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HUMAN RIGHTS AND TECHNOLOGY

Submission to the Human Rights Commission
on the Human Rights and Technology Project

ABOUT US

Set up by consumers for consumers, CHOICE is the consumer advocate that provides Australians with information and advice, free from commercial bias. CHOICE fights to hold industry and government accountable and achieve real change on the issues that matter most.

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INTRODUCTION

CHOICE appreciates the opportunity to provide the following comments to the Australian Human Rights Commission (AHRC) on the *Human Rights and Technology Issues Paper* (Issues Paper).¹

CHOICE welcomes the AHRC's initiative to analyse the social impact of technology using a human rights framework. New technologies are advancing so rapidly that our social, governmental, and economic systems are struggling to keep up with the pace of change. The development of new technologies, such as artificial intelligence (AI), have the potential to be used for good and improve outcomes in sectors such as education and health, but can also be used to cause harm and perpetuate inequality. CHOICE believes that technology must facilitate access to human rights, rather than act as a barrier. The full extent of the harm that may be caused by new technologies is yet to be fully understood. The AHRC's major project on human rights and technology provides an opportunity to investigate this potential harm further.

Our interest in the issues being raised by the AHRC is focused on the implications of businesses using technology and how this impacts consumer outcomes. Particularly, we are concerned about consumer data being used by businesses to unfairly discriminate and cause harm to consumers by targeting them with unsuitable products and services. This is facilitated by increased information asymmetry: businesses are gaining access to more consumer data and developing new algorithms for analysis, while consumers lack transparency about how their data is being used. A consumer right to greater transparency about how data is being collected, analysed, and applied is necessary to empower consumers and enforce protections against unfair discrimination.

The AHRC should investigate the known and potential harms that the technologies outlined in this submission pose to inform recommendations to prioritise human rights in the design and regulation of new technologies.

Recommendations

1. The AHRC should examine how insurers use consumer data to calculate insurance premiums.

¹ Australian Human Rights Commission (2018), *Human Rights and Technology Issues Paper*, Sydney

- The AHRC should consider how fair calculations for insurance premiums can be made and how regulation can ensure that consumers are not unfairly discriminated against in the insurance industry.
2. The AHRC should examine how financial services are using personal and population level data to target financial products to consumers.
 - The AHRC should consider how a regulatory framework, such as a robust product design and distribution obligation, could be implemented to prevent businesses from exploiting vulnerable customers who are likely to take out a financial product that is unsuitable for them.
 - The AHRC should consider how proxy data can be used to identify customers, and make recommendations for a regulatory framework that prevents businesses from unfairly discriminating against consumers on the basis of protected attributes that are identified through proxy data.
 3. The AHRC should examine gaps in existing legislation that need to be addressed to prevent businesses from exploiting consumers' DNA data.
 4. The AHRC should examine the present and potential harms caused by renting apps and examine the need for coordinated federal reform to lift standards in the rental market.
 5. The AHRC should explore how new technologies in the sharing economy exacerbate unfair discrimination and make recommendations for how this can be addressed through regulation.
 6. The AHRC should consider whether the design of the Consumer Data Right is effective in facilitating equitable access to the right of everyone to enjoy the benefits of scientific progress and its applications.
 7. The AHRC should make recommendations for how human rights protections could be better integrated into the Australian legal system.
 8. The AHRC should make recommendations for how the *Privacy Act 1988* could be updated.
 - the AHRC should make recommendations for how the use of consumer data to unfairly discriminate against consumers could be prevented in the Privacy Act.
 - the AHRC should make recommendations for how a right to transparency could be included in the Privacy Act.
 - The AHRC should consider how penalties for businesses who misuse consumer data could be increased.
 - The AHRC should make recommendations as to how the Privacy Act could be revised, including through the incorporation of effective principles-based regulation.
 9. The AHRC should explore how regulation can be used to require businesses to incorporate protections into every stage of their technology design processes.

- The AHRC should also consider how businesses can ensure that inclusivity and accessibility are a core consideration in their technology design processes.
- 10. The AHRC should consider how a regulator could play a central role in promoting responsible innovation in AI-informed decision-making.
- 11. The AHRC should explore how cultures of responsible innovation are fostered in international contexts, and how this could be developed in Australia.

1. Consumer issues and technology²

Access to technology: making sure no one is left behind

Technology has the potential to enable access to human rights but also to compromise them. There are existing barriers that prevent consumers from accessing technology - and the experiences that technology facilitates. Groups that have historically been left behind as technology develops include:

- 'New migrants and refugees
- People from non-English speaking backgrounds
- Older women
- People of low socioeconomic status
- People in rural and remote areas
- Indigenous communities
- People with disabilities.³

As new technologies develop and more products and services become available online, our failure to support these groups to keep up compounds, leaving people even further behind. Factors that prevent access to technology often overlap. Age, geography, education and income in particular play a key role in shaping the way people access and use online resources.⁴

Australia's Digital Inclusion Index shows that despite improved access to technology, the distance between digitally included and excluded Australians is substantial and widening.⁵ People who are connected are using technology and quickly picking up new skills but almost 2.6 million Australians do not use the internet, and around 1.3 million households are not connected to it.⁶ In 2017, people in low income households had an average digital inclusion score of 41.1, compared to a score of 68.1 in high-income households. The Economist Intelligence Unit's Inclusive Internet Index ranked Australia 25th in the world. While Australia scored well on availability, there was room for improvement on affordability (cost of access relative to income),

² This section is a response to consultation question 1

³ Leung, L. (2014), 'Availability, access and affordability across 'digital divides': common experiences amongst minority groups', *Australian Journal of Telecommunications and the Digital Economy*, Vol 2: Issue 2, p.x1

⁴ Thomas, J. et al. (2018), 'Australia's digital divide is not going away', *The Conversation*, 29 March, accessed 12 October 2018.

