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Commonwealth of Australia
Attorney-General's Department

REVIEW OF THE PRIVACY ACT 1988 (CTH)

Profiling and the right to be heard

The Government's review of the Privacy Act 1988 (Cth) is welcome and indeed overdue. The terms of reference and questions for consideration indicate that the review is being conducted with the seriousness it deserves. Among the many matters highlighted for review are whether:

- inferred data should be treated in the same way, and thus attract the same protections, as primary ("collected" and "observed") data;
- access and correction rights should be enhanced;
- a formal "right to erasure" (or "right to be forgotten") should be introduced; and whether
- the Act should extend to the data processing activities of small businesses.

Each of these, and the many more encompassed within the review's ambit, require urgent resolution.

However, at least one other matter that should properly be the subject of review is not mentioned in the issues paper. It concerns the right of an individual who is subject to profiling to put across their view before any significant decision affecting them is reached. Here I draw on the model provided by Article 22 of the EU's GDPR. (I note that the framing of Article 22 is problematic—indeed it may not support the precise construction I assume in what follows. What is important, however, is the idea of a right to be heard, even if uncertainty remains about its true nature and scope in the GDPR.)

The provision relevantly states (emphasis added):

> **Article 22 – Automated individual decision-making, including profiling**
>
> (1) The data subject shall have the right not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning him or her or similarly significantly affects him or her.
>
> (2) Paragraph 1 shall not apply if the decision:
>
> (a) is necessary for entering into, or performance of, a contract between the data subject and a data controller;
> (b) …; or
> (c) is based on the data subject's explicit consent.
>
> (3) In the cases referred to in points (a) and (c) of paragraph 2, the data controller shall implement suitable measures to safeguard the data subject's rights and freedoms and legitimate interests, at least the right to obtain human intervention on the part of the controller, *to express his or her point of view* and to contest the decision.

Leverhulme Centre for the Future of Intelligence
Level 1, 16 Mill Lane, Cambridge CB2 1SB
Website: www.lcfi.ac.uk

Although Article 22 is often discussed in connection with a putative "right to explanation," I would draw attention to the italicised text, which seems to be compatible with another right, viz. the right to be heard. That is to say, the effect of Article 22(3) appears to be that whenever an individual is profiled, in circumstances where that profiling could significantly affect them, the individual is entitled to be heard on the matter, presumably so that any decision can take their representations into account.[1] This is so even where profiling is explicitly consented to or is otherwise necessary to enter into or perform a contract between data subject and data controller.

The right to be heard is a notion familiar in public law, and forms part of the requirements of natural justice/procedural fairness/due process. Again, whether or not this is quite what is on offer in the GDPR is of limited interest here. The crucial point is that before a data subject is put to the trouble of having to contest an incorrect or unfair decision, it would be far more useful and efficient for all parties involved if the data subject could make any truthful representations they think are necessary to have a determination be as favourable as possible. Automatic refusals of online credit applications, for example, should not occur by reason of incomplete or inaccurate information: the applicant should be offered the opportunity, there and then, to set the record straight. This would prevent the data subject having to rely on a *post hoc* right of explanation, which of necessity can only be called in aid after the data subject has suffered the injustice of an incorrect or unfair determination. A corollary of the right to be heard, of course, is that human intervention may be essential in all cases of profiling that significantly affect a data subject.

The review should therefore carefully consider enshrining an Australian counterpart of the GDPR's Article 22, at least a provision that gives data subjects the right to express their point of view before an automated decision that significantly affects them is made.

Dr John Zerilli
Research Fellow
Leverhulme Centre for the
Future of Intelligence
University of Cambridge
jz303@cam.ac.uk

[1] See Recital 71, which lists the right of the data subject "to express his or her point of view" separately from their right "to obtain an explanation of the decision reached *after such assessment*" (emphasis added). This suggests that the former right is to be exercised *before* a decision is reached.