

Arrest and use of force in Hamilton unlawful

1. On 10 June 2022 three on-duty officers and one off-duty officer used force to handcuff a man (Mr Z) after arresting him for obstructing them while trying to carry out a vehicle check in a Hamilton shopping centre carpark. The man's partner (Ms Y) was also briefly arrested, as was a shop owner who came out to film the incident. No-one was charged following the arrests.
2. Ms Y complained to Police about:
 - a) the officers' use of force;
 - b) the lack of grounds for the arrests;
 - c) the lawfulness of the officers' search of her car; and
 - d) the officers' targeting of Mr Z due to his appearance.

Police referred the complaint to us under section 15 of the Independent Police Conduct Authority Act 1988.¹

3. An officer was conducting traffic checks in an unmarked car in Hamilton on 10 June 2022 when he says he saw Ms Y driving a car without a seatbelt, with Mr Z in the passenger seat. He noticed Mr Z's facial tattoos, which he believed to be gang related. He decided to follow the car but lost sight of it. A short time later he saw the car in the carpark of a local shopping centre, where Mr Z and Ms Y had come to collect laundry from the laundromat. He radioed for assistance before approaching the car. Mr Z got out of the car and began speaking to the officer. Shortly afterwards, another car with two officers arrived. Police say they were wanting to conduct a vehicle check and accused Mr Z, who was standing by the driver-side door, of obstructing them from doing so. The officers told Mr Z he was under arrest. They then used force, including a head lock, to wrestle him to the ground and sprayed him with oleoresin capsicum spray (pepper spray) before handcuffing him.

¹ Section 15 says "The Commissioner shall notify the Authority of every complaint received by the Police, other than a complaint notified to the Commissioner by the Authority."

4. Most of the incident was captured by CCTV and by Mr X, a shop-owner who recorded the exchange on his cell phone.

The Authority's Findings

Issue 1: Was Officer A's vehicle stop of Ms Y's car lawful?

Officer A's vehicle stop of Ms Y's car was unlawful because it was not for a genuine purpose under the Land Transport Act 1998.

Issue 2: Was the arrest of Mr Z lawful?

Mr Z's arrest was unlawful.

Issue 3: Was the use of force against Mr Z justified?

The use of force against Mr Z was unjustified.

Issue 4: Were the arrests of Mr X and Ms Y lawful?

The arrests of Mr X and Ms Y were unlawful.

Issue 5: Was the search of Ms Y's car lawful?

Officer B's search of Ms Y's car was unlawful because the vehicle stop was unlawful.

Analysis of the Issues

ISSUE 1: WAS OFFICER A'S VEHICLE STOP OF MS Y'S CAR LAWFUL?

Why did Officer A decide to stop Ms Y and conduct a vehicle check?

5. On 10 June 2022 Ms Y and Mr Z were running errands in Ms Y's ute. They had just visited a laundromat and, while their washing was drying, they went for a drive. As they were driving down Massey Street Ms Y got a phone call, so she turned down a one-way street and turned off the car to take the call. Both she and Mr Z sat in the car while she took the call. While they were parked, Officer A drove past. He was working alone, monitoring seatbelts and cell-phone use while driving. Officer A told us that when he first saw Ms Y and Mr Z he had no concern, although he did notice that Mr Z had gang-related facial tattoos. There was nationwide operation at the time to try and combat gang crime, so Officer A searched the licence plate of the car in the police database to see if there were any warrants to arrest. The search did not return any results, so he continued driving.
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6. After Ms Y finished her phone call, she and Mr Z returned to the laundromat. As they drove, Officer A again saw their car and this time says he noticed Ms Y driving without wearing a seatbelt. Officer A did a U-turn but by the time he had turned around, Ms Y had turned down a side street. Officer A told the communications centre (Comms) *“a gold rodeo just slipped me on Massey”* and that *“the front passenger has some come tip me out tats”*.² Officer A says he did not feel the offence warranted urgent duty driving, so he continued with his patrol.
7. Officer A says he is sure he saw Ms Y not wearing a seatbelt. Both Ms Y and Mr Z deny they were committing any traffic offence, and Mr Z commented to us how seriously Ms Y takes safety; that she always wears her seatbelt and pulls over to take phone calls. Neither of them was aware that Officer A was behind them at any point on the way back to the laundromat.
8. A short time later, Officer A saw the ute turn into the Dinsdale shops on Killarney Road. He followed them, turned into the carpark and got out of his car after radioing for assistance. Officer A says his intention was to speak to the driver, Ms Y, about the seatbelt issue. He says that as he got out of his car, Mr Z approached and was initially friendly. Mr Z says Officer A walked over to Ms Y’s car, greeted him by saying, *“you’re a new face in town”* and asked to speak with him. He says he happily told the officer his name. Mr Z described Officer A as initially friendly, but that Officer A told him he needed to check the seatbelts in the car, about which Mr Z was unhappy because he did not think Ms Y’s car should be searched without a reason.
9. Ms Y says she had left the car to get their clothes from the laundromat and when she came back and saw an officer talking to Mr Z, she asked what was going on. According to Ms Y the officer replied that he was *“just wanting to see who this man is”* because he was a *“new face in town”*.

