

## Submission by Consumer Policy Research Centre to Australian Human Rights Commission- Human Rights and Technology Issues Paper

2 October 2018

By email: [tech@humanrights.gov.au](mailto:tech@humanrights.gov.au)

Dear Mr. Santow,

The Consumer Policy Research Centre (CPRC) would like to thank you for the opportunity to respond to the Human Rights and Technology Issues Paper.

CPRC is an independent, not-for-profit consumer research organisation in Australia. CPRC undertakes interdisciplinary and cross-sectoral research to inform policy reform and practice change. Our goal is to achieve a fair outcome for all consumers. Consumer data is a central research priority for the organisation due to the rapidly growing online marketplace, early adoption of digital technology by Australians, and the emerging benefits and risks to consumers of Big Data amalgamation. We make some general observations here and detailed responses to Issues Paper questions below.

### **Inclusion of data collection, sharing and use practices**

The Issues Paper states that *“human rights are centred on the inherent dignity and value of each person, and they recognise humans’ ability to make free choices about how to live.”* The rapid advancement of technology includes not only AI and robotics, but also machine learning and algorithms fueled by Big Data collection. CPRC would welcome the Australian Human Rights Commission (AHRC) considering as part of this investigation how data collection, sharing and amalgamation of consumer data may result in a restriction of free choices about how they live, including what products and services they may be able to access.

The development of detailed profiles or scores of individuals is becoming more and more commonplace, with those profiles leading to differences in the advertisements we are pushed on and offline, differing product eligibility and pricing structures. Mostly, this is characterised by a lack of transparency for the end consumer - a fundamental and growing information asymmetry between buyers and sellers in the marketplace. While identifying and classifying certain groups of individuals may clearly deliver positive outcomes such as early intervention opportunities for hardship, more relevant recommendations and improved consumer experiences, profiling practices also present clear increasing risks for growth in inequality and discrimination.

Furthermore, CPRC is supportive of an organisation in Australia having a role in promoting responsible innovation in artificial intelligence (AI) and related technologies. Australia may learn from existing models internationally where entities have been established to assess or provide training on bias and discrimination in algorithms.

## **Building an evidence base of the values of Australians as this relates to technology & data**

In a period of rapid transformation and disruption across markets and systems, it's perhaps never been more important to be guided by the values of the public as reforms are being considered, or practices regulated.

CPRC's report *Consumer Data & the Digital Economy* (Attachment A) found that Australians value their privacy, but currently feel that they have little control or choice when it comes to what data is being collected, shared and used by a range of organisations. Similarly, those surveyed had a strong expectation that their data should be used fairly, with 88% of consumers finding it unacceptable if their data was being used to charge people different prices based on their past purchasing, online browsing history, or payment behaviour. As Mr. Santow recently stated 'we should pursue innovation that reflects our values'. We would strongly encourage the Commission to seek out further Australian research that communicates the values of the community when it comes to technology and data collection, sharing and use practices as part of this project.

## **The need for economy-wide protection of consumers (and citizens)**

Lastly, within the context of a broad range of initiatives aimed at opening up, or making personally identifiable data more portable underway, CPRC would like to draw the Commission's attention to the increasing risk and scope for discrimination of opening up data in an environment without adequate privacy protections, transparency or agency being delivered to consumers. It is CPRC's view that Australia would benefit from economy-wide consumer protection and privacy reforms similar to the General Data Protection Regulation (GDPR) in the European Union (EU) or California Consumer Privacy Act. Central to this are appropriate levels of transparency and consent for data collection practices.

In this submission we discuss some existing and emerging use of consumer data and the potential implications for human right.

## **What types of technology raise particular human rights concerns? Which human rights are particularly implicated?**

In 2016 it was reported that there were 325 million wearable technologies connected worldwide (i.e. devices with smart sensors and internet connectivity, such as smart watches, fitness trackers etc.), and this is expected to increase to 830 million in 2020<sup>1</sup>. Data collected by these technologies are now being used in other contexts to offer consumers 'rewards' for other products and services. For example, John Hancock, reported to be one of the largest life insurers in the United States has announced moving to "smart life insurance" through their customer's use of smart devices<sup>2</sup>. This begs the question of the extent consumers have the

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<sup>1</sup> Statista. Statistics and Facts on wearable Technology. Available at <https://www.statista.com/topics/1556/wearable-technology/> (Accessed 26 Sep 2018)

<sup>2</sup> Senior, A. John Hancock Leaves Traditional Life Insurance Model Behind to Incentivize Longer, Healthier Lives. John Hancock. Published 19 Sep 2018. Available at <https://www.johnhancock.com/content/johnhancock/news/insurance/2018/09/john-hancock-leaves-traditional-life-insurance-model-behind-to-incentivize-longer--healthier-lives.html> (Accessed 26 Sep 2018)

ability to make free choices about how they live if they are required to provide their wearable technology data as a condition to accessing a service. Issues around accuracy, ownership, privacy and security of the data from wearable technologies has also been flagged as a concern by academics<sup>3</sup>.

