

People Against Prisons Aotearoa would like to thank the Ministry of Justice for the invitation to be involved in the review of the Search and Surveillance Act 2012. In particular we appreciate the significant timeframe provided for our involvement, which has allowed us to gather input from members and ensure that their experiences are reflected in our response below.

People Against Prisons Aotearoa (PAPA) is a prison abolitionist organisation working for a fairer, safer, and more just Aotearoa. Established in 2015, PAPA advocates for prisoners to ensure their human rights are met. We work with different communities to address the worst problems of our criminal justice system and to build a better one.

In considering our input to this review we draw primarily on the experiences shared by our members and on our kaupapa of prison abolition. We have also collected data, research and expert opinion to further inform our response. Broadly, we believe there is a need for significant changes to the entirety of the justice system in Aotearoa. However, acknowledging that the scope of this review is limited only to the Search and Surveillance Act 2012 (the SSA), we have limited our discussion to issues closely related to search and surveillance and have attempted to provide here some suggestions for how this Act could be improved in isolation.

Summary of recommendations

The discussion that follows this summary relates directly to—and provides context for—the recommendations below. It focuses on the disproportionate use and impact of the SSA on Māori and minority groups, the lack of appropriate oversight of powers granted by the SSA, the significant expansion in the collection of images and video footage from public spaces as a result of recent technology developments, as well as the rapid developments in technology that automate analysis of the large amounts of data that are being collected or accessed by government agencies.

Arising from our consideration of these topics in relation to the SSA, our recommendations are to:

- Establish a set of principles to guide the application of powers under the SSA;
- Establish a set of standards, criteria, or otherwise define what constitutes "reasonable" grounds for search and surveillance;
- Establish an independent monitor, with access to classified information, to proactively examine and report on the use of powers under the SSA;
- Define what constitutes a search, or direct policy documents be prepared clarifying parameters of what constitutes a search;
- Make explicit that use of facial recognition software or other algorithms on databases constitutes a search;
- Make explicit that government agencies accessing third party databases, images or footage collected from public spaces constitutes a search; and
- Direct that every use of live or active facial recognition technology by Crown agencies be carried out only with a warrant.

Disproportionate impact on Māori and minority groups

First, we believe that the SSA is failing to protect certain rights and is resulting in perverse outcomes for some groups in Aotearoa. In preparing our feedback here we called for members to share their experiences and thoughts on search and surveillance. We received 11 individual responses and held group discussions on the topic at branch meetings. We have also drawn on feedback received from members in previous years, in response to the 2019 police trial of Armed Response Teams and consultation last year on the police's Tactical Response Model.

In particular, we wish to note the experiences of our members who report undergoing police searches in which officers acted in threatening and intimidating ways, sometimes armed with firearms. Some of our members report police damaging or destroying property in the process of a search. Several members have also expressed concern for the trauma that children, or kuia and kaumatua might experience as a result of this behaviour from police.

Another troubling theme in the experiences of our members is that they have been targeted unfairly or incorrectly by search and surveillance. Many feel that police are failing to uphold the presumption of innocence, reporting that they have been targeted for search and surveillance simply for things like being on bail, having prior convictions, or having family ties to gang members.

The harms from these kinds of unreasonable searches go beyond the trauma and property damage discussed above. They damage people's trust in public institutions and leave them with a legitimate sense of injustice with few options for redress.¹ For people experiencing mental illness or drug dependency, events like this can trigger a relapse or crisis.² Of greatest concern is the way that these searches have the potential to escalate, possibly leading to violence or unnecessarily creating a situation in which someone commits an offence.

These experiences are backed up by wider data on search and surveillance in Aotearoa that reflect significant bias against certain groups. For example, Māori are four times more likely to be subject to warrantless searches than Pākehā.³ In general, Māori are the disproportionate focus of policing: they are also nearly five times as likely as Pākehā to be apprehended by police, and more than six times as likely to be apprehended for no reason.⁴

¹ Kevin L. Nadal et al., 'Perceptions of Police, Racial Profiling, and Psychological Outcomes: A Mixed Methodological Study: Perceptions of Police and Racial Profiling', *Journal of Social Issues* 73, no. 4 (December 2017): 808–30, <https://doi.org/10.1111/josi.12249>.

