

DRAFT CODE OF GOOD ADMINISTRATIVE CONDUCT

**Section 10 (1)(e) of the Promotion of Administrative Justice Act,
2000 (Act No 3 of 2000)**

NOTE :

- THIS DOCUMENT IS A DRAFT ONLY
- THE PURPOSE OF THIS DOCUMENT IS TO OBTAIN INPUT ON THE STRUCTURE AND CONTENT OF THE CODE OF GOOD ADMINISTRATIVE CONDUCT CONTEMPLATED IN SECTION 10(1)(e) OF THE ACT.

Please forward any comments or suggestions, before or on 18 February 2003, to:

E-mail : jeanvanrensborg@justice.gov.za

Fax : (012) 328 5567

For further information please call Mr Jean van Rensburg at :

Tel : (012) 315 1709 or 083 449 7237



CODE OF GOOD ADMINISTRATIVE CONDUCT

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PART 1 : GENERAL INFORMATION

1. INTRODUCTION

1.1 The Constitutional imperative and objects of the Act

South Africa is governed by the Constitution of the Republic of South Africa, Act 108 of 1996 (the Constitution). One of the most important things that the Constitution does is to make South Africa a “constitutional democracy”. This means that the Constitution is the highest law in the country. It contains the Bill of Rights and the rules how government has to function.

Section 33 of the Constitution provides that everyone has the right to administrative action that is lawful, reasonable and procedurally fair, and has the right to be given written reasons. Section 33(3) of the Constitution furthermore requires national legislation to be enacted to give effect to these rights.

The Promotion of Administrative Justice Act, 2000 (Act 3 of 2000)(hereinafter called "the Act") aims to give effect to the rights contemplated in section 33 of the Constitution and to comply with the requirement that national legislation be enacted to give effect to these rights. The Act sets out the minimum requirements that administrative actions have to comply with in order to be lawful, reasonable and fair, and provides for the furnishing of written reasons.

The Act -

- (a) sets out the rules and guidelines that administrators must follow when making decisions;
- (b) requires administrators to give reasons for their decisions;
- (c) requires administrators to inform people about their rights to review or appeal and to request reasons; and
- (d) gives members of the public the right to challenge the decisions of administrators in court.

The Act also strives to –

- (a) promote an efficient administration and good governance; and
- (b) 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.

1.2 Administrative law

Administrative law is the branch of the law dealing with the administration. It is made up of:

- (a) General Administrative law. This is the law that governs the administration in general, by setting out general rules and principles that all administrators must follow and remedies for people affected by administrative decisions where administrative powers have not been properly used or where requirements of the law have not been followed.
- (b) Particular administrative law. This is the body of law governing specific areas of the administration. For example, the law relating to refugees and immigration, vehicle licensing, state tendering procedures, land-use planning or civil aviation.

The Act as supplemented by the Regulations on Fair Administrative Procedures, 2002 (hereinafter called the Regulations) is part of general administrative law. It applies to and binds the entire administration – national, provincial and local. Because the rules in the Act are general, they do not give powers to administrators. Instead, the Act says how the powers given to administrators by other laws must be exercised.

Example :

Suppose officials of the Department of Home Affairs decide to increase the fee for people applying for a passport. This decision affects the public and can only be made if the law allows it. The law here is Section 4(e) of the Passports Act. This allows the Minister of Home Affairs to make regulations relating to the fees payable for a passport. Can the Minister delegate this power to someone else in the Department? Must a hearing be held before the decision is taken to increase the fees? Must reasons be given for the decision to increase the fees? The Passports Act itself does not answer these questions. Instead, one must turn to the ACT, which sets out generally how the powers given to administrators must be exercised.

1.3 Purpose, legal effect and principle of the Code

The purpose of this Code is to provide administrators with practical guidelines and information aimed at the promotion of an efficient administration and the achievements of the objects of the Act.

Departure from the guidelines provided in the Code does not make the administrative procedure concerned automatically unfair. A fair administrative procedure depends on the circumstances of each case.

The key principle in the Code is that administrators should respect and promote the right of individuals and the public to administrative action that is lawful, reasonable and fair.

2. STRUCTURE OF THE ACT AND REGULATIONS

2.1 Structure of the Act

DEFINITIONS

Section 1 contains a number of important definitions and amongst others sets out the meaning of "administrative action", "administrator" and "decision".

ADMINISTRATIVE ACTION AFFECTING INDIVIDUALS

Section 3 (Procedurally fair administrative action affecting any person) in conjunction with section 5 (Reasons for administrative action) are important since they set out the minimum requirements that all administrative actions which affect the rights of an individual must comply with in order to be lawful and fair.

ADMINISTRATIVE ACTION AFFECTING THE PUBLIC

Section 4 (Administrative action affecting public) in conjunction with section 5 (Reasons for administrative action) are important since they set out the minimum requirements that all administrative actions which affect the rights of the public must comply with in order to be lawful and fair.

EXEMPTIONS FROM AND VARIATIONS OF REQUIREMENTS

Section 2, however, allows the Minister of Justice to exempt an administrative action or a group or class of administrative actions from the application of any of the provisions of the above-mentioned sections 3, 4 and 5; or 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). Such an exemption or permission must be approved of by Parliament.

JUDICIAL REVIEW

Sections 6 to 9 contains provisions regarding judicial review of administrative action.

REGULATIONS

In terms of section 10 the Minister of Justice must make regulations regarding a number of matters and has discretion to make regulations with regard to other matters. Particular attention should be given to section 10(1)(a) which obliges the Minister to make regulations concerning 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.

2.2 Structure of the Regulations

PUBLIC INQUIRIES

Chapter 1 (regulations 2 – 15) sets out the procedure in respect of public inquiries contemplated in section 4(1)(a) of the Act.

NOTICE AND COMMENT PROCEDURE

Chapter 2 (regulations 16 – 21) sets out the procedure in respect of the notice and comment procedure contemplated in section 4(1)(b) of the Act.

NOTICE OF ADMINISTRATIVE ACTION AND RIGHTS

Chapter 3 (regulations 22 – 24) provides that the notice informing a person of the administrative decision must also inform that person of the right to request reasons, and any right to review or internal appeal. These provisions are applicable to all administrative actions.

REQUESTS FOR REASONS

Chapter 4 (regulations 25 – 27) sets out the procedure in respect of the furnishing of reasons and should be read in conjunction with section 5 of the Act.

PART 2 : APPLICATION OF THE ACT

3. THE DEFINITION OF AN “ADMINISTRATIVE ACTION”

3.1 What constitutes an “Administrative Action”

The first question to consider is, which actions of administrators are governed by the Act and which are not? The short answer is that the Act applies to actions that constitute administrative actions in terms of the definitions in section 1 of the Act of "*administrative action*" and "*decision*". But what does this mean? Section 1 of the Act gives a complicated definition of ‘administrative action’ and ‘decision’ that can be summarised as follows:

An administrative action is -

- (a) a decision
- (b) of an administrative nature
- (c) made in terms of an empowering provision
- (d) not specifically excluded by the ACT
- (e) made by an organ of state
- (f) that adversely affects rights and
- (g) has ‘direct external legal effect’.

Each of these “elements” are now discussed in detail:

a. “a decision”

In terms of the Act an administrative action is limited to:

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

In terms of the Act a decision can be a decision (or a failure to make a decision) relating to amongst others:

- (a) making, suspending, revoking (withdrawing) 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 (keeping), or refusing to deliver up, an article; or
- (g) doing or refusing to do any other act or thing of an administrative nature.

Failing to make a decision can have a major negative effect (it can “adversely affect”) someone’s rights. An example would be failing to make a decision when someone applies for a passport, since the Constitution gives every citizen the right to a passport. (See section 21 (4) of the Constitution).

b. “of an administrative nature”

Not every decision a member of the administration takes is “of an administrative nature”. Deciding what to have for lunch or what to do after work is obviously not. But decisions that administrators take as part of their job are of an administrative nature.

c. “made in terms of an empowering provision”

An empowering provision is usually a provision of a law that allows an administrator to make a decision.

