

The Authority's Findings

Issue 1: Was Officer B justified in pushing Mr Z?

Officer B was not justified in pushing Mr Z.

Issue 2: Were the arrests of Mr Z and Mr X lawful?

The arrests of Mr Z and Mr X were unlawful.

Police should not have issued Mr Z and Mr X with formal warnings.

Issue 3: Did Police treat Mr Z and Mr X appropriately after their arrests?

We are unable to make a finding on whether Police treated Mr Z and Mr X appropriately after their arrests.

Analysis of the Issues

ISSUE 1: WAS OFFICER B JUSTIFIED IN PUSHING MR Z?

7. In this section, we describe what happened when Mr Z and Mr X encountered Police in Galway Street. We then assess whether Officer B was legally justified in pushing Mr Z under section 48 of the Crimes Act 1961, which relates to force used by anyone to defend themselves or another person.

What happened when Mr Z and Mr X encountered Police in Galway Street?

8. Mr Z and Mr X are friends and had been drinking alcohol in Mr X's inner-city Auckland apartment on the evening of Saturday 21 May 2022. A short time after midnight, the pair went out onto the street to enjoy the nightlife.
9. Both men told us they were slightly intoxicated, but not drunk. The CCTV footage from Galway Street suggests Mr Z was more intoxicated than he recalls, as it captured him urinating in a building recess and then appearing to vomit into a large potted plant.
10. At about 12.45am, a man and a woman walked past Mr Z and Mr X on the street. The man stopped briefly and exchanged words with Mr Z. The CCTV camera did not record sound, so we do not know what they said to each other, but the encounter does not appear to have been aggressive. Mr X told us it was a casual and friendly conversation.
11. A Police van drove into the street as a crime prevention patrol, which is common for Friday and Saturday nights in Auckland city centre. Some of the officers in the van thought Mr Z was "squaring up to" the man and told us "it looked kind of hostile". The man then continued walking down the street away from Mr Z.

12. As the Police van drove past, Mr Z gestured rudely with both hands to the officers inside. The officers say he also swore at them. Officer B says Mr Z shouted something like: *“Look, it’s the f..kin’ pig shit c..ts.”*
13. The officers told us they stopped to speak with Mr Z because he appeared to be drunk and was behaving in a disorderly manner (including appearing to be hostile to the man who had just walked past him). They say that in these situations, they usually tell the person to go home or, if the person is aggressive, arrest them for their own protection as much as anything else. One of the officers told us:

“It’s a Friday/Saturday night, people are drunk, people are looking for fights. That’s what happens on a Friday and Saturday night shift, which is terrible, but it is what it is and that’s what we have to deal with.”
14. Five officers (Officers A, B, C, D and E) got out of the Police van and approached Mr Z. He was standing up against a wall, and the officers stood quite close (within one metre) in a semi-circle around him. While this appears quite intimidating on the footage, the officers describe it as creating a *“safe haven”* to prevent them from being assaulted. Officer C told us:

“I did put him up against the back of a wall just as a safety for me to notice how much he’s creeping up on me and to keep myself safe and my colleagues safe.”
15. Mr Z told us he apologised to the officers straight away, saying: *“I’m sorry, I was joking, like it was cheeky, like shouldn’t have done it.”* The officers deny that Mr Z apologised, and say he was argumentative and aggressive.
16. Officer A says he was the first to speak to Mr Z and told him: *“You know better than to act like that.”* Officer C then spoke to Mr Z and checked his details after asking for his driver’s licence. Officer C says he told Mr X, who appeared more sober, to take Mr Z home or he (Mr Z) would be arrested.
17. The CCTV footage of the encounter shows that Mr Z stepped back towards the wall as the five officers approached and then stood around him. Mr X stood off to one side. Mr Z spoke with the officers and handed something (presumably his driver’s licence) to one of them. Mr Z does not appear to be openly aggressive in the footage (although what was being said is not recorded).
18. Officer B then began talking to Mr Z. Mr Z accepts that he was not fully cooperative (for example, he questioned why he needed to tell the officers his address when it was on his driver’s licence), but says the situation became more heated when Officer B got involved. Officer C says it was obvious that Officer B and Mr Z did not like each other, and that Mr Z was getting quite flustered and a lot angrier than he had been earlier.
19. About one minute and 20 seconds after the officers first approached, Mr Z began moving off to the side, away from them. The CCTV footage shows that Officer B followed Mr Z and stepped up close to face him. Mr Z had his hands behind his back, and Officer B had his arms folded across his chest. The other officers returned to stand close around Mr Z in a semi-circle.

