Submission to AHRC Human Rights and Technology Discussion Paper

7 April 2020

Level 5, 175 Liverpool Street, Sydney NSW 2000
Phone: 61 2 8898 6500 • Fax: 61 2 8898 6555 • www.piac.asn.au

About the Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit legal centre based in Sydney.

Established in 1982, PIAC tackles barriers to justice and fairness experienced by people who are vulnerable or facing disadvantage. We ensure basic rights are enjoyed across the community through legal assistance and strategic litigation, public policy development, communication and training.

Our work addresses issues such as:

- Reducing homelessness, through the Homeless Persons' Legal Service
- Access for people with disability to basic services like public transport, financial services, media and digital technologies
- Justice for Aboriginal and Torres Strait Islander people, through our Indigenous Justice Project and Indigenous Child Protection Project
- Access to affordable energy and water (the Energy and Water Consumers Advocacy Program)
- Fair use of police powers
- Rights of people in detention, including equal access to health care for asylum seekers (the Asylum Seeker Health Rights Project)
- Transitional justice
- Government accountability.

Contact

Public Interest Advocacy Centre
Level 5, 175 Liverpool St
Sydney NSW 2000

T:
E:

Website: www.piac.asn.au

Public Interest Advocacy Centre

@PIACnews

The Public Interest Advocacy Centre office is located on the land of the Gadigal of the Eora Nation.

Human Rights and Technology

PIAC welcomes the opportunity to provide this submission in response to the Australian Human Rights Commission's Human Rights and Technology Discussion Paper, released in December 2019.

This short submission builds on our submission in response to the Issues Paper in September 2018.[1] In particular, we focus on two main areas of expertise in our ongoing work:

- Access to technology for people with disability, and
- The implications of AI for people experiencing homelessness.

1.1 Chapter 3: Regulation

PIAC supports in principle Proposal 1, that:

> The Australian Government should develop a National Strategy on New and Emerging Technologies. This National Strategy should:
> a) Set the national aim of promoting responsible innovation and protecting human rights
> b) Prioritise and resources national leadership on AI
> c) Promote effective regulation – this includes law, co-regulation and self-regulation
> d) Resource education and training for government, industry and civil society.

However, we think it is important for the Commission to more clearly recognise the limits of self-regulation, including whether and in what circumstances it is appropriate.

Self-regulation must occur in a manner that balances the interest of all stakeholders, including people with disability, and not just some (such as the technology/business companies seeking efficiencies).

In the past, voluntary codes and self-regulation have not been effective. Some examples of self-regulatory failure include:

- Non-compliance with the Australian Banking Association Accessibility Principles in the development and distribution of touch screen EFTPOS devices on the Australian market (including the CBA's Albert machines);[2]
- More broadly, the Final Report from the Financial Services Royal Commission[3] is a caution against the limitiations of self-regulation or 'soft' enforcement of regulation;

---

[1] PIAC, *Submission to Australian Human Rights Commission Human Rights and Technology Consultation*, 28 September 2018, ava ab e at: https://p ac.asn.au/2018/09/29/subm ss on-to-the-austra an-human-r ghts-comm ss on-human-r ghts-and-techno ogy-consu tat on/

[2] PIAC, Med a Re ease B nd consumers aunch d scr m nat on case re CBA s n ghtmare EFTPOS mach nes , 16 March 2018, ava ab e at: https://p ac.asn.au/2018/03/16/b nd-consumers- aunch-d scr m nat on-case-re-cbas-n ghtmare-eftpos-mach nes/ PIAC, Med a Re ease A step n the r ght d rect on: CBA to mprove access b ty of A bert EFTPOS mach nes , 10 January 2019, ava ab e at: https://p ac.asn.au/2019/01/10/a-step- n-the-r ght-d rect on-cba-to- mprove-access b ty-of-a bert-eftpos-mach nes/

[3] Roya Comm ss on nto M sconduct n the Bank ng, Superannuat on and F nanc a Serv ces Industry, F na Report, 1 February 2019, ava ab e at: https://f nanc a serv ces.roya comm ss on.gov.au/Pages/reports.aspx#f na

- The Disability Standards for Accessible Public Transport have also largely relied on a self-regulation model, due to the absence of built-in and effective compliance mechanisms, and have therefore consistently failed to address the needs of people with disability.

