



Submission to United Nations Committee
on the Elimination of Racial Discrimination
on Draft General Recommendation No. 36
on Preventing and Combatting Racial Profiling

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1 Introduction

1. The Australian Human Rights Commission (the Commission) welcomes the opportunity to comment to the United Nations Committee on the Elimination of Racial Discrimination (the Committee) about Draft General Recommendation No. 36 on Preventing and Combatting Racial Profiling. In particular, the opportunity to comment on the Draft General Recommendation as it relates to the use of artificial intelligence and its association with racial biases is timely and important.
2. The Australian Human Rights Commissioner, Edward Santow, is leading a major project on behalf of the Commission on human rights and technology (the Project).¹ One of the issues the Project focusses on is the use of artificial intelligence (AI) in decision making that can affect basic human rights.
3. The Commission acknowledges that there can be benefits in using AI in at least some forms of decision making, where there are appropriate safeguards. However, when AI is used in decision making, there is a real risk of algorithmic bias.
4. Algorithmic bias can take many forms, but when it leads to a discriminatory impact on individuals by reference to their race or ethnic origin, this can constitute racial discrimination. Depending on the context in which AI is deployed, it can also engage a range of other human rights.
5. The Commission supports the Committee's work to draw attention to this risk, and the need for states and others to address it, lest they otherwise violate human rights, including those protected by Articles 2, 5, 6 and 7 of the International Convention for the Elimination of all Forms of Racial Discrimination.
6. In the remainder of this submission, the Commission offers some observations in response to some of the key paragraphs of the Draft General Recommendation.

2 Part IV. Defining and understanding racial profiling

2.1 Paragraph 16

7. Paragraph 16 of the Draft General Recommendation outlines how racial profiling may include various actions involving law enforcement agents in police, customs, immigration and national security agencies.
8. The Commission endorses this wide definition of law enforcement agents for the purposes of the Draft General Recommendation.

3 Part VI. Racial biases associated with artificial intelligence

3.1 Paragraph 21

9. While AI is not a term with a precise, universally agreed meaning, the examples in paragraph 21 of the Draft General Recommendation helpfully point to some of the most common technologies and systems that fall within the scope of AI.
10. The Commission endorses this approach to defining the scope of AI.

3.2 Paragraph 23

11. Paragraph 23 of the Draft General Recommendation states: 'A number of factors in grain bias into artificial intelligence systems, increasing their discriminatory potential'. While it is true that there is a serious *risk* of ingrained bias in AI systems, this sentence, as currently drafted, suggests this result is inescapable. The Commission is concerned this inference could encourage a passive approach that accepts ingrained bias as an insoluble problem associated with AI. It would be helpful to observe that a well-designed AI system, used in an appropriate context, can reduce the risk of ingrained bias.
12. The Commission proposes amending paragraph 23 to state that 'a number of factors *tend to create or replicate* bias in AI systems' to address this inference.
13. Paragraph 23 rightly observes that bias in AI systems can increase their discriminatory potential. The Commission suggests this paragraph recognise that discrimination is a subset of algorithmic bias.
14. In addition, Paragraph 23 cites Joy Buolamwini's research as authority for the proposition that 'facial recognition applications suffer from being grounded in predominantly white, male datasets, with errors occurring in up to 20 per cent of the time for women and people with darker skin colours.'
15. It is the Commission's view that this significantly understates the problem. The research to which this sentence refers is known as Gender Shades.² The researchers, led by Ms Buolamwini, tested the accuracy of several market-leading facial recognition applications in identifying the *sex or gender* of people from headshot photos. The error rate cited refers not to how accurate those applications were in matching the *identity* of actual people, but rather whether the individuals in photographs assessed by the facial recognition tools being tested were male or female.

16. When facial recognition technology is used for identification purposes (i.e., to identify the *names* of individuals in photographs), the error rate is far higher than the rate cited in the example above. For example, in a recent trial conducted by the London Metropolitan Police, the facial recognition application resulted in a 96% rate of 'false positives' in matching the identity of individuals.³
17. The Commission suggests paragraph 23 be amended to more accurately reflect Ms Buolamwini's findings and include references to other research about the accuracy of facial recognition for the purposes of identification.

