

GUIDELINE ON THE IMPLEMENTATION OF THE PROMOTION OF ADMINISTRATIVE JUSTICE ACT, 2000

1. General

The Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000) (“PAJA”) gives effect to the right to administrative action that is lawful, reasonable and procedurally fair as well as to the right to written reasons for administrative action as contemplated in section 33 of the Constitution of the Republic of South Africa, 1996. It seeks to make the administration effective and accountable to people for its actions. Together with the Constitution it embraces the Batho Pele Principles and promotes South African citizens’ right to just administration. This section of the Constitution also ensures that people have the right to ask for written reasons when administrative action has a negative impact on them.

Administrators in DIRCO make many decisions on a daily basis that could affect the lives of citizens. These decisions are subject to conditions set out by PAJA. It is therefore critical that administrators understand the PAJA requirements and ensure that decision-making processes, decisions and applicable internal remedial processes are all aligned to the PAJA requirements.

PAJA applies to and binds DIRCO, as an organs of state, and governs all decision-making activities that impact on citizens.

In applying PAJA, administrators achieve the following:

- Facilitate the ability of citizens to access their constitutional rights to just and fair administrative action;
- Enable citizens to actively participate in the decision-making process;
- Ensure that organs of state are accountable and transparent; and
- Promote lawful, reasonable and procedurally fair decision making processes.

2. PAJA definitions

The terms below are defined as follows:

Terms	Description
Administrative action	Any decision taken, or any failure to take a decision by DIRCO when exercising a power in terms of the Constitution or performing a public function in terms of any legislation which adversely affects the rights of any person and which has a direct, external legal effect
Administrator	An organ of state or any natural or juristic person taking administrative action (e.g. the Minister, Director-General, managers and supervisors in DIRCO participating in the administrative decision-making process)
Business Unit	A work unit within DIRCO

Decision	Any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision
Empowering provision	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
Fair procedure	A procedure that will enable consultation, representation and communication of a decision and rights
Lawful	A decision allowed by law, taken by an authorised administrator acting within the scope of his/her authorisation
Organ of State	Any department of state or administration in the national, provincial or local sphere of government. Any other functionary or institution exercising a power or performing a function in terms of the Constitution or exercising a public power or performing public function in terms of any legislation, but does not include a court or a judicial officer.
Reasonable	The decision taken must be justifiable or there must be a good reason for the decision

3. What is administrative action?

Administrative action consists of the following six elements:

- 1) A decision or failure to make a decision
- 2) It must be of an administrative nature made in terms of an empowering provision

Decisions that administrators in DIRCO make as part of their daily tasks are usually of an administrative nature and based on an empowering provision to ensure that decisions are lawful and within the scope of the administrators' powers

Examples of empowering provisions are the Public Service Act, 1994 (Proclamation No. 103 of 1994), the Public Service Regulations, 2016 and relevant DIRCO Policies

- 3) It should not be specifically excluded by PAJA

Excluded decisions include:

- Policy decisions of the executive
- The making of legislation by Parliament, a provincial legislature or a municipal council; and
- The exercise of judicial functions by officers of courts and some bodies

4) That is made by an organ of state

All decisions of an administrative nature taken by DIRCO based on applicable prescripts will be affected

5) That adversely affects rights

A decision will adversely affect the rights of someone or a group when it has a negative effect – this will include decisions that:

- *Require someone to do something or not to do something*
- *Limit or remove someone's rights*
- *Lead to a conclusion that someone does not have a right to something*

A beneficial decision would therefore not constitute administrative action

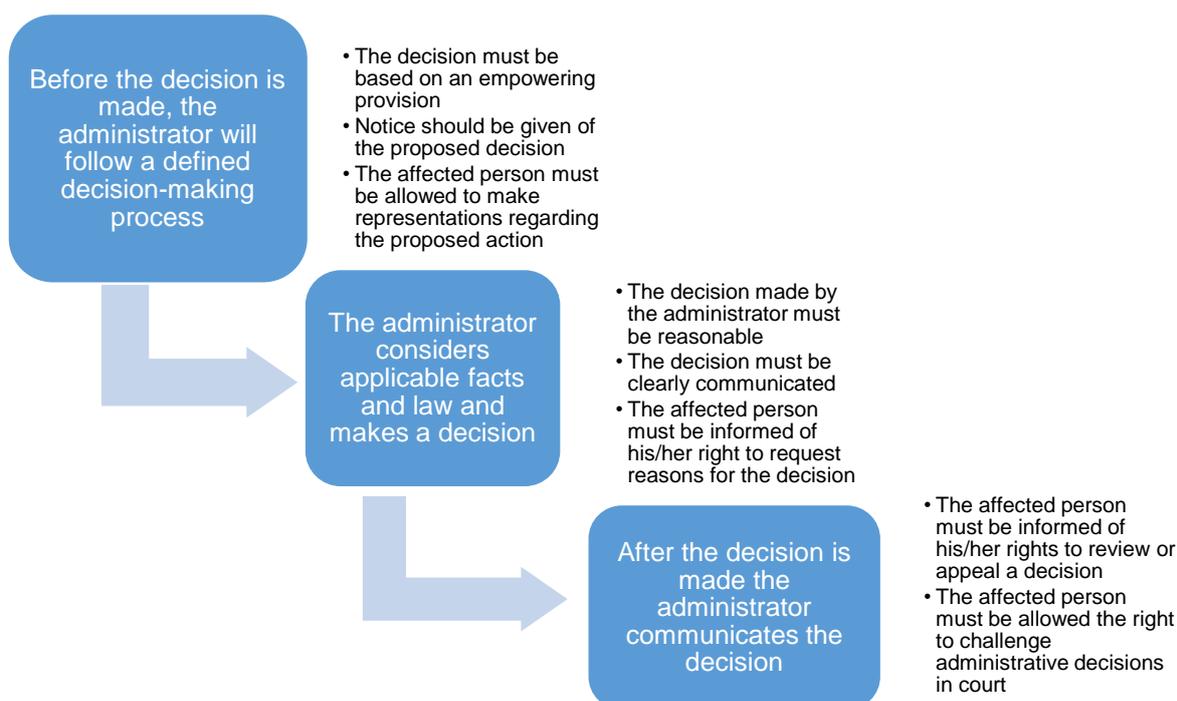
6) That has "direct external legal effect"

