to explain her side of the story, you will probably need to write to her, explaining what you have found out and what decision you plan to take. In our example we have informed Ms Dube that according to information she has received an amount of R 100 000 and that she should indicate before 30 November 2001 if this is indeed true.

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

You have waited until 30 November 2001 without having received a response from Ms Dube.

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

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

However, when you visited her house she was not there, but one of her neighbours, told you about the out-of-court settlement and the money Ms Dube received. As a result, and since Ms Dube has never written back to you, you decide to turn down her application.

This section explains-

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

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

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

- You must set out your decision clearly, which also includes your particulars;
- you must give adequate reasons (or you must provide information on the right to request reasons); and
- you must provide information on any legal remedies available.

In general, the decision should include the following parts:

(a) 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;
- the person’s address;
- if you are writing to a department or business, the name of the particular person who should receive and attend to the letter (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).

(b) The problem

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

(c) The decision

This is where you state exactly what decision you have taken without yet giving reasons for the decision.

- 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?

- State all the subordinate decisions. Each 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-
 - (i) conditions attached to the main decision.
 - (ii) time limits attached to the main decision.
 - (iii) exceptions attached to the main decision.
 - (iv) exemptions to the main decision.
- 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.

(d) Reasons for the decision (and any subordinate decisions)

- For the main decision:
 - (i) State the jurisdiction or authority of the decision-maker. That is, say why you have authority to make this particular decision (in simple cases, where there is no dispute about your authority, it may not be necessary to elaborate on this requirement).
 - (ii) State the facts of the matter. Two sets of facts are important:
 - The **history** of the matter.
 - (aa) 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 mention whom you informed and what their responses were.

If you have already sent these responses to the original applicant and he or she has replied to them, you must also mention this.
 - (bb) If the State initiated the matter, say why your Department decided to start an investigation. Set out who was informed of the investigation and what their responses were.
 - List all the **facts on which the decision is based**.
 - (iii) Give the reference of the empowering provision – that is, say what provision covers decisions on these types of facts.

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 empowering provision, give the reference of the case and explain what impact the interpretation has had on that provision.
 - (iv) Apply the law to the facts listed.
- Repeat the process for each of the subordinate decisions **and** any cost order.

Note that:

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.

- What to do if you are not allowed to give reasons automatically

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

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

remedies.

Example:

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

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

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

(e) Advice on legal remedies

- If there is an internal appeal available, you should include a paragraph in the letter that-
 - (i) gives the contact details of the person responsible for the internal appeal (including that person's name, physical address, fax number and telephone number);
 - (ii) sets out the period of time in which the appellant must lodge the appeal or the date by which the appeal must be lodged; and
 - (iii) explains any prescribed or special forms that must be used for the internal appeal. Attach copies of these forms as an enclosure.
- If no internal appeal is available you should include a paragraph in the letter that-
 - (i) identifies the Court that has jurisdiction to hear a review; and
 - (ii) state the time-limit within which the proceedings for review has to be instituted.

(f) Ending off

- Write a complimentary closing (such as "Yours sincerely").
- Sign the letter.
- Write your name and job title **clearly** underneath your signature.
- Say which 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).
- Indicate who complimentary copies will be sent to for example, "CC: Dr P D Smith").

Remember:

Include-

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

An example of a letter informing a person of the decision and providing reasons is contained in Annexure E to this Code.

ANNEXURE A

Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996)

Just administrative action

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.

ANNEXURE B

Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000)

ACT

To give effect to the right to administrative action that is lawful, reasonable and procedurally fair and to the right to written reasons for administrative action as contemplated in section 33 of the Constitution of the Republic of South Africa, 1996; and to provide for matters incidental thereto.

Preamble

WHEREAS section 33 (1) and (2) of the Constitution provides that everyone has the right to administrative action that is lawful, reasonable and procedurally fair and that everyone whose rights have been adversely affected by administrative action has the right to be given written reasons;

AND WHEREAS section 33 (3) of the Constitution requires national legislation to be enacted to give effect to those rights, and to-

- * provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
- * impose a duty on the state to give effect to those rights; and
- * promote an efficient administration;

AND WHEREAS item 23 of Schedule 6 to the Constitution provides that the national legislation envisaged in section 33 (3) must be enacted within three years of the date on which the Constitution took effect;

AND IN ORDER TO-

- promote an efficient administration and good governance; and
- create a culture of accountability, openness and transparency in the public administration or in the exercise of a public power or the performance of a public function, by giving effect to the right to just administrative action,

BE IT THEREFORE ENACTED by the Parliament of the Republic of South Africa, as follows:-

Definitions

1. In this Act, unless the context indicates otherwise-

- (i) 'administrative action' means any decision taken, or any failure to take a decision, by-
 - (a) an organ of state, when-
 - (i) exercising a power in terms of the Constitution or a provincial constitution; or
 - (ii) exercising a public power or performing a public function in terms of any legislation; or
 - (b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect, but does not include-
 - (aa) the executive powers or functions of the National Executive, including the powers or functions referred to in sections 79 (1) and (4), 84 (2) (a), (b), (c), (d), (f), (g), (h), (i) and (k), 85 (2) (b), (c), (d) and (e), 91 (2), (3), (4) and (5), 92 (3), 93, 97, 98, 99 and 100 of the Constitution;

