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ADVOCACY CENTRE

Submission to Australian Human Rights Commission Human Rights and Technology Consultation

28 September 2018

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.

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1. Response to the Human Rights and Technology Issues Paper

PIAC welcomes the opportunity to provide this submission in response to the Australian Human Rights Commission's (AHRC) issues paper on *Human Rights and Technology*.

The issues raised by the Commission's project are important ones which are already having a significant impact on the lives of nearly all Australians.

In this submission, we draw on our work in the areas of homelessness, transitional justice, policing and disability discrimination to address some of the questions posed in the issues paper.

1.1 Homelessness and access, or lack of access, to technology

Question 2 asks:

Noting that particular groups within the Australian community can experience new technology differently, what are the key issues regarding new technologies for these groups of people (such as children and young people; older people; women and girls; LGBTI people; people of culturally and linguistically diverse backgrounds; Aboriginal and Torres Strait Islander peoples)?

One group not explicitly identified in this question that also experiences new technology differently is people experiencing homelessness. This includes a lack of reliable access to technology, which has an impact on other human rights (including housing and healthcare). Homelessness also raises the issue of whether access to technology itself, including the internet, is a human right in the 21st century.

In preparing a response to this question, PIAC consulted with members of its StreetCare advisory group. This body, established in 2009, brings together a diverse group of people with experiences of homelessness: men; women; young people; older people; Aboriginal people; people with disability and representatives from inner Sydney, outer suburbs and rural/regional areas. Members identified a range of issues, particularly surrounding mobile phones and access to government services.

We also draw significantly on the work of The University of Sydney and ACCAN, and specifically their 2014 report *Homeless and Connected: Mobile phones and the Internet in the lives of homeless Australians*.¹

Lack of reliable access to technology

The experience and knowledge of StreetCare is that the majority of people experiencing homelessness *do* have access to mobile phones.

This view is supported by the results of the *Homeless and Connected* study, which found that 95% of homeless participants had a mobile phone, including 77% who had a smart phone.² Indeed, 'this is [a] higher rate of ownership than recorded in the general population, which is 92% of all Australians over 18.'³

¹ Dr Justine Humphry, *Homeless and Connected: Mobile phones and the internet in the lives of homeless Australians*, August 2014, The University of Sydney.

² Ibid, 3.

³ Ibid, 20.

However, having a mobile phone is not necessarily the same thing as having reliable connectivity – both in terms of phone calls and internet data:

Having a phone does not guarantee access. The study revealed that even when the vast majority of participants had a mobile phone, this did not mean that users were always connected. Lack of power, imposed service restrictions, breakdown and loss of mobile handsets, and most of all, shortage of credit for one or more mobile services meant that participants had partial or discontinuous access to phone and internet services. 32% of participants reported having had difficulty recharging their mobile handset, a basic condition of access that most people take for granted.⁴

These barriers were also reported by members of StreetCare. Some raised an additional problem that many people experiencing homelessness only had access to older models of smart phones, and that these models meant that, when attempting to access internet services, the phones were more prone to ‘crashes’ or other service difficulties.

StreetCare members also expressed the concern that, even if they had access to a smart phone, they were more likely to be on ‘pre-paid’ plans, meaning that the charges for using the internet were higher than they would otherwise be on post-paid plans, and much less likely to have access to large (or unlimited) amounts of data.

Not only do people experiencing homelessness have less reliable access to the internet, they are able to access less of it.

This finding is also supported by the *Homeless and Connected* study, which noted that: ‘[w]hile there was a high level of mobile connectivity, high data costs meant that smart phones were mainly used for calls and text.’⁵

Further, Dr Humphry observed that:

a preferred method of access adopted by the majority of participants: a combination of a mobile phone handset owned outright with a pre-paid service... Participants who were interviewed explained that this method was the only way to manage the upfront and ongoing costs associated with a mobile without getting into financial difficulty.⁶

Nevertheless, despite these strategies to minimise cost exposure, people who are homeless still found themselves experiencing cost-related lack of access:

the most common type of connectivity problem was related to a shortage of funds. Without the ability to add credit to a pre-paid mobile service, users were left without the ability to make calls, send texts and access the Internet. If on a post-paid plan, users might have a range of service restrictions imposed or have their service entirely disconnected.⁷

The lack of reliable internet access for people experiencing homelessness is a particular issue because of the absence of alternative arrangements: “[f]or people experiencing homelessness [having a mobile phone] is a matter of survival – there is no ready alternative like a household telephone or broadband connection to use when homeless.”⁸

⁴ Ibid, 33.

⁵ Ibid, 14.

⁶ Ibid, 23-24.

⁷ Ibid, 34.

⁸ Ibid, 4.

This makes accessibility, and specifically a lack of access to reliable internet, a ‘new technology’ challenge that has a particular adverse impact on people experiencing homelessness:

The inability to connect a fixed line service to an address, to make installation decisions about the type of service and products. And not knowing where the closest power outlet is or a safe and dry place to use technology, are all issues which impact on service availability. These are not related to geographical constraints, but rather, to a lack of agency to exert control over space.⁹

These challenges are ongoing, with little apparent progress in the four years since the *Homeless and Connected* study was published. As Dr Humphry noted to *ABC News* in July this year: ‘Mobile phones are often the only or the exclusive form of communication for someone who is without housing or in insecure housing or between homes, and that means that they don’t have alternative forms of digital access.’¹⁰

The fear, including from members of StreetCare, is that as newer forms of technology become available to most members of the community, homeless Australians will fall further and further behind in terms of how they access it – or whether they can access it at all.