Example:

The Minister of Home Affairs is allowed to increase passport application fees. The “empowering provision” that gives the Minister the power to make this decision is Section 4(e) of the Passports Act.

d. “not specifically excluded by the Act”

The Act excludes some of the actions of particular organs of state from the definition of administrative action – and these are therefore not governed by the Act. Most of these actions are governed directly by the Constitution and have their own specific rights, procedures and remedies.

Actions that are excluded are listed in section 1 of the Act and include:

- Policy decisions of the executive.
- The making of legislation by Parliament, a provincial legislature or a municipal council.
- The exercise of judicial functions by the officers of courts and some other bodies.
- Decisions under the Promotion of Access to Information Act, 2000 (Act 2 of 2000), to either allow or deny access to information.

e. “made by an organ of state”

“Organs of state” include departments at national, provincial or local government level. In terms of section 239 of the Constitution, organs of state also include “functionaries or institutions exercising a power or performing a function in terms of any legislation”.

Note:

Government departments, functionaries and institutions are all covered by the ACT. The ACT goes further though and covers decisions by private individuals and companies when they are “exercising public power”. An example would be when a government department out sources some of its work to a private company, such as when a municipality contracts with a company to supply water to the peoples’ homes. Importantly, when an organ of state out sources a public power to a private company, that organ of state must still ensure that the Act is complied with. Also included in this definition would be non-statutory bodies controlling national sports codes.

f. “that adversely affects rights”

To be an administrative action, the decision taken must adversely affect rights. What does this mean?

“Adversely” means that the decision must impose a burden or have a negative effect.

This includes decisions that:

- Require someone to do something, to tolerate something or not to do something;
- Limit or remove someone's rights; or
- Decide someone does not have a right to something. This is called an "adverse determination of a person's rights".

A beneficial decision (one in someone's favour or to someone's advantage) would therefore not be administrative action. However, it is important to take into account that a beneficial decision with regard to one person may often have an adverse effect on the rights of another person, and would therefore still qualify as an administrative action.

Example:

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

Quite often though, a decision to grant one person a benefit will have an adverse effect on someone else. For example, X and Y apply for the same licence and the administrator decides to give it to X.

Or, when permission is granted to construct a building, this could have an adverse effect on a neighbour whose view may be blocked by the new building.

There are two ways that a decision can affect a person's rights:

- The decision could deprive a person of their existing rights. For example, where an administrator decides to withdraw a license that a person already has; or
- It could affect a person's right by determining what those rights are. An example is where someone applies for a license and the administrator decides not to grant it. Here, the decision means the person will not get the rights that go along with the license.

The ACT uses the term in both of these senses. In other words, decisions that deprive someone of rights, and those that determine what that person's rights will be, are both "administrative action".

Example:

A person applies to the Department of Social Development for a welfare grant. If the grant is given, the person has a claim against the department for the payment of money and the department has a duty to pay the money. This is a right. If officials of the department turn down the application, an adverse determination of the applicant's rights has been made (i.e., it has been decided that the applicant has no right to claim the grant).

"Rights" are understood in law as when one person has a right to claim something against another person and that other person has a duty to do something. Rights can be the rights granted by the Bill of Rights in the Constitution, by contract or by legislation. Rights can even be created by a promise of an administrator.

g. has a "direct legal effect"

This phrase has three components – a decision must have a legal effect, the effect must be direct, and it must be external. This is another way of saying that to qualify as administrative action, decisions must have a real impact on a person's rights.

“Legal effect” means that a decision must be a legally binding determination of someone’s rights or obligations. In other words, a decision must establish what someone’s rights or obligations are, or must change or withdraw them.

“Direct effect” means that the decision must be a final one. If the making of a decision requires an administrator to take several steps or decisions, and only the last step effects a member of the public, then only the last step is said to have direct effect. In such a case, only the last step is an administrative action and can taken to court for judicial review.

“External effect” means that the decision has to affect someone who is not a part of the organ of state. This will be the case even where people within such an organ of state (such as public servants, students or prisoners) are concerned if they are affected in their individual rights - that is, not through measures that are part of the daily business of the organ of state.

Example :

The decision to suspend a public servant or to fail a learner in their matric exam affects these people in their individual rights. These decisions are therefore administrative actions.

But a supervisor’s instructions to a public servant to perform a specific task or a teacher’s decision to fail a learner in an ordinary school test are things that are part of the daily internal operations of the organ of state. These are therefore not administrative actions, because they do not affect the person’s rights.

3.2 Summary: “Administrative Action”

Summary :

- If an action did not involve a **decision**, it is not an administrative action;
- If a decision was taken, but it was not of an **administrative nature** or was not made in terms of an **empowering provision**, then it is not an administrative action;
- If the decision is one of the type **excluded by the ACT**, it is not an administrative action;
- If the decision is not taken by an **organ of state** it is (usually) not an administrative action;
- If the decision does not **adversely affect** someone’s **rights**, it is not an administrative action; and
- If the decision does not have a **direct external legal effect**, it is also not an administrative action.

Note:

It is important not to misunderstand the Act: The definition of administrative action given in the Act is quite narrow – so, if an action does not fit this definition, it could be argued that the Act does not have to be followed. However, this must not be used as a way of getting out of following fair and transparent procedures. To comply with the right to just administrative action in the Constitution, it may be necessary to follow the rules of the Act even in cases that do not fall under this definition. The narrow definition of administrative action in the Act has been used to provide a starting point for judicial review, without unnecessarily burdening the public administration.

3.3 Practical examples: “Administrative Action”

Practical Examples

1. 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 the ACT (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 their rights.**
 - f. The decision does **not** have a direct external legal effect – this is only something that is part of the daily business of the Department.

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

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

Points (a) to (d) 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.

Once again, the fact that the AJA 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 public tender. If the 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.

Practical Examples (continued)

3. The request for tenders to design and install the new system is published in the State Tender Bulletin. Is this an administrative action for the purposes of the Act?

The answer remains the same, because:

- The decision still does not adversely affect anyone's rights (by determining those rights or depriving a person of them); and
- The decision has no direct external legal effect - there is no finality and no effect on a person's rights.

Therefore, the decision is not an administrative action.

4. 10 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 administrative action under the ACT. However, the department must still follow the law regarding tenders.

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

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

However, in relation to the people or companies that were not successful, this is administrative action in terms of the ACT because: The decision to award the tender to tenderer 1 and not to them 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 cannot be separated, fair procedures have to be followed from the very beginning to comply with the ACT.

4. EXEMPTIONS FROM THE APPLICATION OF THE ACT

In terms of section 2 of the Act the Minister may, by notice in the Gazette if it is reasonable and justifiable in the circumstances, exempt administrative actions from the application of any of the provisions of section 3, 4 or 5 of the Act, or 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) of the Act.

Since any exemption or permission to vary any requirement will infringe on the Constitutional right to fair administrative procedures and the right to reasons for administrative action, exemptions and permissions to vary any requirement will only be granted in very exceptional cases. Any exemption or permission granted must also, before publication in the Gazette, be approved by Parliament.

PART 3 : LAWFUL ADMINISTRATIVE ACTION: AM I AUTHORISED BY LAW TO TAKE THE ACTION?

5. THE CONCEPT “LAWFUL”

“Lawful” means that administrators must obey the law and must be authorised by law for the decisions they make.

5.1 Obeying the law

An administrator must obey both general administrative law as well as the empowering provision granting the administrator the authority to take an administrative action. The administrator must comply with all steps or procedures prescribed in the empowering provision.

5.2 Authority to act

Before embarking on an administrative procedure an administrator should ensure that he or she has the necessary authorization to take the administrative action. Authority to take an administrative action will be contained in an empowering provision and the administrator must stay within the powers granted therein.

