



## Principle (iii): Inadequate review of decisions

### Overview

Scrutiny principle (iii) requires the committee to scrutinise each bill as to whether it makes rights, liberties or obligations unduly dependent upon non-reviewable decisions. Under this principle, the committee will typically be concerned with bills which:

- do not provide for independent merits review where appropriate;
- exclude or limit judicial review;
- exclude or limit procedural fairness; and
- provide for automated decision making.

The following discussion summarises the committee's expectations regarding key issues arising under principle (iii). The issues identified are not exhaustive.

### Availability of independent merits review

If a bill empowers a decision-maker to make decisions which have the capacity to affect rights, liberties or obligations, those decisions should ordinarily be subject to independent merits review.

Where a bill contains such a decision, the committee expects the explanatory memorandum to the bill to address the following matters:

- whether independent merits review is available; and
- if independent merits review is not available, the characteristics of the relevant decision/s which justify the omission of merits review, by reference to the Administrative Review Council's guide, *What decisions should be subject to merit review?*<sup>1</sup>

### Availability of judicial review

The exclusion of judicial review of administrative action removes a fundamental right of persons who are affected by administrative decisions to challenge the legality of those decisions in the courts. Any exclusion or limitation of judicial review, including an exclusion or limitation of the operation of the simplified and enlarged scheme of review provided for by the *Administrative Decisions (Judicial Review) Act 1977*, requires a clear and substantial justification.

Section 75(v) of the Constitution provides for an entrenched minimum provision of judicial review. Provisions of a bill which attempt to exclude this jurisdiction will be scrutinised closely by the committee.

The committee will also closely scrutinise provisions which may undermine the efficacy of judicial review. For example, judicial review may be limited by way of a no-invalidity clause. No-invalidity clauses provide that the breach of statutory requirements attached to a particular decision or act do

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1 Attorney-General's Department, *What decisions should be subject to merit review?*, available at <https://www.ag.gov.au/legal-system/publications/what-decisions-should-be-subject-merit-review-arc-publication-1999#chapter-4-factors-that-may-justify-excluding-merits-review>.

not result in the invalidity of that act or decision. The consequence of these clauses is to remove the basis for judicial remedies which would enforce those limits on power. Other provisions which indirectly restrict the efficacy of judicial review include non-compellability clauses (which remove duties on the decision-maker to consider whether to exercise a power) and secrecy clauses (which limit the access of courts to relevant information).

Where a bill contains an exclusion or limitation of judicial review, the committee expects the explanatory memorandum to the bill to address the following matters:

- the nature and scope of the exclusion or limitation; and
- why it is considered necessary and appropriate to restrict a person's access to judicial review.

### **Procedural fairness**

Procedural fairness is a fundamental common law right that ensures fair decision-making. Amongst other matters, this requires decision-makers to be free from bias and the appearance of bias (known as the 'no bias rule') and to ensure that people who are adversely affected by a decision are given an adequate opportunity to put their case before the decision is made (known as the 'fair hearing rule'). The fair hearing rule includes not only the right of a person to contest any charges against them but also to test any evidence upon which any allegations are based.

Where a bill limits or excludes the right to procedural fairness the committee expects the explanatory memorandum to the bill to address the following matters:

- the nature and scope of the exclusion or limitation; and
- why it is considered necessary and appropriate to restrict a person's right to procedural fairness.

### **Automated decision-making**

Administrative law typically requires decision-makers to engage in an active intellectual process in respect of the decisions they are required or empowered to make. A failure to engage in such a process—for example, where decisions are made by computer rather than by a person—may lead to legal error.

In addition, there are risks that the use of an automated decision-making process may operate as a fetter on discretionary power, by inflexibly applying predetermined criteria to decisions that should be made on the merits of the individual case. These matters are particularly relevant to more complex or discretionary decisions, and circumstances where the exercise of a statutory power is conditioned on the decision-maker taking specified matters into account or forming a particular state of mind.

Where a bill includes a provision which enables decisions to be made through an automated process, the committee expects the explanatory memorandum to the bill to address the following matters:

- why it is considered necessary and appropriate to provide for automated decision-making of the particular decisions in question;
- how default administrative law principles and requirements (such as considering relevant matters, flexible application of policy, and legal reasonableness) will be maintained in the making of automated decisions;
- what safeguards are in place to ensure that automated decisions will be made appropriately and will not be subject to legal error, and whether these safeguards are contained in law or policy; and
- if a broad power to allow automated decision-making is included in bill—why it would not be appropriate to limit the power to particular decisions.

## Explanatory memorandum checklist

The following checklist summarises the types of information which should be included in explanatory memoranda where a bill may engage scrutiny principle (iii).

- Availability of independent merits review** Where a bill contains a discretionary decision that has the capacity to affect rights, liberties, or obligations, the committee expects the explanatory memorandum to the bill to address the following matters:
  - whether independent merits review is available; and
  - if independent merits review is not available, the characteristics of the relevant decision/s which justify the omission of merits review, by reference to the Administrative Review Council's guide, *What decisions should be subject to merit review?*.
  
- Availability of judicial review** Where a bill contains an exclusion or limitation of judicial review, the committee expects the explanatory memorandum to the bill to address the following matters:
  - the nature and scope of the exclusion or limitation; and
  - why it is considered necessary and appropriate to restrict a person's access to judicial review.
  
- Procedural fairness** Where a bill limits or excludes the right to procedural fairness the committee expects the explanatory memorandum to the bill to address the following matters:
  - the nature and scope of the exclusion or limitation; and
  - why it is considered necessary and appropriate to restrict a person's right to procedural fairness.
  
- Automated decision-making** Where a bill includes a provision which enables decisions to be made through an automated process, the committee expects the explanatory memorandum to the bill to address the following matters:
  - why it is considered necessary and appropriate to provide for automated decision-making of the particular decisions in question;
  - how default administrative law principles and requirements (such as considering relevant matters, flexible application of policy, and legal reasonableness) will be maintained in the making of automated decisions;
  - what safeguards are in place to ensure that automated decisions will be made appropriately and will not be subject to legal error, and whether these safeguards are contained in law or policy; and
  - if a broad power to allow automated decision-making is included in bill—why it would not be appropriate to limit the power to particular decisions.