20. Officer B says he followed Mr Z because he was telling him that he was not free to leave. He says the officers were “*continuing to confirm [Mr Z’s] details*” and denies knowing that Officer C was talking to Mr X about taking Mr Z home. He told us he was trying to de-escalate the situation because Mr Z was aggressive and uncooperative. Officer B says Mr Z:

“... stood in close proximity to me, approximately 40 centimetres to one metre, with his head down and forehead forward, moving his arms and head around in an unpredictable manner. [Mr Z] began making comments such as: ‘you guys are the biggest gang in New Zealand, you’re nothing without your badge.’ Due to [Mr Z’s] close proximity and tense body language and derogatory comments... I believed [Mr Z] may have been intending to headbutt me.”

21. When we put it to Officer B that it appeared from the CCTV footage that, rather than de-escalating the situation, he was the one who stepped up close to Mr Z, Officer B replied: “*That may be your perspective from the footage but that’s not my opinion.... I was speaking with him, reasoning with him.*”
22. Mr Z told us Officer B got in his face and was abusive to him, saying: “*What, you think you’re a f..cking tough guy?*” Mr Z says he tried to remain calm, but thought Officer B was baiting him, so he replied by saying something like: “*Little man, big uniform*”.
23. The CCTV footage shows that Mr Z’s arms were not moving but he occasionally nodded his head as he was speaking with Officer B. After about 40 seconds of Mr Z and Officer B standing very close and talking, Officer B pushed Mr Z backwards with both palms.
24. When we spoke to the other officers who were there, two said they did not see the push. One said they saw it, and it happened because Mr Z was getting up in Officer B’s face and antagonising him. This officer could not explain why the CCTV footage showed that it was Officer B who stepped close to Mr Z. Another officer said they did see Officer B push Mr Z “*for whatever reason*”, and that it surprised him. Mr X told us: “*There was just no need*” for Officer B to push Mr Z.
25. Mr Z stumbled back a short distance into the wall behind him while Officer B turned around and walked towards the Police van.

Was Officer B legally justified in using force against Mr Z?

26. Officer B told us he pushed Mr Z because:

“... it was necessary for me to act immediately and create a safe space between [Mr Z] and myself as I believed he was intending to headbutt me. I delivered a firm double handed open palm push to [Mr Z’s] chest which created a sufficient and safe distance between [him] and myself.”

27. Section 48 of the Crimes Act provides that any person, including a Police officer, is legally justified in using reasonable force in defence of themselves or another.

28. The assessment under section 48 involves three questions:
- a) What were the circumstances as the officer believed them to be (a subjective test)?
 - b) Was the officer's use of force against Mr Z for the purpose of defending himself or another (a subjective test)?
 - c) Was the officer's use of force against Mr Z reasonable in the circumstances as the officer believed them to be (an objective test)?

What did Officer B believe the circumstances to be?

29. As outlined above, Officer B says Mr Z was aggressive, standing up close to him, making "derogatory" comments and "moving his arms and head around in an unpredictable manner". He says this led him to believe Mr Z was about to headbutt him, and he needed to push Mr Z away to prevent this from happening.
30. We do not find Officer B's claim that he believed he was defending himself when he pushed Mr Z convincing. The CCTV footage shows it was Officer B who got up close to Mr Z and stayed there for about 40 seconds before pushing him. If Officer B was concerned about being assaulted, it does not make sense that he would (a) deliberately get that close to Mr Z and stay there; and (b) immediately turn his back on Mr Z after pushing him.
31. The CCTV footage also shows that Mr Z was not moving his arms around when Officer B was up close to him. Mr Z was standing with his hands behind his back. He was nodding his head as he spoke. He was not backing down to Officer B with his words, but his body language was compliant and non-threatening. Mr Z was also surrounded by five officers, so there was a power imbalance in Officer B's favour.
32. Therefore, we do not accept that Officer B genuinely believed Mr Z was going to headbutt or otherwise assault him at the time he pushed Mr Z. Rather, in our assessment of the evidence, Officer B's view was that Mr Z was being difficult and disrespectful.

Was Officer B's use of force for the purpose of defending himself?

33. Having concluded that Officer B did not genuinely think Mr Z was about to assault him, we must also conclude that the officer did not push Mr Z to defend himself. Rather, from the evidence, it appears that Officer B pushed Mr Z in response to Mr Z's behaviour as already described.
34. Since the purpose of Officer B's use of force was not to defend himself or another, in our view the legal defence provided by section 48 is not available to him.

What have we concluded?