In terms of section 1 of the Act, “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.

Where an administrator is to act under a delegation of power, the administrator should ensure that the delegation of power is authorized by the empowering provision.

5.3 Practical example

Example :

In terms of section 49(2) of the Agricultural Credit Act, 1966, the Director-General may with the consent of the Minister of Agriculture delegate to any officer in the Department any power conferred to the Director-General in terms of the said Act. Section 1 of the Act provides that “Department” means the Department of Agriculture.

The delegation of power by the Director-General has three requirements:

- The Minister must consent to the delegation; and
- The officer to whom the power is delegated must be an officer of the Department of Agriculture; and
- The power delegated must be provided for and conferred upon the Director-General in the Act.

If these requirements are not met the delegation will be unlawful as well as any action taken by the officer concerned.

PART 4 : EFFECT OF THE ADMINISTRATIVE ACTION: DOES THE ACTION AFFECT INDIVIDUAL OR PUBLIC RIGHTS?

6. INDIVIDUAL AND PUBLIC RIGHTS

6.1 Ascertaining whether individual or public rights are affected

The Act determines different procedures depending on whether individual or public rights are affected.

The rights of an individual are affected where the action has a particular impact on the individual and is personal in nature. An action affects the public if it has a general impact on a right of the public as a whole or on sectors of the public and is impersonal in nature.

Where an administrative action affects the rights of any individual, one of the procedures provided for in section 3 of the Act have to be complied with. Typically the rights of an individual will be affected in administrative decisions pertaining to the granting of licenses and permits. A juristic person such as a company is also a "person" for the purposes of the Act.

An administrative action that affects any right of the public must comply with one of the procedures provided for in section 4 of the Act. In terms of section 1 of the Act, "public" includes any group or class of the public. Public rights will for instance be affected in decisions to declare roads as toll roads and the determination of toll fees.

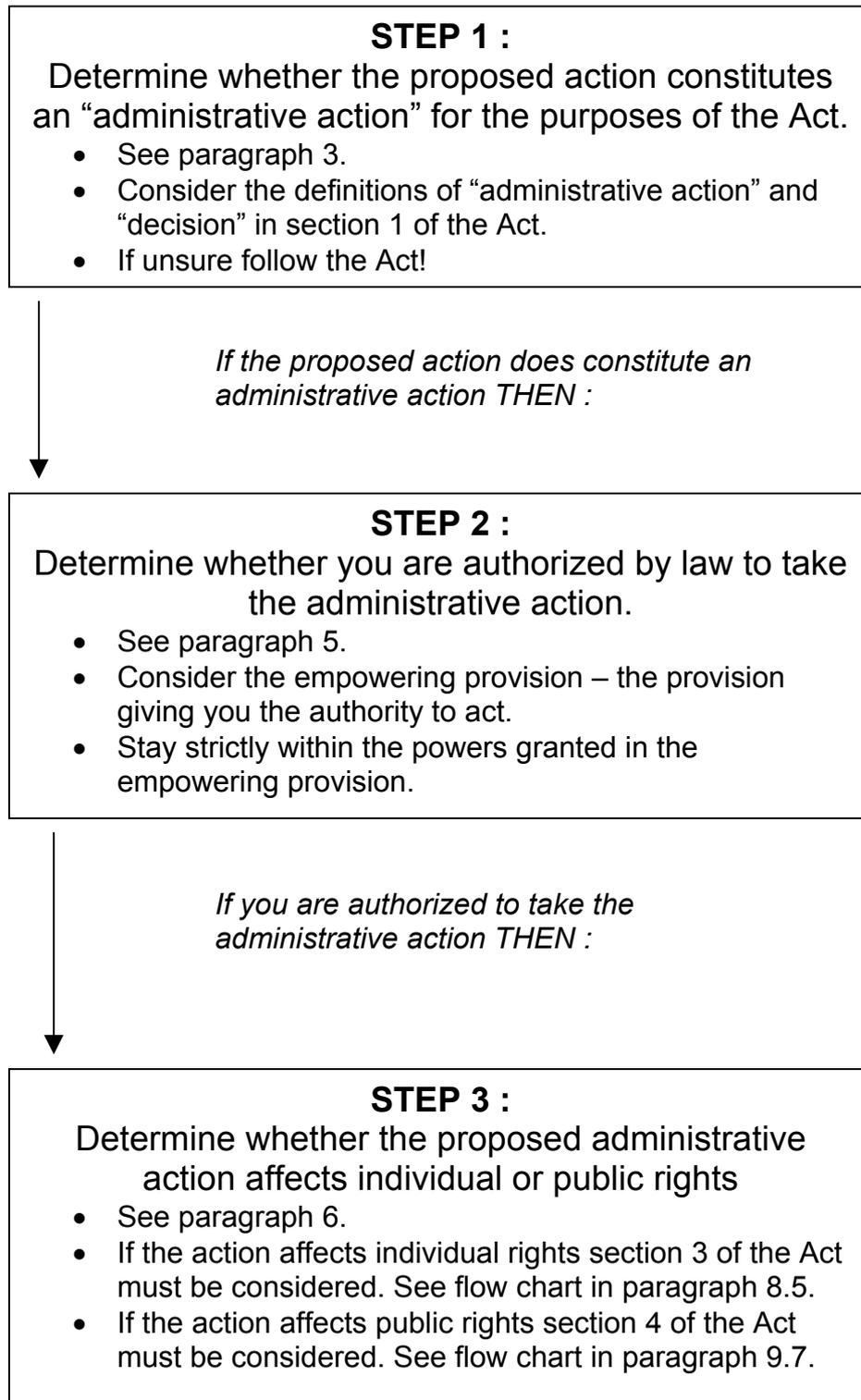
Determining whether individual or public rights are affected is the last of the initial questions an administrator must answer before the administrator embarks on an administrative procedure provided for in either section 3 or 4 of the Act. These initial steps or questions to be answered by an administrator are contained in the flow chart under paragraph 6.3.

6.2 Practical example

A decision not to award someone a social pension that they have applied for is a decision affecting a particular person. Here, the administrator taking such a decision must follow the procedures in section 3 of the ACT.

A decision to change the age at which people qualify for a social pension affects the public generally. The procedures set out in Section 4 of the ACT must therefore be followed before taking such a decision.

6.3 Flow chart for initial steps



PART 5 : PROCEDURALLY FAIR ADMINISTRATIVE ACTION: WHICH PROCEDURE SHOULD BE FOLLOWED?

7. THE CONCEPT “PROCEDURAL FAIRNESS”

An overriding requirement in respect of any administrative action is that it must be procedurally fair. The Constitution requires administrative action to be procedurally fair.

There are two parts to the idea of procedural fairness:

- The first part is that it is usually thought to be 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 affecting someone without first hearing what they have to say. The Latin phrase ‘audi alteram partem’, which means one should hear what the person who will be affected by the decision has to say before deciding, covers this idea.
- The second part is that the decision-making process must be free from any real or apparent partiality, bias or prejudice. When making a decision, administrators must be seen by everyone to be making the decision fairly and impartially and not because of their own private or personal interest in the matter. As is often said, “justice must both be done and must be seen to be done”.

8. FAIR PROCEDURES WHERE INDIVIDUAL RIGHTS AFFECTED

8.1 Choice of procedures

An administrator has a choice (see the guidelines in exercising this choice in paragraph 6.4, below) of two procedures in taking the administrative action :

- *Section 3(2)(b) - Procedure:* (Follow a procedure that complies with the requirements of section 3(2)(b) of the Act); or
- *Existing Fair but Different - procedure* (section 3(5)): (Follow an existing procedure which is fair but different from the section 3(2)(b) - procedure.

