

Complaint about the Police use of a vehicle checkpoint

INTRODUCTION

1. On the afternoon of 2 October 2016, Police conducted a checkpoint on Dowse Drive in Lower Hutt, Wellington. The purpose of the checkpoint was to identify individuals who had attended an Exit International meeting that had just taken place.
2. On 27 October 2017, due to concerns about the legality of the checkpoint, Police notified the Independent Police Conduct Authority about the incident. A number of individuals affected by Police actions also complained to the Authority and the Authority conducted an independent investigation. This report sets out the results of that investigation and the Authority's findings.

BACKGROUND

3. This section of the report provides a summary of the incident and the evidence considered by the Authority. When quoting or describing the accounts of any officer, complainant or witness, it is not intended to suggest that the Authority has accepted that particular account.
4. Analysis of the evidence and explanations of where the Authority has accepted, rejected or preferred that evidence is reserved for the 'Authority's Findings' section.

Summary of events

5. On 25 August 2016, Police were tasked by a Coroner to conduct enquiries into the recent death of an elderly woman. The cause of the woman's death was thought to be pentobarbitone toxicity.¹
6. On 29 August 2016, Wellington Police set up Operation Painter. The officer in charge of Operation Painter was Officer A, a Detective Senior Sergeant. He reported to Officer B, a Detective Inspector, who oversaw the Police investigation.

¹ Pentobarbitone is a class C controlled drug that can be used to induce death. It is commonly referred to as Nembutal.

7. During the investigation, Police gathered information which suggested that Ms Z, a member of Exit International, had provided the elderly woman with counselling and guidance prior to her death.² The scope of the investigation later expanded to include the deaths of a number of other people.
8. In mid to late 2016, Officers A and B received information that an Exit International meeting was to take place at an address in Lower Hutt in October 2016.
9. Officers A and B told the Authority that they suspected that some of the conversations at the meeting would be about supplying and using pentobarbitone. As a result, on 29 September 2016, Police obtained a surveillance device warrant for the Lower Hutt address.
10. Although the primary aim was to obtain evidence that would support their investigation into the offence of aiding and abetting suicide, Officers A and B said that another major concern for them was the welfare of the meeting attendees. As a result, the officers arranged for a search warrant for the address, which was (according to the recording officer's notebook) to be used if the officers believed that they needed to "*intervene during the meeting or afterwards to prevent the act of suicide pursuant to section 41 of the Crimes Act 1961*" (see paragraph 35).

Exit International meeting

11. At about 1.45pm on 2 October 2016, 22 people attended the Exit International meeting.
12. The meeting lasted for approximately one hour and 50 minutes, and during this time Police monitored the conversation using the surveillance device. Although the audio feed cut in and out, Officers A and B said that they were able to hear conversations on various topics, including ways to self-euthanise and how to import pentobarbitone.
13. At the time Officer A recorded in his notebook that they had "*no imminent safety concerns*" about the welfare of the attendees. However, he also noted that there was a "*potential increased threat/risk*" to the attendees.
14. Similarly, when speaking to the Authority, Officer B said:

"It wasn't until we heard [them] conveying all these possibilities to commit suicide ... that we were of the view that the risk level had raised considerably We didn't think they were going to commit suicide that day but they had now been armed with knowledge on how to obtain these things and there was a real possibility that [someone could commit suicide] within five to seven days once they had that information."
15. As a result, towards the end of the meeting, Officers A and B discussed how they would identify those who were attending the meeting. The officers said that they needed to quickly identify the attendees so that they could provide them with welfare and support.

² Exit International is an international non-profit organization advocating legalisation of euthanasia and supporting voluntary euthanasia.

