

Police photography of children in Queensland:

An analysis of police powers and privacy rights

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May 2018

This position paper was researched and drafted by UQ law students Isabelle Peart, Josephine Booth and Amy Hancell. The position paper was prepared for and on behalf of **Caxton Legal Centre's Human Rights and Civil Law Practice**. The project was undertaken as part of the Manning Street Project, a student pro bono partnership between the UQ Pro Bono Centre and Caxton Legal Centre. Student researchers undertook this task on a *pro bono* basis, without any academic credit or reward, as part of their contribution to service as future members of the legal profession. The UQ Pro Bono Centre thanks Caxton Legal Centre for allowing us to contribute to its vital work.



POLICE PHOTOGRAPHY OF CHILDREN IN QUEENSLAND: AN ANALYSIS OF POLICE POWERS AND PRIVACY RIGHTS

I INTRODUCTION

In January 2018, media reports were released claiming that children in the streets of Mount Isa were being stopped and photographed by Queensland Police Officers who were also recording their name, address and where they were going as part of a police operation, Operation Tucson, to reduce crime in the area.¹ The operation triggered concerns about the lawfulness of photographing children in the street and how the photographs were going to be retained and used.² At the time, Acting Assistant Commissioner, Kev Guteridge, said that the photographs were being used to eliminate the photographed persons from suspicion in other police investigations.³ In response to the reports, vice-president of the Queensland Council for Civil Liberties, Terry O’Gorman, said that ‘Police do not have the power, and should not have the power, to willy-nilly walk down the streets, take photographs of people and put them on the major Queensland Police Service database’.⁴ Queensland Police Minister Mark Ryan issued a statement that the officers conducting the operation had all acted within the law.⁵

This report seeks to address the concerns that have arisen out of the Mount Isa operation. The report begins by outlining the context of police photography in Queensland. Part II considers the effectiveness of police targeting operations and the social implications. Part III focuses specifically on the effectiveness of police photography and its social implications. Finally, a number of recommendations have been made based on the findings of this report.

A History of the Relationship Between Photography and Policing

Since the invention of photographic imaging, police have used photography for criminal identification and the administration of justice.⁶ In the United Kingdom, privacy law

¹ Harriet Tatham, ‘Mount Isa Children Stopped, Photographed as Part of Police Crackdown’ *ABC News* (online), 17 January 2018 <<http://www.abc.net.au/news/2018-01-17/mount-isa-children-questioned-photographed-in-police-crackdown/9331220>>.

² Casey Briggs, ‘Police Stopping and Photographing Kids on Streets ‘Illegal’, Say Civil Libertarians’ *ABC News* (online), 18 January 2018 <<http://www.abc.net.au/news/2018-01-18/youth-crime-crackdown-illegal-warn-civil-libertarians/9339996>>.

³ *Ibid.*

⁴ *Ibid.*

⁵ Casey Briggs, ‘Lawyer Echoes Concerns about Queensland Police ‘Illegally’ Photographing Children in Mount Isa’ *ABC News* (online), 23 January 2018 <<http://www.abc.net.au/news/2018-01-23/lawyer-echoes-concerns-about-police-photographing-children/9350458>>.

⁶ Jake Goldenfien, ‘Police Photography and Privacy: Identity, Stigma and Reasonable Expectation’ (2013) 36(1) *University of New South Wales Law Journal* 256, 257 and 262.

developed through common law largely as a way to protect middle and upper-class people from intrusions upon their private lives.⁷ With this focus on protecting private life, historically privacy law has afforded less protection from state surveillance on people, especially working class people.⁸ This is the common law position that Australia has inherited. The need to protect individuals from overzealous police surveillance is more pressing now due to the emergence of technologies allowing high-quality photographs to be taken and broadcast instantaneously.⁹ The development of facial recognition technology makes the issue even more concerning.¹⁰