⁵ Thomas, J. et al. (2017), *Measuring Australia's Digital Divide: The Australian Digital Inclusion Index 2017*, RMIT University, Melbourne, for Telstra, p3

⁶ Ibid.

relevance (existence and extent of relevant content), and readiness (the capacity to access the Internet, including skills, cultural acceptance, and supporting policy).⁷ Substantial progress needs to be made to ensure that Australians can access information, products and services online.

Digital access has tangible impacts on people's ability to access human rights. For example Article 25 of the Universal Declaration of Human Rights states:

*(1) Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.*⁸

In Australia, those over the age of 65 are the heaviest users of our healthcare system.⁹ Many points of access to the Australian healthcare system are now digital, from booking an appointment online, to claiming a Medicare rebate, to accessing My Health Record. People over the age of 65 are Australia's least digitally included age group, and they are being left further and further behind.¹⁰ That means older Australians, who are the heaviest users of healthcare and have the most to gain from accessing online tools that could simplify their journey through the healthcare system, are the least likely to reap these benefits.

Before we look ahead at the harms posed by new technologies, we must first consider how to address existing inequalities that leave individuals and cohorts behind. If existing issues are not addressed, we risk exacerbating inequalities.

The difference between availability and access to technology must always be at the core of the debate.¹¹ Too often the responsibility and cost of access to technology rests with individuals, due to an assumption that so long as there is availability, access will follow.¹² Factors that limit access in instances where there is availability can be nuanced. They can include affordability of particular technologies, levels of literacy in that technology, or a lack of accessibility features needed to assist someone with a disability.

⁷ [The Inclusive Internet Index'](#) (2018), *The Economist*, accessed 1 October 2018

⁸ United Nations (1948), *Universal Declaration of Human Rights*

⁹ Thomas, J. et al. (2018), 'Australia's digital divide is not going away', *The Conversation*, 29 March, accessed 12 October 2018.

¹⁰ Thomas, J. et al. (2017), *Measuring Australia's Digital Divide: The Australian Digital Inclusion Index 2017*, RMIT University, Melbourne, for Telstra, p14

¹¹ Leung, L. (2014), 'Availability, access and affordability across 'digital divides': common experiences amongst minority groups', *Australian Journal of Telecommunications and the Digital Economy*, Vol 2: Issue 2, p9

¹² *Ibid.* p10

Issues with data and discrimination

Many of CHOICE's concerns about new technologies focus on data and its potential to enable or limit the right to equality and non-discrimination, as articulated in Article 26 in the International Covenant on Civil and Political Rights:¹³

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Technological change and access to new data sets means that price and service discrimination can easily become more prevalent and more personalised. Price discrimination in itself does not necessarily harm consumers - it can be positive. For example, price discrimination can help people experiencing vulnerability access lower prices on their electricity, and ensure that pensioners get a seniors' discount on their travel.

But as people spend more time online, price personalisation is on the rise, and there are more opportunities for businesses to harm consumers by using data to unfairly discriminate and target people with products that will harm them.

Price discrimination in the digital age is not transparent. While previously consumers may have been more privy to the mechanics of businesses' pricing strategies - for example, seeing how goods were priced differently across several outlets of a supermarket chain - this ability is diminished when consumers access products and services online.¹⁴

The key challenges that personalised pricing pose include:

- Certain cohorts end up paying more for essential services, such as energy
- People do not know how to protect themselves from personalised pricing tactics
- Personalised pricing could make products or services more expensive or poorer quality for vulnerable people
- Personalised pricing might pose a risk for consumers by increasing disengagement and discouraging switching¹⁵

¹³ United Nations (1966), *International Covenant on Civil and Political Rights*, Article 26

¹⁴ Wild, M. and Thorne, M. (2018), *A Price of one's own*, Citizens Advice, London, p1

¹⁵ Ibid. p2

Personalisation must drive improved outcomes and must not unfairly disadvantage or harm consumers. To ensure that everyone's right to equality and non-discrimination is protected in a world of new technology, regulation must put limitations on price discrimination based on identity, limit businesses' access to consumer data, and ensure businesses provide transparency around pricing practices.¹⁶ It is also vital that protections are put in place to prevent predatory marketing practices that, for example, target low income consumers who are struggling with debt with higher-priced products, when more affordable products are available. Regulation must enable businesses' algorithms to be analysed and audited to ensure that unfair and harmful discrimination practices do not occur.