**A flow chart in respect of these two procedures is contained in paragraph 8.5.*

8.2 The section 3(2)(b)-procedure

There are five mandatory procedures that must be followed when performing an administrative action that has a particular impact on a person or persons. These are that the affected person must be given:

(a) Before the decision is taken:

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

(b) After the decision is taken:

- 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 the ACT.

These steps will now be considered in more detail:

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

“Adequate notice” means more than just informing a person that an administrative action is being proposed. The person must be given enough time to respond to the planned administrative action. The person also needs to know enough information about the proposed administrative action to be able to work out how to respond to the proposed action. They need to know the nature of the action (what is being proposed) and the purpose (why is the action being proposed).

8.2.2 A reasonable opportunity to make representations

The length of time a person should be given to make representations will be different in different circumstances. This should include an opportunity to raise objections, provide new information, or answer charges.

A “reasonable opportunity to make representations” can sometimes mean that a person affected by administrative action must be given a hearing where that person can make a verbal input. At other times, it may only mean that a person should be allowed to submit written representations to an administrator who must read and think about them.

8.2.3 A clear statement of the administrative action

An administrator must clearly inform the affected individual or individuals of the decision that has been made. A person affected by the administrative action must

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 Part 7 of this Code.

8.2.4 Adequate notice of any right to appeal or review

People affected by an administrative action can challenge that action if they think the action was wrong. This could, if the law provides for it, be by going to a higher level within the government, like a supervisor or an appeal board. They can also take the matter to court for judicial review.

An administrator must tell the person that they have these rights. The administrator must also inform the person about the details and procedures for exercising this right in advance - that is, without waiting for the person to ask. Information should be provided on at least the following:

- Where the appeal can be made;
- When it must be made; and
- How to make the appeal.

At the time when the administrator informs a person of the decision the administrator should also notify the person of any right to appeal or review. This requirement is discussed in Part 7 of this Code.

8.2.5 Adequate notice of a person's right to request reasons

People affected by the administrative action must be told that they have the right to request reasons for that action. The administrator must also pro-actively inform the person about the details and procedures to exercise this right – that is, without waiting for them to ask.

- Where the request can be made;
- When it must be made;
- How to request reasons; and
- Where to get assistance

At the time when the administrator informs a person of the decision the administrator should also notify the person of the right to request reasons. This requirement is discussed in Part 7 of this Code.

8.3 Existing Fair but Different - procedure

Section 3(5) of the Act allows an administrator to follow an existing administrative procedure, provided that :

- The administrator is empowered by an empowering provision to follow the procedure; and
- The procedure is fair.

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 the Act will be indicative of the fairness of any existing procedure. Administrators should therefore evaluate existing procedures with those specifically prescribed in the Act.

“Empowering provision” is defined in section 1 of the Act as 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.

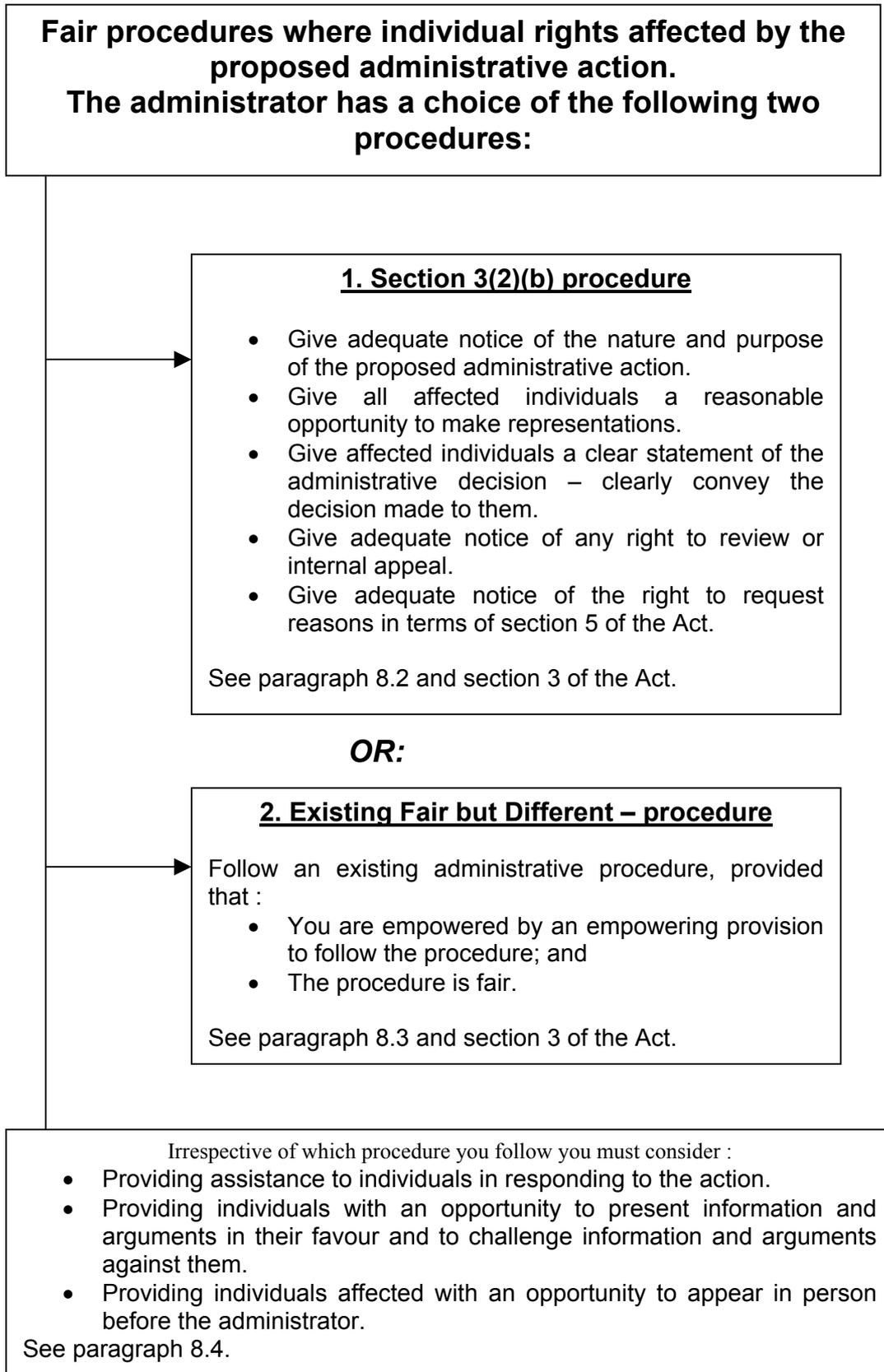
Whether the procedure is fair will depend on the specific circumstances of each case.

8.4 Additional discretionary measures

In addition to the mandatory procedures outlined above, to ensure fairness, every administrator must consider the following three additional measures:

- Providing assistance in responding to the action. Assistance may entail additional measures to ensure that a person who cannot read are informed of the intended administrative action. It may also entail special measures such as a secretarial facility to obtain 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.
- A person should be given an 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 thereto.
- A person affected may need to be given the opportunity to appear in person before the administrator.

8.5 Flow chart for procedures where individual rights affected



9 FAIR PROCEDURES WHERE PUBLIC RIGHTS ARE AFFECTED

9.1 Choice of procedures

Section 4 of the Act says that the administrator must decide which public procedure should be followed when administrative action affects the rights of the public. These public 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.

In terms of section 4 of the Act an administrator has five choices of procedure in taking the administrative action:

- *Public Inquiry - procedure* (sections 4(1)(a) and 4(2)): The content of this procedure is prescribed in Chapter 1 of the Regulations; or
- *Notice and Comment - procedure* (sections 4(1)(b) and 4(3)): The content of this procedure is prescribed 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. The content of this procedure is prescribed in Chapter 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 sections 4(1)(a) - (c) procedures;
- *Section 3(2) - Procedure* (section 4(1)(e): (Follow a procedure that complies with the requirements of section 3(2)(b) of the Act).