The arrival of Officers B and C

10. Officers B and C arrived while Officer A and Mr Z were talking. Officer A went over to them and said he told them he wanted to speak to the driver and check the roadworthiness of the car.
11. Officers B and C told us that when they arrived, their intent was to apply section 113 of the Land Transport Act 1998 to conduct a roadworthiness check of the car. This check can be conducted by one person and involves checking the exterior features such as tyres, windscreen wipers and rust, as well as the registration and warrant of fitness on the front windscreen. Mr X (the shop-owner and witness described in paragraph 4) said that while he had assumed the officer would conduct a regular roadworthiness check, none of the officers checked the windscreen - *“I didn’t see any officers interested in the actual thing they came for”*.
12. Instead, Mr X saw Officers B and C showing an immediate interest in the inside of the ute. He told us that as he watched, he heard Officer B or C say, *“Move away from the car because I want to look in your car.”*

² A *“tip out”* is a Police colloquialism for a vehicle stop.

13. Ms Y describes a “swarm of cops” coming in and being told they needed to look in her vehicle. When she asked why, they replied that they needed to check it was roadworthy. She says she told them they could check the outside in order to do this, but they told her they needed to look inside and make sure the seatbelts work. Ms Y told us that the back seat of the car had not been used since she had received her last warrant of fitness, so the seatbelts in the back were still done up and were visible had the officers looked through the windows. Officer A denies he told Ms Y that he needed to check the seatbelts.
14. Officer A says he tried to talk to Ms Y but that she ignored him and says that his attention was focused on keeping the public and other officers safe. However, the CCTV footage shows that throughout the entire incident, officers paid very little attention to Ms Y, despite her being the driver of the car and the person who Officer A alleges was driving without wearing a seatbelt.

Conclusion

15. Officer A says that he stopped Ms Y’s car because he had seen Ms Y driving without wearing a seatbelt. However, Officer A’s initial comment to Mr Z – “you’re a new face in town” – and his prior radio communication stating that Mr Z had “come tip me out tats” – appears to demonstrate that Officer A’s real interest was in Mr Z. Officer A has expressed remorse about his comment over the radio. CCTV footage and witness accounts also show the focus of all officers in the carpark was on Mr Z (despite him only having been a passenger in the car).
16. Our assessment, on the basis of available evidence, is that Officer A did not stop the car because Ms Y had not been wearing a seatbelt. He stopped the car because he had profiled Mr Z based on his facial tattoos.

Was the vehicle stop lawful?

17. Officer A says that he stopped Ms Y under Section 114 of the Land Transport Act 1998 because she was not wearing a seatbelt. Section 114 gives Police a limited power to stop a car to ask for a driver’s (Ms Y’s) name and address. If he had wanted to ask Ms Y her name and address, Officer A had every opportunity to do so. As we conclude above, the evidence indicates that Officer A’s real interest was not with Ms Y, but the appearance of Mr Z as a large, tattooed man whom he had not seen in the neighbourhood before. The section 114 power does not extend to asking questions of a passenger (Mr Z).
18. The checking of seatbelts can form part of a roadworthiness check, a purpose justified under the Land Transport Act. However, based on the evidence in this case, our conclusion is that Officer A stopped the vehicle with the object of searching it (see paragraph 16). Stops under section 114 of the Land Transport Act 1998 can only be undertaken if they are genuinely for the purpose of enforcement of the Land Transport Act 1998. They cannot be used as a pretext to undertake a search.³ We therefore conclude that Officer A’s vehicle stop was unlawful.