- (bb) the executive powers or functions of the Provincial Executive, including the powers or functions referred to in sections 121 (1) and (2), 125 (2) (d), (e) and (f), 126, 127 (2), 132 (2), 133 (3) (b), 137, 138, 139 and 145 (1) of the Constitution;
 - (cc) the executive powers or functions of a municipal council;
 - (dd) the legislative functions of Parliament, a provincial legislature or a municipal council;
 - (ee) the judicial functions of a judicial officer of a court referred to in section 166 of the Constitution or of a Special Tribunal established under section 2 of the Special Investigating Units and Special Tribunals Act, 1996 (Act 74 of 1996), and the judicial functions of a traditional leader under customary law or any other law;
 - (ff) a decision to institute or continue a prosecution;
 - (gg) a decision relating to any aspect regarding the appointment of a judicial officer, by the Judicial Service Commission;
 - (hh) any decision taken, or failure to take a decision, in terms of any provision of the Promotion of Access to Information Act, 2000; or
 - (ii) any decision taken, or failure to take a decision, in terms of section 4 (1);
- (ii) 'administrator' means an organ of state or any natural or juristic person taking administrative action;
- (iii) 'Constitution' means the Constitution of the Republic of South Africa, 1996;
- (iv) 'court' means-
- (a) the Constitutional Court acting in terms of section 167(6)(a) of the Constitution; or
 - (b) (i) a High Court or another court of similar status; or
 - (ii) a Magistrate's Court, either generally or in respect of a specified class of administrative actions, designated by the Minister by notice in the Gazette and presided over by a magistrate or an additional magistrate designated in terms of section 9A, within whose area of jurisdiction the administrative action occurred or the administrator has his or her or its principal place of administration or the party whose rights have been affected is domiciled or ordinarily resident or the adverse effect of the administrative action was, is or will be experienced;
- (v) 'decision' means any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision, including a decision relating to-
- (a) making, suspending, revoking or refusing to make an order, award or determination;
 - (b) giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission;
 - (c) issuing, suspending, revoking or refusing to issue a licence, authority or other instrument;
 - (d) imposing a condition or restriction;
 - (e) making a declaration, demand or requirement;
 - (f) retaining, or refusing to deliver up, an article; or

- (g) doing or refusing to do any other act or thing of an administrative nature, and a reference to a failure to take a decision must be construed accordingly;
- (vi) 'empowering provision' means a law, a rule of common law, customary law, or an agreement, instrument or other document in terms of which an administrative action was purportedly taken;
- (vii) 'failure', in relation to the taking of a decision, includes a refusal to take the decision;
- (viii) 'Minister' means the Cabinet member responsible for the administration of justice;
- (ix) 'organ of state' bears the meaning assigned to it in section 239 of the Constitution;
- (x) 'prescribed' means prescribed by regulation made under section 10;
- (xi) 'public', for the purposes of section 4, includes any group or class of the public;
- (xii) 'this Act' includes the regulations; and
- (xiii) 'tribunal' means any independent and impartial tribunal established by national legislation for the purpose of judicially reviewing an administrative action in terms of this Act.

Application of Act

2.(1) The Minister may, by notice in the Gazette-

- (a) if it is reasonable and justifiable in the circumstances, exempt an administrative action or a group or class of administrative actions from the application of any of the provisions of section 3, 4 or 5; or
- (b) in order to promote an efficient administration and if it is reasonable and justifiable in the circumstances, permit an administrator to vary any of the requirements referred to in section 3 (2), 4 (1) (a) to (e), (2) and (3) or 5 (2), in a manner specified in the notice.

(2) Any exemption or permission granted in terms of subsection (1) must, before publication in the Gazette, be approved by Parliament.

Procedurally fair administrative action affecting any person

3.(1) Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.

(2) (a) A fair administrative procedure depends on the circumstances of each case.

(b) In order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection (4), must give a person referred to in subsection (1)-

- (a) adequate notice of the nature and purpose of the proposed administrative action;
- (b) a reasonable opportunity to make representations;
- (c) a clear statement of the administrative action;
- (d) adequate notice of any right of review or internal appeal, where applicable; and
- (e) adequate notice of the right to request reasons in terms of section 5.

(3) In order to give effect to the right to procedurally fair administrative action, an administrator may, in his or her or its discretion, also give a person referred to in subsection (1) an opportunity to-

- (a) obtain assistance and, in serious or complex cases, legal representation;
- (b) present and dispute information and arguments; and
- (c) appear in person.

(4)(a) If it is reasonable and justifiable in the circumstances, an administrator may depart from any of the requirements referred to in subsection (2).

(b) In determining whether a departure as contemplated in paragraph (a) is reasonable and justifiable, an administrator must take into account all relevant factors, including-

- (i) the objects of the empowering provision;
- (ii) the nature and purpose of, and the need to take, the administrative action;
- (iii) the likely effect of the administrative action;
- (iv) the urgency of taking the administrative action or the urgency of the matter; and
- (v) the need to promote an efficient administration and good governance.

(5) Where an administrator is empowered by any empowering provision to follow a procedure which is fair but different from the provisions of subsection (2), the administrator may act in accordance with that different procedure.

Administrative action affecting public

4. (1) In cases where an administrative action materially and adversely affects the rights of the public, an administrator, in order to give effect to the right to procedurally fair administrative action, must decide whether-

- (a) to hold a public inquiry in terms of subsection (2);
- (b) to follow a notice and comment procedure in terms of subsection (3);
- (c) to follow the procedures in both subsections (2) and (3);
- (d) where the administrator is empowered by any empowering provision to follow a procedure which is fair but different, to follow that procedure; or
- (e) to follow another appropriate procedure which gives effect to section 3.

(2) If an administrator decides to hold a public inquiry-

- (a) the administrator must conduct the public inquiry or appoint a suitably qualified person or panel of persons to do so; and
- (b) the administrator or the person or panel referred to in paragraph (a) must-
 - (i) determine the procedure for the public inquiry, which must-
 - (aa) include a public hearing; and
 - (bb) comply with the procedures to be followed in connection with public inquiries, as prescribed;
 - (ii) conduct the inquiry in accordance with that procedure;
 - (iii) compile a written report on the inquiry and give reasons for any administrative action taken or recommended; and
 - (iv) as soon as possible thereafter-
 - (aa) publish in English and in at least one of the other official languages in the Gazette or relevant provincial Gazette a notice containing a concise summary of any report and the particulars of the places and times at which the report may be inspected and copied; and

(bb) convey by such other means of communication which the administrator considers effective, the information referred to in item (a) to the public concerned.