Finance and General Insurance

Use of data for pricing discrimination

As consumers' digital footprint continues to increase and methods of data and analysis become more sophisticated, it is important to investigate the impact of algorithmic bias or general use of data by companies on access to products and services. A particular area of concern to CHOICE is the calculation of insurance premiums.

Insurers need to rely on a number of factors in order to calculate a premium, and often these factors will result in price discrimination. These factors can be fair, for example a car parked in a street will attract a higher insurance premium than a car parked in a garage because a car is exposed to fewer risks when it is locked up on private property. However, insurers sometimes factor in a range of personal data points that increase insurance premiums without clear justification. For example, media reports have shown that one insurer was using information about the level of education obtained by a person to set car insurance premiums.¹⁷ Those who had finished schooling in year ten were being charged higher premiums than those who had completed high school or gone on to tertiary study. CHOICE is concerned about the assumption the insurer has made: while there may be a correlation between education levels and riskier driving habits, someone's level of education does not cause them to be a riskier driver. Even if information about education is not directly provided by the consumer to the insurance company, it may be possible for the insurance company to obtain this information through other means - potentially through overlaying purchased data sets which may be gathered from a range of tracking technologies including cookies, loyalty cards, device tracking, and pixels.¹⁸

¹⁶ Ibid. p3

¹⁷ Rolfe, J. (2018), 'Car insurance pricing based on a person's education may be 'discriminatory', watchdog says', *Herald Sun*, 26 January, viewed 02 October 2018. The report found Progressive Direct customers who had left school in year 10 were charged up to 14% more for car insurance premiums compared to those who had gone on to tertiary studies.

¹⁸ Consumer Policy Research Centre (2018), *Consumer data and the digital economy - Emerging Issues in data collection, use and sharing*, Melbourne, p12

Given how closely tied education levels are to social origin and other protected attributes, it's worrying that insurers are charging people more based on education status. This example shows that businesses are using consumer data to make unfair deductions about consumers, and highlights a need to improve protections in this area. These protections should at minimum include establishing a right to transparency, so that consumers are able to keep businesses accountable for the judgements that their employees, and their algorithms, have made on the basis of available data. AHRC should examine these business practices in detail as part of this consultation.

Transparency and insurance pricing

At present, we can only point to a small number of examples of potentially unfair discriminatory practices because insurers do not have to disclose how they determine premium prices. Insurers are exempt from anti-discrimination protections where they can show the discrimination is reasonable and based on actuarial or statistical data that shows a special degree of risk. The problem is this data often goes untested and is not publicly available. Consumers are left completely in the dark about the factors that make up their premium price and are therefore unaware which insurers may be discriminating against them for factors outside their control or which may be discriminatory. Insurers may use new data to crudely and unfairly discriminate against consumers by making causal inferences, and unfairly excluding people from access to certain products or unfairly raising prices. Their practices deserve greater scrutiny.

Use of data to target people with poor-value products

Consumer data is also used to develop targeted marketing strategies that are tailored towards particular groups of consumers. These strategies are becoming increasingly more sophisticated as new data sets become available online. Businesses can easily obtain information about consumers that may include details such as their education level, purchasing history, interests, and willingness to pay for certain products and services, or the likelihood of a consumer taking out a loan. While targeted marketing can be used to provide consumers with products that are tailored to their needs and interests, this data could also be used to target customers with unsuitable products. For example, a payday lending service may purchase information that about a person that reveals a history of missed payments on a loan, but a willingness to borrow large amounts of money. This payday lending company might aggressively market to that person, promoting products with higher interest rates that the customer would be unlikely to be able to repay.

The data sets that businesses can access are abundant, and businesses are building sophisticated algorithms and AI technologies that can build customer profiles with considerable accuracy. There is evidence that analysis of consumers' social media and internet browsing

history is being used by insurance companies to inform their 'risk signalling' and 'premium dispersion'.¹⁹

The financial services industry is also relying on social media data points, which are collected through programs such as Westpac's "Know Me", that utilises data to develop sophisticated customer profiles.²⁰ There are challenges posed by analysing social media data. Some data points, when combined, may act as a proxy for race or other protected attributes. Relatively basic digital records such as Facebook 'likes' can be used to predict a wide range of personal attributes and personality traits. A 2012 study was able to accurately predict whether an individual was African American or Caucasian with 95 percent accuracy based on Facebook likes alone.²¹ Facebook is also developing new algorithms to predict income levels.²² The sheer quantity of data, and the accuracy with which algorithms are being used to predict individuals' personal attributes on the basis of online activity is staggering. Unless appropriate protections are in place to prevent businesses from using this data to unfairly discriminate or harm, consumers are at risk of being exploited.

Insurers and financial institutions also rely on data collected from internet connected devices.²³ It is equally important to be mindful of the risks presented by proxy data sets. For example, smart meter data collected from someone's home in regular intervals could be used to infer certain behaviours such as when and how often they use their washer and dryer, which hours they work, when they take a shower, and when they watch television. These inferences can in turn permit intimate deductions about a person's lifestyle including their occupation, religion, health and financial circumstances.²⁴ This information reveals sensitive, personal details about individuals' lives that were not previously available to businesses. Businesses now have a greater responsibility to use this data fairly, and ensure that the assumptions they make using these data sets are fair to consumers. It is crucial that businesses identify these links in their algorithms and ensure that consumers are not being unfairly discriminated against based on protected attributes. It is also vital that protections are put in place to prevent predatory marketing practices that target groups of consumers who are struggling with debt with higher-priced products, when more affordable products are available.