35. Section 48 of the Crimes Act does not justify Officer B's use of force. Nor is any other legal defence available.
36. We find that Officer B pushing Mr Z in these circumstances was both unlawful and unreasonable.

FINDING ON ISSUE 1

Officer B was not justified in pushing Mr Z.

ISSUE 2: WERE THE ARRESTS OF MR Z AND MR X LAWFUL?

37. In this section we describe what happened when Police arrested Mr Z and Mr X. We then assess whether Mr Z and Mr X had committed offences, and whether their arrests were legally justified.

What happened when Police arrested Mr Z and Mr X?

38. The CCTV footage shows that, when Officer B turned and walked towards the Police van after pushing Mr Z, Mr Z and the other officers also stepped towards the Police van. Mr Z told us he got up off the wall and asked Officer B: *“What the f..k was that?”* He says Officer B then:

“... just boom, punched me. Like, he kind of like grabbed me first and then gave me like these like little, you know, jabs to the head whatever and then that’s when I just felt the rest of the cops just, you know, grab me.”

39. Officer B says he was going to the Police van to consult his sergeant (Officer F) about arresting Mr Z when he looked back over his shoulder to see Mr Z aggressively approaching him. The CCTV footage shows that Officer B turned around and pushed Mr Z backwards to the wall, then pulled Mr Z’s head down as two other officers grabbed his arms and helped Officer B take him to the ground.
40. The footage does not show Officer B punching Mr Z. Mr X says he did not see whether the officer was punching Mr Z, but he did see the officer’s *“arm go back and forth a few times”*.
41. Mr X started filming on his cell phone as Officer B and other officers took Mr Z to the ground and handcuffed him. Mr X’s footage shows that he pointed directly at Officer B while saying: *“Look at you, antagonising people just to get an arrest. That one there, you!”* He later said to another officer: *“Your cop pushed him.”* Mr X also called the officers a *“bunch of racists”* and asked for the officers’ badge numbers. When we later spoke to Mr X, he said he suspected Police had targeted Mr Z because he is *“not white”*, and Police have stereotypes about *“certain people from certain communities”*.
42. Mr Z says Police did not tell him he was under arrest and did not advise him of his rights. Police searched him and put him into a secure area in the back of the Police van.
43. Meanwhile, Officer E told Mr X to stand back, or he would be arrested. About a minute later, Officer F came up and told Mr X to leave or he would be arrested for obstruction. Mr X walked away. About two and a half minutes later, the Police van drove past Mr X on Galway Street. Mr X says he was *“90 percent positive”* he saw Officer B giving him *“the fingers”* from inside the van. Officer B denied doing this. Mr X says he immediately returned the gesture.
44. The Police van stopped and four officers, including Officer B, got out and arrested Mr X. Mr X says he waited calmly for the officers with his hands behind his back, but they took him down

onto the ground and applied handcuffs before placing him into another secure area in the back of the van.

45. After receiving Mr Z and Mr X into custody, Police released them 15 minutes later with formal warnings. Mr Z's warning was for 'disorderly behaviour likely to cause violence' under section 3 of the Summary Offences Act 1981. Mr X's warning was for a less serious disorderly behaviour offence under section 4 of the Summary Offences Act.

Did Police have good cause to suspect Mr Z and Mr X had committed offences?

46. For the arrests to be lawful, Police must have had "*good cause to suspect*" that Mr Z and Mr X had committed offences by behaving in a disorderly manner under section 3 and section 4 of the Summary Offences Act respectively.²
47. Section 3 of the Summary Offences Act says:

"Disorderly behaviour

Every person is liable to imprisonment for a term not exceeding 3 months or a fine not exceeding \$2,000 who, in or within view of any public place, behaves in a disorderly manner that is likely in the circumstances to cause violence against persons or property to start or continue."

48. Section 4 of the Summary Offences Act says:

"Offensive behaviour or language

- (1) *Every person is liable to a fine not exceeding \$1,000 who,—*
- (a) *in or within view of any public place, behaves in an offensive or disorderly manner; or*
 - (b) *in any public place, addresses any words to any person intending to threaten, alarm, insult, or offend that person; or*
 - (c) *in or within hearing of a public place,—*
 - (i) *uses any threatening or insulting words and is reckless whether any person is alarmed or insulted by those words; or*
 - (ii) *addresses any indecent or obscene words to any person.*
- (2) *Every person is liable to a fine not exceeding \$500 who, in or within hearing of any public place, uses any indecent or obscene words."*

² Section 39 of the Summary Offences Act 1981.

How do the Courts define 'disorderly' behaviour?