B Police Photography in Australia

In 2010, a case was brought against police officers in Victoria who took photographs of a young woman attending a lawful protest.¹¹ This was the first case that has been brought against police officers in Australia for photographing a member of the public. In Victoria, section 13 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the ‘*Victorian Charter*’) creates a protection from unlawful or arbitrary interferences with privacy.¹² In the *Caripis* case, the Tribunal recognised the fact that recording of photographic data and the systematic and permanent retention of this data by the police may give rise to privacy concerns.¹³ It was also found that the mere storage of data relating to an individual’s private life amounted to an interference with the right to privacy created by the *Victorian Charter*.¹⁴ The claim in *Caripis* was ultimately unsuccessful as the Tribunal held that the photographs were being taken by the Victorian Police for a legitimate purpose and the taking of photographs of the claimant’s face did not constitute the taking of private information.¹⁵ Despite this, the case highlighted concerns associated with the legitimacy of allowing police officers to photograph people who had not been suspected of having committed an offence. The notion of random police photography is even more concerning in Queensland where there is no statutory recognition or protection of the fundamental right to privacy.

C The Current Position in Queensland

The ability of Queensland Police officers to take photographs of a person under the age of eighteen years is regulated by the *Youth Justice Act 1992* (Qld), the Queensland Police

⁷ Ibid 259.

⁸ Ibid.

⁹ Ibid 277.

¹⁰ Ibid.

¹¹ *Capris v Victoria Police (Health and Safety)* [2012] VCAT 1472.

¹² *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 13.

¹³ *Capris v Victoria Police (Health and Safety)* [2012] VCAT 1472 [55].

¹⁴ Ibid [57].

¹⁵ Ibid [53]-[68].

Operational Procedures Manual ('OPM') and the *Police Powers and Responsibilities Act 2000* (Qld) (*PPRA*).

Chapter 7.5 of the *OPM* provides guidelines for police officers when taking the identifying particulars of a child. Identifying particulars are defined under the *PPRA* to include a photograph of the person.¹⁶ The *OPM* provides proper procedure for officers taking identifying particulars of children in three situations: where a child has been taken into police custody under arrest,¹⁷ where the child is charged with an indictable offence or an arrest offence but has not been arrested,¹⁸ and where the police are seeking identifying particulars for an investigative purpose.¹⁹ If identifying particulars are being taken in any of these situations, there are procedures for the person to apply for the destruction of their identifying particulars.²⁰ However, the Queensland legislative and regulatory framework is silent on the matter of taking a photograph, an identifying particular, of a child that serves no investigatory purpose. This indicates that the police officers in Mount Isa were not acting unlawfully in taking photographs of children when conducting random police checks.

D The Issue of Proportionality

While it cannot be concluded that the police officers in Mount Isa were acting unlawfully, the question remains whether they were acting reasonably. It is well-recognised that the reasonableness of police conduct 'can only be determined by balancing the need for the intrusion against the severity of the intrusion'.²¹ This is ultimately a question of proportionality. In the United States this is based on the constitutionally-entrenched rights to individual freedom, which Australia does not have. However, the concept of proportionality in government conduct is present throughout Australian law.²² To assess whether Operation Tucson (and other operations like it) is sufficiently proportionate, its ability to meet its objective must be balanced against its consequences. As the analysis below will reveal, both the general practice of targeted policing (Part II) and the direct

¹⁶ *Police Powers and Responsibilities Act 2000* (Qld) sch 6.

¹⁷ Queensland Police Service, *Operational Procedures Manual*, Issue 63, 29 March 2018, Ch 5.7(ii); *Police Powers and Responsibilities Act 2000* (Qld) s 467.

¹⁸ Queensland Police Service, *Operational Procedures Manual*, Issue 63, 29 March 2018, Ch 5.7.1 which requires the police officer seeking the identifying particulars to make an application to a Childrens Court magistrate under the *Youth Justice Act 1992* (Qld) s 25.

¹⁹ *Ibid* ch 5.7.2.

²⁰ See *Police Powers and Responsibilities Act 2000* (Qld) s 474 for where a child has been arrested; *Youth Justice Act 1992* (Qld) s 27 for where a child is charged but not arrested; Queensland Police Service, *Operational Procedures Manual*, Issue 63, 29 March 2018, Ch 5.7.3 for where the identifying particulars are taken for an investigative purpose.