¹⁹ Actuaries Institute (2016), *The Impact of Big Data on Insurance - Green Paper*, Sydney, p11

²⁰ Cameron, N. (2014), 'Customer-led big data programs deliver millions to Westpac's bottom line', *CMO from IDG*, 24 February, viewed 02 October 2018

²¹ Kosinski, M. et al. (2013), 'Private traits and attributes are predictable from digital records of human behavior', *Proceedings of the National Academy of Sciences*, Washington, p2

²² Cao, S. (2018), 'Here's how Facebook's new algorithm predicts whether you are rich or poor', *Observer*, 2 February, viewed 02 October 2018

²³ Actuaries Institute (2016), *The Impact of Big Data on Insurance - Green Paper*, Sydney, p10

²⁴ Privacy International (2018), "Privacy win! US court says Fourth Amendment protects smart meter data", *Privacy International*, blog, 24 August, accessed 05 September 2018

Recommendations 1 and 2

1. The AHRC should examine how insurers use consumer data to calculate insurance premiums.
 - The AHRC should consider how fair calculations for insurance premiums can be made and how regulation can ensure that consumers are not unfairly discriminated against in the insurance industry.
2. The AHRC should examine how financial services are using personal and population level data to target financial products to consumers.
 - The AHRC should consider how a regulatory framework, such as a robust product design and distribution obligation, could be implemented to prevent businesses from exploiting vulnerable customers who are likely to take out a financial product that is unsuitable for them.
 - The AHRC should consider how proxy data can be used to identify customers, and make recommendations for a regulatory framework that prevents businesses from unfairly discriminating against consumers on the basis of protected attributes that are identified through proxy data.

Health and genetic data

Advances in health data may pose major risks for consumers if protections are not in place to prevent this data from being used by businesses to unfairly discriminate against individuals and cohorts. New technologies have allowed individuals to trace their ancestry and discover more about their origins through the use of direct-to-consumer DNA testing kits. MyDNA and Ancestry.com are amongst the most popular websites, which supply consumers who sign up with a home-kit that can be used to gather genetic samples at home prior to being sent back for analysis. Other services supply DNA tests to assess health, fitness, and diet-related indicators. One of the biggest issues however, is that DNA tests can impact consumers' ability to secure or claim life insurance. Currently if an individual has genetic test results, even if they were done online, they must disclose that information to insurers if it's requested.²⁵ Any results - regardless of the quality of scientific analysis - that could indicate a risk of disease can be used against the individual by the life insurers in a variety of ways, from increasing premiums to denying claims. As with the broader financial services sector, there is little to no transparency about how these test results are considered by insurers and what genuine risk people face based on the results.

²⁵ Bray, K. (2018), '[Are home DNA kits reliable?](#)', *CHOICE*, 10 September, viewed 02 October 2018.

In April 2018, a parliamentary inquiry report which looked at the life insurance industry made a recommendation regarding the use of predictive genetic information.²⁶ It recommended that, in consultation with the Australian Genetic Non-Discrimination Working Group, the Financial Services Council – the peak lobby group for life insurers – assess the consumer impact of imposing a moratorium on life insurers using this kind of information except where it was provided by the consumer to demonstrate they're not at risk of developing a disease. Self-regulation does not go far enough to address the potential harms posed by these new technologies. People must be protected through strong legislative frameworks that prevent unjust discrimination on the basis of genetic data. The AHRC should consider gaps in existing legislation that need to be addressed to increase transparency from insurers and prevent businesses from exploiting consumers' DNA data.

Recommendation 3

3. The AHRC should examine gaps in existing legislation that need to be addressed to prevent businesses from exploiting consumers' DNA data.

Renting technologies

CHOICE has identified the rise of renting apps as an emerging issue in the rental marketplace. CHOICE is concerned about the potential for these apps to facilitate discrimination that prevents consumers from accessing an essential service that is also considered a human right - housing.²⁷ CHOICE's research has shown that 75% of renters believe that competition amongst applicants for a rental property is fierce, and in a highly competitive market there is a power imbalance between landlords and renters.²⁸ This makes it increasingly difficult to identify direct discrimination on the basis of protected attributes, and even more difficult for renters to seek redress. Rental apps that collect large amounts of data about people applying for a tenancy give the potential for this discrimination to occur on a much greater scale than ever before.