**A flow chart in respect of these procedures is contained in paragraph 9.7.*

9.2 The Public Inquiry Procedure

There are four basic steps to a public inquiry procedure.

1. Before the inquiry, you must decide whether to conduct the inquiry yourself or to appoint another person or a panel of people to conduct it.
2. You must give notice of the inquiry. This must include details and information about the matter and issues being investigated in the public inquiry.
3. A public hearing must be held as part of the public inquiry.

4. After the inquiry, you must compile a written report and publish a summary of the report.

The public inquiry procedure will now be considered in more detail:

9.2.1 Conducting the inquiry self or appointing another person or panel

An administrator should first decide whether he or she will be conducting the inquiry or whether another person or panel of persons should be appointed to conduct the inquiry. The nature and complexity of the inquiry should lead the administrator in this regard. An administrator remains responsible to ensure that the Act is complied with where a person or panel has been appointed.

The appointment of a person or panel must be in writing and fully set out the terms of reference of that person or panel. An administrator must also in writing-

- allocate the necessary resources provided to the person or panel;
- determine and indicate the time and financial framework within which the inquiry has to be completed;
- indicate when the person or panel must report on progress made with the completion of the inquiry; and
- indicate that the person or panel must immediately report any administrative or other obstacles impeding progress with the inquiry.

Similarly a person or panel of persons appointed must-

- 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;
- regularly or on request by the administrator, report to the administrator on progress with the completion of the inquiry; and
- immediately report to the administrator any administrative or other obstacles impeding progress with the inquiry.

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

9.2.2 Giving notice of the public inquiry

(a) *The manner in which notice must be given.*

Information concerning the proposed administrative action must be published by way of notice-

- 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
- 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

- 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.

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.

(b) *The content of the notice of a public inquiry.*

The notice must contain-

- a statement on whether the administrator will conduct the inquiry or whether a person or panel of persons has been appointed to conduct the inquiry; and
- if a person or panel has been appointed, 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 convener of that panel as well as the period within which the inquiry should be completed; and
- 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; and
- an invitation to members of the public who have information on the matter to be investigated, to submit written representations or request permission to testify or make oral representations; and
- the closing date, which may not be earlier than 30 days from the date of publication of the notice, for persons to submit written representations or request permission to testify or make oral representations; and
- 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; and
- the name and official title of the person to whom any written representations or requests for permission must be sent or delivered, as well as the full contact details of this person; and
- sufficient information about the matter to be investigated to enable the public to submit meaningful representations; and
- 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.

(c) *Special provisions to reduce the costs of notice of a public inquiry.*

In order to reduce the cost of notices, the Regulations provide that a notice published in a newspaper may 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.

Note:

The notice of a public inquiry not only informs the public of a proposed administrative action but is also an important tool for the 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 therefore.

(d) Additional required measures to publicize the proposed administrative action

In order 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-

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

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, to comply with regulation 3(7).

(e) Additional discretionary measures to publicize the proposed administrative action

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 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.

(f) Access to information

If a notice 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.

(g) Closing dates and comments

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

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.

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 intended administrative action.

9.2.3 Giving notice of the public hearing

(a) *The manner in which notice of a public hearing must be given.*

Notice of the hearing must be published in-

- 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;
- 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
- a newspaper which is distributed in a specific area, if the administrative action affects the rights of the public in that specific area only.

(b) *The content of the notice of a public hearing*

A notice of a public hearing must-

- state particulars of the matter that is being investigated;
- state the venue of the hearing and the time and date on which the hearing will commence; and
- invite members of the public to attend the hearing.

9.2.4 Procedural aspects of a public hearing

(a) *Duration of a public hearing*

There are no specific time periods prescribed except that a public hearing must be started and completed without unreasonable delay.

(b) *Procedure at a public hearing*

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.

The person presiding may –

- allow a person present at the proceedings and whose request for permission has been granted, to give evidence, to make oral representations or to produce a document;

- 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;
- administer an oath or solemn affirmation to that person;
- question that person, or have that person questioned by a person designated by the person presiding; and
- retain for a reasonable period any document produced at the hearing.

The administrator, or the person or panel conducting a public inquiry, may –

- adjourn a public hearing and set a time and date for its resumption; or
- at any time after the adjournment, change the time or date for the resumption of that hearing.

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).

(c) Persons appearing at a public hearing

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.

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.

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.

(d) Access to a public hearing

As a general rule public hearings are open to the public, including the media. Exceptions to the rule are when –

- legislation applicable to the hearing provides for the hearing to take place in closed session; or
- 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.

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

- to regulate public access, including access of the media, to the place where the hearing is held;
- to prevent and control misconduct by members of the public attending the hearing; and
- 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.

The person presiding at a public hearing may –

- 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; or
 - (ii) whenever this is necessary to give effect to the measures with regard to access, order and safety; or
- order a person 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.

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

- who disrupts the proceedings or causes a nuisance; or
- does not leave when ordered to leave.

9.2.5 Concluding the public inquiry

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 taken or recommended without unreasonable delay.

As soon as possible after compiling the report-

- 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 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 information referred to in item (a) to the public concerned.

When a panel reports on a public inquiry it must also report any minority view.

9.3 The Notice and Comment Procedure

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

1. The public must be given enough information about the proposed administrative action to allow them to make meaningful representations. That is, a **notice** must be given, which sets out enough information on the proposed action.
2. You must **call for comments** on the proposed administrative action, and you must allow enough time for those comments to be made.

Thereafter:

3. You must **consider** the comments that you receive.
4. You must **decide** whether or not to take the proposed administrative action, with or without changes.

9.3.1 Giving notice of the intended administrative action

(a) *The manner in which notice must be given*

Information concerning the proposed administrative action must be published by way of notice, –

- 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
- 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
- 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.

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.

(b) *The content of the notice.*

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, which date may not be earlier than 30 days from the date of publication of the notice;
- a caution that comments received after the closing date may be disregarded;
- the name and official title of the person to whom any comments must be sent or delivered; and
- the name and official title of the person to whom any written representations or requests for permission must be sent or delivered, as well as the full contact details of this person; and
- sufficient information about the proposed administrative action to enable members of the public to submit meaningful comments; and
- 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.

(c) *Special provisions to reduce the costs of notice*

In order to reduce the cost of notices, the Regulations provide that a notice published in a newspaper may only contain-

- (d) a concise statement of the matter to be investigated;
- (e) 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
- (f) 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.

(d) Additional required measures to publicize the proposed administrative action

In order 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-

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

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, to comply with regulation 3(7).

(e) Additional discretionary measures to publicize the proposed administrative action

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 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.

(f) Access to information

If a notice 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.

(g) Closing dates and comments

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

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.

A closing date for comment specified in a notice may be extended by the administrator. 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 intended administrative action.

9.4 Public Inquiry and Notice and Comment Procedure

An administrator may in particular circumstances decide to follow the notice and comment as well as the public inquiry procedure. For example, you may have a notice and comment procedure and then, based on the comments, 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. The public inquiry procedure for the public in general and the notice and comment procedure in respect of the specific individuals affected.

9.5 Existing Fair but Different Procedure

Where public rights are affected the Act also allows an administrator to follow an existing administrative procedure, provided that :

- The administrator is empowered by an empowering provision to follow the procedure; and
- The procedure is fair.

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 the Act will be indicative of the fairness of any existing procedure. Administrators should therefore evaluate existing procedures with those specifically prescribed in the Act and regulations.

9.6 The Section 3(2)(b) Procedure

Where public rights are affected the Act also allows an administrator to follow the procedure prescribed in respect of individual rights in section 3(2)(b), which is discussed in paragraph 8.2 of this Code.

9.7 Flow chart for procedures where public rights 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 procedure.
- Compile a written report and publish a summary of the report.

