



Instructor Guidance Note— Automated decision making

What is automated decision making?

1 “Automated decision making” refers to using a computer system (an **automated system**) to automate part or all of an administrative decision making process. Examples include using an automated system to do any of the following:

- make an administrative decision;
- recommend an administrative decision to a decision-maker;
- provide support to a decision-maker during the decision-making process (e.g. by providing commentary on law or policy);
- generate a summary or preliminary assessment for use by a decision-maker;
- automate aspects of a fact-finding process (e.g. by data matching).

2 Some of the risks of using an automated system include:

- algorithmic bias (this is where an algorithm generates information with an inherent bias, favouring certain kinds of output over other kinds of output, in turn leading to discrimination or other negative effects on individuals); or
- inaccurate, or less accurate, decisions; or
- unclear reasons for decisions; or
- a large volume of inaccurate decisions made in a short period.

3 An automated system is required to comply with administrative law principles of legality, fairness, rationality and transparency. For an automated system that involves the system making an administrative decision, express legislative authority is required.

Which decisions are appropriate for automated decision making?

4 A critical consideration is whether a particular decision is of a kind that makes it suitable for automated decision-making. Generally speaking, the greater the degree to which a decision requires the exercise of human cognition, the greater the risks associated with using automated decision-making.

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5 Typical examples of such decisions are provisions that repose a discretion in the decision-maker, or which require an evaluative judgement to be made against given criteria. For example:

- deciding whether to commence an investigation; or
- deciding whether to grant a licence to a person; or
- deciding whether a person is a fit and proper person; or
- deciding whether a person has appropriate qualifications; or
- deciding whether a person has made reasonable efforts; or
- deciding whether a course of action is in the public interest.

6 The Senate Standing Committees that review legislation will scrutinise provisions that authorise automated decision-making for the following:

- whether any of the decisions that are permitted to be made by the automated system are discretionary or evaluative in nature;
- whether there is potential for the automated system to act as a fetter on discretionary power by inflexibly applying predetermined criteria to decisions that should be made on the merits of each individual case;
- whether the Attorney-General's Department (**AGD**) has been consulted in the legislative design of the automated decision-making framework.

7 Before instructing OPC to draft provisions authorising the use of an automated system to make decisions that will or may involve the exercise of discretion or making an evaluative judgement, the instructing agency should seek advice from AGD, and legal advice, about whether using an automated system to make such a decision is lawful or appropriate.

8 If an automated system is to be used to make these kinds of decisions, it might be necessary for the agency to develop standard operating procedures that set out circumstances in which the usual decision-maker:

- would always be satisfied, or not satisfied, about particular matters; or
- would always make, or not make, a particular decision.

9 Additionally, if the automated system will involve the use of artificial intelligence, there will be additional considerations regarding ethical principles and mandatory guardrails.

Authorising the use of an automated system

10 The legislation must specify *who* is to be authorised to make the arrangements to use an automated system in decision-making. This will inevitably be someone senior (e.g. the

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Minister, the Secretary or the Chief Executive Officer). It is usual to also make provision for who has *control* of the automated system used in automated decision-making. This will very often be the same person who arranges for the automated system to be used, but this is not necessarily the case (for example, the Minister may be the person authorised to arrange for the use of the automated system, but the system is under the control of the Secretary).

11 Instructing agencies need to consider how the arrangement is to be made (e.g. “in writing” or “by legislative instrument”). It is good practice for the legislation to include an obligation to publish:

- information about the arrangement having been made; and
- details of which decisions may be made by the automated system; and
- what steps (e.g. development of guidelines) have been taken to ensure that decisions made by the automated system are decisions that a natural person could validly make; and
- what quality assurance arrangements are in place to ensure that the automated system is properly designed, operates as intended and is regularly maintained.

12 The legislation will usually provide that the person who arranges for the use of the automated system is obliged to:

- take reasonable steps to ensure that decisions made by the automated system are decisions that could validly be made by a natural person under the legislation; and
- report information about the operation of the automated system.

Nominating a human decision-maker for administrative law purposes

13 If a provision authorising automated decision-making is to be included, the accountability requirements of administrative law and Commonwealth legal policy mean that a natural person must be nominated (by position or title) as having ultimate responsibility for the decision. This is typically done by providing that a decision made by operation of the automated system is taken to be made by the nominated person. Usually, that person will be:

- the relevant Minister; or
- someone senior in the agency, such as the Secretary of the Department or the Chief Executive Officer; or
- in cases where there is an entity having separate legal personality, the entity itself.

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14 The most appropriate nominee is determined by having regard to the identity of the one or more persons in whom decision-making power and responsibility is reposed by the legislative scheme.

Scope of permitted administrative action

15 The provision will need to set out the scope of the administrative action that can be the subject of automated decision-making. To do so, it should list provisions of the Act under which administrative action can be taken. It may include a definition of the **administrative action** that is permitted.

16 The explanatory materials for the legislation should include an explanation of why it is considered appropriate for an automated system to be used to take the kind of administrative action permitted by the provision.

17 It might be that the kind of decisions for which automated decision-making is to be permitted are, in part at least, determined by a legislative instrument. If this approach is taken, the agency should include explanatory material justifying the approach (the Scrutiny Committees generally expect those decisions for which automated decision-making is permitted to be identified in the primary legislation).

18 Agencies should consider whether any specific functions should be excluded from scope of automated decision-making (e.g. the function of reviewing other decisions made under the legislation).

Transparency

19 It is good practice to include in the automated decision-making provision an express obligation on the person who controls the automated system to notify each person who is the subject of a decision made by the automated system that an automated system was used to make the decision.

Safeguards

20 As a safeguard, provisions authorising a person to arrange for the use of an automated system are expected to allow that person to substitute their own decision for that of the automated system, if satisfied that the automated system has made a decision that is not the correct or preferable one.

21 Consider whether to include a time limit on the making of substituted decisions. A related consideration is whether the person empowered to substitute decisions is under a duty to consider whether to exercise the power of substitution, whether on request by an applicant or otherwise.

Interaction with administrative review generally

22 Instructors should consider how the provisions allowing substitution of decisions made by the automated system interact with the general regime for administrative review of decisions made under the legislation. For example, is a substituted decision subject to merits

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review? How do the provisions about substituted decisions interact with any provisions in the legislation that permit or require the person making the substituted decision to personally review a decision or other administrative action taken by another official under the legislative scheme?

Delegation

23 Consider whether the power to arrange for the use of an automated system is to be delegable. It will often be the case that this power is expressly excluded from the list of delegable powers and functions.

24 If it is to be delegable, it will be necessary to restrict the class of potential delegates to suitably senior officials.

Standardised framework for automated decision-making

25 The Attorney-General's Department is currently developing legislation for a standardised framework that would apply in relation to administrative action taken using automated systems under Commonwealth laws. It is intended that the framework would operate in a similar way to the *Regulatory Powers (Standard Provisions) Act 2014*, in that the application of the automated decision-making framework would be triggered by an Act or legislative instrument. The framework legislation would then set out standard provisions that apply where an automated system is used to take administrative action.

More information

- Commonwealth Ombudsman's Better Practice Guide on Automated Decision Making (March 2025)
- contact the Automated Decision-Making Section in the Administrative Law Branch of the Attorney-General's Department

The purpose of Instructor Guidance Notes is to assist agencies with general legislative drafting issues and preparing drafting instructions for Bills and instruments. The series is intended to be a starting point for instructors' own engagement with the matters covered. Instructor Guidance Notes are not statements of official policy and are not intended to be a comprehensive statement of the law. This Instructor Guidance Note should not be relied on as a substitute for legal advice.