³ *R v Fletcher* (2002) 19 CRNZ 399 (CA)

FINDING ON ISSUE 1

Officer A's vehicle stop of Ms Y's car was unlawful because it was not for a genuine purpose under the Land Transport Act 1998.

ISSUE 2: WAS THE ARREST OF MR Z FOR OBSTRUCTION LAWFUL?

19. If Ms Y and Mr Z were unlawfully stopped by Officer A, it follows that subsequent Police actions were not part of their lawful duty and therefore Mr Z could not be obstructing them. Therefore, his arrest must have been unlawful. Despite this, we have analysed the events leading up to Mr Z's arrest to determine whether his arrest would have been lawful if the vehicle stop had been lawful.

Events leading up to Mr Z's arrest

20. Officer A told us that after Officers B and C arrived and started speaking with Mr Z, Mr Z's behaviour changed. Officer A says when he saw Ms Y returning from the laundromat he went to speak with her, and Mr Z returned to the driver's side of Ms Y's ute "*and ...stood there...making it quite clear that he didn't want Police to go anywhere near him or his car*". He says that while he was talking to Ms Y he could see that Mr Z was "*becoming more aggressive*", standing with his back against the car with his chest and arms out and then taking off his jacket as if he were preparing for confrontation. Officer A says he heard Officer B warning him that he was obstructing Police and that they just wanted to check his car. Officer B described Mr Z as taking off his T-shirt and "*adopting a fighting stance*". He says he did not feel safe in front of Mr Z and did not want to push past him.
21. While Mr Z talked to the officers, he was standing towards the rear of the ute on the driver's side. The officers say he was refusing to move to allow them to inspect the exterior of the vehicle. Officer B says that Mr Z was physically obstructing him from carrying out the vehicle checks and that he had formed the opinion that Mr Z would block him, whichever direction he tried to go. He told us:
- "The male's behaviour was quite aggressive, I didn't feel comfortable, say, sending [Officer C] [to carry out the checks] and leaving me alone with him...So to me the safest option was that he moved out of the way so we could go and carry out the check".*
22. Officer B also said that Officer A was out of earshot, so he could not ask that he carry out the Warrant of Fitness and registration check on the other side of the car. The video footage taken by Mr X, and the CCTV, show that Officer A is within earshot during parts of the exchange. We asked Officer B why he could not carry out the warrant and registration checks on his mobile device and he explained that people often have false or copied plates on their vehicles, so he likes to make sure the plates match the registration sticker.
23. Officer A agreed that Mr Z was obstructing Police from carrying out their vehicle check. He described the way Mr Z "*just continued to stand there and refused to make way for Police*".

24. CCTV footage shows Officers B and C standing between the ute and another car while having a heated discussion with Mr Z. It also shows Officer A moving around, speaking to the bystanders, including Mr X who had gathered to watch and film the incident.
25. The footage shows Mr Z getting increasingly frustrated and, at one point, taking his jacket off. The officers say he was obstructing them from conducting their roadworthiness check of the car. Mr Z told us he was standing his ground because he did not think it was fair for the car to be searched and he felt Police were belittling him in front of the crowd. The audio from Mr X's cell phone footage records officers warning Mr Z that he would be arrested for obstruction of a Police officer if he did not move out of the way. Mr Z did not comply, and Officer B told him he was under arrest.

Conclusion

The law

26. Section 23 of the Summary Offences Act 1981 makes it an offence to intentionally obstruct a constable acting in the execution of his duty.
27. Courts have found that obstruction will occur where the action complained of makes it more difficult for the police to carry out their duties. There is no reason why words alone cannot amount to obstruction.⁴