An important finding of the *Homeless and Connected* study, also reported by StreetCare members, is that despite most homeless people having some form of access to mobile phones (reliable or otherwise) there was nevertheless a cohort of homeless people who had no mobile and/or internet access at all:

There was another category of participants who were also falling through the digital gap. The research found that single adult males living in emergency housing, boarding houses, on the street or in temporary accommodation were more likely to be without a mobile phone than other participants, indeed, ten times more likely. Of the 5 without a mobile phone, all were single adult males, 3 (60%) were long-term homeless who had been living on the street or in temporary shelter for two or more years, 4 (80%) had experienced a mental illness (compared to 43% in the total sample) and 3 (60%) were over 40.¹¹

Therefore, as well as addressing the connectivity challenges faced by people experiencing homelessness who do have access to mobile phones, there is an underlying challenge to ensure others either gain access to the same technology, or maintain social connection and access to essential services via alternative means.

Lack of access to other human rights

The lack of reliable access to technology, and especially to the internet, is not just a problem in itself. It also significantly increases the barriers to people experiencing homelessness enjoying other fundamental human rights, such as housing and healthcare.

As noted in the *Homeless and Connected* study:

A wide range of activities which constitute fundamental forms of social and economic participation, including accessing emergency services,¹² medical help and crisis support, hinge on ready access to a phone. With large-scale patterns of changing social connectivity and the shift of government and other

⁹ Ibid, 47.

¹⁰ ‘Homelessness and digital exclusion: Why a \$10 phone card can be a matter of life or death’, *ABC News*, 4 July 2018, via <http://www.abc.net.au/news/2018-07-04/homelessness-and-the-digital-exclusion/9938182>

¹¹ Dr Justine Humphry, *Homeless and Connected: Mobile phones and the Internet in the lives of homeless Australians*, August 2014, The University of Sydney, 45.

¹² 52% of participants in the study indicated they used a mobile phone to contact emergency services. Ibid, 3.

services to online modes of delivery, the need to have a mobile phone – with access to the Internet – is greatly magnified.¹³

The consequence of not having a mobile phone, and/or not having access to internet data, is the potential to fall through ‘service gaps’.¹⁴

The most obvious human right affected is that of housing, with the *Homeless and Connected* study finding that 34% of participants reported that a mobile phone was important for ‘finding accommodation’.¹⁵ Mobile phones are also used to access support services, which includes homelessness services, by 49% of people in the study.¹⁶ Members of the StreetCare advisory group supported these findings.

Mobile phones, and internet access, are also essential to access healthcare. 48% of homeless people reported using their mobile phone to access medical assistance, and 15% for contacting doctors or other medical services.¹⁷

Access to technology underpins a wide range of other forms of direct economic participation, with people experiencing homelessness reporting using a mobile phone for:

- Banking (44%)
- Being contacted by employers (42%), and
- Paying bills (36%).¹⁸

Technology is also increasingly vital for homeless people to receive the welfare and other support payments to which they are entitled. In some cases, not having a working phone, or internet access, means missing out completely. As noted by Dr Humphry in relation to the *Homeless and Connected* study: ‘connectivity limitations... meant that users were deprived of the ability to... comply with the contact and reporting requirements of government agencies such as CentreLink.’¹⁹

This last point was perhaps the single most important concern identified by StreetCare members: that in designing Government services, and especially moving such services to an online-first, or even online-only, platform, homeless people – and especially homeless people who have limited internet access – can miss out on essential support, including in terms of housing itself.

As described by Dr Humphry:

Another key context of use for people experiencing homeless are the support services, government agencies and other essential services like banks and health care institutions with whom many in this group interact on a regular, even daily, basis. As this research has shown, people experiencing homelessness undertake many of these interactions using their mobile phones as well as through other online platforms. Mobiles had already become a normal and expected part of this service relationship. Without a mobile phone, people who are homeless may find it increasingly difficult to access these services and may even become ineligible to receive a service. Needing to have an operating phone number to stay on the eligibility list for public housing (if you are unable to provide a mailing address) or the obligation to update a move of address if on government income support are examples of the new risks arising from not having access to a working mobile phone.²⁰

¹³ Ibid, 4.

¹⁴ Ibid, 14.

¹⁵ Ibid, 28.

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ Ibid, 34-35.

²⁰ Ibid, 49.

And specifically in relation to internet access:

Another concern is the impact of digital service delivery by government agencies. As part of a sector-wide program of service reform, many public service agencies are rapidly enlarging the volume and range of transactions that can be performed using online and mobile channels. The Medicare and Centrelink Express apps, launched by the Department of Human Services in 2012, are good examples of this digital reform program aimed, as one Program Director explained, at 'shifting the bulk of customers away from the face-fo-face and telephone channel to what we call 'self-management'".²¹

While these technological developments may suit many groups within society, improving access and convenience, they potentially exacerbate the exclusion experienced by groups like homeless people, and especially those with unreliable internet access – or no access at all.

For these reasons, PIAC supports the recommendations made in the *Homeless and Connected* study for government agencies and support services to address these challenges, in particular:

Recommendation 1. Ensure cost effective contact methods and multiple access points to services (especially for high volume services) such as 1800 or 13/1300 numbers, call back options, Facebook, Live Chat, SMS and other social media, web-based platforms and apps.

...

Recommendation 4. Preserve non-digital contact and service points for customers who are non-Internet users and those without access to mobile and online technologies.

Recommendation 5. Work in partnership with mobile service providers, libraries, local councils and service users to develop and promote affordable Internet access and provisioning solutions that integrate with where and how people experiencing homelessness use digital technology (for example, fixed Internet access points and self-service terminals, Wi-Fi hotspots, options to switch to available Wi-Fi services, low-cost and pay-per-use mobile broadband, power recharge stations and shelters for securely storing equipment).²²

A final point that StreetCare members wished to emphasise is that, where alternative internet arrangements and online access points are provided, their reliability is critical – there was significant frustration at attending offices of government agencies to complete online forms only to find that the resources provided are not working.