²¹ Jin S Choi and Ernest Kim, 'The Constitutional Status of Photo Stops: The Implications of Terry and its Progeny' (1994) 2 *Asian Pacific American Law Journal* 60, 67.

²² See generally *Privacy Act 1988* (Cth); *Police Powers and Responsibilities Act 2000* (Qld).

practice of street photography (Part III) are not only ineffective in preventing crime, but also inflict considerable social harm.

II TARGETED POLICING

A Inability to Prevent Crime

Described as a ‘police crackdown’,²³ Operation Tucson appears to constitute a targeted ‘hot-spots policing’²⁴ strategy. Hot-spot policing can involve either a problem-oriented strategy, where police attempt to change the underlying social conditions in crime-ridden areas, or a traditional strategy, where they attempt to ‘crack down’ on crime by increasing police presence and interference in particular areas.²⁵ For the duration of Operation Tucson, the Queensland Police Force increased the number of permanent and temporary officers in the area, increased its night patrols and deployed its mobile policing unit to crime hotspots,²⁶ indicating it has adopted a traditional hot-spot policing strategy. While some studies have identified that hot-spot policing strategies can have a modest effect on crime reduction, efforts relying on problem-oriented strategies are significantly more effective than those relying on traditional strategies.²⁷

B Social Harm

1 Impacts on Youth Crime

Although targeted policing strategies such as Operations Tucson seek to reduce crime rates, there is evidence that in reality these strategies have the adverse effect. A significant aspect of targeted policing strategies involves increased police presence in a community, meaning that officers are more likely to have more interactions with young people in that community. However, frequent and repeated stops by police of children has the potential to be very intimidating. Many reports have suggested that this intimidation can lead to negative perceptions of police officers.²⁸ As Queensland’s Crime and Misconduct

²³ Tatham, above n 1.

²⁴ See Department of Criminology, Law and Society, *Hot Spots Policing* (2018) Center for Evidence-Based Crime Policy <<http://cebcp.org/evidence-based-policing/what-works-in-policing/research-evidence-review/hot-spots-policing/>>.

²⁵ National Institute of Justice, *Practice Profile: Hot Spots Policing*, Crime Solutions <<https://www.crimesolutions.gov/PracticeDetails.aspx?ID=8>>.

²⁶ Samantha Walton, ‘Juvenile Crime Targeted in New Mount Isa Police Operation’, *The North West Star* (online), 22 December 2017 <<https://www.northweststar.com.au/story/5138168/juvenile-crime-targeted-in-new-mount-isa-police-operation/>>.

²⁷ National Institute of Justice, *Practice Profile: Hot Spots Policing*, Crime Solutions <<https://www.crimesolutions.gov/PracticeDetails.aspx?ID=8>>.

²⁸ Daryl S Borgquist, Timothy J Johnson and Martin A Walsh, ‘Police and Urban Youth Relations: An Antidote

Commission explains, intimidating or aggressive interactions between police and children 'are often characterised by conflict and tension, with high levels of anger, fear and mistrust on both sides'.²⁹

The issue with negative perceptions of police in children is that they are likely to lead to less cooperation and compliance. A 2009 study documented these reactions in American teenagers. It found that the teenagers were angered by being stopped and felt hopeless to change police perceptions of themselves as criminal.³⁰ The conclusion was that the police activity 'weakens police authority in the eyes of the youths and reduces their willingness to comply with police directives'.³¹ Thus, frequent and repeated stopping of children can potentially increase the likelihood that those children will become aggressive with police officers and commit crimes as a result.

Operation Tucson primarily involves the frequent monitoring of youth and the photography of them, thus exacerbating the conflict between youth and the police in Mount Isa, the negative perceptions by youth of the police and the stigma of offenders for these youth. Sergeant Inskip asserted that 500 stops had been made during the operation with approximately 20 children actually committing crime³². Thus, the intrusive approach by the police of stopping youth, photographing and questioning them and dropping them home during this operation, when many of the targets may have little to no involvement previously with the police may be detrimental to their future.