16. Officers A and B told the Authority that *“the provision of welfare and support is consistent with the New Zealand Police Prevention First Operational Strategy ... where Police drive to proactively stop harmful incidents before they occur”*.
17. Although an officer had been in place for the duration of the meeting recording vehicle registrations and taking covert photos of the attendees, Officers A and B decided, after some consideration, that a vehicle checkpoint capable of giving officers the opportunity to stop and speak to meeting attendees would be more suitable. Officer A said that the checkpoint would allow Police to identify the attendees more quickly and effectively so that they could *“facilitate and implement prevention opportunities”*.
18. At about 3.30pm, immediately prior to setting up the checkpoint, Officers A and B phoned the Area Commander and the Acting District Commander to advise them about the proposed checkpoint. During the phone calls, the Area Commander and the Acting District Commander were made aware that a checkpoint was in the process of being organised and that the officers’ main consideration was the preservation of life.
19. The Acting District Commander later told Police that he considered the use of the checkpoint to be a *“reasonable tactic”* to identify those at risk of committing suicide. Similarly, the Area Commander recalled that the purpose of the checkpoint was to prevent suicide and he believed the decision was reasonable in the circumstances.
20. No legal opinion was sought before setting up the checkpoint.

Vehicle checkpoint

21. At approximately 3.50pm, Officer A directed Officer C and four other officers to conduct a vehicle checkpoint on Dowse Drive, Lower Hutt. Officer A told Officer C that they were to stop all downhill traffic and to conduct driver’s licence and registration checks.
22. Officer A told the Authority that they believed setting up the checkpoint in this location would capture most of the attendees, as it was the principal route leading away from Ms Z’s home address.
23. Approximately 50 vehicles were stopped at the checkpoint. Of these, seven vehicles contained people who had attended the Exit International meeting.
24. The Authority spoke with five meeting attendees who went through the checkpoint. They each had different experiences. These experiences included being breath tested (where an officer had a breath screening device at their disposal), having their name and address recorded, and being allowed to drive through without being spoken to.
25. The Authority also interviewed the five officers who conducted the checkpoint. When asked whether they had any concerns about setting up a checkpoint in these circumstances, the officers said they were not concerned as they were of the view that Police had previously used traffic stops to gather information in other situations.

Welfare checks

26. Officer A told the Authority that as a result of the checkpoint, about nine meeting attendees were identified and, over the next five days, Police made a number of inquiries to identify the remaining attendees. Officer A said these enquiries included reviewing the intercepted audio, checking vehicle registrations and trying to tie the covert photographs to individuals in the Police computer database.
27. While this was happening, Police consulted a number of suicide prevention specialists to understand how to provide the attendees with the right support. Officer A said that they wanted to provide their staff with documentation and advice so that they could talk to the attendees “without causing more harm than good”.
28. On 6 October 2016, Officer A held a briefing for the officers who would be conducting the welfare checks. Officer A advised them that it was important to treat them with “dignity, respect, empathy and professionalism”. He said that they were to be non-judgmental and their aim was to ensure that “welfare and aftercare was wrapped around these people”.
29. From 7-11 October 2016, Police conducted welfare visits to approximately 15 meeting attendees.
30. The Authority spoke with a number of people who received welfare visits from Police during this time. A common sentiment they expressed was that Police misjudged them. They said that they were not depressed or immediately suicidal. They were well-educated people who wanted to educate themselves on what options would be available to them should their health take a turn for the worse.

31. For example, Ms Y said the welfare visit:

“... seemed patronising to elderly people. I mean why should just because one’s 85 one be assumed to be kind of helpless and weak and pathetic and needing comforting Police to come and pat you on the back.”

32. Similarly, Ms X said:

“I’ve never had any contact with the Police ... I immediately thought of somebody in my family in an accident ... He wanted my son’s name and address and I said that I would not give him any information unless I’d talked to my son first. The mood changed as he said, “This is about you being at an Exit meeting” ... I [found] that threatening and I think that’s pretty bad behaviour really ... The people that are in Exit or Voluntary Euthanasia are all intelligent people who have looked at these issues over the years and in no way are we suicidal or want to die, we’re just wanting to make some plans for later on in our life.”

33. Mr W told the Authority that in hindsight, he believed Police visited him for reasons other than their concern for his welfare. He said:

“I answered the door to policemen ... They mentioned “exit” and said that they were concerned about whether I was at risk of doing harm to myself. I assured

them that I wasn't. They asked to speak to my wife and asked her the same question about me and whether she was supportive of me ... I was a little surprised. It's only retrospect it seems odd and I think they were there for other reasons than just about my state."