(3) If an administrator decides to follow a notice and comment procedure, the administrator must-

- (a) take appropriate steps to communicate the administrative action to those likely to be materially and adversely affected by it and call for comments from them;
- (b) consider any comments received;
- (c) decide whether or not to take the administrative action, with or without changes; and
- (d) comply with the procedures to be followed in connection with notice and comment procedures, as prescribed.

(4) (a) If it is reasonable and justifiable in the circumstances, an administrator may depart from the requirements referred to in subsections (1) (a) to (e), (2) and (3).

(b) In determining whether a departure as contemplated in paragraph (a) is reasonable and justifiable, an administrator must take into account all relevant factors, including-

- (i) the objects of the empowering provision;
- (ii) the nature and purpose of, and the need to take, the administrative action;
- (iii) the likely effect of the administrative action;
- (iv) the urgency of taking the administrative action or the urgency of the matter; and
- (v) the need to promote an efficient administration and good governance.

Reasons for administrative action

5.(1) Any person whose rights have been materially and adversely affected by administrative action and who has not been given reasons for the action may, within 90 days after the date on which that person became aware of the action or might reasonably have been expected to have become aware of the action, request that the administrator concerned furnish written reasons for the action.

(2) The administrator to whom the request is made must, within 90 days after receiving the request, give that person adequate reasons in writing for the administrative action.

(3) If an administrator fails to furnish adequate reasons for an administrative action it must, subject to subsection (4) and in the absence of proof to the contrary, be presumed in any proceedings for judicial review that the administrative action was taken without good reason.

(4) (a) An administrator may depart from the requirement to furnish adequate reasons if it is reasonable and justifiable in the circumstances, and must forthwith inform the person making the request of such departure.

(b) In determining whether a departure as contemplated in paragraph (a) is reasonable and justifiable, an administrator must take into account all relevant factors, including-

- (i) the objects of the empowering provision;
- (ii) the nature, purpose and likely effect of the administrative action concerned;
- (iii) the nature and the extent of the departure;
- (iv) the relation between the departure and its purpose;
- (v) the importance of the purpose of the departure; and

- (vi) the need to promote an efficient administration and good governance.

(5) Where an administrator is empowered by any empowering provision to follow a procedure which is fair but different from the provisions of subsection (2), the administrator may act in accordance with that different procedure.

(6)(a) In order to promote an efficient administration, the Minister may, at the request of an administrator, by notice in the Gazette publish a list specifying any administrative action or a group or class of administrative actions in respect of which the administrator concerned will automatically furnish reasons to a person whose rights are adversely affected by such actions, without such person having to request reasons in terms of this section.

(b) The Minister must, within 14 days after the receipt of a request referred to in paragraph (a) and at the cost of the relevant administrator, publish such list, as contemplated in that paragraph.

Judicial review of administrative action

6.(1) Any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action.

(2) A court or tribunal has the power to judicially review an administrative action if-

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

(3) If any person relies on the ground of review referred to in subsection (2) (g), he or she may in respect of a failure to take a decision, where-

- (a) (i) an administrator has a duty to take a decision;
- (ii) there is no law that prescribes a period within which the administrator is required to take that decision; and
- (iii) the administrator has failed to take that decision, institute proceedings in a court or tribunal for judicial review of the failure to take the decision on the ground that there has been unreasonable delay in taking the decision; or
- (b) (i) an administrator has a duty to take a decision;
- (ii) a law prescribes a period within which the administrator is required to take that decision; and
- (iii) the administrator has failed to take that decision before the expiration of that period, institute proceedings in a court or tribunal for judicial review of the failure to take the decision within that period on the ground that the administrator has a duty to take the decision notwithstanding the expiration of that period.

Procedure for judicial review

7.(1) Any proceedings for judicial review in terms of section 6 (1) must be instituted without unreasonable delay and not later than 180 days after the date-

- (a) subject to subsection (2) (c), on which any proceedings instituted in terms of internal remedies as contemplated in subsection (2)(a) have been concluded; or
- (b) where no such remedies exist, on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons.

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

(b) Subject to paragraph (c), a court or tribunal must, if it is not satisfied that any internal remedy referred to in paragraph (a) has been exhausted, direct that the person concerned must first exhaust such remedy before instituting proceedings in a court or tribunal for judicial review in terms of this Act.

(c) A court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice.

(3) The Rules Board for Courts of Law established by section 2 of the Rules Board for Courts of Law Act, 1985 (Act 107 of 1985), must within one year after the date of commencement of this Act, make and implement rules of procedure for judicial review.

(4) Before the implementation of the rules of procedure referred to in subsection (3), all proceedings for judicial review must be instituted in a High Court or the Constitutional Court.

(5) Any rule made under subsection (3) must, before publication in the Gazette, be approved by Parliament.

Remedies in proceedings for judicial review

8.(1) The court or tribunal, in proceedings for judicial review in terms of section 6 (1), may grant any order that is just and equitable, including orders-

- (a) directing the administrator-

- (i) to give reasons; or
- (ii) to act in the manner the court or tribunal requires;
- (b) prohibiting the administrator from acting in a particular manner;
- (c) setting aside the administrative action and-
 - (i) remitting the matter for reconsideration by the administrator, with or without directions; or
 - (ii) in exceptional cases-
 - (aa) substituting or varying the administrative action or correcting a defect resulting from the administrative action; or
 - (bb) directing the administrator or any other party to the proceedings to pay compensation;
- (d) declaring the rights of the parties in respect of any matter to which the administrative action relates;
- (e) granting a temporary interdict or other temporary relief; or
- (f) as to costs.

(2) The court or tribunal, in proceedings for judicial review in terms of section 6 (3), may grant any order that is just and equitable, including orders-

- (a) directing the taking of the decision;
- (b) declaring the rights of the parties in relation to the taking of the decision;
- (c) directing any of the parties to do, or to refrain from doing, any act or thing the doing, or the refraining from the doing, of which the court or tribunal considers necessary to do justice between the parties; or
- (d) as to costs.

