Consumer Policy Research Centre submission to United Nations Special Rapporteur on the right to privacy- consultation on 'Gender Perspectives on Privacy'

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By email: ecoom02@sec.research.um.edu.mt

Dear Professor Cannataci,

The Consumer Policy Research Centre (CPRC) would like to thank you for the opportunity to contribute to the United Nations Special Rapporteur on the right to privacy consultation on 'Gender Perspectives on Privacy'.

CPRC is an independent, not-for-profit consumer research organisation in Melbourne, 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.

In this submission, CPRC provides an exploration of gender impacts of privacy as it relates to consumers. Australia is going through a period of significant policy reform relating to data including and not limited to the Treasury Laws Amendment (Consumer Data Right) Bill 2018, Data Sharing & Release Bill, and Digital Platform Inquiry. Therefore, it is opportune to reflect on privacy protection in Australia, in the context of an evolving global digital economy and international data protection laws, and the impact this may have on consumers.

CPRC is concerned about the collection, use and sharing of consumer data in an environment without genuine consumer consent or control. It is CPRC's view that Australia needs an economy-wide reform similar to the General Data Protection Regulation (GDPR) in the European Union (EU) as the current data protection afforded to consumers by Australian privacy laws are inadequate in today's global data sharing landscape.

The use of personal information by corporations and the impacts on gender and privacy

In Australia, the Privacy Act regulates how personal information is handled. It applies to most Australian and Norfolk Island Government agencies, all private sector and not-for-profit organisations with an annual turnover of more than $3 million, all private health service

providers, and some small businesses[1]. Small businesses in Australia with a turnover of $3 million or less are generally not liable data holders under the Act. This is a significant portion of businesses as the Australian small business and family enterprise ombudsman suggests that majority (approximately 9 in 10) of Australian businesses are small businesses, defined in their report as having a turnover less than $2 million or employs less than 20 people[2].

While the law requires companies to provide Privacy Policies outlining how they manage personal information, privacy experts argue that these documents are often too long and complex for consumers to read and understand[3]. Data sharing practices are often enabled through Terms of Services or Data collection notices by default via statements like "By using our Services, you agree that [X company] can use such data in accordance with our privacy policies..." which may contain information about collecting or sharing data with "partners". Individuals who clicked 'I agree' to notices about the collection, use or sharing of their personal data may not have freely 'consented' to these terms and do not have the ability to negotiate the terms[4]. This notion is further supported by findings of a market research by the CPRC into consumer knowledge and attitudes on data collection, sharing and use[5].

Many companies are collecting information about who individuals are (i.e. identifiable information), their social network, what they do online (e.g. browser history, interests and preferences), and even what they do offline (e.g. offline purchases, location tracking, microphone recording on mobile devices)[6,7]. Companies are also collecting additional data that have been externally compiled by other parties such as obtaining data through public sources (e.g. public databases, data scraping), purchasing from third parties (e.g. data brokers), receiving consumer data through business partnerships, or swapping lists[8]. Particularly

[1] Office of the Australian Information Commissioner (OAIC). (2018). Privacy Act. Office of the Australian Information Commissioner. Available at https://www.oaic.gov.au/privacy-law/privacy-act/. (Accessed on 12 April 2018)

[2] The Australian Small Business and Family Enterprise Ombudsman. (2016). Small Business Counts. Small Business in the Australian Economy. The Australian Small Business and Family Enterprise Ombudsman. Retrieved from https://www.asbfeo.gov.au/sites/default/files/Small_Business_Statistical_Report-Final.pdf

[3] Kemp, K. (2017). Big Data, Financial Inclusion and Privacy for the Poor. Dvara Research. Available at https://www.dvara.com/blog/2017/08/22/big-data-financial-inclusion-and-privacy-for-the-poor/.