LAWS AND POLICIES

Power to require a driver to stop

34. Section 114 of the Land Transport Act 1998 provides that a Police officer may signal or request the driver of a vehicle to stop the vehicle as soon as is practicable, and subsection (3) states that:

"An enforcement officer may require the driver of a vehicle that is stopped under this Act to:

(a) remain stopped for as long as is reasonably necessary for an enforcement officer to obtain the particulars referred to in paragraph (b), or to complete the exercise of any other power conferred on an enforcement officer by this Act; and

(b) on demand by an enforcement officer:

- (i) give his or her full name, full address, date of birth, occupation, and telephone number, or such of those particulars as the enforcement officer may specify; and*
- (ii) state whether or not he or she is the owner of the vehicle; and*
- (iii) if the driver is not the owner of the vehicle, give the name and address of the owner or such particulars within the driver's knowledge as may lead to the identification of the owner."*

Prevention of suicide

35. Section 41 of the Crimes Act 1961 states:

"Everyone is justified in using such force as may be reasonably necessary in order to prevent the commission of suicide, or the commission of an offence which would be likely to cause immediate and serious injury to the person or property of any one, or in order to prevent any act being done which he or she believes, on reasonable grounds, would, if committed, amount to suicide or to any such offence."

THE AUTHORITY'S FINDINGS

36. The Authority identified and considered the following issues:

- 1) Were Police justified in setting up a vehicle checkpoint to identify those who had attended an Exit International meeting?

- 2) Were Police justified in conducting welfare visits in respect of those who had attended the Exit International meeting on 2 October 2016?

Issue 1: Were Police justified in setting up a vehicle checkpoint to identify those who had attended an Exit International meeting?

37. Section 114 of the Land Transport Act 1998 gives officers the power to stop a vehicle. Once stopped, the officer may require the driver to remain stopped for as long as reasonably necessary for the officer to exercise their power under the Act. In particular, the officer may require the driver to provide their personal details.
38. In this instance, the primary reason the checkpoint was set up was to obtain evidence; namely the details of those leaving an Exit International meeting.
39. When asked by the Authority if Police thought about the lawfulness of establishing a checkpoint, Officers A and B said they did not consider it at the time.
40. Officers A and B told the Authority that their primary consideration was preventing suicide. Officer B said that Police took an “*oath to protect life*” and it was part of Police business to keep people safe. He said if Police believe suicide is being contemplated, they should intervene as permitted by section 41 of the Crimes Act 1961.
41. In this instance, Officer B said the checkpoint was undertaken to achieve the right outcome. Although he acknowledged that its lawfulness under the Land Transport Act 1998 was not considered, he said that they were not deliberately usurping the law and they acted with the right intentions.
42. Officer A also noted that Police have used similar checkpoints in the past for intelligence purposes. In this situation, he said the checkpoint was implemented to “*prevent suicide as per section 41 of the Crimes Act 1961*”. This view was supported by the Acting District Commander and the Area Commander who believed the tactic was reasonable in the circumstances.
43. The Authority is not aware of any other instances where checkpoints have been established for purposes other than land transport enforcement and have not gathered any evidence which supports this assertion. In addition, there is no Police policy which supports Officer A’s view.
44. The Authority notes that Police have now drawn to the attention of all staff that:

“Officers must genuinely stop motorists for the primary purposes of land transport enforcement and exercise their powers for those purposes. This does not, however, preclude the use of any information obtained through the enforcement of transport legislation being used for a secondary purpose (i.e. Intelligence gathering.”.

45. In respect of Officers A's comments concerning section 41 of the Crimes Act 1961, this section is clearly designed to stop an imminent suicide. It is only applicable when there is a close temporal connection between the force used and the act that is to be prevented.³ Section 41 does not authorise force to prevent something that may or may not occur in the unknown future. Although the intercepted audio and reveals discussion between attendees about how to obtain controlled drugs to commit suicide, there is no evidence in that discussion, or elsewhere, to suggest that they were at immediate risk of suicide. Indeed, Officer A recorded in his notebook at the time of the meeting Police had "*no imminent safety concerns*" about the attendees' welfare.
46. Moreover, section 41 is directed toward using force. There is nothing in the activity of conducting a checkpoint that constitutes force. Given that the elements of immediacy and force did not exist, it is difficult to see how section 41 could apply.
47. It follows then that the only basis upon which the checkpoint could have been set up was under section 114 of the Land Transport Act. However, checkpoints under that section can only be conducted for the purposes of land transport enforcement and administration under section 114 of the Land Transport Act.⁴ Given that Officers A and B have both stated that the checkpoint was solely implemented to gather the names of the Exit International meeting attendees, it is clear that the vehicles were not genuinely stopped for land transport purposes. Therefore, Officers A and B's implementation of a checkpoint was unlawful.
48. Similarly, the Acting District Commander and the Area Commander should have recognised that the proposed actions were unlawful and should have advised the officers.