Another product that is increasingly available is genetic testing kits such as direct-to-consumer tests available by mail order or via the internet<sup>4</sup>. Genetic testing has raised concerns around privacy and genetic discrimination by insurers to deny applicants life insurance or raise premiums inappropriately<sup>5</sup>. The Parliamentary Joint Committee on Corporations and Financial Services suggests that “*genetic discrimination reflects the belief that, as a person has no control over their genetic makeup, it would be unfair to discriminate against them*”<sup>6</sup>. Such use could deter people from accessing genetic tests or participating in medical research for their own health benefit or for advancing scientific knowledge<sup>7</sup>.

Internationally, several countries have introduced legislation or voluntary agreements to restrict or fully ban the use of genetic information by insurance companies<sup>8</sup>. In Australia, life insurers are permitted to use consumer’s genetic information where consent has been obtained<sup>9</sup>. However, academics have argued that under Australian law applicants must disclose any known genetic test results if requested by the insurer<sup>10</sup>. Numerous submissions were received by the Parliamentary Joint Committee on Corporations and Financial Services regarding the inquiry into the life insurance industry proposing reform to ban or restrict the use of genetic information by life insurers in Australia<sup>11</sup>. Subsequently, the Committee has recommended that the Financial Services Council in consultation with the Australian Genetic Non-Discrimination working group update their codes and standards to put in place a moratorium, prohibiting life insurers from using outcomes of predictive genetic tests<sup>12</sup>. It may be useful to follow the

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<sup>3</sup> Piwek, L., Ellis, D.A., Andrews, S., Joinson, A. The Rise of Consumer Health Wearables: Promises and Barriers. PLoS Med. 2016; 13(2):e1001953. Available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4737495/>

<sup>4</sup> Harvey, K. and Diug, B. Retail genetics. Aust Prescr 2017;40:86-87. Available at <https://www.nps.org.au/australian-prescriber/articles/retail-genetics#article>

<sup>5</sup> Tiller, J. and Lacaze, P. Australians can be denied life insurance based on genetic test results, and there is little protection. The Conversation. Published 25 Aug 2017. Available at <https://theconversation.com/australians-can-be-denied-life-insurance-based-on-genetic-test-results-and-there-is-little-protection-81335> (Accessed 25 Sep 2018)

<sup>6</sup> Parliamentary Joint Committee on Corporations and Financial Services. (2018) Inquiry into the Life Insurance Industry. Available at [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Corporations\\_and\\_Financial\\_Services/LifeInsurance](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/LifeInsurance)

<sup>7</sup> Ibid. Parliamentary Joint Committee on Corporations and Financial Services. (2018) Inquiry into the Life Insurance Industry

<sup>8</sup> Ibid. Parliamentary Joint Committee on Corporations and Financial Services. (2018) Inquiry into the Life Insurance Industry

<sup>9</sup> Ibid. Parliamentary Joint Committee on Corporations and Financial Services. (2018) Inquiry into the Life Insurance Industry.

<sup>10</sup> Ibid. Tiller, J. and Lacaze, P. Australians can be denied life insurance based on genetic test results, and there is little protection.

<sup>11</sup> Ibid. Parliamentary Joint Committee on Corporations and Financial Services. (2018) Inquiry into the Life Insurance Industry

<sup>12</sup> Ibid. Parliamentary Joint Committee on Corporations and Financial Services. (2018) Inquiry into the Life Insurance Industry

progress of these recommendations and explore the use of both genetic and wearable technology data in other settings which may result in discriminatory outcomes.

Noting that particular groups within the Australian community can experience new technology differently, what are the key issues regarding new technologies for these groups of people?

In our recent submission to the UN Special Rapporteur on the Right to Privacy consultation on 'gender perspectives on privacy', we highlight how the increasing data collection, sharing and amalgamation by companies and the lack of privacy on particular attributes such as gender can lead to poor consumer outcomes (Attachment B). For example, in 2012, Target made headlines for marketing practices based on pregnancy prediction scores they created<sup>13</sup>. Allegedly, each shopper at Target was assigned a unique code which stores information about the individual such as their demographic information, what they buy, how often they visit the store, and how they make their purchase (credit card or coupon)<sup>14</sup>. Target's statistician identified 25 products that allowed Target to assign each shopper a "pregnancy prediction" score and estimate a due date and window for which the company could send coupons timed to specific stages of pregnancy. It was reported by The New York Times Magazine that Target allegedly sent coupons to the home of a high school student which led to her father finding out she was pregnant.