Access to technology as an emerging human right

The above discussion considers technology as a necessary instrument to enjoy other rights, including housing and healthcare.

In an increasingly connected world, access to technology generally, and the internet specifically, may itself be a human right. Such a right has already been recognised by countries as diverse as Estonia, France, Costa Rica and Finland.²³

The UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, has also argued that:

²¹ Ibid, 39.

²² Ibid, 5-6.

²³ Australian Human Rights Commission, 'Human Rights in Cyberspace', 2013, Chapter 8.1, via: <https://www.humanrights.gov.au/publications/background-paper-human-rights-cyberspace/8-right-access-internet>

The Internet, as a medium by which the right to freedom of expression can be exercised, can only serve its purpose if States assume their commitment to develop effective policies to attain universal access to the Internet. Without concrete policies and plans of action, the Internet will become a technological tool that is accessible only to a certain elite while perpetrating the 'digital divide'. The term 'digital divide' refers to the gap between people with effective access to digital and information technologies, in particular the Internet, and those with very limited or no access at all.²⁴

In PIAC's view, the importance of internet access goes beyond concerns about freedom of expression. It is instead about something more fundamental to the state of being human – social and emotional connection with others, including with family members and close friends.

This is borne out by the *Homeless and Connected* study, which revealed the importance of digital connection, especially for the families involved in the study:

Of the 21 families involved in the study, (single persons with children and couples with children), there were only 3 who did not have a smart phone. This result underlines the importance of, and priority given to, the mobile phone – and the smart phone – for maintaining contact with family members and coordinating family life.²⁵

Indeed, 'digital inclusion is now understood as essential for social inclusion',²⁶ with:

- 67% of people experiencing homelessness using their phones for social networking
- 80% saying their mobile is important for 'staying in touch with friends'
- 74% using it to make new friends, and
- 52% for contacting family.²⁷

Many of these proportions are higher than the earlier figures for using mobile phones to access government agencies and services, thus underscoring the importance of this technology for many people in terms of being an active, and socially connected, part of a 21st century society.

The risk therefore is that a lack of enjoyment of the right to technology will result in a lack of 'digital citizenship' for many people experiencing homelessness (amongst others). As noted by Dr Humphry: 'As digital inclusion becomes a pre-condition for social inclusion, there is also a higher risk of social exclusion that comes with new access and participation barriers, and these are particularly compounded for some vulnerable groups.'²⁸

The nature of this 'basic want' is expressed most clearly by David, a homeless person describing the benefits of a \$10 phone card to *ABC News*, who commented that: 'The phone card is important because being in a position where life can get pretty tough, I just thought that in the event of an emergency I could give my friend a call or my family a call.'²⁹

Being denied that option – of being able to contact loved ones in the event of an emergency – would be unthinkable to many, but serves to illustrate the fundamental role that technology now plays, and explains its emergence as a human right.

²⁴ United Nations Human Rights Council, 'Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression', 17th Session, UN A/HRC/17/27 (16 May 2011), via: https://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf

²⁵ Ibid, 22.

²⁶ Ibid, 14.

²⁷ Ibid, 25-28.

²⁸ Ibid, 50.

²⁹ 'Homelessness and digital exclusion: Why a \$10 phone card can be a matter of life or death', *ABC News*, 4 July 2018, via <http://www.abc.net.au/news/2018-07-04/homelessness-and-the-digital-exclusion/9938182>

This question of whether access to the internet is a human right, specifically in the context of people experiencing homelessness, has been explored in further detail in the United States.³⁰

Claire Cain Miller in the *New York Times* writes that:

Internet access has in many ways become like a basic need. Without it, it can be difficult to find a home, apply for a job, sign up for classes, make homeless shelter reservations or find soup kitchens. And for people who live on the streets, smartphones are the most efficient way to connect to the Internet. So while clothing and food are vital, advocates say equipping homeless and low-income people with phones and technical skills also makes sense.³¹

Holly Leonard, a person with experience of homelessness interviewed for that article, expressed it this way:

People don't put out 'for rent' signs anymore, so the Internet is the best way. You can't even go get a paper application for a lot of things. You can't get a job unless you get online... Before I got a free phone, it was like you're almost non-existent.

For the purposes of this consultation, it may be unnecessary to determine whether access to technology generally, and the internet specifically, is, or should be, a distinct human right. There is abundant evidence that people who are homeless already experience new technology differently, with significant barriers to accessing reliable mobile phones and especially internet services, impacting their enjoyment of other human rights like housing and healthcare.

These existing barriers must be addressed, and work done to overcome any additional barriers that may emerge as technological change continues to accelerate. Otherwise, more and more people experiencing homelessness are at risk of being rendered 'non-existent' in 21st century Australia.

³⁰ Daniela Hernandez, 'The Internet is a Universal Human Right. Just ask the homeless', *Wired*, 14 October 2013, via: <https://www.wired.com/2013/10/homeless-but-wired/>

³¹ Claire Cain Miller, 'Fighting homelessness, one smartphone at a time', *New York Times*, 14 April 2015, via: <https://www.nytimes.com/2015/04/15/upshot/fighting-homelessness-one-smartphone-at-a-time.html>

1.2 Promoting human rights through new technology

Question 3 asks:

How should Australian law protect human rights in the development, use and application of new technologies? In particular:

- a) What gaps, if any, are there in this area of Australian law?*
- b) What can we learn about the need for regulating new technologies, and the options for doing so, from international human rights law and the experiences of other countries?*
- c) What principles should guide regulation in this area?*

Question 4 asks: *In addition to legislation, how should the Australian Government, the private sector and others protect and promote human rights in the development of new technology?*

The Issues Paper rightfully predominantly raises questions around responsible innovation. While responsible innovation is integral to the protection of human rights and PIAC supports this focus, PIAC advocates for a proactive response to technology as well as a reactive one.