² Ron Paterson et al., *He Ara Oranga: Report of the Government Inquiry into Mental Health and Addiction*, (Wellington: Government Inquiry into Mental Health and Addiction, 2018): 44, <https://mentalhealth.inquiry.govt.nz/assets/Summary-reports/He-Ara-Oranga.pdf>.

³ Chris McKeen, Felipe Rodrigues, and Eugene Bingham, 'Unwarranted: The Little-Known, but Widely-Used Police Tactic', *Stuff*, 12 December 2020, <https://interactives.stuff.co.nz/2020/12/unwarranted-police-searches-racial-bias-justice/>.

⁴ Between July 2014 and March 2022 there were 513,539 apprehensions of Māori individuals, with 4,449 of these having no further proceedings, out of a total population estimated at 875,300. This compares to 430,988 and 2,652 respectively for Pākehā, with a total population estimated at 3,297,864; New Zealand Police, "Proceedings (offender demographics)", accessed 30 May 2022, <https://www.police.govt.nz/about-us/publications-statistics/data-and-statistics/policedatanz/proceedings-offender-demographics>; Stats NZ, "New Zealand's population reflects growing diversity", 23 September 2019, <https://www.stats.govt.nz/news/new-zealands-population-reflects-growing-diversity>; Stats NZ,

Ultimately the result of any disproportionate police attention is higher crime detection rates among the target group, and consequently disproportionate numbers of arrests and prosecutions.⁵ In the case of Māori, this feeds into a criminal justice system where bias amplifies at every step of the process and ends in a drastically disproportionate number of Māori given custodial sentences.⁶ Legislation that disproportionately negatively impacts on Māori also breaches the Crown's obligations under *Te Tiriti o Waitangi*.

In our submission to the justice select committee over the Counter-Terrorism Legislation Amendment Bill 2021, we called attention to the issue of the amendments within that bill bringing disproportionate police attention to Muslim communities and activist groups in Aotearoa.⁷ This is because the amendments significantly expanded the contexts and justifications for carrying out activities under the SSA. Of particular concern was the ability of police to justify searches with suspicion that individuals or groups were committing one of the newly created offences that include providing aid, training or planning and preparation. These are often legitimate activities carried out by activist groups that could now bring undue police attention as a result of counter-terrorism laws.

The amendments also lowered the bar for suspicion of terrorist activity, by changing the definition of a terrorist act to include much broader wording. Furthermore, counter-terrorism laws in Aotearoa use only the United Nations' list of sanctioned terrorist entities, which is heavily dominated by Muslim organisations or organisations seen as a threat to Western-aligned governments. This entrenches a legal bias against Muslims in Aotearoa, who are more likely to come under suspicion of committing an offence and thus be subject to search and surveillance. The sum impact of these amendments falls disproportionately on activist groups and Muslim communities. We see similar issues relating to the current use of the SSA and its impact on Māori.

Standards, criteria and principles to guide search and surveillance

The processes described thus far are the mechanisms by which powers granted to Crown agencies under the SSA contribute directly to systemic racism and bias, particularly against Māori. Some of these issues go beyond the scope of a review of the SSA to address. However, we suggest that a key current issue in the SSA is the significant scope and discretion given to police

⁴ "Māori population estimates: At 30 June 2021", 16 November 2021,

<https://www.stats.govt.nz/information-releases/maori-population-estimates-at-30-june-2021>.

⁵ See: Trevor Bradley and Reece Walters, *Introduction to Criminological Thought*, 3rd ed (Auckland, N.Z.: Edify Ltd, 2019). 19-57.

⁶ Te Uepū Hāpai i te Ora, *He Waka Roimata: Transforming Our Criminal Justice System*, (Wellington: Te Uepū Hāpai i te Ora: The Safe and Effective Justice Advisory Group, 2019), 23. Policy, Strategy and Research Group, 'Over-Representation of Māori in the Criminal Justice System: An Exploratory Report' (Wellington: Department of Corrections, 2007). Khylee Quince, 'Māori and the Criminal Justice System', in *Criminal Justice in New Zealand*, ed. Julia Tolmie and Warren Brookbanks (Wellington: LexisNexis NZ, 2007), 333-358.