Variation of time

9.(1) The period of-

- (a) 90 days referred to in section 5 may be reduced; or
- (b) 90 days or 180 days referred to in sections 5 and 7 may be extended for a fixed period,

by agreement between the parties or, failing such agreement, by a court or tribunal on application by the person or administrator concerned.

(2) The court or tribunal may grant an application in terms of subsection (1) where the interests of justice so require.

Designation and training of presiding officers

9A.(1)(a) The head of an administrative region defined in section 1 of the Magistrates' Courts Act, 1944 (Act No. 32 of 1944), must, subject to subsection (2), designate in writing any magistrate or additional magistrate as a presiding officer of the Magistrate's Court designated by the Minister in terms of section 1 of this Act.

(b) A presiding officer must perform the functions and duties and exercise the powers assigned to or conferred on him or her under this Act or any other law.

(2) Only a magistrate or additional magistrate who has completed a training course-

- (a) before the date of commencement of this section; or
- (b) as contemplated in subsection (5),

and whose name has been included on the list contemplated in subsection (4)(a), may be designated in terms of subsection (1).

(3) The heads of administrative regions must-

- (a) take all reasonable steps within available resources to designate at least one presiding officer for each magistrate's court within

his or her area of jurisdiction which has been designated by the Minister in terms of section 1 ; and

- (b) without delay, inform the Director-General: Justice and Constitutional Development of any magistrate or additional magistrate who has completed a training course as contemplated in subsections (5) and (6) or who has been designated in terms of subsection (1).

(4) The Director-General: Justice and Constitutional Development must compile and keep a list of every magistrate or additional magistrate who has-

- (a) completed a training course as contemplated in subsections (5) and (6); or
- (b) been designated as a presiding officer of a magistrate's court contemplated in subsection (1).

(5) The Chief Justice must, in consultation with the Judicial Service Commission and the Magistrates Commission, develop the content of training courses with the view to building a dedicated and experienced pool of trained and specialised presiding officers for purposes of presiding in court proceedings as contemplated in this Act.

(6) The Chief Justice must, in consultation with the Judicial Service Commission, the Magistrates Commission and the Minister, implement the training courses contemplated in subsection (5).

(7) The Minister must table a report in Parliament, as prescribed. Relating to the content and implementation of the training courses referred to in subsections (5) and (6).

Regulations and code of good administrative conduct

10.(1) The Minister must make regulations relating to-

- (a) the procedures to be followed by designated administrators or in relation to classes of administrative action in order to promote the right to procedural fairness;
- (b) the procedures to be followed in connection with public inquiries;
- (c) the procedures to be followed in connection with notice and comment procedures; and
- (d) the procedures to be followed in connection with requests for reasons.

(2) The Minister may make regulations relating to-

- (a) the establishment, duties and powers of an advisory council to monitor the application of this Act and to advise the Minister on-
 - (i) the appropriateness of publishing uniform rules and standards which must be complied with in the taking of administrative actions, including the compilation and maintenance of registers containing the text of rules and standards used by organs of state;
 - (ii) any improvements that might be made in respect of internal complaints procedures, internal administrative appeals and the judicial review by courts or tribunals of administrative action;
 - (iii) the appropriateness of establishing independent and impartial tribunals, in addition to the courts, to review administrative action and of specialised administrative tribunals, including a tribunal with general jurisdiction over all organs of state or a number of organs of state, to hear and determine appeals against administrative action;
 - (iv) the appropriateness of requiring administrators, from time to time, to consider the continuance of standards

- administered by them and of prescribing measures for the automatic lapsing of rules and standards;
- (v) programmes for educating the public and the members and employees of administrators regarding the contents of this Act and the provisions of the Constitution relating to administrative action;
- (vi) any other improvements aimed at ensuring that administrative action conforms with the right to administrative justice;
- (vii) any steps which may lead to the achievement of the objects of this Act; and
- (viii) any other matter in respect of which the Minister requests advice;
- (b) the compilation and publication of protocols for the drafting of rules and standards;
- (c) the initiation, conducting and co-ordination of programmes for educating the public and the members and employees of administrators regarding the contents of this Act and the provisions of the Constitution relating to administrative action;
- (d) matters required or permitted by this Act to be prescribed; and
- (e) matters necessary or convenient to be prescribed in order to-
 - (i) achieve the objects of this Act; or
 - (ii) subject to subsection (3), give effect to any advice or recommendations by the advisory council referred to in paragraph (a).

(3) This section may not be construed as empowering the Minister to make regulations, without prior consultation with the Public Service Commission, regarding any matter which may be regulated by the Public Service Commission under the Constitution or any other law.

(4) Any regulation-

- (a) made under subsections (1)(a), (b), (c) and (d) and (2) (c), (d) and (e) must, before publication in the Gazette, be submitted to Parliament; and
- (b) made under subsection (2)(a) and (b) must, before publication in the Gazette, be approved by Parliament.

(5) Any regulation made under subsections (1) and (2) or any provision of the code of good administrative conduct made under subsection (5A) which may result in financial expenditure for the State must be made in consultation with the Minister of Finance.

(5A) The Minister must, by notice in the Gazette, publish a code of good administrative conduct in order to provide administrators with practical guidelines and information aimed at the promotion of an efficient administration and the achievement of the objects of this Act.

(6) The code of good administrative conduct contemplated in subsection (5A) must, before publication in the Gazette, be approved by Cabinet and Parliament and must be made within 42 months after the commencement of this section.

Short title and commencement

11. This Act is called the Promotion of Administrative Justice Act, 2000, and comes into operation on a date fixed by the President by proclamation in the Gazette.