As described by Land and Aronson:

Efforts to protect and promote human rights have to take seriously the ways in which these technologies, and the forms of knowledge creation, production, and dissemination they enable, can create harms and be exploited to violate rights. At the same time, human rights practitioners must continue to seek creative ways to make use of new technologies to improve the human condition.³²

PIAC believes there is an opportunity to go further than checking and ensuring innovation is responsible, by actively promoting the development and use of new technologies for human rights advocacy and protection. The Paper does raise examples of where '[s]ome NGOs are increasingly using new technologies to push for accountability for human rights violations' and asks how the potential of new technologies for human rights protection can be harnessed.

PIAC's Conflict Mapping and Archive Project is an example of how basic database technology can be used to map human rights violations that occurred in Sri Lanka. The project illustrates how the benefits of technological advancements in other fields would enhance our existing work if we were able to better access it. Examples of useful technological innovations include content gathering systems that underpin manual filtering of information, automated coding for event data, and developments in interactive data visualisation.

Currently, there are examples of human rights NGOs being able to leverage some of the technological developments that have been created for other purposes, but examples are relatively limited and should be encouraged further. They include the impressive satellite analysis work being undertaken by Human Rights Watch most notably with respect to the Rohingya crisis; or the International Peace Information Service (IPIS) who among other technological tools, uses interactive data visualisation technology to develop sophisticated conflict mapping in sub-Saharan Africa.

While there are increasing partnerships being created globally between data scientists, technology experts, human rights practitioners and political scientists, PIAC supports the Commission's attempts to bring these experts together as well. An issue that arises, however, is that human rights organisations often have very limited in-house technological capacity, limiting

³² Molly K Land and Jay D Aronson, *New Technologies for Human Rights Law and Practice*, Cambridge University Press, April 2018, 1.

their ability to harness technology for impact. More needs to be done to create incentives for the commercial sector to work with and innovate in a way that enhances the work of our human rights organisations.

In addition to adopting legislation that requires technology companies to address any negative impact their innovations might have, technology companies should be strongly encouraged to consider what positive application their work can have for human rights. Like the legal sector is encouraged (or even required in order to be eligible for government work) in various jurisdictions to undertake *pro bono* work, so too should technology companies be encouraged to have a *pro bono* program. This could be done through government procurement of technology services. It might include technology companies allocating a percentage of their budget to *pro bono* work, or a certain number of staff hours being dedicated to *pro bono* work.

The Paper discusses self-regulation, co-regulation and regulation by design with respect to AI-informed decision making. In doing this, the NGO sector should be encouraged and supported to be part of this regulatory and monitoring process. The Paper uses the example of Justice X who is prejudiced and gives harsher sentences. Globally, there are a handful of innovative projects that rely on technology to display comprehensive data on prison systems and sentencing practices. If NGOs are encouraged and supported to run projects like this, they can play a crucial part in regulating and mitigating against biased decision making both by AI and humans.

1.3 The Suspect Targeting Management Plan (STMP): A cautionary tale

Question 5 asks:

How well are human rights protected and promoted in AI-informed decision making? In particular, what are some practical examples of how AI-informed decision making can protect or threaten human rights?

As part of the Youth Justice Coalition, PIAC has played a pivotal role in examining NSW Police's Suspect Targeting Management Plan (PLAN) policy, including co-authoring the *Policing Young People in NSW* report, released in October 2017.³³

As described in that report:

The New South Wales Police Force Suspect Targeting Management Plan (STMP) seeks to prevent future offending by targeting repeat offenders and people police believe are likely to commit future crime. The STMP is both a police intelligence tool that uses risk assessment to identify suspects and a policing program that guides police interaction with individuals who are subject to the program.³⁴

The STMP is comprised of:

- An administrative policy
- An intelligence and risk assessment tool, and
- A targeted policing program.³⁵

Individuals identified for inclusion on the STMP are 'subject to a "targeted program" by NSW Police officers, which includes police attending the individual's house on a regular basis, and using police powers to stop and search, and move on directions, whenever police encounter the individual.'³⁶

This clearly has a significant impact on the day-to-day lives of people who are subject to the STMP, including a high potential to interfere with their enjoyment of a number of human rights.

Relevant to the current consultation, Dr Sentas and Ms Pandolfini note that:

We understand that the Ombudsman's reference to the STMP as a standardised plan may refer to the use of particular algorithms, or risk assessment tools, to calculate a person's risk of offending or re-offending. However, the STMP policy and risk assessment tools are not publicly available.³⁷

Lack of transparency

Although it appears the STMP does not currently involve the use of AI-informed decision making, it does appear to involve the application of supposedly objective 'intelligence criteria' to determine whether a person is high-, medium- or low-risk. This opens the door to the further deployment of AI-informed decision making in similar circumstances in the future.

³³ Vicki Sentas and Camilla Pandolfini, *Policing Young People in NSW: A study of the Suspect Targeting Management Plan*, Youth Justice Coalition, October 2017, via: <https://www.piac.asn.au/wp-content/uploads/2017/10/17.10.25-YJC-STMP-Report.pdf>

³⁴ Ibid, 1.

³⁵ Ibid, 5.

³⁶ Ibid.

³⁷ Ibid, 6.

It can therefore also provide lessons on what best practice in this area should be – or, in the case of the STMP, examples of risks in the application of technology in law enforcement.

The first point to note is that the policy and risk assessments underpinning the NSW Police STMP program are not publicly available. This undermines the legitimacy and credibility of the program.