49. The Supreme Court has considered a person's right to freedom of expression against the limitations section 4 of the Summary Offences Act places on a person's behaviour.³ The Court has reasoned that the legislation protects the public order and does not restrict any person's freedom of expression. It also does not forbid abusive or insulting language.
50. Further, the Court determined that if the behaviour is an expression of someone's opinion, it must do more than just annoy or even wound a person's feelings; it must be disruptive of public order (as considered against circumstances such as the time and place where the behaviour occurs). Causing annoyance, even serious annoyance, is insufficient if the public order is not affected.
51. A high bar has been set for when a person's behaviour is judged to be "disorderly". The Courts have said that:
- Disorderly behaviour should largely disturb the normal functioning of life in the environs of that place.⁴
 - Any disturbance caused by disorderly behaviour must seriously violate the public order and be serious enough to justify the intervention of criminal law.⁵
 - Where a person's conduct is likely to cause a reaction from the Police only, it will not amount to disorderly behaviour.⁶ This is because the only effect of such behaviour is a Police response, and there is no actual threat to the public order.
52. The offence of disorderly behaviour under section 3 of the Summary Offences Act is essentially an aggravated form of the offence found in section 4. To make out the offence under section 3, all the elements under section 4 must be satisfied, with the additional requirement that the behaviour must be likely to cause violence to persons or property to start or continue.⁷

Was Mr Z's and Mr X's behaviour 'disorderly'?

53. As outlined above, Police say they stopped to talk to Mr Z because he had sworn and rudely gestured at them. However, they only arrested him after Officer B had pushed him. Officer B says he thought Mr Z was about to assault him. On the evidence, we are not satisfied that Mr Z was about to assault Officer B or anyone else. Even if, as Officer B says, Mr Z did approach him aggressively after he was pushed, that reaction was prompted by Officer B's unlawful conduct.
54. Police also arrested Mr X after he rudely gestured at them and have provided no other reason or example of 'disorderly' behaviour from him.

³ *Brooker v Police* [2007] NZSC 30. Section 14 of the New Zealand Bill of Rights 1990 says: "Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form."

⁴ *Hooper v Police* [2017] NZDC 28741.

⁵ *R v Lohnes* [1992] 1 SCR 167; *Melser v Police* [1967] NZLR 437.

⁶ *R v Ali'Imatafifafi* [2007] NZCA 329.

⁷ Bruce Robertson J (ed) *Adams on Criminal Law* (online looseleaf ed, Thomson Brookers) at [SO3.04].

55. Our view is that Police did not have good cause to suspect that either Mr Z or Mr X had behaved in a disorderly manner. That is because swearing and rude gestures directed at Police do not constitute a serious disruption to public order and do not significantly disturb or threaten “*the normal functioning of life*” (in fact, the CCTV footage shows no one else was nearby at the time). The behaviour was directed solely at Police, and therefore did not meet the threshold for disorderly behaviour.
56. In terms of establishing disorderly behaviour under section 3 of the Summary Offences Act, Police also had to have good cause to suspect that Mr Z’s behaviour was “*likely to cause violence to persons or property to start or continue*”. Mr Z’s behaviour fell well short of this.

Were the arrests lawful?

57. Having concluded that Police did not have good cause to suspect Mr Z and Mr X had committed offences under sections 3 or 4 of the Summary Offences Act, it follows that the arrests and the force Police used to make those arrests was unlawful.

Should Police have given Mr Z and Mr X formal warnings?

58. Police policy on formal warnings required that both evidential sufficiency and public interest requirements (as set out in the Solicitor-General’s Prosecution Guidelines) were met before a person could be given a formal warning. This means there had to be enough evidence to prove an offence in a court before Police could give someone a formal warning.
59. Police did not have enough evidence that Mr Z’s and Mr X’s behaviour risked upsetting the public order or provoking a violent response that could amount to disorderly behaviour. Accordingly, they should not have given Mr Z and Mr X formal warnings.

FINDINGS ON ISSUE 2

The arrests of Mr Z and Mr X were unlawful.

Police should not have issued Mr Z and Mr X with formal warnings.

ISSUE 3: DID POLICE TREAT MR Z AND MR X INAPPROPRIATELY AFTER THEIR ARRESTS?

60. In this section we outline what Mr Z and Mr X told us about how Police treated them after they were arrested, and the officers’ response.
61. Mr Z says:
- The officers applied the handcuffs so tight that he screamed in pain for them to be loosened. This was not done until he was at the Police station. His hands were numb afterwards.
 - As the officers took him to the back of the Police van, they were “*degrading*” him and told him: “*you’re not such a f..king tough guy now*”.