⁷ People Against Prisons Aotearoa, 'Submission to the Justice Committee on the Counter-Terrorism Legislation Bill 2021', 1 July 2021, https://www.parliament.nz/en/pb/sc/submissions-and-advice/document/53SCJU_EVI_109913_JU1769/people-against-prisons-aotearoa.

and other agencies over when it is appropriate to carry out search and surveillance, with little or no oversight.

Ultimately the discussion above indicates that the SSA is not currently fit to protect human rights, *Te Tiriti* rights, and other rights to privacy, autonomy and dignity. We argue that the law does not appropriately balance these with law enforcement activities, including those carried out by police in the name of community safety or crime prevention.

We believe there are two changes that could be made to improve the current situation. First, **we recommend that the SSA be amended to include a set of general principles to guide the application of all powers granted under the Act.** We strongly recommend that this specifically include criteria or minimum standards for what constitutes "reasonable" grounds for search and surveillance.

We suggest that specific principles included to guide application of powers under the Act should state that all powers be exercised:

- in a manner that minimises the intrusion on the privacy of individuals or groups likely to be affected;
- giving effect to *Te Tiriti o Waitangi*, and in particular, relevant cultural, spiritual and/or religious considerations;
- in a way that gives effect to the principle that a warrant or order should be obtained in preference to exercising a warrantless power; and
- giving due regard to the importance of the affected individual's right to freedom from disproportionate state intervention.

In terms of broader principles to guide "reasonable" grounds for search and surveillance, we suggest these could include fairness, equity, respect for dignity, privacy, *Te Tiriti*, and kaupapa Māori values like kaitiakitanga and manaakitanga. Everyone in Aotearoa should feel safe, and should be safe, from unjust or unwarranted search and surveillance. No one should be threatened or be made to feel scared and powerless because of the actions of Crown agencies. Unfortunately, these rights are not always upheld, especially for Māori, Muslim and working class whānau.

The creation of an explicit minimum threshold for what constitutes "reasonable" grounds, as well as inclusion of principles to guide search and surveillance would help to ensure everyone is treated more equitably. It could potentially reduce some of the bias in the criminal justice system. It would also leave law enforcement less exposed to the risk of getting the decision wrong, by reducing the need for officers to remember all the different circumstances in which warrantless search powers can be legally applied. Finally, it would provide communities with more reason to trust in government agencies.

Oversight of search and surveillance

Our second recommendation is for the establishment of an independent monitor, with access to classified information, to proactively review use of powers under the SSA. The experiences shared by our members and the data discussed above indicate this is necessary to

ensure that the discretion given to government agencies over search and surveillance is not being abused or misused, or leading to perverse and disproportionate outcomes.

We believe it is also necessary as a result of the significantly expanded powers of search and surveillance granted by last year's amendments to counter-terrorism laws. These amendments created new offences and broadened the definition of a 'terrorist act'. In turn, this has created much greater potential for abuse of power by law enforcement seeking to legally circumvent appropriate processes or requirements for carrying out warrantless search and surveillance.

At present, this monitoring role is filled imperfectly by either civil proceedings or people laying complaints with the Independent Police Conduct Authority (IPCA). Both of these are only possible after and in response to the injustice of unreasonable search and surveillance. Once again, the experiences of our members suggest that significantly more needs to be done to prevent this happening.

We also highlight how inaccessible the process for redress is here: it comes either with the high cost of engaging a lawyer, or requires a high level of bureaucratic and institutional knowledge to progress a complaint with the IPCA. Furthermore, IPCA investigations are not sufficiently 'independent', and the IPCA is significantly limited in its ability to action any findings.⁸ Neither process is appropriate to prevent harm being done via the SSA.

Recent developments in technology

The next set of recommendations we would make around the SSA concern the recent increases in the use, proliferation, and power of technology as a tool for search and surveillance.