Our analysis

28. Officers B and C both told us that they were only wanting to check the vehicle's registration and warrant of fitness on the windscreen. The task could have been completed by a single lap of the car.
29. Officer B told us that before he could carry out those checks Mr Z "*just directly got in front of me and stopped me from walking to the vehicle*". At this point, Officer C says that he attempted to call Mr Z over from where he was talking to Officer B, in order to explain the checks they wanted to conduct. We have viewed the CCTV. When Officer B first engages with Mr Z, Officers A and C are standing nearby, looking on. Mr Z is clearly upset but does not appear threatening. This is consistent with witness accounts. There appears to have been no impediment to either Officer A or Officer C walking around the car to conduct the required checks at this stage. Mr Z was not standing in front of any vital parts of the car such as the warrant of fitness sticker. The bystander, Mr X, observed that "*not one cop was at the car*" performing a WOF and registration check.
30. Even once Officer C joined Officer B, Officer A remained free to conduct the required checks. Officer A says he was concerned for his colleagues' safety and therefore did not want to leave them in order to conduct the visual inspection. However, video footage shows that Officer A did move around the car, speaking with bystanders. We therefore do not accept his explanation.

⁴ *Ulrich v Police* (1989) 4 CRNZ 144

31. Our assessment, on the basis of available evidence, is that Mr Z was not in any way obstructing police from carrying out their roadworthiness checks. His arrest was therefore unjustified even if Officer A's vehicle stop had been lawful.

FINDING ON ISSUE 2

The arrest of Mr Z for obstruction was unlawful and unjustified.

ISSUE 3: WAS THE USE OF FORCE AGAINST MR Z JUSTIFIED?

What force did officers use to effect the arrest of Mr Z?

32. After Officer B told Mr Z he was under arrest, he and Officer C attempted to handcuff him by placing his hands behind his back. Mr X's cell phone footage records Mr Z repeatedly telling the officers that he cannot put his hands behind his back. He told us that he generally gets handcuffed at the front due to his size. Officer A then joined the officers' efforts.
33. Both the CCTV and cell phone footage show Officer B placing his arm around Mr Z's neck to take him to the ground. Mr Z says he recalls this happening, and that it caused him difficulty in breathing such that he needed to be seen by a doctor afterwards. At one point during the interaction, an off-duty police officer (Officer D) ran in to assist.⁵ The other officers did not know he was an off-duty officer at the time. All four officers were able to get Mr Z to the ground. Initially he was lying on his front, but the officers then rolled him onto his back and Officer B suggested to Officer C that they use pepper spray. Officer C warned the other officers that he was about to spray, and Officer D held back Mr Z's head – he told us he did this to avoid getting spray in his own eyes while ensuring control of Mr Z. Officer C sprayed Mr Z's face at close range.
34. Officers were then able to handcuff Mr Z and he was escorted to a Police car, where Officer C says he applied aftercare for the pepper spray. Mr Z does not specifically recall this, saying the only aftercare he remembers is being given a hose at the Police station. After viewing the CCTV footage and hearing the accounts of Officers B and C, we are satisfied that Mr Z was given appropriate aftercare at the scene.
35. The three types of force that officers used to effect the arrest of Mr Z were:
- Officers pulling on Mr Z's limbs to get him off balance and bring him to the ground;
 - Officer B's placement of his arm around Mr Z's neck in a head lock; and
 - Officer C's use of pepper spray.
36. Mr Z went to the doctor following the incident due to injuries caused during the arrest, including injury to his neck which caused him to wince in pain when talking.

⁵ Police policy allows for the intervention of off duty officers and states they should announce to the offender and bystanders who they are. Officer D says he announced he was an off-duty officer, although the officers say they did not know who the person was who came and assisted in getting Mr Z to the ground.

Was the officers' use of force legally justified?