See paragraph 9.2, section 4 of the Act 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 paragraph 9.3, section 4 of the Act 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 9.4, section 4 and Chapters 1 and 2 of the Regulations.

OR

4. Section 3(2)(b) procedure

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

See paragraphs 9.5 and 8.2, and section 3 of the Act.

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 9.6 and 8.3, and section 3 of the Act.

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

See paragraphs 9.2.2(d) and (e), 9.3.1(d) and (e), and 8.4.

10. EXERCISING THE DISCRETION WITH REGARD TO PROCEDURES

The discretion in choosing a procedure should be exercised taking all circumstances into account. The objects of the Act are important considerations and administrators should strive to promote fair administrative justice within their allocated resources.

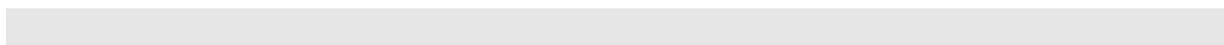
Existing administrative procedures should be evaluated to ensure that they are fair in the circumstances they are conducted. If an existing administrative procedure is not fair the administrator should either follow another procedure provided for in the Act or supplement the existing procedure to make it fair. To provide continuity and consistency existing established procedures that are fair should be followed. Existing fair procedures shall not be discarded for a less onerous procedure prescribed in the Act.

11. URGENT ADMINISTRATIVE DECISIONS

Both with regard to individual rights and public rights sections 3(4) and 4(4) of the Act allow an administrator to depart from any or all of the procedural requirements if it is reasonable and justifiable in the circumstances.

These sections are there to cover exceptional cases where an overriding public interest demands that the administrator act quickly without complying with one or more of the requirements of a particular prescribed procedure or without following a fair procedure, for example, where it is necessary to close a public road because of the eminent danger it holds for the lives of road users.

These savings clauses are not intended to be used as further procedures that the administrator may follow.



PART 6 : FAIR DECISION MAKING: HOW SHOULD AN ADMINISTRATIVE DECISION BE MADE?

12 TAKING A FAIR DECISION

A fair decision means that the administrator applied his mind to the matter, was not biased, did not make an error in law and was rational and reasonable.

Note:

The grounds for judicial review set out in Part 9 of this Code also gives guidance to an administrator with regard to both procedural fairness and the taking of a fair decision.

12.1 Applying your mind to the matter, rationality and reasonableness

This means that an administrator must take all relevant factors, comments, inputs, representations, information and evidence into account before coming to a decision.

The administrator must also, after consideration of the comments, decide whether or not to change the initial proposed administrative action. In other words an administrative action with or without changes must be decided on in light of the comments received.

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 makes the decision to take the action.

12.2 Bias

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 means too that the person making the decision is not independent and impartial. Bias is further discussed in paragraph 15.4.2 of this Code.

Where it could appear that a particular administrator might be biased, it is best to get some other administrator to make the decision.

12.3 Error in law

Where administrative action is based on a mistake about what the law requires, a court may set the action aside.

12.4 Failure To Take A Decision

For the purposes of the Act 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 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.

PART 7 : CONVEYING THE DECISION: HOW SHOULD THE ADMINISTRATOR INFORM INDIVIDUALS OR THE PUBLIC OF THE DECISION?

13. CONVEYING THE DECISION TAKEN

After a decision has been taken the administrator must convey the decision to the public or individuals affected thereby.

13.1 Conveying the decision

The Act together with Chapter 3 of the Regulations require that an administrator must inform a person or people affected by an administrative action of the decision taken. This notice must be a clear and understandable statement of the decision. Together with the decision it is also advisable to give reasons for the decision at this stage.

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.

Finally the notice must also inform the person or public of the right to request reasons for the action including;

- ☞ the formal requirements in respect of a request for reasons;
- ☞ assistance that will be given in requesting reasons.

If your administration uses template forms for review or appeal proceedings or for requests for reasons, these forms should be attached to the notice.

Note;

If the administrative action affects public rights but also in particular the rights of some individuals, those individuals should specifically be informed of the decision as set out above.

13.2 Conveying the decision after a public inquiry

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 taken or recommended without unreasonable delay. When a panel reports on a public inquiry it must also report any minority view.

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 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 information referred to in item (a) to the public concerned.

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.

If only a recommendation is made the administrator must convey the eventual decision made in accordance with the guidelines in paragraph 13.1.

PART 8: GUIDELINES FOR GIVING REASONS FOR ADMINISTRATIVE ACTION

14 THE RIGHT TO WRITTEN REASONS FOR ADMINISTRATIVE ACTION

14.1 When should I give reasons for my decisions?

It is generally good administrative practice to give reasons for **all** decisions when you inform people of the decision. The Constitution says 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.

According to the ACT, the request for reasons must be made within 90 days of the date on which the person became aware (or should have become aware) of the administrative action. You must then give adequate reasons, **in writing**, within 90 days.

Note:

According to the ACT, administrators must give reasons for their administrative action to a person who **requests** them. Of course, an administrator can give reasons immediately with the decision. Sometimes this can help settle potential disputes already at the very beginning.

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.

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 reason within 90 days, the administrator may follow that different procedure.

14.2 Who can request reasons?

Anyone whose rights have been adversely affected by administrative action can request written reasons. This includes someone whose rights have been specifically affected.

14.3 Administrator's duties

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.

An administrator to whom a request for reasons is made must first of all acknowledge receipt of the request.

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 was declined.

14.4 What are adequate written reasons?

You must provide a **satisfactory explanation** of why a decision was taken. This does not mean that the reasons have to convince the person that the decision was correct. Instead, your reasons must have enough detail to explain why the administrative action was taken. It is not enough to just repeat the relevant sections of the empowering provisions in your reply.

If the person requesting reasons has raised specific questions, these should be answered as far as possible.

The reasons should be written in a language that the requester will understand. For example, do not use technical terms unless you know the person will understand these.

Generally, the length of your statement will depend on the complexity, nature and importance of the decision that it explains. The more complex or serious, the better motivated your statement should be.

14.5 Automatic furnishing of reasons

Section 6(5)(a) of the Act provides that 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.

14.6 Grounds for refusing to give reasons

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.

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.

14.7 Consequences of failing to give adequate reasons

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.

This means that where an administrator failed to give any reasons or gave inadequate reasons, that administrator will carry the burden to prove that the administrative action concerned was taken with good reason.

PART 9: JUDICIAL REVIEW OF ADMINISTRATIVE ACTION

15 JUDICIAL REVIEW

15.1 Introduction

For the rights to just administrative action to be more than just rights on paper, there must be a way to enforce them. The most important way in which these rights can be enforced is by **judicial review**. This means that any person who is unhappy with an administrative decision can challenge the decision in court. There, they can argue that the decision is a violation of the rights 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.

15.2 Exhaustion of internal remedies

Before someone can ask a court to review an administrative action, there is an important rule in the ACT 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 the ACT.

Internal remedies are ways of correcting, reviewing or appealing administrative decisions using the administration itself. The difference between internal remedies and the remedy of judicial review is that the judicial review is review by a court, which is **independent** from the administration.

Example:

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 that 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.

This law does allow this procedure to be left out in 'exceptional circumstances' and if it is 'in the interest of justice'. If she wants to leave out this internal remedy, Agnes will have to show the court why her circumstances are exceptional and why it is in the interests of justice to do so.

15.3 What is the time limit for judicial review?

One of the most important rules in the ACT is that an application for judicial review must be made **within 180 days** of the date on which all internal remedies were exhausted.

Where there are no internal remedies available, the application must be made **within 180 days** of the date on which the applicant became aware of the decision (or could reasonably be expected to have become aware of the decision).

A person who asks for judicial review after this period will not be successful, unless they can convince the court to that it is “in the interests of justice” to allow it.