Racial discrimination in the Australian rental market is well-documented. MacDonald et al. found that 'tenants of Middle Eastern and Indian descent are treated very differently to their Anglo Saxon counterparts during interactions with real estate agents' however the 'friendly nature of these interactions makes the discrimination difficult to identify.'²⁹ New renting technologies may exacerbate subtle forms of discrimination by allowing agents to screen potential candidates

²⁶ Commonwealth of Australia (2018), *Life Insurance Industry*, report, Canberra, Chapter 9 pp137-156

²⁷ United Nations (1948), *Universal Declaration of Human Rights*, Article 25

²⁸ CHOICE (2017), *Unsettled*, report, Sydney, p12

²⁹ MacDonald, H. et al. (2016), *Rental Discrimination in the Multi-ethnic Metropolis: Evidence from Sydney*, Urban Policy and Research, Vol.34, No.4, pp373-385

online prior to inspections or use additional data points to make unfair, biased assessments about the candidate's suitability. As yet, the consumer harm caused by renting apps has not been able to be assessed in detail but CHOICE is concerned about the impact of such technologies as they continue to gain momentum in the rental market.

The renting application service tApp collects extensive data on tenants who are applying for rental properties. tApp is a subsidiary service of Trading Reference Australia/Tenant Reference Australia (TRA), which describes itself as a 'database containing information regarding to defaulting tenants.'³⁰ Applications like tApp claim to simplify the rental application process but in reality require renters to comply with a detailed suite of terms and conditions which includes giving permission for tApp to share tenant data with insurers, utility companies and banks as part of their business practices.³¹ Firstly, this raises major concerns about requiring potential applicants to trade their privacy in order to access housing. Real estate agents that require applicants to use the service in order to apply for a property put renters in a position where they are required to share a considerable amount of personal data which may be passed on to other businesses. Secondly, the service's lack of transparency prevents consumers from understanding what information is kept about them and how it is used. Consumers are able to find out if they are listed in the database for a \$22 fee, which may be cost-prohibitive to those who cannot afford it, but it does not tell people how their data is used as part of the application process.

Another tenancy application service, 1Form, provides publicly available reports about renters in each suburb that demonstrates the extensive nature of the data held by these companies.³² The 1form service lists suburb-level data about the ages of tenants, number of children in households, incomes, occupations, gender and student-status, among other attributes. This is just the data that's available publicly. It's unclear what data is provided to landlords and agents that is then used to make decisions about whether to grant someone access to housing.

Another emerging issue at the intersection of renting and technology is that the application processes within renting apps can easily be made too onerous in a way that discriminates against people, for example people who have trouble using technology, new migrants to Australia, or have English as their second language. For example, tApp requires the following to be provided as part of a rental application:

- 'Proof of rental history: Last four rental receipts or Printout of tenancy history

³⁰ 'Frequently Asked Questions' (2018), *Trading Reference Australia*, online, viewed 02 October 2018

³¹ 'Privacy' (2018), *tApp*, online, viewed 02 October 2018

³² 'Investor Reports' (2018), *1form*, online viewed 24 October 2018

- Proof of current address: Utility statements (no greater than six months old) or Council rates notice
- Proof of income: 3 previous payslips or Bank statement or If self-employed - tax returns and business registration
- References: Minimum 2 written from previous agent or landlord; and/or written reference from employer or friend³³

In Australia landlords can select a tenant at their discretion, and may refer to documents provided by applicant in order to ascertain if they are gainfully employed, and have the ability to pay for their rental. Landlords and real estate agents may ask a tenant to provide a range of documents as part of their application in order to confirm their identity, and show proof of employment. The extent of what documents can be requested however, is unclear. The Office of the Australian Information Commissioner (OAIC) explains that:

'A real estate agency can only collect the personal information of yours that is reasonably necessary for one of its functions or activities. A real estate agent is not allowed to collect more information than is necessary because it is convenient to do so. It is also not allowed to collect information because they think it may be useful in the future.'³⁴

CHOICE is concerned about instances where this process becomes too complex and too extensive, and the provision of documents, such as the documentation listed in tApp's requirements, may be a challenge for individuals and cohorts of consumers. If the process is too onerous, it may prevent potential tenants from being able to fill in an application that will allow them to be considered for a rental property. When these documents are collected digitally, it is more difficult for a consumer to be able to leave sections of their form blank, or incomplete. The complexity of rental application processes, particularly when they are facilitated online, needs to be investigated in detail to better understand how they enable, or prevent people from accessing housing.

New renting technologies are also beginning to challenge established processes for processing rental bonds. TrustBond, a commercial bond operator currently operating in Canberra, allows renters to pay ongoing fees to a commercial guarantor which covers their bond for them.³⁵ Trustbond allows users to create a profile by connecting a range of online accounts including Facebook, Twitter, LinkedIn, AirBnb, Ebay, Uber, Couchsurfing, 1Form, and Airtasker to

³³ Registration form (2018), *tApp*, online, viewed 02 October 2018

³⁴ 'Tenancy' (2018), *Office of the Australian Information Commissioner*, online, viewed 17 October 2018

³⁵ O'Mallon, F. (2018), 'Canberra's rental bonds to open to commercial guarantors', *The Canberra Times*, 5 May, viewed 02 October 2018

determine a 'TrustScore'.³⁶ It is not clear what information is collected and analysed by Trustbond to determine a 'TrustScore', and this is concerning.³⁷ Social networks contain endless amounts of personal information including individual's interests, relationships, hobbies, and political beliefs, as well as other sensitive information that could be scrutinised by agents to form an opinion on a person's eligibility to access a property. This lack of transparency cements the power imbalance between landlords and renters.