37. In Issue 2 we found that the officers' arrest of Mr Z was unjustified. It follows that any force used to effect that arrest was also unjustified.
38. If Police had been justified in arresting Mr Z then the relevant provision in considering whether their use of force was justified is Section 39 of the Crimes Act 1961. That section empowers Police to use "such force as may be necessary" to overcome any force used in resisting an arrest or the execution of any sentence, warrant, or process, unless the arrest can be made "by reasonable means in a less violent manner".
39. Under section 39, the Authority must determine:
- a) whether the officers believed on reasonable grounds that Mr Z was using force to resist arrest; and if so
 - b) whether the degree of force used to overcome that resistance was proportionate, and reasonable in the circumstances as the officers reasonably believed them to be.
40. Due to our finding that the arrest was unjustified, it is unnecessary to set out a full analysis of Police use of force under section 39. The real concern in this case is the way Police overreached their powers in stopping Ms Y's car and in arresting Mr Z. However, even if the vehicle stop and arrest had been justified, the use of force would still have been excessive.
41. Officer B told us that while Mr Z did not try and assault them, he was making a "*strong, aggressive attempt to not let us arrest him*" and that, because of Mr Z's strength, the officers could get hurt if he did try and assault them. Officer A described Mr Z's attempt to block them from arresting him as the way he was holding his hands so they could not move them behind his back.
42. Officer A told us:
- "I don't remember him yelling or attempting to hit anyone or anything like that but he was very much resisting and just holding his arms out and not following any direction at all".*
43. The bystander, Mr X, told us that Mr Z was not really resisting. Our review of the CCTV and cell phone footage corroborates this. He was explaining to the officers why he could not be handcuffed behind his back, but they were not listening to him.
44. In taking Mr Z to the ground, Officer B put his arm across Mr Z's neck in what could be described as a headlock. He told us this was unintentional, and rather than being a particular tactic he was using "*we just did what we could, we don't really get any formal training taking people to the ground*". His view was that this amount of force was reasonable in response to the resistance Mr Z was showing.
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45. Officer B suggested the use of pepper spray to Officer C. He says he considered Mr Z to be in the ‘assaultive’ range when considering what their tactical options were. Officer C says he considered other options such as taser (but decided they were too close) or empty hand tactics such as striking him, but decided that pepper spray was the least violent means to effect the arrest. Again, Mr Z’s lack of resistance and continued protestations that he could physically not place his hands behind his back mean the use of pepper spray was unjustified.

Conclusion

46. The officers were not legally justified in using force to effect the arrest of Mr Z because his arrest was not legally justified. Even if it had been, the force used was excessive when considered under section 39. The officers had the opportunity to listen to Mr Z’s reasons for not being able to place his hands behind his back to be handcuffed and could have responded accordingly.
47. An officer is required to complete a tactical options report (TOR) when he or she has used a certain level of force on a member of the public. The report includes each tactical option and a description of the force used and the reasons for using it. Officer B failed to complete a tactical options report, in breach of Police policy.

FINDINGS ON ISSUE 3

The officers’ use of force against Mr Z was not justified, and Officer B should have completed a tactical options report following the incident.

ISSUE 4: WERE THE ARRESTS OF MS Y AND MR X LAWFUL?

48. After Mr Z had been arrested and placed in the back of a Police car, Ms Y was arrested for obstructing Police after kicking the tyre of a Police car.⁶ She was placed in the back of a Police car, and she explained to an officer that she had acted out of frustration at what she perceived was the unfairness of the way Police had treated Mr Z. She was released with a verbal warning after officers had finished searching her car. Ms Y told us:

“And then they tried to arrest me... I’ve never ever been arrested in my life, like never, and this is what we get just for going and doing our laundry.”

49. Mr X was arrested for obstruction of Police, due to his filming of the incident on his cell phone. He, too, was released with a verbal warning while at the scene.
50. There is no evidence, from CCTV footage or otherwise, that when Ms Y kicked the tyre she was obstructing any officers executing their duties. Further, the kick did not result in any damage to the car so Police could not allege the offence of wilful damage.⁷ We are therefore satisfied that Police had no grounds to arrest her.

⁶ The offence of obstruction is explained at footnote 3.

⁷ Section 11 of the Summary Offences Act 1981 establishes the offence of wilful damage where a person intentionally or recklessly damages any property, without lawful justification or excuse.

51. In watching Mr X's cell phone footage, it is possible to hear Police warning him for obstruction. At one point Officer A tells him he is happy for Mr X to film, but that Police need space to do their job. The footage shows that, at this point, Mr X takes a step back in compliance. Officer B says that Mr X was becoming a concern to him when they had taken Mr Z to the ground and were spraying him with OC spray. He says Mr X was getting closer and closer, and was quite aggressive with what he was saying, and that at one point he got so close he could touch them. He recalls having told Mr X to move away multiple times. He also recalls that after Mr Z's arrest the situation had calmed down, so he decided to release him with a warning.
52. We have viewed the mobile phone and CCTV footage and have considered Officer B's account. There is no evidence that Mr X obstructed Police executing their duty. When Police asked him to give them more space, he did so.
53. There is no evidence that either Ms Y or Mr X committed an offence during the incident. We therefore find that their arrest was unlawful, and Police overreached the powers available to them.