First, the use of facial recognition technology (FRT) for surveillance is highly problematic for several reasons. This technology leads to higher rates of false positives for non-white groups,⁹ and, in the past, has been trained to address this issue in part by having people select photos of people who 'look Māori'.¹⁰ This introduces further human bias to the system.

Compounding the issue of accuracy for Māori is the fact that FRT is not developed to deal with tā moko or moko kauae.¹¹ These are taonga which are protected under *Te Tiriti*, meaning that any

⁸ Guyon Espiner, "How the police watchdog is more secretive than the spy agency," *RNZ*, 30 March 2022, <https://www.rnz.co.nz/news/in-depth/464251/how-the-police-watchdog-is-more-secretive-than-the-spy-agency>.

⁹ NIST (National Institute of Standards and Technology), "NIST Study Evaluates Effects of Race, Age, Sex on Face Recognition Software", 19 December 2019, <https://www.nist.gov/news-events/news/2019/12/nist-study-evaluates-effects-race-age-sex-face-recognition-software>.

¹⁰ Mackenzie Smith, "Police searched for suspects in unapproved trial of facial recognition tech, Clearview AI," *RNZ*, 15 May 2020, <https://www.rnz.co.nz/news/national/416697/police-searched-for-suspects-in-unapproved-trial-of-facial-recognition-tech-clearview-ai>.

¹¹ Meriana Johnsen, "Police facial recognition discrimination against Māori a matter of time — expert," *RNZ*, 2 September 2020, <https://www.rnz.co.nz/news/te-manu-korihi/425081/police-facial-recognition-discrimination-against-maori-a-matter-of-time-expert>.

collection of photos of tā moko or moko kauae by a Crown agency and any attempts by the same to train software to recognise or process them are likely violations of *Te Tiriti*.

An independent report into FRT commissioned by the police summarised these issues: "Disproportionate effect on Māori and accuracy and bias issues resulting from the over-representation of Māori in police data are considered a high risk in any considerations of use or future use of FRT."¹² The report highlighted other concerns, including that the application of FRT or other algorithms to this data can amount to a breach of privacy and a failure to uphold the presumption of innocence.

Alongside developments in FRT, there has been a rapid expansion in the collection and storage of images and video footage taken in public. This is done by police, both in the course of their regular duties¹³ as well as online via social media.¹⁴ This collection is also done by central government, local councils, and by private individuals, especially business owners.

A recent report showed that local and central governments operate more than 10,000 CCTV cameras in cities throughout Aotearoa, with many more installed privately.¹⁵ Police and other government agencies have access to these. This occurs: directly via information sharing agreements; by being granted access to private recordings; or at times by using databases created specifically to collect and share user-submitted images of suspected offenders with other users (often business owners) and police.¹⁶ The legal status of this is ambiguous.¹⁷

This raises a number of concerns. First, the collection of this data is not a neutral process. It is informed by a number of biases. Stemming from police biases leading to disproportionate apprehensions of Māori, a subsequent effect is that police routinely collect more photographs of Māori than Pākehā.¹⁸ Systemically as well, Māori are overrepresented in the criminal justice system, meaning police databases are already likely to contain more data on Māori than any other groups.¹⁹

¹² Nessa Lynch and Andrew Chen, "Facial Recognition Technology: Considerations for use in policing," Accessed 30 May 2022,

<https://www.police.govt.nz/sites/default/files/publications/facial-recognition-technology-consideration-s-for-use-policing.pdf>, 79.

¹³ New Zealand Police, "Well and truly OnDuty", Accessed 30 May 2022,

<https://www.police.govt.nz/news/ten-one-magazine/well-and-truly-onduty>.

¹⁴ Phil Pennington, "Police tight-lipped on tools used to scan social media activity," *RNZ*, 14 June 2021,

<https://www.rnz.co.nz/news/national/444670/police-tight-lipped-on-tools-used-to-scan-social-media-activity>.

¹⁵ Farah Hancock, "The streets have eyes," *RNZ*, 19 April 2022,

<https://www.rnz.co.nz/programmes/in-depth-special-projects/story/2018837763/the-streets-have-eyes>.

¹⁶ Hancock, "The streets"; Official Information Act request to the New Zealand Police by Thomas Holmes, 7 March 2020, <https://fyi.org.nz/request/12401-auror-platform>.