There are three components:

(1) Legal effect: The decision must be legally binding

(2) Direct effect: The decision must be the final one – if the making of a decision requires an administrator to take several steps or decisions, and only the last steps effects a member of the public, then only the last step will constitute an administrative action

(3) External effect: The decision must affect someone who is not part of DIRCO

4. What must be done when taking decisions?

1) Before a decision is made

- Adequate notice of the nature and purpose of the proposed administrative action should be given

The person must know the nature of the action to be taken and why it is being proposed and must be informed of what decision is being planned and why it is being considered

- The person must be given a reasonable time to make presentations

The person should be given an opportunity to make presentations regarding the proposed decision, and this includes providing new information, raising objections and/or answering charges

2) A decision must be-

- Reasonable

The decision made must be justifiable by providing good reasons and the process of decision-making should be thorough

- Lawful

The administrator must make a decision in terms of an empowering provision and must be authorised by law

- Fair

The decisions that have a negative effect on a person should not be taken without consulting him or her first

- Rational

The decision should not be arbitrary and a rational connection should exist between a legitimate governmental purpose and the measures adopted – all relevant factors should be taken into account and the decision should thus be based upon findings of fact and the application of legal principles to those facts

3) Discretionary powers

- Discretionary powers must be used only by the person given these powers
- Discretionary powers must be used within the law and for the purposes that they are given
- Decisions can only be taken for reasons allowed by law
- When an administrator is using discretion, he or she can only take relevant factors into account – if the relevant factors are not considered or irrelevant factors are taken into account, the decision is not taken for good reason

4) After the decision has been made

- A clear statement of the administrative action

The affected person must be informed of the decision that has been taken in writing, using plain and straight forward language that is easy for the person to understand

- Adequate notice of the right to request reasons in terms of section 5 of PAJA

The affected person must be informed as well about his or her right to request reasons for the decision within 90 days of the decision being made and information should be given on where, when and how reasons could be requested

- Appeal, where applicable

- If an internal appeal procedure exists

*The affected person must be informed that, if he or she disagrees with the decision, he or she could appeal or review the decision
Information should be provided on where, when and how to appeal or the decision and what time limits should be complied with*

- Where no internal appeal procedure exists

If the affected person is not satisfied with the decision, he or she may approach the court and ask for the decision to be reviewed

5. Failure to comply with PAJA

1) General

For the right to just administrative action to be more than rights, there must be a way to enforce it. The most important way in which these rights can be enforced is by judicial review which means that any person who is unhappy with an administrative decision can challenge the decision in court within 180 days (6 months) of the final decision or the internal appeal having been decided.

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
- Ordering the government to pay damages to the affected person.

2) **Grounds for judicial review**

- **Lack of authority and/or unlawful delegation**
 - An administrators must obey the law and must have authority in law for his or her decisions
 - If an administrators make decisions that are not allowed by law, he or she has acted unlawfully and the decision will be invalid
 - Administrators need to be able to show a specific law that gives them the authority to perform an administrative action
 - The law often puts certain conditions on this authorisation and many laws require a decision to be made by an official of a certain rank or with certain qualifications, 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

- **Bias**
 - Administrators must make decisions without bias
 - Bias means that the decision maker is not independent and impartial and/or is unfairly slanted towards or in favour of a particular person or decision

- **Failure to comply with mandatory and material procedure**
 - Empowering provisions often require certain procedures to be followed or certain conditions to be met before action is taken
 - If this is not complied with, any further decisions will be unauthorised

- **Procedural unfairness**
 - Failure to follow a fair procedure before making a decision will allow persons affected to apply to court to have the decision reviewed

- **Error of law**
 - Where administrative action is based on a mistake about what the law requires, a court may set the action aside

- **Rationality and reasonableness**
 - Administrative action must be reasonable and rational – the decision taken must thus make sense given the information that was available to the decision maker
 - The administrative action could thus be reviewed if it contravenes a law, is not authorised by the empowering provision concerned or is not rationally connected to the purpose for which it was taken