Based on these experiences, we submit that where self-regulation is implemented it needs to be coupled with stronger and more active enforcement of the law. This is difficult to achieve within the current framework of human rights protection in Australia, and in particular in relation to anti-discrimination law (where, for example, cost risks apply to litigants, and it is often difficult to bring representative complaints). Therefore, there needs to be independent regulators with strong enforcement powers and which are exercised.

1.2 Chapter 9: The right to access technology

PIAC welcomes proposals 20, 21 and 22 re digital technology, namely:

> Proposal 20: Federal, state, territory and local governments should commit to using Digital Technology that complies with recognised accessibility standards, currently WCAG 2.1 and Australian Standard EN 301 549, and successor standards. To this end, all Australian governments should:
>
> a) Adopt an accessible procurement policy, promoting the procurement of goods, services and facilities that use Digital Technology in a way that meets the above accessibility standards. Such a policy would also favour government procurement from entities that implement such accessibility standards in their own activities.
> b) Develop policies that increase the availability of accessible communication services such as Easy English versions and human customer support.
>
> Proposal 21: The Australian Government should conduct an inquiry into compliance by industry with accessibility standards such as WCAG 2.1 and Australian Standard EN 301 549. Incentives for compliance with standards could include changes relating to taxation, grants and procurement, research and design, and the promotion of good practices by industry.
>
> Proposal 22: The Australian Government should amend the *Broadcasting Services Act 1992* (Cth) to require national broadcasting services, commercial broadcasting services, and subscription broadcasting services to:
>
> a) Audio describe content for a minimum of 14 hours per week for each channel, with annual increases
> b) Increase the minimum weekly hours of captioned content on an annual basis.

However, in addition to binding requirements on governments and government services, we submit there should be stronger requirements on private companies to develop or acquire accessible technology – because, from the perspective of an end user who is a person with disability, it should not matter who is providing the services, only that it is accessible.

Specifically, in relation to proposal 21, the Commission should consider further whether such incentives would be sufficient for private companies to adequately develop, test or acquire accessible technology before it is rolled out on the Australian market.

Proposal 23 is that 'Standards Australia should develop an Australian Standard or Technical Specification that covers the provision of accessible information, instructional and training materials to accompany consumer goods, in consultation with people with disability and other interested parties.'

Again, we support this proposal in principle. However, we reiterate our comments in relation to Chapter 3 [at 1.1 above] that there must be mechanisms in place to ensure these specifications are complied with. This includes the appointment, or establishment, of an appropriate regulator, which can vet a product before it is introduced in the Australian market, to ensure it is accessible. This regulator should be able to ompose penalties for a failure to comply.

Finally, we note that at 9.5, on page 166, of the Discussion Paper, there is a discussion of 'private sector leadership'. This is framed in a very different way compared to the requirements which are imposed on government.

We question this framing. Ensuring products and services are accessible for people with disability is a fundamental legal obligation. There is clearly a role for 'leadership' in developing best practice and innovation to ensure inclusivity, but the expectation of accessibility should be a given. Consquently, we again submit that the standards which are ultimately applied to the private sector (appropriately developed in conjunction with people with disability and other interested parties) should be mandatory.

1.3 Chapter 6: Accountable AI-informed decision making

The following case study and discussion, about information collected in relation to people who are 'rough sleeping' in NSW, relates to proposals 7-10 in Chapter 6, as well as these two questions:

> Question C: Does Australian law need to be reformed to make it easier to assess the lawfulness of an AI-informed decision-making system, by providing better access to technical information used in AI-informed decision-making systems such as algorithms? and
>
> Question D: How should Australian law require or encourage the intervention by human decision makers in the process of AI-informed decision making?

Following the state election in 2019, the re-elected Premier of New South Wales announced a series of priority areas for work. Two of these directly related to the reduction of rough sleeping (also called 'street sleeping') and homelessness, with ambitious targets to reduce rough sleeping by 25% by 2020 and by 50% across the state by 2025.

These priorities have leant momentum to existing initiatives aligned with these targets, including existing homeless outreach initiatives and a cross-sectoral collaboration of organisations and governments known as Act To End Street Sleeping (ATESS). In the inner city of Sydney, these activities sit alongside long-standing engagement with the rough sleeping community by the City of Sydney Council, local specialist homelessness services and allied service providers such as PIAC's Homeless Persons Legal Service (HPLS). In recent years, we have observed an increase in the number of assertive outreach based programs that aim to assist rough sleepers by actively seeking them out in public spaces.