In the housing rental market, new technologies present new ways to browse, negotiate and secure rental properties. While the advent of these technologies can remove convoluted paper processes and simplify recordkeeping, it can also open the door to new forms of discrimination. CHOICE recommends that the risks posed by these renting technologies need to be further explored in order to ensure that a framework for a more equitable renting system can be developed and implemented in every state.

Recommendation 4

4. The AHRC should examine the present and potential harms caused by renting apps and examine the need for coordinated federal reform to lift standards in the rental market.

Holiday rentals

The online marketplace can facilitate discrimination against individuals and certain cohorts of consumers. This has been well-documented in the sharing economy, and is particularly apparent on the home-sharing website Airbnb. Airbnb has created a new marketplace, empowering users to act as short-term landlords by 'hosting' visitors in their properties. Anti-discrimination laws in Australia ban landlords from discriminating against applicants based on characteristics including gender, race, and other protected attributes.³⁸ An Australian business could not refuse service to customers on the same grounds.³⁹ While anti-discrimination legislation can be difficult for consumers to apply in the renting market, the Airbnb rental market is even more murky when it comes to protecting consumers from being discriminated against on the basis of protected attributes.

Airbnb allows hosts to decide whether they accept a guest's application to stay at their property after they have seen the guest's name, and often their picture. The design of this booking

³⁶ 'FAQ' (2018), *Trustbond*, online, viewed 02 October 2018.

³⁷ Uribe, Alice (2017), 'Suncorp partners with Spanish start-up Traity for rental bonds', *Financial Review*, viewed 10 October 2018

³⁸ 'Discrimination and renting - Information for rental agents and landlords' (2018), *Victorian Equal Opportunity & Human Rights Commission*, online, viewed 2 October 2018

³⁹ 'Refusing service' (2018), *Business.gov.au*, online, viewed 2 October 2018

process enables unfair discrimination by hosts. This has been demonstrated through a US study that created dummy accounts, which then inquired about the availability of roughly 6,400 listings on Airbnb across five cities.⁴⁰ The study found significant discrimination against guests with distinctively African-American names, with these guests receiving a positive response roughly 42% of the time, compared to roughly 50% of caucasian guests.⁴¹ This discrimination has been documented through an extensive study that controls for variables, and gathered a wide range of data points to prove discrimination occurred. From a consumer's perspective however, the design of the platform makes it difficult to prove whether a host is discriminating based on a customer's race or ethnicity, and even more difficult to seek redress when discrimination has occurred.

While there are many alternatives to using Airbnb, the platform has become a major player in the short-term rental market, and is continuing to grow. In 2017, 14.2% of the properties in the City of Waverly in Sydney were Airbnbs, and 5.5% percent of dwellings in the City of Sydney were listed on the platform.⁴² Given the significant presence of home-sharing platforms in the holiday rental marketplace, it is crucial to investigate how the design of new technologies actively facilitates discriminatory practices, and whether existing legislation is sufficient in protecting consumers who use these new technologies.

Recommendation 5

5. The AHRC should explore how new technologies in the sharing economy exacerbate unfair discrimination and make recommendations for how this can be addressed through regulation.

Consumer Data Right

Australian consumers will soon be able to access their banking, energy and telecommunications data through the Consumer Data Right (CDR). The CDR was conceived to empower consumers through improved access to their data, and to facilitate consumer mobility between products and services. Providing consumers with relevant and accessible information about the products they consume and services they use should lead to both better individual consumer experiences and more competition in markets. Providing consumers with access to their own data in a convenient format should improve their ability to drive competition on the demand side by rewarding those businesses that best meet their needs or preferences, and consequently encourage the

⁴⁰ Edelman, B. et al. (2017), 'Racial Discrimination in the Sharing Economy: Evidence from a Field Experiment', *American Economic Journal: Applied Economics*, Vol. 9, No. 2, pp1-22

⁴¹ Ibid. p2

⁴² The Tenants' Union (2017), *Airbnb and renting in Sydney*, report, Sydney, p6

development of new products and services. In order to succeed however, the CDR must be consumer-focused, efficient, and fair. This means ensuring that the design of the CDR must cater to the needs of all consumer cohorts.

CHOICE has raised a number of concerns around consumer access to CDR data in order to ensure that consumers are able to reap the benefits of the CDR regime. Simply making data available will not result in better-informed consumers and more competitive markets – it is necessary that the data is also accessible and useable. The importance of the end user experience cannot be understated; ‘one click’ processes for downloading and uploading data will aid in increasing usability for consumers. Consumer testing is crucial in the design of any new technology, and the CDR is no exception.

Consumers’ access to data should be free. Price should not be a barrier that prevents consumers from accessing their data as part of the CDR. In instances where businesses may charge for certain data sets, businesses should be required to waive data access fees for those who cannot afford to pay them. CHOICE strongly disagrees with a market-based approach to charging customers for access to CDR data, and is extremely concerned that such an approach will leave consumers behind. The system should proactively consider how to deliver equitable outcomes from the get go, rather than function as a response to greedy business behaviour that exploits consumers.