15.4 The grounds on which administrative action can be reviewed

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

We will now look at some of these grounds in more detail:

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

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 have acted “unlawfully” and their decisions will be invalid. In most cases, administrators need to be able to show a specific law that gives them the authority to perform an administrative action. In general, without legislative authority, administrators are not authorised to make decisions and take administrative action.

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 such a decision is made by someone without these qualifications, 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 will not be authorised.

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

Example:

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.

15.4.2 Bias - Section 6 (2)(a)(iii)

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 means too that the person making the decision is not independent and impartial.

There are two types of bias: **actual** bias and **apparent** bias. Both types make an administrative decision invalid. This is explained by the saying that “justice must not only be done but must also be seen to be done”. Even if you are not actually biased against a particular person or decision, you will act without authority if it **reasonably appears** that you are biased. That is, if a reasonable member of the community **could think** that you are biased, this will be apparent bias and procedural fairness will not have been complied with.

The circumstances that usually create such an impression are where there is a **conflict of interest**. This could be a monetary interest, a personal interest or a prejudice.

Note: Monetary interest, personal interest and 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 they will be biased.

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

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

Where it could appear that a particular administrator might be biased, it is best to get some other administrator to make the decision.

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

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.

15.4.4 Procedural fairness – Section 6 (2)(c)

We have already looked at procedural fairness in detail when we looked at the requirements of Sections 3 and 4 of the ACT. Failure to follow fair procedures before taking a decision will allow people affected by it to ask a court to declare the decision invalid.

Where the procedure followed was not fair the fact that the eventual decision was fair will not matter or rescue the administrative action.

15.4.5 Error of law – Section 6 (2)(d)

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.

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

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:

Mr Ndlovu is suing the local council for damaging his property. 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 refuse to give him the planning permission unless he withdraws his case against them. 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.

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.

Discretionary powers must be used by the person given these powers and not by others.

Example:

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 they tell the Refugee Status Determination Officer to make that decision in a particular way.

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

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 makes the decision to take the action.

There must be a rational connection between the information available to the administrator and the decision reached.

PART 10 : COMPLETE PRACTICAL EXAMPLE

16. PRACTICAL EXAMPLE

In a practical case which so far has been described in more general terms. It outlines the whole structure of a decision-making process from the application to the final decision. It concludes with a kind of template for decisions.

It shows:

- The ACT complements the provisions of particular administrative law as far as fair procedure is concerned;
- It gives helpful guidance for structuring efficient and lawful decision-making processes;
- It can be changed to fit other areas of particular administrative law so that organs of State can customize it to their particular needs.

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 the ACT on the decision-making process, which is:

- 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;
- Giving reasons or informing the person of the right to reasons, and of any legal remedies, when the decision is negative or qualified.

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.

16.1 Step 1: The Application

Ms Dube applies for an old age pension. She provides 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.

16.2 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 relevant information. Ms Dube expects you to come up with a decision.

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

16.3 Step 3: Identification of relevant legal provisions and helpful material

You will need to know the relevant law and any internal policies (including whether any powers have been delegated). 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** to this Act 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 and so on.

As mentioned, there is also a **manual** that gives additional guidance to administrators (see above).

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 a 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 will need, the next step when applying the law is to get an understanding of 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.

16.4 Step 4: Applying the law to the case or facts

You now need to apply the law to the facts.

a. The Law

- **Competency and delegation.** The SAA and other documents (regulations, delegations and so on) will say whether you are competent to make the decision. (The ACT itself does not deal with competency and similar issues in each case because the ACT 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 Act, in the regulations and in 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 a grant can earn or hold as assets. This calculation is rather complicated and changes from time to time. Let's presume for our case that the limit for assets is R5 000.00.

Note;

The ACT focuses on fair procedures. Although decisions can be reviewed in terms of s 6 (2) of the ACT also because of the reasons 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 (here 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 are Ms Dube's neighbour 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's presume that they are all complied with.
- **Substantive requirements in the SAA** and the respective regulations. Mr Dube is:
 - Within the age limit as she is 70 years old;
 - A South African citizen;
 - Has residence (lives) in South Africa; and
 - She says that she does not have any assets. However, you are not sure whether this statement is correct. As described above you live in Ms Dube's neighbourhood and you were told that she was recently 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 a state pension, not even a reduced one. In this case you would have to decline the application.

Now we can see the particular relevance of the ACT, 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 the ACT apply.

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

Note;

a. Positive decisions

At first sight, the ACT appears only to apply 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 this decision. Your letter must say that you have granted the pension and how much money she will receive. Otherwise, Ms Dube could sue you for failure to take a (clear) decision.

b. Temporary awards

In case of temporary awards (such as giving someone a disability grant for a fixed period), the ACT applies as well because this decision will affect the person's rights if they had applied for a permanent grant.

c. Acting out of your own authority

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 had a pension and you found out she had received a huge out-of-court settlement, you have to withdraw her old age pension. In such a case, you need to give Ms Dube a chance to make representations.

16.5 Step 5: Communicating with the applicant – the Audi alteram partem rule

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. An example of a letter in this regard is set out in Annexure A to this Part of the Code.

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

You have waited until 30 November 2001 without having receiving a response.

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 come up with the final decision.

However, in our example your information is based on hearsay – that is, you have heard that Ms Dube has this money but you do not know this for sure yourself. News 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, even though you visited her house, she was not there. While talking to one of her neighbours, she tells you as well 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.

It 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:

- A clear decision must be set out, which also includes your particulars;
- Adequate reasons must be given (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:

i. Address block

Make sure to include:

- Your address (which will usually be on the letterhead you use);
- The date of the letter;
- Your file reference number;
- Any special mailing instruction, if necessary (such as “By Registered Mail”; or “By Fax”);
- The name of the person to whom you are writing;
- Their address;
- The name of the particular person you want to see the letter if you are writing to a department or business (for example, “Attention: Ms P Ndlovu”);
- Your salutation (such as “Dear Ms Mkhize” or “Dear Sir”); and
- The subject of the letter (such as “RE: Your application for a liquor licence).

ii. The problem

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

iii. The decision

This is where you state exactly what decision has been taken without yet giving reasons for the decision:

1. State the main decision in one sentence only, but do not give any reasons for the decision here. The purpose of this sentence is for the recipient to get a clear and simple answer to the question: “Did I succeed in my application?” or “What does the Department want from me?”

Where you are acting on your own authority (and where you can't refer to an application), you can test whether your decision is clear and complete by checking to see that it answers the question: Who has to do what, when and where?

2. State all the subordinate decisions. Every subordinate decision must be stated in one sentence only, without giving any reasons for it. Remember that you are only allowed to make subordinate decisions if the empowering provision allows it. Subordinate decisions include:
 - a. Conditions attached to the main decision.

- b. Time limits attached to the main decision.
 - c. Exceptions attached to the main decision.
 - d. Exemptions to the main decision.
3. Make a cost order, if the empowering provision allows or requires it. State the amount that must be paid, who must pay it, and by what date the amount should be paid. If you have to issue an assessment before the amount can be paid, attach the assessment as an enclosure.

iv. Reasons for the decision (and any subordinate decisions)

1. For the main decision:

- a. 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).

- b. State the facts of the matter. Two sets of facts are important:

- i. The **history** of the matter.

- 1. If the matter arose from an application by someone, say who applied for what and when.

In some cases, you may have given other people a chance to comment or make representations before taking your decision. If this is the case, you must say who you informed and what their responses were.

If you have already sent these responses to the original applicant and they have replied to them, you must also mention this.

- 2. If 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.

- ii. List all the **facts on which the decision is based**.

- c. Give the reference of the empowering provision – that is, say what provision covers decisions on these types of facts.
- d. State the purpose of the empowering provision. List the conditions that must be met before an administrator may exercise the powers in the empowering provision. If you rely on a Court's interpretation of the section, give the reference of the case and explain what impact this decision has had on the section.
- e. Apply the law to the facts listed.