As observed by Dr Sentas and Ms Pandolfini, '[i]t is impossible to assess the claim that the STMP is accountable because it deploys risk assessment tools, if these tools and the assumptions underlying them are not made available for scrutiny.'³⁸

The lack of transparency also has a detrimental impact on individuals:

In the absence of transparent criteria, individuals are often left wondering whether factors such as their race or their family history have influenced the NSW Police decision to nominate them as a target on the STMP. This absence of clear explanation for placement on an STMP then cascades into absence of transparent, clear or lawful justification in the targeting or management of an individual.³⁹

For these reasons, the second recommendation of the *Policing Young People in NSW* report was that 'NSW Police make the STMP policy and operational arrangements publicly available to enable transparency and accountability'.

The recently-completed NSW Parliamentary Committee inquiry into youth diversion⁴⁰ adopted a similar recommendation in its final report.

Lack of contestability

A related problem of the STMP is that people who are placed on it are unable to contest their inclusion.

This clearly derives from the lack of transparency of the risk assessment tool and policy itself – if that documentation is not available then it is impossible for someone to determine whether they have been correctly included under the STMP, and if they have not to challenge that decision.

In the case of the STMP, however, this problem is compounded by the fact that many, possibly the majority, of people subject to an STMP are never told that they have been placed on it.

For people who are aware of the policy, they may be able to deduce that they are likely to be subject to an active STMP. However, many young people and young Aboriginal and Torres Strait Islander people may be completely unaware of the policy itself, and therefore have no idea that it is potentially the reason that they are being stopped, searched and moved on. In the absence of this knowledge, both the perception and the reality of being unjustly harassed is greatly exacerbated.

Even where a person becomes aware that they are subject to an STMP, there is currently no requirement that NSW Police explain the reasons for why they have been included. Nor is there

³⁸ Ibid, 6.

³⁹ Ibid.

⁴⁰ NSW Legislative Assembly Committee on Law and Safety, *Inquiry into the Adequacy of Youth Diversionary Programs in New South Wales*, September 2018, via: <https://www.parliament.nsw.gov.au/ladocs/inquiries/2464/Report%20Adequacy%20of%20Youth%20Diversionary%20Programs%20in%20NSW.PDF> Recommendation 8: 'That the NSW Police Force make the Suspect Targeting Management Plan policy and high level operational arrangements publicly available.'

any formal ability for the person affected to contest their inclusion, or to request a review, either internal or independent.

For all of these reasons, the Youth Justice Coalition recommended that:

NSW Police amend the STMP Policy to mandate formal notification by police to any individual placed on a STMP, including reasons for placement on the STMP and the date of the next review. Subsequent notifications to individuals on an STMP should outline the outcome of the review and reason for the STMP being maintained or discontinued (Recommendation 4).

Once again, this recommendation goes to some of the issues that must be considered in any further future deployment of AI-informed decision making in law enforcement specifically and justice generally.

Systemic Discrimination

A final issue to consider in relation to AI-informed decision making, based on the example of the STMP, is that the outputs of such decision making must be closely monitored to identify and then take steps to avoid discriminatory outcomes.

This may be particularly the case with AI-informed decisions. Such decisions will have the appearance of neutrality or objectivity which may mask indirect or 'disparate impact' discrimination. Such discrimination may result from the use of criteria that are themselves the subject of conscious or unconscious bias, or from the disparate impact of otherwise neutral criteria.

In preparing the *Policing Young People in NSW* report, the Youth Justice Coalition was unable to find publicly-available demographic data of who was being subject to STMPs in NSW.

As a result, it sought to obtain data on the use of the STMP directly from the NSW Police through the *Government Information (Public Access) Act 2009* (NSW). This data included demographic information from a diverse range of NSW Local Area Commands (LACs) for the 2014-15 and 2015-16 years.

While limited, this data demonstrated that there were significant issues in terms of who was being placed on STMPs:

Across the 10 LACs; 213 people were subject to an STMP, 60 of whom were still subject to an STMP as at 30 June 2015...
One hundred and four (48.82%) of STMP targets were young people. The youngest STMP target was just 11 years old.
Ninety-four (44.1%) were identified as Aboriginal...
Barwon had 40 STMP targets, the second highest number out of all ten LACs examined. 67% or 27 of those individuals were Aboriginal...⁴¹

These figures clearly show that the STMP policy has a disproportionate impact on young people, and on young Aboriginal and Torres Strait Islander people in particular. This impact is in fact so disproportionate that it is at least arguable that the implementation of this policy contributes to a racially discriminatory outcome.

In practice, the impact is worse than the *Policing Young People in NSW* report estimated. Shortly after its publication, the NSW Police Commissioner, Mr Mick Fuller, released figures showing that

⁴¹ Ibid, 11.

of the 1,800 people subject to an STMP in NSW, approximately 55% were Indigenous.⁴² And the youngest person subject to an STMP was just nine years old⁴³ (lower than the criminal age of responsibility in this jurisdiction).

It is unclear whether these figures were being actively monitored within NSW Police prior to the publication of the *Policing Young People in NSW* report, or whether the report prompted renewed attention to this issue.

Regular publication of such data would be beneficial in helping to identify any disproportionate or discriminatory outcomes, which is why the report recommended:

That NSW Police make data on the STMP publicly available through BOCSAR. Available data should include demographic information, (age, racial background, LAC) as well as data on the length of time enrolled in the STMP, and risk categories (Recommendation 5).

This would obviously assist NGOs, including both human rights and Indigenous groups, to identify any issues that arise in terms the impact of the STMP.

However, publication alone is not sufficient. Where law enforcement agencies such as NSW Police employ 'risk assessment tools' like the STMP – whether they rely on algorithms, AI-informed decision making or simply 'intelligence criteria' – they should be required to actively monitor the impact of them to determine whether they disproportionately affect different groups within society, including (or especially) Aboriginal and Torres Strait Islander people.