[4] ibid

[5] Nguyen, P. and Solomon, L. (2018) Consumer Data and the Digital Economy. Consumer Policy Research Centre. Retrieved from http://cprc.org.au/2018/07/15/report-consumer-data-digital-economy/

[6] Competition & Markets Authority (CMA). (2015). The commercial use of consumer data: Report on the CMA's call for information. Competition & Markets Authority, London, United Kingdom. Retrieved from https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/435817/The_commercial_use_of_consumer_data.pdf

[7] Maheshwari, S. (2017). That game on your phone may be tracking what you're watching on TV. The New York Times. Published 28 Dec 2017. Available at https://www.nytimes.com/2017/12/28/business/media/alphonso-app-tracking.html. (Accessed on 19 Jan 2018)

[8] Australian Communications and Media Authority (ACMA). (2016). Data driven marketing practices: Australian industry participants survey results December 2016. Australian Communications and Media Authority, Melbourne, Australia. Retrieved from https://www.acma.gov.au/theACMA/data-driven-marketing-practices.

concerning is the often opaque activities of data brokers who are amalgamating and on-selling information about consumers with other companies and data brokers[9].

One of the key questions emerging from this new consumer environment is how profiles generated by data collection in an environment of weak privacy protection may negatively impact consumers based on gender. In 2012, Target made headlines for marketing practices based on pregnancy prediction scores they created[10]. At the time, it was reported that women were targeted with specially designed ads in their second trimester, a period when most expectant mothers begin buying new things[11]. According to reports by the New York Times Magazine, 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)[12]. This information can be combined with other information the company has bought about the individual[13]. An observation made was that *"when someone suddenly starts buying lots of scent-free soap and extra-big bags of cotton balls, in addition to hand sanitizers and washcloths, it signals they could be getting close to their delivery date"*[14]. 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. Through this predictive model, Target allegedly sent coupons to the home of a high school student which led to her father finding out she was pregnant. In addition to a breach of privacy, there is also the issue of manipulation and lack of transparency. It was reported in the New York Times Magazine that Target deliberately presented their ads in ways to make it less obvious to pregnant women their behaviour was being studied and that they were being manipulated into purchasing products—with an executive allegedly saying *"And we found out that as long as a pregnant woman thinks she hasn't been spied on, she'll use the coupons. She just assumes that everyone else on her block got the same mailer for diapers and cribs. As long as we don't spook her, it works."*. What may surprise consumers in this scenario is that companies often claim to be in compliance with privacy law, and sometimes it could be argued that in the strictest sense, they are. This begs the question of whether the law is keeping up with the changing digital economy and marketing capabilities and its impacts on privacy. The EU are taking the lead in developing the GDPR where there are higher standards of data protection for data subjects in the EU. The GDPR outlines strict conditions for obtaining consent[15] and provides

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[9]Federal Trade Commission. (2014). Data Brokers. A Call for Transparency and Accountability. Federal Trade Commission. Retrieved from https://www.ftc.gov/system/files/documents/reports/data-brokers-call-transparency-accountability-report-federal-trade-commission-may-2014/140527databrokerreport.pdf.

[10] 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)

[11] ibid

[12] ibid

[13] ibid

[14] ibid

[15] Intersoft consulting. (n.d). Art. 7 Conditions for Consent. Intersoft consulting. Available at https://gdpr-info.eu/art-7-gdpr/ (Accessed 17 April 2018).

data subjects with the rights to data access, data portability, object to certain uses, rectify incorrect information, and the right to erasure (to have their data deleted)[16].

In Australia, the privacy protections available to individuals are lacking by comparison. 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[17]; 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 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.

Automated discrimination and unintended gender impacts

Another issue to consider as part of this consultation 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[18]. Market literature suggested that women largely control and make household purchases and therefore are regarded as more valuable targets for advertising[19]. 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) suggested that policy approaches to regulate and make algorithms transparent may still be limited in detecting and foreseeing discrimination, for instance in this example, limited analysis in the algorithm audit may simply reveal the algorithm was trying to achieve cost-minimisation despite leading to a discriminatory outcome.

