



Principle (m): Other technical scrutiny grounds

Overview

Senate standing order 23(3)(m) requires the committee to scrutinise each instrument as to whether it complies with any other ground relating to the technical scrutiny of delegated legislation that the committee considers appropriate. The matters raised by the committee under this principle will vary from instrument to instrument; however, they will be underpinned by the committee's concern to protect and promote fundamental rule of law principles, including but not limited to:

- access to justice;
- equality before the law;
- legal certainty;
- parliamentary sovereignty;
- procedural fairness;
- protection of personal rights and liberties;
- separation of powers; and
- transparency and accountability.

The following sections provide additional guidance on key issues which the committee may raise under scrutiny principle (m). This guideline will be updated regularly to reflect any developments in committee practices under this principle.

Parliamentary oversight

Tabling of review reports

Tabling documents in Parliament is important to parliamentary scrutiny, as it alerts parliamentarians to the existence of the documents and provides opportunities for debate that are not available where documents are not tabled. Accordingly, instruments which provide for the review of significant matters should also require the review report to be tabled in Parliament. Such reports should also be published online, in the interests of promoting transparency and accountability. Where an instrument does not require the tabling or publication of a review report, the explanatory statement should justify this omission.

Automated assistance in decision-making

Provisions which facilitate automated assistance in administrative decision-making engage a number of administrative law and rule of law principles. For example, such provisions may reduce transparency in decision-making and fetter the exercise of discretionary power by inflexibly applying predetermined criteria to decisions that should be made on the merits of the individual case. Accordingly, whilst technology may be used to assist in the decision-making process, instruments should not provide for significant or discretionary decisions to be made by computers.

Automated decision-making also raises concerns about the quality and accessibility of independent merits review, as digital decisions may not be accompanied with a robust statement of reasons for the decision.

Where an instrument provides for automated assistance in a decision-making process, the explanatory statement should explain:

- the nature of the automated assistance, including the extent to which discretion is involved;
- why it is considered necessary and appropriate to provide for automated decision making in the decision-making process;
- what safeguards are in place to ensure that the decision-maker exercises their discretionary powers personally and without fetter;
- whether the automated assistance in the decision-making process complies with the best practice principles set out in the Administrative Review Council's report on [Automated Assistance in Administrative Decision Making](#), and, if not, why not; and
- any additional safeguards in place to ensure appropriate review rights are available (for example, whether there are mechanisms in place to ensure that errors can be corrected).

Further guidance about provisions which facilitate automated assistance in decision-making is contained in the Commonwealth Ombudsman's [Better Practice Guide on Automated Decision-Making](#).

Explanatory statement checklist

The following checklist summarises the types of information which should be included in an explanatory statement.

- | | | |
|--------------------------|--|---|
| <input type="checkbox"/> | Tabling of review reports in Parliament | Where an instrument provides for a review of significant matters but fails to require the review report to be tabled in Parliament the explanatory statement should justify this omission. |
| <input type="checkbox"/> | Automated assistance in decision-making | <p>Where an instrument provides for automated assistance in a decision-making process, the explanatory statement should explain:</p> <ul style="list-style-type: none"> • the nature of the automated assistance, including the level of discretion involved; • why it is considered necessary and appropriate to provide for automated assistance in the decision-making process; • what safeguards are in place to ensure the decision-maker exercises their discretionary powers personally and without fetter; • whether the automated assistance in the decision-making process complies with the best practice principles set out in the Administrative Review Council's report on Automated Assistance in Administrative Decision Making, and, if not, why not; and • any additional safeguards in place to ensure appropriate review rights are available (for example, whether there are mechanisms in place to ensure that errors can be corrected). |