

Walking While Brown: A Critical Commentary on the New Zealand Police Extra-Legal Photographing and Surveillance of Rangatahi Māori

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In December 2020 and again in March 2021, Radio New Zealand (RNZ) reported that NZ Police had stopped young people and demanded that they hand over personal information and allow their photographs to be taken. Some of the personal information and photographs were then uploaded to a centralized investigative app called *OnDuty* for future reference while others were simply stored and retained on business and private devices of police officers (Hurihanganui & Cardwell, 2020; Hurihanganui, 2021). These incidents involved mostly rangatahi Māori (Māori youth) being approached without cause, i.e., they had neither committed an offence nor were they suspected of having done so. Initial indications from NZ Police portrayed the practice as limited and 'rare' but, by March 2021, it was evident that the practice was widespread with incidents being reported throughout the country (Hurihanganui, 2021).

When the story broke in late 2020, NZ Police defended the practice, highlighting the fact that they had the power to take photos of youth under Section 214 of the 1989 Oranga Tamariki Act (Hurihanganui & Cardwell, 2020). However, this power can only be used in limited circumstances, which does not cover stopping and demanding photos of rangatahi Māori (or any other youth for that matter) when they have not committed an offence or when there is insufficient evidence they have committed one. While New Zealand laws allow people to photograph others in public places, police officers must abide by stricter rules under the *Privacy Act 2020* and must only collect photos if there is a clear and lawful purpose (IPCA & OPC, 2022).

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By late 2021, concerns over this police practice resulted in a joint investigation by New Zealand's Office of the Privacy Commissioner (OPC) and the Independent Policy Complaints Authority (IPCA). The final report from this investigation was released on 8 September 2022. In summary, the investigation found that:

1. Three complaints from whānau (extended families) whose rangatahi had been stopped and photographed were upheld.
2. Almost 11,000 people were photographed between 2018 and 2021, and 53 percent were Māori.
3. Thousands of photos of members of the public were also found on officers' mobile devices, and the rollout of smartphones about 10 years ago had not come with adequate training.
4. A widespread practice had developed where police officers routinely took photographs of rangatahi and adults in public for later identification with little cause. People were photographed for simply looking 'out of place' or 'suspicious'.
5. Police were not justified in photographing rangatahi the way they did, as the photographs were not necessary for a lawful policing purpose, such as investigating a crime.
6. Police officers had neither sought proper consent from rangatahi and their parents or caregivers before taking the photographs nor had they adequately explained why the photographs were taken and what they would be used for.
7. Many officers erroneously believed they could photograph rangatahi who had not committed an offence to gather intelligence or for future investigative purposes.
8. Police routinely ignored that rangatahi have special protections in the NZ criminal legal system set out in both several pieces of domestic legislation and the *United Nations Convention on the Rights of the Child* (UNCROC). The joint inquiry determined that Police conduct, in many cases, was inconsistent with those legal protections (IPCA & OPC, 2022).

The joint inquiry recommended that:

Police policy, procedures and training be revised and enhanced to reflect that:

- *photographs are sensitive biometric information;*



- *when Police are photographing adults and youth, they are doing so either under a specific statutory authorisation, or in compliance with the information privacy principles; and*
- *photographs should be taken in accordance with youth specific protections.*

Lastly, in December 2021, NZ Police were issued a compliance notice by the OPC to stop collecting duplicate photographs and biometric prints from rangatahi who had not committed an offence and to delete unlawfully collected material.

The political, and ‘administrative’ response to the report of the joint inquiry, its findings and recommendations, was both swift and predictable. The NZ Police Commissioner, Andrew Coster, responded to the report by stating that intelligence gathering, including taking photos and voluntary fingerprints, allowed the agency to carry out its core functions as set out by the *Policing Act 2008* – particularly the prevention and investigation of crime (Thomas, 2022). While “welcoming” the report, Coster also stated that “some of the findings and recommendations present significant challenges to our staff being able to carry out their duties successfully” (Thomas, 2022, n.p.), and that “the implications of this is that we will struggle to prevent some crime and investigate some crime” (Cook, 2022, n.p.). The obvious inference made by the Commissioner was that if Police were unable to take information and photographs of law-abiding members of the public this would impede their ability to ‘do their job’.

Similar arguments were presented by the President of the NZ Police Association, Chris Cahill. In response to the release of the report, Cahill doubled down on Coster’s insinuation that Police work would be significantly hampered if they were not able to collect intelligence from rangatahi who had committed no crime. Cahill argued that the findings were “out of step with what police officers need to do every day to protect New Zealanders from becoming victims of crimes” (Thomas, 2022, n.p.). Cahill said police need to be able to keep copies of young people’s fingerprints to solve crimes and justified the practice because “[w]e’re aware of hundreds of positive fingerprint hits that would identify offenders of crime that police aren’t acting on because of this report” (Cook, 2022, n.p.).