ANNEXURE C

Regulations on Fair Administrative Procedures, 2002

(Regulation Gazette No. 23674 of 31 July 2002)

No.R 1022

31 July 2002

PROMOTION OF ADMINISTRATIVE JUSTICE ACT, 2000 REGULATIONS ON FAIR ADMINISTRATIVE PROCEDURES

The Minister for Justice and Constitutional Development has in terms of section 10 of the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000), made the regulations set out in the Schedule.

SCHEDULE

Definitions

1. In these regulations, unless the context otherwise indicates, a word or expression to which a meaning has been assigned in the Act has the meaning so assigned, and "Act" means the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000).

Tabling of report on training courses

1A. The Minister must table a report in Parliament contemplated in section 9A(7) of the Act, within six months after-

- (a) the commencement of this regulation; and
- (b) every date on which there is a substantial change in either the content or the implementation of the training courses or both.

CHAPTER 1 PUBLIC INQUIRIES

Application of this Chapter

2. This Chapter applies to administrative action which materially and adversely affects the rights of the public as envisaged in section 4(1) of the Act, and must be complied with if an administrator decides in terms of section 4(1) of the Act to hold a public inquiry contemplated in section 4(1)(a) of the Act.

Part 1: General

Notice of public inquiry

3. (1) An administrator must give notice of a public inquiry, –
- (a) if the administrative action affects the rights of the public throughout the Republic, in the *Government Gazette* and a newspaper which is distributed, or in newspapers which collectively are distributed, throughout the Republic; or

- (b) if the administrative action affects the rights of the public in a particular province only, in the *Provincial Gazette* of that province and a newspaper which is distributed, or in newspapers which collectively are distributed, throughout that province; or
- (c) if the administrative action affects the rights of the public in a specific area only, in a newspaper which is distributed in that specific area.

(2) A notice published in terms of subregulation (1) must state –

- (a) whether the administrator will conduct the inquiry or whether a person or panel of persons has been appointed in terms of section 4(2)(a) of the Act to conduct the inquiry;
- (b) where a person or panel has been appointed –
 - (i) the name of the person or the names of the persons on the panel appointed to conduct that inquiry, including, in the case of a panel, the name of the person appointed as convenor of that panel; and
 - (ii) the period within which the inquiry should be completed; and
- (c) particulars of the matter to be investigated, or if a person or panel has been appointed, the terms of reference of that person or panel.

(3) A notice published in terms of subregulation (1) must –

- (a) contain an invitation to members of the public who have information on the matter to be investigated, to submit –
 - (i) written representations; or
 - (ii) a request for permission to testify or to make oral representations;
- (b) state the closing date, which may not be earlier than 30 days from the date of publication of the notice, for persons to submit –
 - (i) written representations; or
 - (ii) requests for permission to testify or to make oral representations;
- (c) when appropriate, contain a warning that written representations, or requests for permission to testify or to make oral representations, received after the closing date may be disregarded;
- (d) state the name and official title of the person to whom any written representations or requests for permission must be sent or delivered; and
- (e) state the –
 - (i) work postal and street address and, if available, also an electronic mail address;
 - (ii) work telephone number; and
 - (iii) fax number, if any,of the person contemplated in paragraph (d).

(4) A notice published in terms of subregulation (1) must –

- (a) contain sufficient information about the matter to be investigated to enable the public to submit meaningful representations; and
- (b) when appropriate, specify a place or places where, and the hours within which, further information about the matter to be investigated will be available for public scrutiny.

(5) A notice published in terms of subregulation (1)(a) and (b) in a newspaper may, notwithstanding the provisions of subregulations (2) to (4), only contain-

- (a) a concise statement of the matter to be investigated;
- (b) the name, official title, contact telephone number and physical address of the person from whom further information on the matter and the procedure of the investigation can be obtained; and
- (c) a note that a more detailed notice concerning the matter to be investigated appears in the *Government Gazette* or *Provincial Gazette*, as the case may be.

(6) If a notice published in terms of subregulation (1) specifies a place or places where further information about the matter to be investigated will be available for public scrutiny, access to that information must be allowed from the date on which the notice is published until the closing date for comment, with the exclusion of Saturdays, Sundays and public holidays.

(7) Persons who want to submit requests for permission to testify or to make oral representations, must submit in writing to the person referred to in subregulation (3) (d) –

- (a) their names, postal address and telephone number or other contact details;
- (b) an indication of the matter on which they wish to testify or make oral or written representations; and
- (c) their preference as to the language in which they want to testify or make oral or written representations.

(8) In order to ensure that a public inquiry is brought to the attention of the public, an administrator may, in addition, publicise the information referred to in subregulations (1) to (4) by way of communications through the printed or electronic media, including by way of press releases, press conferences, the Internet, radio or television broadcasts, posters or leaflets.

Language

4. (1) A notice published in terms of regulation 3(1) must be in at least two of the official languages.

(2) A notice published in terms of regulation 3(1)(b) or (c) must take account of language preferences and usage in the province or area concerned.

(3) Written representations may be in any official language.

Special assistance

5. (1) If any administrative action that may be taken as a consequence of the public inquiry may materially and adversely affect the rights of members of a specific community consisting of a considerable proportion of people who cannot read or write or who otherwise need special assistance –

- (a) a notice must be publicised in the area in a manner that will bring the matter to be investigated to the attention of the community at large; and

- (b) the administrator must take special steps to solicit the views of members of the community on the matter to be investigated.

(2) Special steps in terms of subregulation (1)(b) may include –

- (a) the holding of public or group meetings where the matter to be investigated and the possible consequences are explained, questions are answered and views from the audience are minuted;
- (b) a survey of public opinion in the community on the matter to be investigated;
- (c) provision of a secretarial facility in the community where members of the community can state their views on the matter to be investigated; or
- (d) secretarial assistance to persons who wish to submit requests for permission to testify or to make oral representations, to comply with regulation 3(7).