3.3 Paragraph 24

18. Paragraph 24 refers to the use of AI in the judicial system. It is clear from the available research that the human rights engaged by AI will depend on the context in which AI is used. The Commission is of the view that this paragraph should clearly state that where AI is used in a context in which fundamental human rights are at stake, for example the criminal justice system, errors are more likely to lead to a range of serious human rights violations.

4 Part VII. Recommendations

4.1 Paragraphs 26-27

19. Paragraphs 26-27 refer to legislative measures that should be adopted. International human rights law already prohibits racial discrimination and this prohibition is widely incorporated into domestic legislation globally. The problem of algorithmic bias has been exacerbated by states and non-state entities being slow to apply their existing laws to the relatively new context of AI.
20. It is the Commission's view that these paragraphs be expanded to require the application of existing anti-discrimination and other laws that prohibit racial discrimination to contexts where AI is used.

4.2 Paragraphs 32-34

21. Paragraphs 32-34 refer to 'accountability', primarily by reference to 'deviations from policy'. However, the first duty of law enforcement and other bodies is to be accountable against their *legal* obligations, including existing laws that prohibit racial and other forms of discrimination and require reasons and other transparency measures for decisions that affect individuals' rights and interests.
22. The Commission proposes that these paragraphs be amended to reflect this positive obligation already required of law enforcement and other bodies.

4.3 Paragraph 35

23. Paragraph 35 observes that states should adopt 'measures' that 'aim at preventing artificial intelligence from undermining' an exhaustive list of human rights. The Commission is of the view this should be amended to make clear that these measures should not merely 'aim' to achieve this goal; they should be *effective* in achieving this goal.
24. The list of human rights in paragraph 35 is an exhaustive one. It does not include, for example, rights such as the right to a fair trial which can arise in certain law enforcement contexts. The Commission would prefer that this list be included as a non-exhaustive list of human rights.

4.4 Paragraphs 30, 33, 34 and 37

25. The Commission notes that in this part of the Draft General Recommendation the broad definition of law enforcement agents outlined in paragraph 16, and endorsed above, is not replicated.
26. In paragraphs 30, 33, 34, and 37 reference is made to police rather than law enforcement agents more broadly. It is the Commission's view that the recommendations of the Draft General Recommendation set out in paragraphs 30, 33, 34 and 37 be drafted more expansively to apply to law enforcement agents as defined in paragraph 16.

4.5 Paragraph 38

27. Paragraph 38 recommends that States adopt measures to ensure human rights compliance of private sector design, deployment and implementation of artificial intelligence systems. It is the Commission's view that this recommendation should be informed by, and specifically reference, the 2011 *United Nations Guiding Principles on Business and Human Rights* (the Guiding Principles), which provide a framework to support this recommendation.
28. Specifically, Guiding Principles 1, 2 and 3 explain that states have a duty to protect against human rights abuses by third parties within their territory or jurisdiction, including by the adoption of laws and policies and the provision of guidance for business. In addition, Guiding Principles 11–24, provide that business enterprises have a 'responsibility to respect human rights', and should undertake a process of 'human rights due diligence' in relation to the potential human rights impacts of their business activities and relationships.

Endnotes

¹ For more information see: Australian Human Rights Commission, *Human Rights & Technology* (2019), <https://tech.humanrights.gov.au>.

² Joy Buolamwini and Timnit Gebru, *Gender Shades: Intersectional Accuracy Disparities in Commercial Gender Classification*, Conference on Fairness, Accountability, and Transparency – Proceedings of Machine Learning Research (2018), <http://gendershades.org>.

³ Lizzie Dearden, *Facial recognition wrongly identifies public as potential criminals 96% of time, figures reveal*, The Independent (7 May 2019), <https://www.independent.co.uk/news/uk/home-news/facial-recognition-london-inaccurate-met-police-trials-a8898946.html>.