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[16] Intersoft consulting. (n.d). Rights of the data subject. Intersoft consulting. Available at https://gdpr-info.eu/chapter-3/ (Accessed 1 June 2018)

[17] 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 (Accessed 28 August 2018)

[18] 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 (Accessed 19 Sep 2018)

[19] Ibid. Lambrecht, A. and Tucker, C.E. Algorithmic Bias?

This is a surprising example of different and unintended gender-based experiences in the digital era. Lambrecht and Tucker (2018) explained "The key allocation mechanism that dictates the distribution of information is not a measure of the desirability of information dissemination, but instead is the return on investment on advertising across all industry sectors. Advertising allocation decisions by a retail sector selling household products therefore affect communication opportunities and costs in the sector offering job opportunities"[20]. From a consumer perspective, it would be a concern if automated ad optimization or deliberate ad control options could also result in gender differences in opportunities for accessing essential products and services such as housing. Money CNN News in March 2018 reported that Facebook was being sued for allegedly allowing landlords and brokers to exclude ads from being displayed based on the user's gender, family status, and interest categories such as 'disability parking permits'[21]. This is somewhat surprising given Lambrecht and Tucker's recent finding that Facebook had a policy prohibiting wrongful exclusion of specific groups of people from seeing an ad with reference to employment and housing[22].This case is still before the courts[23].

This raises some questions- would this have occurred if there was greater privacy of information relating to gender? Would it be technically possible to remove gender as an attribute for ad optimization in certain situations? Even if technically possible, we might still be faced with the challenge that other proxies could be picked up in the ad optimization process that would still result in gender disparities. So perhaps it may be worth considering how one might code for gender equal opportunities to view ads as a counter measure to unintended discriminatory outcomes. 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 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 finding jobs, homes or other essential products/services.

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[20] Ibid. Lambrecht, A. and Tucker, C.E. Algorithmic Bias?

[21] Fiegerman, S. (2018) Facebook sued for allegedly allowing housing discrimination. Money CNN. Published 27 March 2018. Available at http://money.cnn.com/2018/03/27/technology/facebook-housing-lawsuit/index.html. (Accessed 9 April 2018)

[22] Ibid. Lambrecht, A. and Tucker, C.E. Algorithmic Bias?

[23] Lipak, A. The US government alleges Facebook enabled housing ad discrimination. The Verge. Published 19 Aug 2018. Available at https://www.theverge.com/2018/8/19/17757108/us-department-of-housing-and-urban-development-facebook-complaint-race-gender-discrimination (Accessed 21 Sep 2018)

Policy recommendations

In CPRC's Consumer Data and the Digital Economy 2018 report, Nguyen & Solomon provide five recommendations for policymakers considering consumer data regulation in the digital economy[24]:

- Build consumer trust and confidence to participate in the digital economy;
- Consumers need to be provided with genuine choice and control over collection, sharing & use;
- Ensure consumers' right to privacy is adequately protected- supported by strategies such as Privacy by Design and partial privacy self-management;
- Provide greater transparency of, and access to data and profiles- for example algorithmic auditing including bias and fairness checks;
- Strengthen regulatory monitoring and intervention powers.

Additionally, Lambrecht and Tucker (2018) suggest a need to reflect on anti-discrimination laws and provide guidance of how one can lawfully differentiate by gender to correct for unintended discriminatory outcomes[25], whilst still protecting against deliberate and harmful discrimination.

We hope that our contribution may be a useful resource in your consideration of gender perspectives on privacy as it relates to consumers.

If you have any questions or would like further information regarding this submission, please contact office@cprc.org.au.

Yours sincerely,

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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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[24] Ibid. Nguyen, P. and Solomon, L. (2018) Consumer Data and the Digital Economy
[25] Ibid. Lambrecht, A. and Tucker, C.E. Algorithmic Bias?