Extension of closing date

6. (1) An administrator may extend the closing date specified in a notice published in terms of regulation 3 for persons who want to submit written representations or requests for permission to testify or to make oral representations.

(2) Any extension of a closing date for a significant period must be published by way of a notice as prescribed in regulations 3(1) and 4(1) and, when appropriate, in regulation 3(8).

Representations and requests received after closing date

7. (1) An administrator, or a person or panel conducting a public inquiry –

- (a) may refuse to accept any written representations or requests for permission to testify or to make oral representations, received after the closing date; or
- (b) may, but is not obliged to, grant requests for condonation of late submission of written representations or requests for permission to testify or to make oral representations.

(2) A request for condonation may be granted on good cause shown by the person who submitted the written representations or the request for permission, provided that condonation would not –

- (a) lead to unnecessary delays; or
- (b) otherwise prejudice the public interest.

Special provisions applicable to both persons and panels appointed to conduct public inquiries

8. If a person or panel has been appointed in terms of section 4(2)(a) of the Act to conduct a public inquiry, that person or panel must –

- (a) conduct the inquiry –
 - (i) in accordance with the terms of reference;
 - (ii) with the resources provided by the administrator; and
 - (iii) within a time and financial framework determined by the administrator;
- (b) regularly or on request by the administrator, report to the administrator on progress with the completion of the inquiry; and

- (c) immediately report to the administrator any administrative or other obstacles impeding progress with the inquiry.

Special provisions applicable to panels only

9. (1) The convenor of a panel, or another panel member designated by the convenor, presides at meetings of the panel.

(2) When a panel reports on a public inquiry in terms of section 4(2)(b)(iii) of the Act, it must also report any minority view.

Compilation of written report

10. An administrator, or a person or panel conducting a public inquiry, must compile the written report contemplated in section 4(2)(b)(iii) of the Act without unreasonable delay.

Part 2: Public hearings

Commencement of public hearings

11. (1) An administrator, or a person or panel conducting a public inquiry, must start and complete a public hearing contemplated in section 4(2)(b)(i)(aa) of the Act without unreasonable delay.

(2) An administrator or a person or panel conducting a public inquiry must give notice of the public hearing in at least –

- (a) a newspaper which is distributed, or in newspapers which collectively are distributed, throughout the Republic, if the administrative action affects the rights of the public throughout the Republic;
- (b) a newspaper which is distributed, or in newspapers which collectively are distributed, throughout a particular province, if the administrative action affects the rights of the public in that particular province only; or
- (c) a newspaper which is distributed in a specific area, if the administrative action affects the rights of the public in that specific area only.

(3) A notice published in terms of subregulation (2) must –

- (a) be in at least two of the official languages;
- (b) if the administrative action affects the rights of the public in a particular province or a specific area, take into account the language preferences and usage in the province or area concerned;
- (c) state particulars of the matter that is being investigated;
- (d) state the venue of the hearing and the time and date on which the hearing will commence; and
- (e) invite members of the public to attend the hearing.

(4) In order to ensure that a public hearing is brought to the attention of the public, the administrator or the

person or panel conducting that public hearing may, in addition, publicise the information referred to in subregulations (2) and (3) by way of communications through the printed or electronic media, including by way of press releases, press conferences, the Internet, radio or television broadcasts, posters or leaflets.

(5) An administrator, or a person or panel conducting a public inquiry, must inform every person who submitted a request for permission to testify or to make oral representations in terms of regulation 3(7) –

- (a) whether the request has been granted, and if not, the reasons why the request was declined;
- (b) the venue of the public hearing, and the time and date on which it will commence; and
- (c) if the request is granted, the date on which that person will be heard.

Procedure at public hearings

12. (1) The administrator, or the person or panel conducting a public inquiry, determines the procedure at that public hearing, subject to the Act and any other provision of these regulations.

(2) The law regarding privilege as applicable to a witness summoned to give evidence in a criminal case in a court, applies to the questioning of a person in the course of a public hearing.

Person presiding at public hearings

13. (1) The administrator or, if a person or panel has been appointed to conduct the public inquiry, that person or the convenor of the panel, or another panel member designated by the convenor, presides at a public hearing.

(2) The person presiding at a public hearing, either in person or through an assistant, must explain the issues the administrator or the person or panel has to consider, and the person presiding may –

- (a) allow a person present at the proceedings and whose request for permission referred to in regulation 3(7) has been granted, to give evidence, to make oral representations or to produce a document;
- (b) call any other person present at the proceedings to give evidence, to make oral representations or to produce a document in that person's custody;
- (c) administer an oath or solemn affirmation to that person;
- (d) question that person, or have that person questioned by a person designated by the person presiding; and
- (e) retain for a reasonable period any document produced in terms of paragraph (a) or (b).

Persons appearing at public hearing

14. (1) A person appearing at a public hearing may, with the approval of the person presiding at the public hearing and at own expense, be assisted by a representative.

(2) A person appearing at a public hearing, including such person's representative, may speak in a language of choice, but must observe the directives of and conform to the procedures determined by the person presiding at the public hearing.

(3) If the person appearing at a public hearing is a minor, the person presiding at the hearing must ensure that the minor's rights and interests are protected.

Access to public hearings

15. (1) Public hearings are open to the public, including the media, and the person presiding at the public hearing may not exclude the public, including the media, from the hearing, except when –

- (a) legislation applicable to the hearing provides for the hearing to take place in closed session; or
- (b) a matter is raised during the hearing which is –
 - (i) privileged in terms of the law;
 - (ii) confidential in terms of legislation; or
 - (iii) of such a nature that its confidential treatment is for any other reason reasonable and justifiable in an open and democratic society.

(2) The administrator or the person or panel conducting the public inquiry may take reasonable measures–

- (a) to regulate public access, including access of the media, to the place where the hearing is held;
- (b) to prevent and control misconduct by members of the public attending the hearing; and
- (c) to provide for the voluntary searching of any person, and, where appropriate, for the refusal of entry to, or the removal of any person from the place where that hearing is held.