The CDR has the potential to help consumers reap the benefits of new data technologies, but this new consumer right must be shared by everyone. CHOICE believes that the success of this government initiative and its ability to deliver improved outcomes for consumers should be evaluated after its implementation. Furthermore, the Consumer Data Right has the potential to facilitate a human right contained within the International Covenant on Civil and Political Rights, the right of everyone ‘To enjoy the benefits of scientific progress and its applications.’⁴³ The AHRC should consider whether the design of the CDR is effective in facilitating access to this human right.

Recommendation 6

6. The AHRC should consider whether the design of the Consumer Data Right is effective in facilitating equitable access to the right of everyone to enjoy the benefits of scientific progress and its applications.

⁴³ United Nations (1966), *International Covenant on Civil and Political Rights*, Article 15

2. Australian law, human rights and technology⁴⁴

In order to establish better laws to protect human rights in the development, use and application of new technologies, Australia must first ensure that human rights are contained within a legal framework that is recognised across every state and territory. Australia is party to both the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), and must therefore secure the rights under this treaty and make them effective.⁴⁵ Australia's human rights protections are found in the Constitution, common law and legislation, but focus predominantly on the rights contained within the ICCPR. Like in many other democracies, Australia's economic, social and cultural rights, which relate to 'the workplace, social security, family life, participation in cultural life and access to housing, food, water, health care and education'⁴⁶ are not given the same social or legal status as civic and political rights.⁴⁷ However, economic, social and cultural rights are some of the most important to making sure markets function fairly for all Australians, particularly access to housing, food, water and health care.

As an organisation that is dedicated to fighting for fair, safe and just markets for Australian consumers, CHOICE believes it is important for all human rights, particularly those connected to rights accessed through commercial markets in Australia, have legal force. Australia's legal system needs better legal protections for human rights. Victoria has adopted a Human Rights Charter (the Charter) under the *Charter of Human Rights and Responsibilities Act 2006*. The Charter protects twenty fundamental human rights. The Charter was developed to clearly articulate, and enforce, the Victorian Government's human rights obligations to its citizens. This is a step forward for Victorian citizens, but the rest of Australia is yet to catch up. The breadth of civil and political rights, and economic, social and cultural rights should be clearly and unambiguously enshrined in within a legal framework for all Australian states. Until this has occurred, the enforcement of human rights in Australia will continue to remain inconsistent.

In ensuring that Australians can access their human rights effectively, Australia should update key legislation to ensure that Australians are empowered to access technology, while simultaneously protected from potential harms that it poses. To do this, Australia should revise, update, and expand the remit of the *Privacy Act 1988* (Privacy Act). The Privacy Act has not

⁴⁴ This section is a response to consultation question 3

⁴⁵ United Nations (1969), *Vienna Convention on the Law of Treaties*, Article 26

⁴⁶ Office of High Commissioner for Human Rights, *Frequently Asked Questions on Economic, Social and Cultural Rights*, Fact Sheet No. 33

⁴⁷ Tobin, John (2010), 'Economic, social and cultural rights', Occasional paper, *University of Melbourne*, Melbourne, p2

kept up with the pace of technological change. For example, the Privacy Act defines personal information as:

‘information or an opinion, whether true or not, and whether recorded in a material form or not, about an identified individual, or an individual who is reasonably identifiable.’⁴⁸

This definition needs to be revised. It fails to capture a range of data that can identify a person through various means, such as linking anonymised web browsing histories to social media profiles with a 70% success rate.⁴⁹ This definition has been expanded upon in proposed CDR legislation, which defines consumer data as that which ‘relates to a consumer.’⁵⁰ CHOICE strongly supports this broader definition, as it will expand consumer data protections, capturing new data types such as consumer metadata that relates to but is not explicitly about a consumer. This will go further to ensure that data is not misused by individuals and businesses. While this definition is a considerable improvement, it will only supersede the Privacy Act’s definition of personal data in particular instances, such as when an accredited third party accesses customer data from a data holder within the CDR system. This is likely to create confusion for consumers. The interaction between the Privacy Act, and the Privacy Safeguards developed for the CDR creates a web of protections that would be difficult for the average consumer to understand. It is vital that the Privacy Act be updated to ensure that consumers are able to access the highest levels of protections, and that these are simple to navigate should a consumer wish to find out about their rights, or seek redress for a breach.