2. Repeat the process for each of the subordinate decisions **and** any cost order.

Note:

This structure sets out all the elements of a sound motivation for a decision. Of course, you can keep it short in 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

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, the ACT requires you to inform the person of the right to request reasons afterwards. The draft 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.'

v. Advice on legal remedies

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

vi. Ending off

- Write a complimentary closing (such as “Yours sincerely”);
- Sign the letter;
- Write your name and job title **clearly** underneath your signature;
- Say what department you are from;
- If you will be sending enclosures, say how many there are (for example, “Encl. (3)”);
- Include the writer’s initials (if the letter is typed on your behalf); and
- Indicate who complimentary copies will be sent to (for example, “CC: Dr P D Smith”)

Remember to include:

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

An example of a letter is attached as Annexure B to this Part of the Code.

Part 10: Annexure A**Department of Social Development**

Private Bag X 61
Johannesburg
0001
Tel.: 011/3227558

10 October 2001

Reference: 12345/01

By Registered Mail

Mrs A Dube
PO Box 123
Diepkloof, 0123

Dear Mrs Dube,

RE: Your application for a pension grant dated 20/09/2001

I refer to your application for an old age pension. Regulation 13 of the regulations to the Social Assistance Act 66 of 1992 says that a pension can only be given to a person who (amongst other things) does not have savings exceeding R5,000.00.

It has come to our knowledge that you have recently received an amount of R100,000.00 Rand as an out-of-court settlement relating to the death of your late husband 10 years ago. If this is so, you will not qualify for an old age pension.

Please let us know whether this in fact the case and, if it is, how much money you actually received. Please let us have your reply by 15 November 2001 or I will have to reject your application.

Sincerely



A Brooks
Deputy Director: Social Grants
dm

Part 10: Annexure B

Department of Social Development

Private Bag X 61
Johannesburg
0001
Tel.: 011/3227558

1 December 2001
Reference: 12345/01

CERTIFIED MAIL

Mrs Dube
PO Box 123
Diepkloof, 0123
ID. Number:

Dear Mrs Dube,

RE: Your application dated 20/09/2001

You have applied for an old age pension.

Decision:

Your application for an old age pension dated 20/09/01 has been rejected.

Reasons:

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

Our decision is based on the following facts and legal opinion:

It has come to our knowledge that you have recently received R100 000.00 in an out-of-court settlement relating to the death of your late husband 10 years ago. On 10 October 2001, we wrote to you asking whether or not this was true and, if so, how much money you received. You have not responded to this letter. One of our officers tried in vain to contact you at your house on 25 and 30 November to discuss the matter with you. On one of these occasions, one of your neighbours confirmed our information with regard to the above stated out-of-court settlement.

Amongst other conditions, regulation 13 of the regulations to the Social Assistance Act 66 of 1992 says that your assets may not exceed an amount of R5 000.00. Since your assets are around R100 000.00, you do not qualify for a pension grant or for a reduced grant.

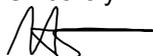
Based on these facts and the relevant legal provisions your application had to be rejected.

Advice regarding legal remedies:

Under section 10 of the Social Assistance Act, you have the right to appeal against this decision. It must be done in writing within ninety (90) days of receiving this letter. The appeal may be lodged at your nearest District/Service Office.

If you do lodge an appeal under section 10 and the appeal 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
dm

PART 11 : GUIDELINES FOR GOOD ADMINISTRATION

17. GOOD ADMINISTRATION

17.1 Dealing with the public

17.1.1 In their dealing with the public, public servants shall respect the principles laid down in this Code and the Batho Pele principles.

17.1.2 Officials must ensure that the public can contact them personally, by telephone, via mail, per fax or per e-mail.

17.2 Courtesy.

17.2.1 The official shall be service minded, courteous and accessible in relations with the public.

17.2.2 Members of the public must be treated friendly and with an understanding of and sympathy for their needs.

17.2.3 Waiting times for members of the public should be minimised as far as possible.

17.2.4 Pregnant women, members of the public accompanied by small children or the infirm, severely handicapped persons and members of the public with obvious health problems should receive preferential treatment, and should not be exposed to long waiting times. Every waiting area should contain a clearly visible notice to this effect.

17.2.5 If the official is not responsible for the matter concerned, he or she shall direct the member of the public to the responsible official.

17.2.6 The official shall alert the member of the public to any errors or omissions in documents or applications, and shall provide an opportunity to rectify them.

17.3 Correspondence.

17.3.1 When answering correspondence, telephone calls and e-mail, the official shall be as helpful as possible, and shall reply as completely and accurately as possible to questions that were asked.

17.3.1 Every communication to the Administration shall receive an acknowledgement of receipt within two weeks, except if a substantive reply can be sent within that period.

17.3.2 An acknowledgement of receipt shall contain the name and contact particulars of the official who is dealing with the matter, and shall contain the name of the subdivision or section to which the official belongs.

17.3.4 If a letter is addressed to an Administration that has no competence to deal with the matter, it shall ensure that the document is transferred without delay to the competent Administration. The Administration that received the document first, shall inform the member of the public of the referral. The competent Administration shall issue an acknowledgment of receipt of the document to the member of the public.

17.4 Keeping records.

17.4.1 An Administration shall keep adequate records of its incoming and outgoing mail, and of the measures it takes in every case.

17.4.2 Every separate matter shall have a separate file.

17.4.3 All current matters shall be diarised to ensure that matters are followed up and that matters are dealt with at the appropriate time.

17.5 Access to information.

17.5.1 Requests for access to documents shall be referred to the Information Officer of the public body.

17.5.2 An official shall respect the privacy of members of the public, and shall not disclose information pertaining to a member of the public without the written instruction of the Information Officer.

17.5.3 Members of the public have the right to know how the Administration dealt with similar matters in the past.

17.6 Impartiality

17.6.1 An administrator shall abstain from being involved in an administrative action in which the administrator or any of his or her family, relatives, friends or acquaintances has any interest of any nature.

17.6.2 An administrator shall immediately report any person who

attempts to bribe or otherwise unduly influence the outcome of an administrative action.

17.6.3 An administrator shall immediately report any fellow administrator or functionary who acts in a corrupt manner or otherwise misuses his or her power.

17.7 Be consistent.

17.7.1 The official shall be consistent in his or her decisions. The official shall follow the Administration's normal guidelines and policies in taking decisions, unless there are legitimate grounds for departing from those practices. The grounds for departing from standard practices shall be recorded in writing.

17.7.2 The official shall respect the legitimate and reasonable expectations that members of the public have in the light of how the Administration has acted in the past.

17.8 Advice.

17.8.1 The official shall, where necessary, advise the public on how matters, which comes into his or her remit, is to be pursued and how to proceed in dealing with the matter.

17.8.2 The official shall inform a member of the public of the best way to structure an application in order to accelerate the decision making process, including any alternative procedure available that may be more efficient or cost effective.

17.8.3 The official shall assist members of the public with the completing of forms and with the submissions of applications.

17.8.4 The official shall provide a member of the public with all the necessary documentation required to complete a transaction.

17.8.5 An Administration should provide its customers with brochures, leaflets or similar material containing information regarding the services the Administration provides, including the procedures, guidelines, criteria used in providing the service, and the time it will take.

17.9 Procedures:

17.9.1 Procedures followed by the Administration must comply with the Promotion of Administrative Justice Act.

- 17.9.2 All procedures, policies, guidelines and criteria used in decision-making, must be made known to the public.
- 17.9.3 Officials shall follow procedures laid down in policies as far as is reasonably possible.
- 17.9.4 When a procedure appears to be inadequate, the officials shall take steps to have them changed.
- 17.9.5 When an Administration introduces new procedures and schemes, it should be carefully planned. The Administration should run pilot tests as far as possible, and should ensure that staff is properly trained to handle the new procedure.
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