Furthermore, the earlier a youth's interaction with the criminal justice system, the more likely they are to be involved in the system in the future, leading to more serious penalties.³³ The experience of being stopped by police is often the first encounter youth have with the 'coercive arm of the state' and in many cases creates deep resentment, when individually targeted and the stops become more intrusive.³⁴ Youth as young as 8 have been

to Racial Violence: A Guide for Police, Youth and Community Leaders to Improve Police/Urban Relations' (Report, United States Department of Justice, Community Relations Service, 1995); John Liederbach, 'Controlling Suburban and Small-Town Hoods: An Examination of Police Encounters with Juveniles' (2007) 5(2) *Youth Violence and Juvenile Justice* 107; Rob White, 'Police Practices, Punishment and Juvenile Crime Prevention', in Allan Borowski and Ian O'Connor (eds), *Juvenile Crime, Justice and Corrections* (Addison Wesley Longman, 1997).

²⁹ Crime and Misconduct Commission, *Monitoring the Queensland Police Service: Interactions Between Police and Young People*, Report (2009) 1.

³⁰ Rod K Brunson and Ronald Weitzer, 'Police Relations with Black and White Youths in Different Urban Neighborhoods' (2009) 44(6) *Urban Affairs Review* 858.

³¹ *Ibid* 880.

³² Tatham, above n. 1

³³ Jacqueline Fitzgerald, 'Reoffending Among Young People Cautioned by Police or Who Participated in a Youth Justice Conference' (2006) (103) *Crime and Justice Bulletin* 1.

³⁴ Ben Bowling and Leanne Weber, 'Stop and Search in Global Context: An Overview' (2011) 21(4) *Policing and Society* 480.

captured in this Mount Isa Operation, and thus this interaction at such a young age will likely lead to further altercations with the system in the future. This effect achieves the opposite result to that intended by the operation, namely, to prevent crime by youth in Mount Isa.

2 Impacts of Racial Profiling

(a) Impacts on Individuals

Racial profiling is the police practice in which officers, consciously or otherwise, systematically target racial minorities in the absence of reasonable grounds for doing so.³⁵ It is known that this is a pervasive problem in Australia, especially with Aboriginal and Torres Strait Islander people. A clear example of this is the recent decision of *Wotton v State of Queensland* where the court held the police had engaged in unlawful discrimination against Indigenous people.³⁶ In Victoria, statistics showed that 45.6 percent of all police stops in Victoria were of African and Middle Eastern youth, despite this demographic only constituting 18 percent of youth in the region.³⁷ In New South Wales, data indicates that people placed on the Suspect Target Management Plan (STMP), a covert police watchlist, were disproportionately of an Aboriginal and Torres Strait Islander background.³⁸

Many Australians who come from Aboriginal and Torres Strait Islander communities, as well as ethnic minority communities, believe that they have been racially profiled.³⁹ A 2008 survey indicated that 26 percent of Aboriginal and Torres Strait Islander people felt that they had been discriminated against in the previous twelve months and that 11 percent felt they had been discriminated against by the police in the previous twelve months due to their race.⁴⁰ According to leading criminologist Chris Cunneen, day-to-day discrimination, racism, violence and terror are still employed as strategies for the maintenance of law and

³⁵ Tamar Hopkins, 'Monitoring Racial Profiling - Introducing a Scheme to Prevent Unlawful Stops and Searches by Victoria Police' (Report, Police Stop Data Working Group, 2017).

³⁶ *Wotton v State of Queensland* (No 6) [2017] FCA 245.

³⁷ Ian Gordon, 'Statistical Commentary on Federal Court of Australia Proceeding No. VID 969 of 2010' (Statistical Commentary, University of Melbourne, 11 September 2012).

³⁸ Vicki Sentas and Camilla Pandolfini, 'Policing Young People in NSW; A Study of the Suspect Targeting Management Plan' (Report, Youth Justice Coalition NSW, 2017).