Over a month after the release of the report, the Minister of Police, Chris Hipkins, speaking at the annual NZ Police Association conference, and clearly influenced by Police responses to the report, started speaking about

the possibility that the government may change various pieces of legislation to make legal the Police activities that had just been declared illegal by the OPC and IPCA. In other words, he alluded to wanting to give Police the power to take information from rangatahi who are simply 'walking while brown'. In response, Māori data specialist Karaitiana Taiuru argued that

[t]o me, it's almost like legislating discrimination against young Māori by the police. We know from the IPCA that is exactly what happened - Māori were over-targeted for photos, for ID. Now the minister is talking about legislating it, it just makes no sense" (as quoted in Green, 2022, n.p.).

In response to the arguments that defended the illegal activity of Police put forward by NZ Police Commissioner, Andrew Coster, President of the NZ Police Association, Chris Cahill, and Minister of Police, Chris Hipkins, we state the following:

1. The argument that photographing and fingerprinting innocent people would allow the police 'to do their job' is void of any logical or rational foundation because if no crime has been committed, no crime needs to be investigated.
2. As far as individual 'voluntariness' and consent to being photographed and fingerprinted are concerned, situations need to be interrogated on a case-by-case basis as many people do not know their rights and tend to 'volunteer' once the police 'suggest' arrest or a trip to the station. Such cases have been reported by RNZ and it is also suggested by the IPCA/OPC report.
3. We agree with Taiuru's comment that the statement by Minister of Police, Chris Hipkins, was shocking because after he had read the report compiled by the OPC and IPCA, Hipkins knew that Māori had been disproportionately targeted and consequently he also knew that if the practice was to be made legal, Māori would be again the main target. A claim of unconscious bias – the common retort of NZ Police to accusations of institutionalised racism – can therefore no longer be sustained.
4. Since the practice evidently affected Māori disproportionately and would therefore continue to affect Māori disproportionately, the only way to guarantee equity in practice would be to fingerprint and photograph every New Zealand citizen and resident over the age of 12.



This is what authoritarian states tend to do, and the police in such regimes have access to that data for any purpose. We have to ask whether New Zealand intends to join the ranks of authoritarian states or remain one that protects civil liberties. We also have to wonder if the majority of the New Zealand population would support such a move if the police practice affected *everyone* and not just Māori.

5. Section 25 c) of *New Zealand Bill of Rights Act 1990* gives everyone “the right to be presumed innocent until proved [sic] guilty according to law”. If we allow police to photograph and fingerprint any innocent person, this rule of law is arguably circumvented, when the data is stored with the intention to solve crimes. In other words, the police practice implies the assumption that the photographed person will commit a crime in future. The movie *Minority Report* inevitably comes to mind.
6. Making the practice legal would also open the door to the misuse of stored data by Police. In this regard, the report by the OPC and IPCA has sufficiently demonstrated that New Zealand citizens and residents cannot necessarily trust that Police will stay within the parameters of what is legally permitted.
7. As far as Chris Cahill’s claim that there are “currently hundreds of crimes where the offenders had been identified by the use of voluntary fingerprints that [police] cannot act on”, the public has no way to verify his claim. Even if this claim was true, it demonstrates how ineffective the practice is since the police had taken thousands of photos and fingerprints but only a few may have yielded results. The thus revealed disproportion also speaks to the fact that the vast majority of the photographed and fingerprinted youth remain innocent even though they had to endure a potentially traumatizing encounter with police.
8. Looking at the bigger picture, the international research evidence demonstrates that the vast majority of youth offenders ‘grow out of crime’ as they transition into adulthood. *Not* being processed through the criminal legal system may speed up this transition while being processed through the system may lead to sustained offending patterns (McGregor, 2019). In other words, society benefits from youth staying in school and not being sent to ‘the university of crime’.
9. Currently, NZ Police speak and act as if our rangatahi and youth present a threat to the fabric of our society that needs to be labelled, catalogued, and constantly surveyed. Research evidence suggests that

such labelling leads to a self-fulfilling prophecy. In other words, we become what other people believe us to be. Hence, the police practice of cataloguing innocent young people and its suggested legalization are counter-productive to the government's goal to reduce the arrest, conviction, and incarceration rates, especially for Māori. What we would like to see instead is a police force that supports *all* our young people to become the best version of themselves and fulfil their innate positive potential.

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