(3) The person presiding at a public hearing may –

- (a) order a member of the public, including the media, to leave the place where that hearing is held –
 - (i) when the public is excluded from that hearing in terms of subregulation (1); or
 - (ii) whenever this is necessary to give effect to the measures taken in terms of subregulation (2); or
- (b) order a person referred to in regulation 14(2) to leave that hearing if that person does not observe a directive of or conform to the procedures determined by the person presiding at the public hearing.

(4) When instructed by the person presiding at a public hearing, a peace officer present at that hearing must remove a person –

- (a) who disrupts the proceedings or causes a nuisance; or
- (b) does not leave when ordered to leave in terms of subregulation (3).

Adjournment of public hearings

16. (1) The administrator, or the person or panel conducting a public inquiry, may –
- (a) adjourn a public hearing and set a time and date for its resumption; or
 - (b) at any time after the adjournment, change the time or date for the resumption of that hearing.
- (2) If the date for resumption of a hearing is changed in terms of subregulation (1)(b), the administrator, or the person or panel conducting that public inquiry, must give notice of such change in accordance with regulation 11(2).

CHAPTER 2

NOTICE AND COMMENT PROCEDURE

Application of this Chapter

17. This Chapter applies to administrative action which materially and adversely affects the rights of the public as envisaged in section 4(1) of the Act, and must be complied with if an administrator decides in terms of section 4(1) of the Act to follow a notice and comment procedure contemplated in section 4(1)(b) of the Act.

Publication

18. (1) Information concerning the proposed administrative action must be published by way of notice, –
- (a) if the administrative action affects the rights of the public throughout the Republic, in the *Government Gazette* and a newspaper which is distributed, or in newspapers which collectively are distributed, throughout the Republic; or
 - (b) if the administrative action affects the rights of the public in a particular province only, in the *Provincial Gazette* of that province and a newspaper which is distributed, or in newspapers which collectively are distributed, throughout that province; or
 - (c) if the administrative action affects the rights of the public in a specific area only, in a newspaper which is distributed in that specific area.
- (2) A notice published in terms of subregulation (1) must include –
- (a) an invitation to members of the public to submit comments in connection with the proposed administrative action to the administrator concerned on or before a date specified in the notice, which date may not be earlier than 30 days from the date of publication of the notice;
 - (b) a caution that comments received after the closing date may be disregarded;
 - (c) the name and official title of the person to whom any comments must be sent or delivered; and
 - (d) the –
 - (i) work, postal and street address and, if available, also an electronic mail address;
 - (ii) work telephone number; and

(iii) fax number, if any,
of the person contemplated in paragraph (c).

(3) A notice published in terms of subregulation (1) must –

- (a) contain sufficient information about the proposed administrative action to enable members of the public to submit meaningful comments; and
- (b) when appropriate, specify a place or places where, and the hours within which, further information concerning the proposed administrative action will be available for public scrutiny.

(4) A notice published in terms of subregulation (1)(a) and (b) in a newspaper may, notwithstanding the provisions of subregulations (2) and (3), only contain-

- (a) a concise statement of the proposed administrative action;
- (b) the name, official title, contact telephone number and physical address of the person from whom further information on the proposed administrative action and the administrative procedure can be obtained; and
- (c) a note that a more detailed notice concerning the proposed administrative action appears in the *Government Gazette* or *Provincial Gazette*, as the case may be.

(5) If a notice published in terms of subregulation (1) specifies a place or places where further information about the proposed administrative action will be available for public scrutiny, access to that information must be allowed from the date on which the notice is published until the closing date for comment, with the exclusion of Saturdays, Sundays and public holidays.

(6) In order to ensure that a proposed administrative action is brought to the attention of the public, an administrator may, in addition, publicise the information referred to in subregulations (1) to (5) by way of communications through the printed or electronic media, including by way of press releases, press conferences, the Internet, radio or television broadcasts, posters or leaflets.

Language

19. (1) A notice published in terms of regulation 18(1) must be in at least two of the official languages.

(2) A notice published in terms of regulation 18(1)(b) or (c) must take account of language preferences and usage in the province or area concerned.

(3) Written comments may be in any official language.

Special assistance

20. (1) If any proposed administrative action may materially and adversely affect the rights of members of a specific community consisting of a significant proportion of people who cannot read or write or who otherwise need special assistance –

- (a) a notice must be publicised in the area of that community in a manner that will bring the

- proposed action to the attention of the community at large; and
- (b) the administrator must take special steps to solicit the views of members of the community.

(2) Special steps in terms of subregulation (1)(b) may include –

- (a) the holding of public or group meetings where the proposed action is explained, questions are answered and views from the audience are minuted;
- (b) a survey of public opinion in the community on the proposed action; or
- (c) provision of a secretarial facility in the community where members of the community can state their views on the proposed action.

Extension of closing date

21. (1) The administrator may extend the closing date for comment specified in a notice published in terms of regulation 18.

(2) Any extension of a closing date of more than one month must be published by way of a notice as prescribed in regulations 18(1) and 19(1) and (2), and when appropriate, in regulation 18 (6).

Comments received after closing date

22. (1) The administrator –

- (a) may refuse to accept comments received after the closing date for comment; or
- (b) may, but is not obliged to, grant requests for condonation of late submission of comments.

(2) A request for condonation may be granted on good cause shown by the person who submitted the comments, provided that condonation would not –

- (a) lead to unnecessary delays; or
- (b) otherwise prejudice the public interest.

CHAPTER 3

NOTICE OF ADMINISTRATIVE ACTION AND RIGHTS

Notice of administrative action and rights

23. If an administrative action that has been taken, materially and adversely affects a person's rights, an administrator, when informing that person of the administrative action, must also inform that person of-

- (a) the right which that person has in terms of section 5 of the Act to request reasons for the action; and
- (b) any right of review or internal appeal, where applicable.