The Privacy Act should set out the highest standards for consumer protections relating to data. The Act should be strengthened, modernised, and made accessible for consumers. The Privacy Act should borrow from the European Union’s General Data Protection Regulation (GDPR), which has introduced bold new consumer rights and protections.⁵¹ In particular, Australia could look to the EU’s GDPR in order to establish a clear right to transparency. Information asymmetry is a major barrier to ensuring that consumers’ human rights are protected when they engage with new technologies. Businesses have no requirement to disclose how their algorithms under Australian legislation. The GDPR establishes this right through a number of requirements:

Article 5.2 of the GDPR reads that a data controller:

⁴⁸ Part II Division 1 Section 6 of the *Privacy Act 1988* (Cth)

⁴⁹ Su, J. et al. (2017), ‘De-anonymizing web browsing data with social networks’, *Proceedings of the 26th International Conference on World Wide Web*, pp1261-1269

⁵⁰ *Treasury Laws Amendment (Consumer Data Right) Bill 2018, Explanatory Materials*, p13

⁵¹ *General Data Protection Regulation*, European Parliament

'must be able to demonstrate that personal data are processed in a transparent manner in relation to the data subject'⁵²

Recital 71 further explains that automated processing:

'should be subject to suitable safeguards, which should include specific information to the data subject and the right to obtain human intervention, to express his or her point of view, to obtain an explanation of the decision reached after such assessment and to challenge the decision'⁵³

The right to transparency is clearly articulated in the GDPR. This is a major benefit to consumers, who have the power to interrogate how businesses process their data. This legislation also holds businesses accountable, and creates incentives for businesses to proactively analyse and audit their algorithms and ensure that they are fair to consumers. Without a clear right to transparency, there is no effective way to interrogate and question algorithmic fairness. The establishment of this right is absolutely essential to protecting human rights in the development, use and application of new technologies. The AHRC should explore how the right to transparency could be established in an Australian context.

CHOICE also recommends that the Australian Government should draw on the GDPR to consider increasing penalties for businesses who misuse consumer data. Penalties need to be increased to disincentivise companies from being non-compliant. In the EU, companies who breach the GDPR would face penalties of up to 4% of annual turnover or €20 million (whichever is greater).⁵⁴ The AHRC should consider how penalties should be structured and enforced in Australia.

When designing new legislation, it is important to consider how the effectiveness of the legislation will be tested and evaluated. Any legislation that is designed to enable access to technology and protect consumers from harms caused by new technologies should be evaluated against a set of goals and outcomes. The discourse around technology is too commonly focused on technological literacy, which assumes that equality of access leads to equality of outcome. Education must not be the only solution to empowering consumers. Proactive steps need to be taken to ensure that inequalities that are perpetuated and facilitated by technology are proactively addressed, and that consumer outcomes are regularly assessed across a cross-section of the Australian population to ensure that our legal frameworks remain effective. For this reason, developing principle-based regulation will be the most suitable

⁵² *General Data Protection Regulation*, European Parliament, Article 5.2

⁵³ *General Data Protection Regulation*, European Parliament, Recital 71

⁵⁴ 'GDPR Key Changes' (2018), *EU GDPR*, online, accessed 17 October 2018

approach. Principle-based regulation articulates substantive objectives that are simple to apply, but allow for legislation to be adapted over time. Legislation must be flexible, adaptive and responsive in order to keep up with the pace of technological change. Without this, legislation such as the Privacy Act in its current form is quickly outdated and therefore does not serve consumers effectively. The AHRC should develop recommendations for the principles that should inform principles-based elements of the Privacy Act.

Recommendations 7 and 8

7. The AHRC should make recommendations for how human rights protections could be better integrated into the Australian legal system.
8. The AHRC should make recommendations for how the *Privacy Act 1988* could be updated.
 - the AHRC should make recommendations for how the use of consumer data to unfairly discriminate against consumers could be prevented in the Privacy Act.
 - the AHRC should make recommendations for how a right to transparency could be included in the Privacy Act.
 - The AHRC should consider how penalties for businesses who misuse consumer data could be increased.
 - The AHRC should make recommendations as to how the Privacy Act could be revised, including through the incorporation of effective principles-based regulation.

3. Developing effective protections⁵⁵

The EU's GDPR is an example of legislation that requires businesses to incorporate data protections at every stage of their technology design processes.⁵⁶ This regulatory approach aims to improve consumer outcomes by improving the process through which technology is developed, rather than simply focusing on outcomes. CHOICE is supportive of this approach. CHOICE also recommends that the design of new technologies should be inclusive, accessible, and these outcomes should inform the design process.

The AHRC has requested input on different approaches to protect human rights in contexts where AI-informed decision-making occurs. CHOICE has articulated a need for strong, modern

⁵⁵ This section is a response to consultation question 7.

⁵⁶ 'Data protection by design and by default' (2018), *Information Commissioner's Office*, online, accessed 17 October 2018

legislation. A regulator must play a central role in promoting responsible innovation in AI-informed decision-making. The regulator must also consult with consumer groups, community representatives, advocates, to ensure that positive consumer outcomes are being delivered. A self-regulatory approach is irresponsible, and risks leaving consumers exposed to harm. While regulation must govern best practice in the data and technology space, this is not at odds with the notion of responsible innovation. The AHRC should explore how cultures of responsible innovation are fostered in international contexts, and how this could be developed in Australia.

Recommendations 9, 10 and 11

9. The AHRC should explore how regulation can be used to require businesses to incorporate protections into every stage of their technology design processes.
 - The AHRC should also consider how businesses can ensure that inclusivity and accessibility are a core consideration in their technology design processes.
10. The AHRC should consider how a regulator could play a central role in promoting responsible innovation in AI-informed decision-making.
11. The AHRC should explore how cultures of responsible innovation are fostered in international contexts, and how this could be developed in Australia.