Another issue for consideration is how automated decision-making could result in unintended outcomes affecting gender differently, and how anti-discrimination laws may conversely be a barrier to correcting discriminatory algorithms. A recent study by Lambrecht and Tucker (2018) found that an algorithm optimizing cost effectiveness in ad delivery resulted in fewer women seeing Science, Technology, Engineering and Math job ads than men, despite the ads intending to be gender neutral<sup>15</sup>. Market literature suggested that women largely control and make household purchases and therefore are regarded as more valuable targets for advertising<sup>16</sup>. Ironically the algorithm learnt that women were more expensive to show the ads to (due to higher demand for eyeballs) and resulted in fewer women seeing the ads as the algorithm was designed to minimize advertising costs. Lambrecht and Tucker (2018) highlighted some of the challenges for approaches to regulate and make algorithms transparent when it comes to detecting and foreseeing discrimination, for instance in this example, limited analysis of the algorithm audit may simply reveal the algorithm was trying to achieve cost-minimisation despite leading to a discriminatory outcome.

Lambrecht and Tucker (2018) proposed that advertisers could potentially run two different campaigns targeting men and women separately to ensure an even quota of men and women seeing the ad but found that targeting an employment ad towards only one gender was not

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<sup>13</sup> Duhigg, C. How Companies Learn Your Secrets. The New York Times Magazine. Published 16 Feb 2012. Available at <https://www.nytimes.com/2012/02/19/magazine/shopping-habits.html?pagewanted=1&r=1&hp> (Accessed 19 Sep 2018)

<sup>14</sup> Ibid. Duhigg, C. How Companies Learn Your Secrets.

<sup>15</sup> Lambrecht, A. and Tucker, C.E. Algorithmic Bias? An Empirical Study into Apparent Gender-Based Discrimination in the Display of STEM Career Ads. SSRN. Last revised 12 Mar 2018. Available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2852260](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2852260) (Accessed 19 Sep 2018)

<sup>16</sup> Ibid. Lambrecht, A. and Tucker, C.E. Algorithmic Bias

approved by the social media platform because it stated that this would not be compliant with Federal anti-discrimination law. Lambrecht and Tucker (2018) called for more policy guidance and reconsideration of how to enable firms to use targeting techniques to correct imbalances that an algorithm may have caused. However, a challenge might still be how to manage the risk of companies or individuals abusing those capabilities to worsen discriminatory outcomes. It may also be worth exploring if these unintended outcomes are occurring in platforms other than social media platforms, such as platforms that are specifically designed for accessing education, housing or other essential products/services.

One area which has received very little attention from policymakers is the protection of Australian children where they are consumers of products which collect, share and analyse a significant amount of identifiable data. We are now entering an era where children feasibly will have generated highly detailed online footprints from an early age. The very significant amounts of research now available to indicate the vulnerability of children and young adults through their interactions with technology, suggests they are one group which would greatly benefit from the targeted attention of the AHRC in this current project.

### How should Australian law protect human rights in the development, use and application of new technologies?

CPRC notes the clear intersection of several different portfolio areas and legislative instruments when it comes to the protection of consumers and citizens during a period of rapid technological advancement. Gaps have emerged between portfolio areas and legislative instruments, indicating the likely need for a whole-of-government response to new technologies and the protection of rights.

As mentioned in the Issues paper, Australia has incorporated some of its human rights obligations into domestic legislation, for example laws that prohibit discrimination on the basis of race, disability, age, sex, sexual orientation, gender identity and some other grounds<sup>17</sup>. However, with the increasing use of opaque algorithms for decision making that remain undisclosed due to asserted propriety rights, the ability to detect breaches of the law against these protected attributes is greatly limited. The law may only be as effective as it enforceable, which depends on transparency of algorithms and detectability of bias and unlawful discrimination.