- The officers were laughing at him and Mr X in the Police van, and deliberately drove *“as fast as they could over speed bumps, going as fast as they could round corners and then brake checking us to make us like fly... trying to get us to like slam ourselves into the wall and stuff”*.

62. Mr X says:

- As the officers were handcuffing him, he said: *“Are you trying to like break my wrist or something?”* and an officer replied: *“Nah, nah, not trying to break it. Just trying to make you hurt a little.”* The officers refused to loosen his handcuffs and his wrists were sore for a week afterwards.
- When the officers took him to the back of the Police van, they bent him over and rammed his head into the internal metal door a few times: *“For what reason I don’t know, power tripping.”*
- He and Mr Z were sliding around in the back of the Police van, and the driver *“would just speed up, slow down, brake check, just whatever they could do to irritate us”*.

63. The officers denied that Mr Z and Mr X complained to them about the handcuffs and denied intentionally driving in a way that caused Mr Z and Mr X discomfort.

64. Mr X’s Cellphone footage did not capture Mr Z complaining about the tightness of the handcuffs. The CCTV footage of the street which captured Mr X’s arrest was too far away to see whether the officers deliberately rammed his head into the van’s internal metal door.

65. Due to conflicting accounts, and in the absence of independent evidence, we are unable to make a finding on this aspect of the complaint.

FINDING ON ISSUE 3

We are unable to make a finding on whether Police treated Mr Z and Mr X inappropriately after their arrests.

66. The Authority completed our investigation in May 2023, although the publication of this report was delayed until Officer B’s court and employment proceedings were completed.

Subsequent Police Action

67. Police conducted their own investigation and subsequently charged Officer B with common assault for pushing Mr Z. Officer B was later discharged without conviction and agreed to pay reparation to Mr Z. Police also completed an employment process with the officer.
68. Police inform us they have undertaken significant work on the workplace practice and culture of this unit, to ensure that processes are appropriate and to the expected standard.
69. The Authority recommended that Police delete the formal warnings for Mr Z and Mr X from the Police database. Police completed this and then advised the two men.



Judge Kenneth Johnston KC

Chair
Independent Police Conduct Authority

12 September 2024

IPCA: 22-13694

Appendix – Laws and Policies

POLICE POLICY

Use of force

70. The Police 'Use of Force' policy provides guidance to Police officers about the use of force and sets out the options available to officers when responding to a situation. Police officers have a range of tactical options available to them to help de-escalate a situation, restrain a person, effect an arrest, or otherwise carry out lawful duties. These include communication, mechanical restraints, empty hand techniques (such as physical restraint holds and arm strikes), OC spray, batons, Police dogs, Tasers, and firearms.
71. Police policy provides a framework for officers to assess, reassess, manage, and respond to use of force situations, ensuring the response (use of force) is necessary and proportionate given the level of threat and risk to themselves and the public. Police refer to this as the TENR (Threat, Exposure, Necessity and Response) assessment.
72. The overriding principle when applying TENR is that of "safety is success". Public and employee safety are paramount, and every effort must be made to minimise harm and maximise safety.
73. The TENR risk assessment must balance the ongoing exposure to harm, with the current threat and the necessity to respond. This will determine the Police response.
74. Police officers must also constantly assess an incident based on information they know about the situation and the behaviour of the people involved, and the potential for de-escalation or escalation. The officer must choose the most reasonable option (use of force), given all the circumstances known to them at the time. This may include information on the incident type, location, and time, the officer and subject's abilities, emotional state, the influence of drugs and alcohol, and the presence or proximity of weapons, similar previous experiences, and environmental conditions. Police refer to this assessment as an officer's Perceived Cumulative Assessment (PCA).
75. A key part of an officer's decision about when, how, and at what level to use force depends on the actions of, or potential actions of, the people involved, and depends on whether they are: cooperative; passively-resisting (refuses verbally or with physical inactivity); actively resisting (pulls, pushes or runs away); assaultive (showing an intent to cause harm, expressed verbally or through body language or physical action); or presenting a threat of grievous bodily harm or death to any person.
76. 'Empty hand tactics' refers to a weaponless use of force, such as grabbing hold of, pushing, or punching a person. Officers can use empty hand tactics to distract or control someone and to defend themselves or others.

77. The policy states that any force must be considered, timely, proportionate, and appropriate given the circumstances known at the time. Victim, public and Police safety always takes precedence, and every effort must be taken to minimise harm and maximise safety.
78. Ultimately, the legal authority to use force is derived from the law and not from Police policy.

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 Kenneth Johnston KC.

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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