³⁹ Tamar Hopkins, 'Complaints Against Police Behaviour in Flemington, Victoria, 2006' (2007) 32(1) *Alternative Law Journal* 32; Human Rights and Equal Opportunity Commission, submitted to the National Inquiry into Racist Violence, *Aboriginal-Police Relations in Redfern: with Special Reference to the 'Police Raid' of 8 February 1990*, May 1990; Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 2, 217; Inquest into the death of Mulrunji (2010) COR 2857/04(9); Inquest into the death of Thomas Hickey (2004) COR 289/2004.

⁴⁰ Australian Bureau of Statistics, *National Aboriginal and Torres Strait Islander Social Survey*, Cat No. 4714.0, March 2008.

order, leading to massive criminalisation of Indigenous Australians.⁴¹ This discrimination is further reflected in the high incarceration rates of Indigenous Australians.

The existence of such racial bias in police practice suggests that it should be a concern for targeting policing operations, particularly as there are no guidelines governing their ability to stop and photograph children on the street. Research from the United Kingdom and United States indicates that the greatest potential for racial bias to occur in police practice is when their discretionary power is the highest. In the case of police photography, the lack of accountability and wide discretion to photograph children creates a significant potential for racial bias. This concern has been reflected by Evelyn Neade, a Murri Court Elder in Mount Isa, in stating that, due to Operation Tucson, 'all our Aboriginal youth, they think the police are picking on all of them because they're black'.⁴²

This racial bias, whether a perception or reality, has a significant impact on the targets. Racial bias has been held to contribute to alienation and negative health outcomes in ethnic minorities.⁴³ Furthermore, individuals may respond inappropriately or retaliate against police putting both citizens and officers at risks. Ample evidence around the world where pertinent data has been collected shows that racial minorities are more likely to be hostile towards police.⁴⁴

(b) *Impacts on Families*

The effect of racial targeting also extends to the families of the targeted individuals. Arguably the most pertinent example of this in the Australian context is the intergenerational trauma experienced by many Aboriginal and Torres Strait Islander people through their experiences with law enforcement in Australia.⁴⁵ A 2017 report on the STMP

⁴¹ Chris Cunneen, *Conflict, Politics and Crime Aboriginal Communities and the Police* (Sydney : Allen & Unwin, 2001).

⁴² Tatham, above n 1.

⁴³ Scot Wortley and Akwasi Owusu-Bempah, 'The Usual Suspects: Police Stop and Search Practices in Canada' (2011) 21(4) *Policing and Society* 395.

⁴⁴ Rod K Brunson and Jody Miller, 'Young Black Men and Urban Policing in the United States' (2006) 46(4) *The British Journal of Criminology* 613; David L Carter, 'Hispanic Interaction with the Criminal Justice System in Texas: Experiences, Attitudes, and Perceptions' (1983) 11(3) *Journal of Criminal Justice* 213; Mark E Correia, Michael D Reising and Nicholas P Lovrich, 'Public Perceptions of State Police: An Analysis of Individual-Level and Contextual Variables' (1996) 24(1) *Journal of Criminal Justice* 17; Venessa Garcia and Liqun Cao, 'Race and Satisfaction with the Police in a Small City' (2005) 33(2) *Journal of Criminal Justice* 191; Ronald Weitzer and Steven A Tuch, 'Racially Biased Policing: Determinants of Citizen Perceptions' (2005) 83(3) *Social Forces* 1009; John Worrall, 'Public Perceptions of Police Efficacy and Image: The "Fuzziness" of Support for the Police' (1999) 24(1) *The Journal of the Southern Criminal Justice Association* 47.

⁴⁵ Judy Atkinson, *Trauma Trails, Recreating Song Lines: The Transgenerational Effects of Trauma in Indigenous Australia* (Spinifex Press, 2002).

in New South Wales found that Aboriginal and Torres Strait Islander people who had experienced intergenerational targeting by police officers were severely impacted in discovering that their children had been placed on the STMP watchlist. In a number of these cases, the targeting of the youth resulted in families having to leave the area due to the deleterious effect on the family.⁴⁶ Thus, the targeting of youth based on racial bias has significant detriment to both the target and their family, and it cannot be argued that it is reasonably proportionate to cause such damage to prevent crime.