FINDING ON ISSUE 4

The arrest of both Ms Y and Mr X was unlawful.

ISSUE 5: WAS THE SEARCH OF MS Y'S VEHICLE LAWFUL?

54. Officers' early interest in searching inside Ms Y's car is set out in paragraphs 12 to 16. After Mr Z had been arrested and placed in the back of the patrol car, Officer A provided an update to Comms, stating "*one in custody, got a couple of (indecipherable) to sort out, plus we've got a vehicle to search*".
55. Officer B says while conducting the roadworthiness check, he looked into the driver's side rear passenger window and saw a small container of cannabis in plain sight on the seat. He says he told Officer A that he was intending to search the car under the Search and Surveillance Act 2012 and asked Officer A if he could inform Mr Z that they were using that power to search.⁸
56. Mr Z accepted responsibility for the cannabis. Seven minutes later another update was given to Comms outlining that two people were in custody and that drugs were located in the car. Mr Z was taken back to the Police Station. He was released a short time later and told he would later receive a notice to attend a Te Pai Oranga hearing for obstruction and a warning for the cannabis.⁹

⁸ Officer B did not provide a section of the Search and Surveillance Act 2012, but from his description of events we understand he would have been relying on section 20.

⁹ Te Pae Oranga Iwi Community Panels are a way that Police and iwi or Māori partners deal with crime and prevent reoffending.

57. The unlawful nature of the vehicle stop set out in Issue 1 made the officers' subsequent search of the car also unlawful. However, if the stop had been lawful, Officer A's search would have been justified under section 20 of the Search and Surveillance Act 2012, which gives an officer the power to search a vehicle if he has reasonable grounds to believe there are drugs in the car.

FINDING ON ISSUE 5

Officer B's search of Ms Y's car was unlawful because the vehicle stop was unlawful.

Subsequent Police Action

Police findings

58. Police have completed a fact-finding report in which they found, consistent with our findings, that Officer A intended to locate and stop the vehicle driven by Ms Y based on the physical appearance of Mr Z. They also found that the arrest of, and use of force against, Mr Z could have been avoided if one of the officers had checked the car's windscreen for the relevant labels rather than insisting Mr Z move.
59. Police have advised that the officers have since undertaken appropriate cultural competency and tactical communication training.



Judge Kenneth Johnston KC

Chair
Independent Police Conduct Authority

5 March 2024

IPCA: 22-14254

About the Authority

WHO IS THE INDEPENDENT POLICE CONDUCT AUTHORITY?

The Independent Police Conduct Authority is an independent body set up by Parliament to provide civilian oversight of Police conduct.

We are not part of the Police – the law requires us to be fully independent. The Authority is overseen by a Board, which is chaired by Judge Colin Doherty.

Being independent means that the Authority makes its own findings based on the facts and the law. We do not answer to the Police, the Government or anyone else over those findings. In this way, our independence is similar to that of a Court.

The Authority employs highly experienced staff who have worked in a range of law enforcement and related roles in New Zealand and overseas.

WHAT ARE THE AUTHORITY'S FUNCTIONS?

Under the Independent Police Conduct Authority Act 1988, the Authority receives and may choose to investigate:

- complaints alleging misconduct or neglect of duty by Police;
- complaints about Police practices, policies and procedures affecting the complainant in a personal capacity;
- notifications of incidents in which Police actions have caused or appear to have caused death or serious bodily harm; and
- referrals by Police under a Memorandum of Understanding between the Authority and Police, which covers instances of potential reputational risk to Police (including serious offending by a Police officer or Police actions that may have an element of corruption).

The Authority's investigation may include visiting the scene of the incident, interviewing the officers involved and any witnesses, and reviewing evidence from the Police's investigation.

On completion of an investigation, the Authority must form an opinion about the Police conduct, policy, practice or procedure which was the subject of the complaint. The Authority may make recommendations to the Commissioner.

THIS REPORT

This report is the result of the work of a multi-disciplinary team. At significant points in the investigation itself and in the preparation of the report, the Authority conducted audits of both process and content.



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