FINDING

Police were not justified in establishing a vehicle checkpoint to identify individuals who had attended an Exit International meeting.

Issue 2: Were Police justified in conducting welfare visits in respect of those who had attended the Exit International meeting on 2 October 2016?

49. Officers A and B told the Authority that after listening to the intercepted conversations at the Exit International meeting, their level of concern for the welfare of the attendees increased. With the information that was provided during the meeting, Officer B said that there was "*a real possibility that [someone would commit suicide] within five to seven days*". No explanation was given for how these timings had been arrived at.
50. Given their concerns, the officers felt it was their duty, in accordance with their oath, police business and the Prevention First Operating Strategy, to implement welfare visits.

³ Simon France ed, *Adams on Criminal Law – Offences and Defences Part 1*, Wellington, Thomson Reuters, 2012 at [CA41.04].

⁴ *McGarrett v R* [2017] NZCA 204 at [18-19].

51. Immediately prior to conducting the welfare visits, Police sought advice and guidance from a number of suicide prevention specialists so that they could provide the meeting attendees with the right level of support.
52. As already discussed, the Authority considers that the checkpoint was unlawful. However, information gathered by Police during the course of the checkpoint was used for the purpose for which it was collected, namely the completion of welfare visits in respect of those Police believed to be at risk. Police did not therefore breach the provisions of the Privacy Act 1993.
53. Nevertheless, a number of meeting attendees who received welfare visits told the Authority that they felt misjudged and patronised. They stated that they were not suicidal and had attended the Exit International meeting to educate themselves about their options.
54. The Authority acknowledges that the welfare visits generated stress and apprehension among those visited, but accepts that the visits were well intentioned and in line with operational policy (see paragraph 50).
55. Police may have been open to criticism had they neglected to undertake any form of follow-up when equipped with information that individuals knew how to end their own lives and either had, or could reasonably be expected to obtain, substances to do so.
56. Although unable to substantiate Mr W's concerns that Police used the welfare visits to fulfil another purpose (see paragraph 33), the Authority would be concerned if they had been utilised as a tactic to progress the Police investigation into the activities of Ms Z.
57. In light of this, and taking into account the expert advice sought by Police (see paragraph 51), in future Police may wish to consider whether responsibility to deliver such support lies with another organisation.

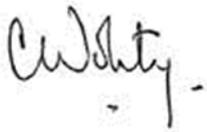
FINDING

Even though no immediate risk to the meeting attendees was identified, either during or after the Exit International meeting, the Police decision to complete welfare visits was appropriate and consistent with their duty to protect life.

CONCLUSIONS

58. The Authority has reached the following conclusions on the balance of probabilities:

- 1) Police were not justified in establishing a vehicle checkpoint to identify individuals who had attended an Exit International meeting.
- 2) Although they generated stress and apprehension among those visited, Police welfare visits to ensure the wellbeing of those believed to be at risk of harm were appropriate in the circumstances.



Judge Colin Doherty

Chair
Independent Police Conduct Authority

15 March 2018

IPCA: 16-0797

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.

It is not part of the Police – the law requires it 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. It does not answer to the Police, the Government or anyone else over those findings. In this way, its 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 complaints alleging misconduct or neglect of duty by Police, or complaints about Police practices, policies and procedures affecting the complainant in a personal capacity;
- investigates, where there are reasonable grounds in the public interest, incidents in which Police actions have caused or appear to have caused death or serious bodily harm.

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 of investigators, report writers and managers. 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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