(c) *Impacts on Communities*

Not only does racial profiling affect the individual targeted, but it is also detrimental to the community. Racial targeting means that wrongdoing among particular communities, such as Indigenous youth, comes frequently to the authorities' attention, reinforcing police and public stereotypes about the minority's involvement in crime.⁴⁷ Furthermore, when it used so frequently against a minority, the community experiences being treated as suspects and enduring the embarrassment of being stopped and, in this case, photographed. Even when justified, the disproportionate impact on minority communities still creates the experience of being unjustly targeted, which in itself may be just as damaging to confidence in police as objective targeting.⁴⁸

The widespread public belief in the existence of racial profiling, whether in perception or reality, causes minority groups to become cynical and mistrust the criminal justice system. Trust and confidence in government institutions are instrumental to its function as they work to increase predictability among citizens based on their expectations that others will also perform actions in expected ways, reinforcing the likelihood of continued acceptance of institutional authority.⁴⁹ Thus, the practice of racial targeting causing mistrust in the community, reduces public support for the police and undermines voluntary compliance, disrupting the existing mechanisms of social control and damaging the legitimacy of policing. To a greater extent, it can even cause civil unrest and be the basis for acquittals in jury trials.⁵⁰ The introduction of this operation therefore may have the opposite effect to its intended purpose.

⁴⁶ Sentas and Pandolfini, above n 37.

⁴⁷ Bowling and Weber, above n 30.

⁴⁸ Tom R Tyler and Cheryl J Wakslak, 'Profiling and Police Legitimacy; Procedural Justice, Attributions of Motive, and Acceptance of Police Authority' (2004) 42(2) *Criminology* 253.

⁴⁹ Jason Lee, *The Ripple Effect: The perception of racial profiling, procedural justice, and citizen confidence in government* (PhD Thesis, ProQuest Dissertations Publishing, 2009).

⁵⁰ Ontario Human Rights Commission, *Paying the Price: The Human Cost of Racial Profiling: Inquiry Report* October 21, 2003.

III POLICE PHOTOGRAPHY

A *Inability to Prevent Crime*

Even if the general practice of hot-spot policing has the capacity to prevent and reduce crime in certain areas, there is little evidence suggesting that photography in isolation serves this purpose in any way.

In justifying Operation Tucson, police in Mount Isa are relying on the overall reduction in crime rates in the region for the relevant period: crime rates are reported as having dropped in January 2018 (when the operation commenced) and then again in February 2018.⁵¹ However, this success is likely a result of other aspects of the operation and cannot be directly attributed to the photography. For instance, there are reports that, as part of Operation Tucson, the police officers involved are taking children home and speaking to their parents.⁵² It is certainly conceivable that removing children from the streets and raising concerns with their guardians could contribute to crime reduction; however, the same cannot be said for taking their photographs. In reality, there seems no legitimate purpose to be served by photographing children, on the streets, about whom no reasonable suspicion is harboured.

Further, even if there were some potential for crime to be prevented or reduced as a result of an operation involving photography, at present, there is little evidence to suggest that the technology being used is sufficient to serve that purpose. As canvassed, the exact purpose and objective for the photography is currently unknown. But, should the police officers in question be attempting in any way to store the photographs taken in order to target suspected criminals in the future, photographing the children outdoors at night would be unlikely to effectively assist in this. A 2006 American study compared the accuracy and validity of official mug shots of Asian gang members with photographs taken of them on streets. It found that, 'unlike official mug shots taken at the station house, photos taken on the street did not include height indicators and were not taken with proper lighting. When low-quality photos are used in lieu of in-person line-ups, it can be difficult for witnesses to distinguish characteristic facial features'.⁵³

⁵¹ Queensland Police Service, *Queensland Crime Statistics* (2018) myPolice Mount Isa <<https://mypolice.qld.gov.au/mountisa/queensland-crime-statistics/>>.