⁴² Michael McGowan, 'More than 50% of those on secretive NSW police blacklist are Aboriginal', *Guardian Australia*, 11 November 2017, via: <https://www.theguardian.com/australia-news/2017/nov/11/more-than-50-of-those-on-secretive-nsw-police-blacklist-are-aboriginal>

⁴³ Ibid.

1.4 People with Disability and Access to Technology

Question 8 asks: What opportunities and challenges currently exist for people with disability accessing technology?

The AHRC Issues Paper clearly identifies a tension at the heart of access to technologies for people with disability.

New technological advances have the capacity to improve equal access to goods and services for people with disability, improving the realisation of core human rights such as equality and non-discrimination.

Example 1: Accessible voting

Work is underway to have all State and Territory Electoral Commissions adopt a single form of electronic voting based on a telephone keypad. A system has been in operation in NSW since 2011 through the use of iVote. The system has allowed blind and vision-impaired people, as well as other voters with a disability and those living in remote areas, to cast a secret and unassisted vote remotely using an interactive voice recognition-based phone number or an internet-enabled computer. Once lodged, iVotes are printed out in a central location as completed ballot papers and included in the manual count processes.

Electronic assisted voting has greatly improved the franchise of people with disability, with many electors who are blind or have low vision responding positively to the use of electronic voting machines.

At the same time, new technologies have the capacity to erect barriers to social inclusion for people with disability that did not previously exist, impeding the practical realisation of human rights.

PIAC's disability discrimination work in recent years has focused on the opportunities and challenges people with disability face in accessing technologies. This is because, as well as being a service in itself, technology is transforming the ways that people with disability access transport, goods and other protected areas of life under the *Disability Discrimination Act 1992* (Cth). Below, we focus upon three core challenges for people with disability posed by technological developments, and illustrate how these issues have arisen for PIAC's clients.

The benefits of technology for people with disability can be undone when technology changes or is upgraded

Over the past five years, PIAC has represented a number of clients who have embraced technological change, with considerable benefit to their lives. In particular, use of internet-based technologies by people with disability has the power to increase independence in access to services, and to enable cultural and social engagement by removing many of the physical barriers that have historically prevented people with disability from enjoying these aspects of community life.

However, considerable issues have arisen for a number of PIAC's clients when technological innovation appears not to have been adequately designed in consultation with people with disability, and with the principles of inclusive design in mind.

Example 2: Gisele Mesnage v Coles

In 2015 PIAC represented Gisele Mesnage, who lodged a claim of unlawful discrimination in the Federal Circuit Court against the major supermarket company, Coles. Ms Mesnage, like thousands of blind and vision-impaired people across the country, relies on screen-reader technology to access websites and to order groceries. As Ms Mesnage stated: 'For me, online shopping is a revolution. Not only do I want to be part of it, I need to be part of it. It's about independence.'

Commencing in 2008, upgrades of the Coles shopping website rendered it almost impossible for Ms Mesnage to use. Ms Mesnage faced recurring difficulty in accessing the website, with it often taking days to complete one order, when she was able to complete an order at all.

In February 2015, the parties reached a settlement of the claim, with Coles agreeing to make further improvements to its website in respect of the accessibility enhancements suggested by Ms Mesnage.

The *Mesnage* case highlights that, in the absence of enforceable standards for website design and upgrades, people with disability may bear a considerable burden of learning and re-learning new iterations of technology as they change. In PIAC's view, the rapid pace of technological innovation is making this issue an increasingly pressing one. Furthermore, in the case of private business providers, time pressures to release products onto the market may arise from the desire of private companies to appear to be innovators or market leaders in a particular area. While such forces are understandable in the context of a marketplace, they may be one factor that explains why adequate consideration of people with disability may not be considered before upgrades and changes are made to complex technologies.

Such issues are not limited to internet-based technologies. Since at least the launch of the iPhone in 2007, touchscreen technologies have proliferated in usage across the marketplace. While it has been possible for corporations to design many such technologies (including the iPhone) with accessibility functions enabling their use by people with disability, in cases where such functions are not present, the removal of tactile features of equipment poses a considerable challenge for some people with disability.

Example 3: Graeme Innes and Nadia Mattiazzo v Commonwealth Bank of Australia

In 2018 PIAC assisted Graeme Innes and Nadia Mattiazzo to lodge claims of unlawful discrimination in the Federal Circuit Court against the Commonwealth Bank of Australia in relation to their Albert EFTPOS machines. Mr Innes and Ms Mattiazzo, who are both blind, say that people who are blind or have low vision are unable to use the Albert machines because they have a touch screen rather than a tactile keypad.

It has been reported that there are more than 88,000 Albert machines in operation across Australia. The bank has continued to roll out the machines despite the concerns of blindness peak groups and individuals. The proliferation of the Albert machines in retail settings represents a serious compromise to the financial independence of Mr Innes and Ms Mattiazzo, who have consistently independently managed their own finances, including EFTPOS transactions, until the introduction of the Albert in 2016.

As Ms Mattiazzo said of her claim: 'These machines seriously limit where I am able to shop and eat out. I am not willing to divulge my PIN to complete strangers and I would be in breach of my contract with the bank if I were to do so. I have no choice but to avoid businesses that use them. If I cannot enter my PIN myself I feel like my independence is being taken away from me'.

The *Innes* and *Mattiazzo* cases highlight the challenges posed for people with disability when new technologies become the only option by which people may access goods and services. The cases are a salient reminder that, before older technologies are removed and replaced, sufficient real-world market testing must occur to ensure that new technological developments do not impede access to goods and services that have previously been easily available.