Further to this, it is CPRC's view that Australia would benefit from greater economy-wide data protection and privacy reform. In Australia, the privacy protections available to individuals are lacking in comparison to the EU where the GDPR has been introduced. A policy analysis by Esayas and Daly (2018) comparing the Australian privacy framework with the EU suggested several shortfalls which has prevented Australia being granted data protection 'adequacy' status as a third country by the EU<sup>18</sup>; firstly, the Australian Privacy Act does not include small and medium enterprises with an annual turnover of less than AU\$3million as liable data holders. Secondly, there are various exemptions for law enforcement and security agency activities

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<sup>17</sup> Australian Human Rights Commissioner. (2018). Human Rights & Technology Issues Paper. Available at <https://tech.humanrights.gov.au/consultation>

<sup>18</sup> Esayas, S. and Daly, A. The Proposed Australian Consumer Data Right: A European Comparison. European Competition and Regulatory Law Review. 2018(2): forthcoming. Available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3236020](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3236020) (Accessed 28 August 2018)

under the Privacy Act. Thirdly, Australia is part of the Five Eyes surveillance partnership, a treaty for cooperation for intelligence with other member countries. Fourth, Australia has mandatory data retention legislation. Lastly, individuals do not have a direct means for enforcing their right under the Privacy Act in court and must contact the Privacy Commissioner to investigate their complaints.

Introducing a GDPR-like reform in Australia will ensure that our privacy protections are at a higher standard and consistent with international standards. Introducing reform consistent with international standards will likely reduce complexity for consumers in understanding their rights and businesses in understanding their compliance obligations.

**In addition to legislation, how should the Australian Government, the private sector and others protect and promote human rights in the development of new technology?**

As mentioned earlier in this submission, CPRC would support a whole-of-government approach in developing responses to Big Data and new technology. Reform across a range of portfolios will likely be required to ensure innovation is sustainable and that the community is adequately protected.

We would like to raise with the AHRC the significant number of policy processes underway in relation to the management, sharing and release of data. The ability of policymakers to fully consider the benefits and risks of such reforms relies upon the ability for consumer and community organisations to participate in such processes.

CPRC also established the Consumer Data Research Network, a network of leading Australian academics working on consumer data issues across the fields of data ethics, consumer behaviour, computing science, competition and consumer law and privacy. We host events and facilitate connection of the academic community to current consumer policy and regulatory reform processes. Adequate ongoing resourcing of nonprofit and academic sectors is critical at a time of such major transformation to ensure Australia's best and brightest can participate and deliver balanced advice to policymakers in forums currently dominated by the commercial sector, locally and internationally.

Furthermore, CPRC is supportive of an organisation in Australia having a role in promoting responsible innovation in AI and related technologies. This may include informing ethical guidelines, advising on auditing practices or establishing standards.

It may often be the case that companies want to comply with the law and regulations but may have limited knowledge of the requirements or experience other barriers such as limited resources. Regulators could support companies by identifying and addressing barriers to compliance. Additionally, regulators and policymakers could help to build and raise awareness of good practice by providing accessible guidelines and or templates.

Furthermore, internationally there have been entities established to assess or provide training on bias and discrimination in algorithms; O'Neil Risk Consulting & Algorithmic Auditing



(ORCAA)<sup>19</sup>, Algorithmic Justice League<sup>20</sup>, and Information Ethics and Equity Institute<sup>21</sup>. It is CPRC's view that all sectors would benefit from a similar initiative in Australia.

We would welcome an ongoing dialogue with the AHRC throughout this project, the growing intersection of consumer protection, privacy and human rights lends itself to collaboration and building a shared understanding across the disciplines and the sectors.

If you have any questions or would like further information regarding this submission, please contact our team via [office@cprc.org.au](mailto:office@cprc.org.au) or (03) 9639 7600.

Yours sincerely,



Lauren Solomon  
Chief Executive Officer  
**Consumer Policy Research Centre**

### About Consumer Policy Research Centre (CPRC)

An independent, non-profit, consumer think-tank established by the Victorian Government in 2016, CPRC undertakes consumer research independently and in partnership with others to inform evidence-based policy and business practice change. Our vision is to deliver a fair outcome for all consumers. We work closely with policymakers, regulators, academia, industry & the community sector to develop, translate and promote evidence-based research to inform practice and policy change.

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<sup>19</sup> ORCCA. (n.d.). O'Neil Risk Consulting & Algorithmic Auditing. ORCAA. Available at <http://www.oneilrisk.com/> (Accessed 26 Sep 2018)

<sup>20</sup> Algorithmic Justice League. (2017). Algorithmic Justice League. Available at <https://www.ajlunited.org/> (Accessed 26 Sep 2018)

<sup>21</sup> IEEI. (2018). Information Ethics & Equity Institute. IEEI. Available at <https://ethicsequity.org/> (Accessed 26 Sep 2018)