⁵² Tatham, above n 1.

⁵³ Hong Tieu, 'Picturing the Asian Gang Member Among Us' (2006) 11 *UCLA Asian Pacific American Law Journal* 41, 57.

B Social Harm

1 Legal Recognition of Privacy Concerns

While there is little protection of personal privacy in Queensland, the range of protections provided in different legal contexts suggest that, at the very least, privacy concerns can be recognised from a social perspective. The social need to protect an individual's right to privacy is recognised by a number of international human rights instruments. Both the *International Covenant on Civil and Political Rights* and the *UN Convention on the Rights of the Child* provide that no person, and no child, shall be subject to arbitrary interferences with their privacy.⁵⁴ The *European Convention on Human Rights* also provides that everyone has the right to respect for their private life and that public authorities shall not interfere with the exercise of this right unless such an interference is in accordance with law and is necessary for the prevention of crime.⁵⁵ Under this Article, a number of cases have been brought before the European Court of Human Rights arguing that random police photography infringes upon this right.⁵⁶

Overseas jurisprudence has identified uncertainty regarding whether photographs taken of individuals in public places constitute public or private information. However, in Queensland, photographs of a person are classified as identifying particulars, suggesting that they would be classified as private information under the statutory framework. Further, while Queensland does not have constitutionally entrenched rights or a human rights framework that protect the individual right to privacy, police powers often acknowledge this interest. For instance, Queensland police officers are required to obtain a search warrant to search a person, unless they have a reasonable suspicion of the existence of a prescribed set of circumstances.⁵⁷ These sorts of provisions are consistent with the well-established principle that, in vesting powers in the police force to prevent and investigate the commission of crime, the state is balancing the competing interests of the community to be safe and for the individual to have privacy.

⁵⁴ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, (entered into force 23 March 1976) ('ICCPR') art 17 and *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990), art 16.

⁵⁵ *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953), art 8.

⁵⁶ See, eg, *Marper* [2008] Eur Court HR 1581 and *R (Catt) v Commissioner of Police of the Metropolis & Anor and another case* [2015] UKSC 9.

⁵⁷ *Police Powers and Responsibilities Act 2000* (Qld) ss 29 and 30.

2 Social Harm

Australian researchers have identified that the key problem with photographs (or any 'recorded images') is that their 'permanent nature ... allows close scrutiny, wide dissemination, and repeated viewing'.⁵⁸ According to the New South Wales Standing Committee of Attorneys-General, 'this permanency and opportunity for repeated viewing provides opportunity for ongoing objectification of the subject, and therefore ongoing harm'.⁵⁹ In the context of an individual's photography for artistic purposes, the ALRC has recommended the introduction of a statutory cause of action to 'provide protection where a person (including a child or young person) has a reasonable expectation of privacy and the act or conduct is sufficiently serious to cause substantial offence to an ordinary person'.⁶⁰ While this is a distinct context, a key driving force in that recommendation was to 'provide a remedy in cases where there is serious harm arising from the invasion of privacy'.⁶¹ This 'harm', of course, is difficult to assess. Some Australian scholars have identified three risk categories: identification, systemisation and stigmatisation.⁶²

The stigmatisation surrounding police officers taking and retaining photographic evidence of non-offenders has been discussed by the European Court of Human Rights.⁶³ The Court has observed that this stigmatisation stems from the fact that in photographing a person who is not suspected or convicted of any offence, they are being treated in the same way as a convicted person.⁶⁴ This blatantly ignores the presumption of innocence which underpins the criminal justice system, both in the European Union and Australia.⁶⁵

Importantly, these concerns are more significant where children are concerned. The negative effects of increased police exposure on young people has been well-documented. It is argued that police photography of young non-offenders can have an equally detrimental effect. Australian discussions in the privacy sphere recognise this: the New South Wales Standing Committee says that 'in looking at this issue in terms of protection from harm it is instructive to look at those involved and whether there is a difference with respect to children (under 18) and adults, and their respective need for protection from

⁵⁸ Standing Committee of Attorneys-General, 'Unauthorised Photographs on the Internet and Ancillary Privacy Issues' (Discussion Paper, August 2005) 12 [54].

