



# 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.

4 For an automated system that involves the system making an administrative decision under legislation, express legislative authority is required.

## Early engagement with Attorney-General’s Department

5 If proposed legislation involves administrative decisions, instructors should consider how computer systems will be used in the decision making process, to identify whether legislative authority will be required. If legislative authority will be required, instructors will need to consult AGD on the approach before instructing OPC.

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### Types of decisions

6 A provision authorising automated decision making will need to set out the scope of the administrative action that can be the subject of automated decision making.

7 Automated decision making gives rise to different issues depending on whether the decisions concerned are based on objective criteria or involve the exercise of judgement.

8 Typical examples of such decisions involving an exercise of judgement are provisions that repose a discretion in the decision maker, or which require evaluative consideration 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.

9 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.

10 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.

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

### Nominating a human decision maker for administrative law purposes

12 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

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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.

13 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.

### **Transparency and safeguards**

14 It is expected that automated decision making provisions include transparency requirements and safeguards. Instructors can obtain information on current requirements from Attorney-General's Department when consulting.

### **Interaction with administrative review generally**

15 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 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?

### **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.