



## Principle (k): Other technical scrutiny grounds

### Overview

Scrutiny principle (k) 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:

- 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 (k). 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.

#### ***Sunsetting: exemption and deferral***

Section 50 of the *Legislation Act 2003* provides that all legislative instruments registered on the Federal Register of Legislation after 1 January 2005 are automatically repealed ten years after registration. This process is called 'sunsetting'. The committee considers that the current sunsetting framework provides an important opportunity for Parliament to maintain effective and regular oversight of delegated legislative powers, and, in particular, ensure that the content of legislative instruments remains current and lawful. In this way, the regime promotes parliamentary supremacy. Accordingly, where an instrument is exempt from sunsetting or defers the sunsetting date of another instrument, the explanatory statement to the instrument should provide a thorough justification for the exemption or deferral.

## 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.

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

- the nature of the automated assistance, including the extent to which discretion is involved;
- why it is 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 Administrative Review Council's '[best practice principles for 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 complying with the Administrative Review Council's guidelines is contained in the Australian Government's [Automated Assistance in Decision-Making Better Practice Guide](#).

### Explanatory statement checklist

The following checklist summarises the types of information which should be included in explanatory statements to instruments which raises potential issues of concern under scrutiny principle (k).

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| <input type="checkbox"/> | <b>Tabling of review reports in Parliament</b> | 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"/> | <b>Sunsetting: exemption and deferral</b>      | Where an instrument is exempt from sunseting or defers the sunseting date of another instrument, the explanatory statement should justify the exemption or deferral.   |
| <input type="checkbox"/> | <b>Automated assistance in decision-making</b> | <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"> <li>• the nature of the automated assistance, including the level of discretion involved;</li> <li>• why it is necessary and appropriate to provide for automated assistance in the decision-making process;</li> <li>• what safeguards are in place to ensure the decision-maker exercises their discretionary powers personally and without fetter; and</li> <li>• whether the automated assistance in the decision-making process complies with the Administrative Review Council's '<a href="#">best practice principles for automated assistance in administrative decision making</a>', and, if not, why not.</li> </ul> |