⁵⁹ Standing Committee of Attorneys-General, 'Unauthorised Photographs on the Internet and Ancillary Privacy Issues' (Discussion Paper, August 2005) 12 [54].

⁶⁰ Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report No 108 (2008) 69.133.

⁶¹ *Ibid.*

⁶² Goldenfein, above n 6.

⁶³ *Marper* [2008] Eur Court HR 1581.

⁶⁴ *Ibid* [122].

⁶⁵ *Ibid.*

harm'.⁶⁶ Most recently, the Australian Law Reform Commission has publicly recognised that 'there is confusion and concern around issues of taking and publishing images of children and young people'.⁶⁷

IV RECOMMENDATIONS

This report has highlighted a series of shortcomings and problems not only with targeted policing strategies in general, but specifically with police photography. As has been canvassed, both targeted policing strategies and police photography are ineffective at serving their key purpose of crime prevention. Furthermore, both practices are capable of causing significant social problems in relation to children - specifically, recidivism, racial profiling, privacy concerns and stigmatisation. In light of this, it can be concluded that Operation Tucson is not a reasonable or proportionate use of police power. This report seeks to make various recommendations to address these concerns.

A Queensland Police Service to Discontinue Operations like Operation Tucson

First, it is recommended that the Queensland Police Service discontinue all similar operations across Queensland, putting an immediate end to the significant social problems caused by the running of such operations.

B Queensland Police Service to Publish the Policy

Second, it is recommended that the Queensland Police Service make the policy used in Operation Tucson and its arrangements publicly available, to enable transparency and accountability.

C Queensland Government to Inquire into the Effects of Operation Tucson

Third, it is recommended that the Queensland Government commence an inquiry or an investigation into the effects of Operation Tucson on the people of Mount Isa. This report has highlighted the social problems arising out of targeted policing and an inquiry should be made to identify those arising out of this operation, and thus provide recommendations for future improvements of policing strategies to prevent crime.

⁶⁶ Standing Committee of Attorneys-General, 'Unauthorised Photographs on the Internet and Ancillary Privacy Issues' (Discussion Paper, August 2005) 12 [55].

⁶⁷ Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report No 108 (2008) 69.129.

D Queensland Parliament to Amend the PPRA

It is recommended that Part 4, Division 1 of the *PPRA* be amended to prohibit the taking of identifying photographs of children outside the scope outlined in ch 5.7 of the *OPM*. Currently, ch 5.7 of the *OPM* provides that photography of children is allowed where a child has been taken into police custody under arrest, where the child is charged with an indictable offence or an arrest offence but has not been arrested, and where the police are seeking identifying particulars for an investigative purpose. In these situations, it is reasonably necessary to take such particulars. However, at present, the *PPRA* is silent on whether identifying particulars can be taken of children who fall outside this scope. It is this gap that has afforded police the power to take photographs of children, and therefore create the problems that this report has identified. An amendment to the *PPRA* to explicitly prohibit this power is therefore necessary and would protect the child against the issues associated with taking their identifying photograph without reasonable suspicion.

E Queensland Police Service to Amend the OPM

In the event that the *PPRA* cannot be amended, for the reasons stated above, it is recommended that the *OPM* be amended to explicitly prohibit the taking of identifying photographs of children outside of the three scenarios already authorised in ch 5.7.

F Queensland Government to Recognise and Protect Individual Privacy Rights

The Queensland Government should formally recognise an individual right to privacy, either through its inclusion in a Human Rights Act or in separate legislation. If this right is to be potentially protected by a Queensland Human Rights Act, it is recommended that the Victorian experience regarding police photography be taken into account. In Victoria identifying police photography taken in public places has been held to be outside the scope of the *Victorian Charter's* privacy protection. In light of this, should a Human Rights Act be introduced in Queensland, it should explicitly acknowledge the photography of identifying particulars as private information, capable of being protected by personal privacy rights.

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May 2018