¹⁷ Lynch and Chen, "Facial Recognition Technology", 75-78.

¹⁸ Hamish Cardwell, "Police to no longer photograph youth unless in custody, barrister concerned arrests of Māori could increase," *RNZ*, 12 January 2022,

<https://www.rnz.co.nz/news/national/459415/police-to-no-longer-photograph-youth-unless-in-custody-barrister-concerned-arrests-of-maori-could-increase>.

¹⁹ Lynch and Chen, "Facial Recognition Technology", 74-79.

Bias can also result from people such as business owners collecting, compiling into databases and sharing, through software like Auror,²⁰ images of people that they suspect of having committed an offence. Such databases will be heavily skewed by biases against things that people commonly associate with criminality, like skin colour, ethnicity, age or clothing style. The use of these databases by Crown agencies risks exacerbating existing biases within criminal justice data and algorithms using this data.

While people in public do not legally have the reasonable expectation of privacy,²¹ we suggest that the widespread collection, storage and use of images and footage from public spaces, both online and offline, nonetheless represent a significant invasion of privacy. This is especially so given the scale of data collection. While we commend the police for voluntarily halting any use of live or active FRT, it is of concern that this came about largely due to investigative reporting and public backlash, and not because there were any legal or procedural barriers to the use of FRT in this capacity. Amendments to the SSA need to put such procedural barriers in place.

Consequently we have several recommendations for how these issues could be improved through changes to the SSA.

Defining a search

Currently, there is no definition in the Act as to what constitutes a “search”. As identified above, increases in the use, proliferation, and power of technology as a tool for search and surveillance creates significant issues regarding ingrained biases, human rights and privacy considerations. These are issues that are currently legally ambiguous. **We strongly recommend that this ambiguity be removed via the definition of what constitutes a search. This could be done through either amending the SSA itself to include such a definition of search, or by directing that policy documents be prepared clarifying the parameters for what constitutes a search.** Such a policy document should be prepared in consultation with the Privacy Commissioner and regularly reviewed.

Any definition of search, or policy documents guiding the same, needs to explicitly include the uses of technology we have identified as being of concern in our discussion above. These are:

- the access by Crown agencies to any CCTV or other footage or recordings of public spaces;
- any access by Crown agencies to private databases containing photos or video footage; and
- the use of Facial Recognition Technology and/or algorithms, whether deployed live, or on databases such as the ones discussed.

Following this, **we recommend that the Act or policy documents explicitly require a warrant for any and every deployment of live or active facial recognition technology.** We believe this will allow for appropriate oversight of a technology that, per our discussion above,

²⁰ <https://www.auror.co/>.

²¹ New Zealand Police, “What are the rules around taking photos or filming in a public place?”, accessed 7 June 2022, <https://www.police.govt.nz/faq/what-are-rules-around-taking-photos-or-filming-public-place>.

contains a number of significant potential risks to human rights, *Te Tiriti* rights, as well as to the broader principles that should guide search, surveillance and law enforcement in Aotearoa.

In regards to databases from online sources mentioned here, it is particularly important to note that these are usually products created and sold by companies operating under different legal jurisdictions to ours.²² This makes it critical that there be clear legal guidance on if, when, and how they can be used in Aotearoa, to ensure that we are upholding democratic rights and values.

Finally, **we recommend that further guidance be developed to ensure that new technological developments do not infringe people's rights.** We believe these recommendations will help to ensure there are some safeguards on the use of the technologies discussed, by applying requirements and restrictions that are appropriate given the inherent risks and issues that arise from the use of these technologies to it as other searches.

Future engagement with community members

The use of email, online workshops and the significant timeframe provided for input to this review helped us to engage fully with the process. Some members have suggested that when engaging directly with individuals and communities (for example in the next phase of consultation in this review of the SSA), it would be helpful for the Ministry to hold face-to-face meetings in various accessible locations, do community callouts, and otherwise physically go into communities to consult. This would be more inclusive of people who, for a variety of reasons, don't or can't use the internet.

²² Pennington, "Police tight-lipped".