Notice of right to request reasons

24. A notice contemplated in regulation 23(1)(a) must also-

- (a) set out the formal requirements in respect of a request for reasons as set out in regulation 27(1) and (3); and
- (b) refer to assistance that will be given in terms of regulation 27(2).

Notice of review or internal appeal

25. A notice contemplated in regulation 23(1)(b), must also, where applicable -

- (a) stipulate the period, if any, in which the review or appeal proceedings must be instituted;
- (b) state the name and address of the person with whom proceedings for review or appeal must be instituted; and
- (c) set out any other formal requirements in respect of the proceedings for review or appeal.

CHAPTER 4 REQUESTS FOR REASONS

Application of this Chapter

26. This Chapter applies to administrative action which materially and adversely affects the rights of any person, and must be complied with if a request for reasons for administrative action is made in terms of section 5(1) of the Act.

Formal requirements

27. (1) A request in terms of section 5 of the Act for reasons for administrative action which materially and adversely affected a person's rights must be –

- (a) in writing;
- (b) addressed to the administrator concerned; and
- (c) sent to the administrator by post, fax or electronic mail or delivered to the administrator by hand.

(2) If an administrator receives an oral request for reasons from a person who cannot write or otherwise needs assistance, the administrator or a person designated by the administrator must give reasonable assistance to that person to submit such request in writing.

(3) A request for reasons contemplated in this Chapter must –

- (a) indicate –
 - (i) the administrative action which affected the rights of the person making the request; and
 - (ii) which rights of that person were materially and adversely affected by the administrative action; and
- (b) state –
 - (i) the full name and postal and, if available, electronic mail address of that person; and
 - (ii) any telephone and fax numbers where that person may be contacted.

Administrator's duties

28. (1) An administrator to whom a request for reasons is made must –

- (a) acknowledge receipt of the request; and
- (b) either –
 - (i) accede to the request and furnish the reasons in writing; or
 - (ii) decline the request.

(2) If an administrator declines a request for reasons in terms of section 5(4)(a) of the Act, the administrator must give reasons in writing to the person who made the request why the request was declined.

Short title and commencement

29. These regulations are called the Regulations on Fair Administrative Procedures, 2002, and shall come into operation on 31 July 2002.

ANNEXURE D

List of Administrative Justice Resources

- A. Internet
1. <http://www.aja.org.za>
Website maintained by the German Agency for Technical Co-operation (GTZ).
 2. <http://www.doj.gov.za>
Website of the Department of Justice and Constitutional Development.
- B. Handbooks
1. [AJA Benchbook](#)
Benchbook on PAJA by professors Iain Currie and Jonathan Klaaren.
 2. [Realising Administrative Justice](#)
Publication of a collection of papers on administrative justice edited by Prof Hugh Corder and Linda van der Vijver.
 3. [The New Constitutional and Administrative Law, Vol 2 Administrative Law](#)
Handbook on administrative law by Prof Cora Hoexter with Rosemary Lyster, edited by Prof Iain Currie.
 4. [Administrative Law and Justice in South Africa](#)
Handbook on administrative law by GE Devenish, K Govender and D Hulme.
 5. [The Right to Know – South Africa’s Promotion of Administrative Justice and Access to Information Acts](#)
Compilation of papers delivered at Conferences for Judicial Officers edited by Claudia Lange and Jakkie Wessels.
 6. [Administrative Law under the 1996 Constitution](#)
Handbook on administrative law by Yvonne Burns.
 7. [Judicial Review of Administrative Action](#)
Handbook on review of administrative action by Jacques de Ville.
- C. Guides
1. [Administrators’ Guide to PAJA](#)
Guide to PAJA compiled by Justice College in conjunction with the GTZ.

ANNEXURE E

DEPARTMENT OF SOCIAL SERVICE

Private Bag X071 PRETORIA 0001 - Tel (012) 774 8065 - Fax (012) 774 5567
Welfare Building - Cnr. Pretorius and Paul Kruger Streets - Pretoria

Ref: PP-23445/2003 (RS)
Enq: A Brooks
E-mail: brooks@socserve.gov.za
Tel: (012) 774-1709
Fax: (012) 774-5567
Date: 10 December 2001
CERTIFIED MAIL

Mrs Dube
PO Box 123
Diepkloof, 0123

Dear Ms Dube

RE: YOUR APPLICATION FOR AN OLD AGE PENSION DATED 20/09/2001

In a letter dated 20 September 2001 you applied for an old age pension.

Decision:

I regret to inform you that your application for an old age pension has not been approved.

Reasons:

We have rejected your application since it appears that your assets exceed an amount of R5.000.00. 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, I wrote to you to verify this information. In that letter I also pointed out that only citizens who hold assets of less than R5000.00 are entitled to an old age pension from the State. I asked you to inform me before 30 November 2001 whether you had indeed received the amount of R100 000.00 and bring to my attention any other factors you wished me to take into account. It is now 10 December 2001 and I have still not heard from you. 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. As a result, I must refuse to grant you an old age pension.

Amongst other conditions, regulation 13 of the Regulations made under the Social Assurances Act, 59 of 1992, says that your assets may not exceed an amount of R5000.00. Since your assets are around R100000.00, 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.

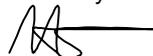
Advice regarding legal remedies:

If you believe my decision is wrong, you can appeal to our Board of Appeals to have it changed. You must make this appeal in writing within 30 days of receiving this letter and using the attached form. The appeal must be sent to the following address:

Old Age Pension Appeal Board
ATTENTION: Ms XS Khumalo
Private Bag X55
Johannesburg, 2000

If your appeal to the Board is unsuccessful you may in terms of section 6 of the Promotion of Administrative Justice Act, 2000, and within 180 days of the appeal decision, institute proceedings for the judicial review of the decision in a competent court or tribunal.

Sincerely



A Brooks
DIRECTOR GENERAL, DEPARTMENT OF SOCIAL SERVICE