In our experience, service providers generally act within the bounds of Privacy Law and are careful to seek consent from individuals before gathering or sharing their personal information. However, we are concerned that there is increasing use of, and reliance upon, standardised decision making tools such as the VI-SPDAT (Vulnerability Index – Service Prioritization Decision Assistance Tool) outside the context of specific service offerings.

The VI-SPDAT is a highly detailed and personal questionnaire comprising more than 50 questions, relating to matters including an individual's health, mental health diagnosis history, recent and historical experiences of trauma, criminal history, and substance use – among other things. Answers are scored according to risk indicators, with only some items asked about contributing to overall risk (for example, mental health diagnoses do not 'count' towards a vulnerability index score), and aggregate scores are used to determine the degree of an individual's vulnerability. There is little information available about how those scores are applied to decision making about service access.

The collection of such a high volume of personally identifiable sensitive information raises some concerns in itself. Individuals are being asked to complete the VI-SPDAT without being informed of how their responses will be used, and in the context of relationships in which there is a significant power imbalance between service providers and rough sleepers seeking support.

Outreach workers are not always fully equipped to advise consumers about their rights in relation to their personal information, or to explain how the answers given will link with services that are ultimately offered. Finally, we note the real possibility that the VI-SPDAT may be used to assess some individuals as 'less vulnerable' or not meeting threshold criteria for service delivery, despite the obvious fact that every person sleeping rough is vulnerable due to their lack of shelter, and is in need of appropriate support.

While it has not been suggested that the VI-SPDAT would replace individualised decision-making by case workers, we are concerned about the opacity of these processes. We would be concerned to avoid a situation in which increased reliance on standardised assessment tools leads to automated processes removed from individual discretion, particularly in the provision – or denial – of services to vulnerable people, including people experiencing homelessness. As such, we would support the mandatory involvement of human decision making in processes human services.

1.4 Chapter 10: Design, education and capacity building

At 10.3, the Commission's preliminary view discusses the benefits of a 'human rights by design process', which is then reflected in Proposal 25:

> The Council of Australian Governments Disability Reform Council should:
>
> a) lead a process for Australia's federal, state and territory governments to commit to adopting and promoting 'human rights by design' in the development and delivery of government services using Digital Technologies, and monitor progress in achieving this aim
>
> b) include policy action to improve access to digital and other technologies for people with disability as a priority in the next National Disability Strategy.

PIAC supports a human rights by design strategy generally. However, we submit that this must be adopted by the private sector as well as by government(s). This includes in the development of products by the private sector, before the products enter the Australian market, to avoid a breach of the *Disability Discrimination Act 1992* (Cth).

Further we submit that there needs to be a consistent approach agreed at an industry level for the private sector, to avoid the situation which developed with the Albert EFTPOS device and other touch screen devices. As the Commission would be aware, with physical raised key pads there were consistent standards for accessibility of such devices, but there now exists a situation where each device can have their own accessibility functionality, and they may be inconsistent with each. This means blind and vision impaired, and other, consumers, will potentially have to learn different accessibility functions depending on which company's touchscreen EFTPOS device they are using, and this is incredibly onerous.

In addition, the focus solely on government in Proposal 25 may be misplaced. Even though governments have a significant role in service delivery, they rarely develop every day consumer products. This is another reason why there needs to be greater regulation to ensure a human rights by design approach is adopted in the private sector at industry-wide levels.

The UN Guiding Principles on Business and Human Rights impose obligations on the private sector to adhere to human rights in the design, production and implementation of new technologies. But they need to be translated into a model which encourages/requires compliance with the Guidelines.

1.5 Chapter 11: Legal protections

PIAC welcomes Proposal 29 that:

> The Attorney-General of Australia should develop a Digital Communication Technology Standard under section 31 of the *Disability Discrimination Act 1992* (Cth). In developing this new Standard, the Attorney-General should consult widely, especially with people with disability and the technology sector. The proposed Standard should apply to the provision of publicly available goods, services and facilities that are primarily used for communication, including those that employ Digital Technologies such as information communication technology, virtual reality and augmented reality.

However, consistent with earlier comments, we submit that there must be compliance standards built into this Standard, and that the Commission or other appropriate body should be resourced to monitor compliance and actively enforce the Standards, rather than relying on consumers to do so through a complaints-based and therefore essentially reactive system.