The presumption that technological change may solve current problems may distract from the need to make current technologies accessible

Although internet-based technologies have transformed the lives of many people with disability, it is important that governments and industry understand that people with disability may also have limited ability to access some technologies, and that the effect of this unequal distribution of resources may be exacerbated for older people with disability, or those who live in rural and regional areas.

A salient example of this issue has arisen for many of PIAC's clients in the use of public transport, where there have been a range of applications for mobile telephones that allow people to determine their location on a public transport network, or the time and location of the next service. While many people with disability are confident users of mobile telephone and internet-based apps, they are not a solution for all people with disability, including those who do not have access to or confidence in using the same technology. There are also potential reliability issues with apps (including reception black spots and/or slow download speeds) that limit their use for some individuals.

For these reasons, apps are not, and should not be considered as, a substitute for physical changes or infrastructure. For example, simply because it may be possible to look up a timetable online, does not mean that bus stops and interchanges should not all be accessible through either braille or talking text. Similarly, apps on phones that announce locations should not be a substitute for audible announcements being made on trains and buses.

It is important for policy makers not to assume that trends in technology take-up that apply generally to the population apply equally to people with disability. For example, a recent report by Ericsson found that nearly six out of ten consumers currently use on demand and catch-up television services. Ericsson also projects that by 2020, seven out of ten consumers will prefer on demand and catch-up services over scheduled linear television viewing. However, peak groups representing people who are blind and vision impaired report that this trend is not the same for their constituents, who are taking up online television services at a far slower rate.

Example 4 – Hudson v ABC and the campaign for Audio Description

Since 2012, Blind Citizens Australia (BCA) has been campaigning for meaningful access to Australian television for people who are blind and vision-impaired. In 2012, the Australian Broadcasting Corporation (ABC) trialled an audio description service for their programmes to assist people who are blind and vision impaired to access television equally with others in the community. Following the successful trial, no further action was taken to make the provision of that service permanent. In 2015, PIAC assisted Suzanne Hudson to lodge a claim of unlawful discrimination in the Federal Circuit Court against the ABC in relation to their failure to provide audio description on free to air television on an ongoing basis. Ultimately, Ms Hudson's case was discontinued.

In 2015-2016, the ABC trialled audio description on its iview catch-up service. The reports assessing the two trials concluded that catch-up services were more sustainable platforms on which to provide AD on an ongoing basis. Likewise, a working group convened by the Commonwealth Department of Communications concluded in its final report that an app and landline phone based solution for AD may represent the best possible compromise between peak body, government and industry positions.

However, peak bodies such as BCA have consistently drawn attention to the fact that a number of potential users of the iview trial were unable to participate because they did not have access to the internet, suitable data allowances, a device required to access iview or the knowledge and ability to access iview. Such issues are likely to be replicated should any policy direction taken by the government assume that provision of AD on catch-up services or apps is an replacement for, rather than an additional alternative to, AD being made available on free to air television.

Technological interventions in the market may subvert regulatory frameworks that protect the rights of people with disability

Since the introduction of the *Disability Discrimination Act* in 1992, both jurisprudence and enforceable Standards have expanded the regulatory framework in which the rights of people with disability are protected. However, as technological change leads to unforeseen services dominating the marketplace, the pace of regulatory change may not be quick enough to ensure ongoing protection for people with disability.

One example of this shift that has been reported in complaints to PIAC includes the failure by many point-to-point private transport services (including 'ride-share' platforms such as Uber) to comply with regulatory requirements in place for those wishing to obtain taxi licenses. This may include guaranteeing that a particular number of vehicles in a fleet are accessible for people with a disability, and a need for increased safety in terms of pick-up and set-down spaces for people with disability using point-to-point schemes.

In considering such technological developments, it is key that policy makers pay close attention to the particular kind of disruption that is occurring in a market, and the implications of that disruption for people with disability. Specifically, in a competitive market products and services that are accessible for people with disability must not be permitted to fail or disappear, simply because non-accessible services have entered as a dominant player in a market.

Question 9 asks:

What should be the Australian Government's strategy in promoting accessible technology for people with disability? In particular:

- a) What, if any, changes to Australian law are needed to ensure new technology is accessible?*
- b) What, if any, policy and other changes are needed in Australia to promote accessibility for new technology?*

a) What, if any, changes to Australian law are needed to ensure new technology is accessible?

There are currently three sources of law that relate to the accessibility of technology for people with disability in Australia.

First, the United Nations Convention on the Rights of Persons with Disabilities (CRPD), obliges the Commonwealth Government and its agencies to take appropriate steps to ensure that people with disability can access technology on an equal basis to others. Article 9 of the CRPD relevantly provides:

1. ... States Parties shall take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to ... information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public... These measures, which shall include the identification and elimination of obstacles and barriers to accessibility, shall apply to, inter alia:

...

b) Information, communications and other services, including electronic services and emergency services.

2. States Parties shall also take appropriate measures:

a) To develop, promulgate and monitor the implementation of minimum standards and guidelines for the accessibility of facilities and services open or provided to the public;

b) To ensure that private entities that offer facilities and services which are open or provided to the public take into account all aspects of accessibility for persons with disabilities;

c) To provide training for stakeholders on accessibility issues facing persons with disabilities;

...

g) To promote access for persons with disabilities to new information and communications technologies and systems, including the Internet;

h) To promote the design, development, production and distribution of accessible information and communications technologies and systems at an early stage, so that these technologies and systems become accessible at minimum cost.

Second, the *Disability Discrimination Act 1992* (Cth) (DDA) makes it unlawful for both public and private sector actors to discriminate against a person on the grounds of disability when they provide and/or make available goods, services, facilities and access to public premises, each of which have a link with new technologies.

Third, specific pieces of technology-specific legislation, such as Acts that regulate telecommunications, may impact (or have the capacity to impact) the regulation of industries that provide technologies, and in turn affect accessibility for the products within that industry.

This submission focuses a number of legal issues arising in relation to these frameworks, and considers how the law could better ensure that new technologies are accessible.

There is currently a lack of binding Standards under the DDA in relation to accessible technology

In setting up a (primarily) complaints-based system for discrimination, the DDA provides people with disability only limited protection from inaccessible technologies. That is because, while it may be unlawful to develop and release a piece of technology that is inaccessible to people with disability, by the time such a product is released onto the market, used by an individual, and a complaint is made to the AHRC, it is often the case that many months of research and development have been invested into the architecture of that new technology, making respondents reluctant to change course and 'start from scratch'. As in the built environment, it is often costly to 'retro-fit' technology to make it accessible. Depending upon the extent of a new technology's penetration, developers of new technology may therefore consider it an unjustifiable hardship for them to attempt such retro-fitting, once it has been released.

A further issue relating to the DDA is that, to date, there has been very little jurisprudence interpreting the manner in which the non-discrimination provisions of the DDA apply to developers, manufacturers and distributors of inaccessible software and hardware. This lack of jurisprudence is a self-reinforcing issue, because, in PIAC's experience, when discrimination claims in relation to new technologies arise, it is difficult to give legal advice on their prospects of success, making potential litigants wary about pursuing their claim in Court, especially in light of the prohibitive cost risks involved in litigation. Accordingly, little legal guidance is available for public and private sector actors about what they must do to meet their obligations under the DDA when designing and distributing new technologies.

It is therefore critical that the AHRC consider whether it is possible to develop binding Standards for accessible technologies under the DDA, or, at a minimum, whether further Advisory Notes under s 61(1) of the DDA, such as those developed for World Wide Web access in 2010, may be appropriate in the technological space. The guidance provided by such Advisory Notes and Standards would provide useful information to public and private sector actors about their obligations when designing and implementing technology, as well as giving people with disability confidence about the extent of their rights.

In PIAC's view, such Standards and/or Advisory notes should be developed in consultation with people with disability and experts in the relevant technologies, and capture the principles of co-design, namely that:

- co-design of technology with people with disability is critical to ensure accessibility; and

- the manner in which co-design is conducted should depend on the nature of the technology.

Such Standards and/or Advisory Notes would also need to be updated regularly, to take account of the rapid pace of technological change.

The Australian Government should make provision of accessible technologies a mandatory condition of participating in regulated industries

In light of its obligations under the CRPD, it is appropriate that the Australian Government consider how to use legislation in specific technology-related areas to influence the behavior of the private sector.

For example, under the *Telecommunications Act 1997* (Cth) and the *Telecommunications (Equipment for the Disabled) Regulations 1998*, there are a number of features (including raised 'pips' on the number 5; hands-free capability, and volume control) that must be present on all telephonic equipment used for standard telephone services in Australia. By legislating in this manner, the Australian Government has ensured that there are a minimum set of standards for technological equipment that consistently improve the accessibility of telephonic equipment.

Likewise, the Australian Government has made it a condition of obtaining a broadcasting license under the *Broadcasting Services Act 1992* (Cth) that any broadcaster must provide a minimum quota of captioned content on free-to-air television. In PIAC's view, the opportunity exists to extend that framework to other forms of accessibility for television, such as quotas or targets for a minimum number of hours of audio-described content. More broadly, PIAC believes that whenever the Government is undertaking a regulatory review in the telecommunications space, it is important to consider what regulatory criteria should be built in, so as to improve technological accessibility for people with disability by the setting of minimum mandatory standards.

b) What, if any, policy and other changes are needed in Australia to promote accessibility for new technology?

The Australian Human Rights Commission should monitor and review voluntary industry standards relating to accessible technology

In addition to the legislative Standards and Advisory Notes that are developed by the AHRC, voluntary industry standards also have a role in regulating the behavior of the private sector and industry. In this regard, it is important that the Disability Discrimination Commissioner play an active role engaging the heads of industry to encourage them to develop standards of regulation when new technologies are designed.

As the below example demonstrates, it is also crucial that, once such standards are developed, the AHRC continues to have a monitoring role in the implementation and any review of the standards, to ensure that continuous reviews build upon and strengthen accessibility gains, rather than progress being reversed.

Australian Banking Standards

In 1999-2000, at the request of the Attorney-General, the Disability Discrimination Commissioner conducted a public inquiry on accessibility of electronic commerce for people with disability and older people. Out of that inquiry, the Commission secured agreement by the Australian Bankers Association (ABA) to voluntarily develop a series of industry accessibility standards on the following:

- ATMs;
- EFTPOS;
- Automated Telephone Banking; and
- Internet Banking.

These standards, developed in consultation with community representatives, were launched in April 2002.

In 2016, the ABA announced that it would replace its standards with a set of Accessibility Principles for Banking Services, and consultations are currently ongoing. In PIAC's view, the ABA's proposed move from a set of prescriptive principles for the design of banking technologies to a high level set of behavioural principles is concerning. PIAC considers that, if finalised in their current form, the Principles will not operate to provide an early enough signal to industry that a piece of touchscreen technology, such as the Commonwealth Bank's Albert EFTPOS terminal, is inaccessible, prior to its release onto the market.

The Australian Government should provide training for stakeholders on accessibility issues facing persons with disability

In accordance with its obligations under the CRPD, the Australian Government should seek out opportunities to provide key stakeholders in technological industries with information and educational resources to improve their knowledge of accessibility. This may involve providing training resources for businesses about the ways in which they can work together with people with disability to ensure that technologies are designed in an accessible manner.

Such training and resources could be designed and delivered by an agency as the AHRC. Alternatively, the government could provide funding to peak bodies with expertise in both disability issues, technology and human rights, such as ACCAN, to develop and provide training over an extended period of time.