

Police conduct unlawful entry to arrest man in Masterton

Outline of Events

1. At about 8.20pm on 12 March 2019 six Police officers, including three dog handlers, arrived at Ms Y's house to arrest Mr W, her son, for alleged breach of bail conditions, burglary and assault. They did not have a warrant for the arrest. Two of the officers approached the front door and were met by Ms Y, who was confrontational and stood blocking the doorway. Mr W then appeared behind her in the hallway but refused to come outside when asked by the officers. They then informed him he was under arrest. He took a step backwards and the officers thought he might try and escape, so three of them entered the house, followed by the supervising sergeant. A struggle followed, as Police grabbed Mr W to prevent him from escaping.
2. In the course of the struggle one of the officers, Officer D, felt a tug on his Taser, looked down, saw Mr W's hand over the area of his Taser and believed that Mr W was trying to grab it. In response he applied force to the base of Mr W's neck to push him against the wall.
3. Three officers took Mr W to the ground and struggled to put handcuffs on him. At this point, Officer E heard the struggle and entered the house from the rear. He assisted with the arrest by holding onto Mr W's legs until handcuffs were applied. Officer F, a dog handler, was already positioned at the back of the property and when he heard a struggle went inside with his dog. He saw that Mr W was already in custody so left the house.
4. Ms Z complained to Police about excessive use of force during Mr W's arrest, specifically complaining that Officer D had one of his hands around Mr W's throat during the arrest and appeared to be strangling him.
5. The Police investigation found that, while the force used by the officers during the arrest was unfortunate, it was technically justified.

6. Police notified the Authority about this incident and the Authority conducted an independent investigation into the matter.

The Authority's Investigation

7. The Authority interviewed Officers A, B, C and D who attended the arrest, as well as Mr W, Ms Y and Ms Z. The Authority visited Ms Y's house and reviewed the Police investigation of the complaint.
8. The Authority considered the following issues:
 - 1) Was the police entry onto Ms Y's property and arrest of Mr W lawful?
 - 2) Was the use of force during Mr W's arrest lawful?

The Authority's Findings

ISSUE 1: WAS THE POLICE ENTRY ONTO MS Y'S PROPERTY AND ARREST OF MR W LAWFUL?

Reason for entry onto Ms Y's property

9. Mr W and Ms X had been in a relationship. Mr W and Ms X were both subject to conditions of bail to not associate with each other and at the time of this incident Mr W was back living with his mother, Ms Y.
10. On 23 February 2019 at about 3.20am Ms X rang Police to report that Mr W was attempting to break into her house. Officer C and another officer attended. Ms X told them that Mr W had just left on foot before Police arrived. The two officers drove straight to Ms Y's house, arriving within two minutes. Ms Y told them that Mr W had been with her for most of the night. She went to his room and woke him up. He got up and spoke to Police. The attending officers recorded that based on his appearance when woken up they were satisfied that he had not been away from the address in the last 10 to 20 minutes. Mr W admitted that he had tried to call Ms X at midnight, but she did not answer. Police warned him for breaching his bail by attempting to contact Ms X and then left the address.
11. Later in the afternoon on 23 February 2019 Officer C rang Ms X and told her that Mr W had not been arrested or charged. Ms X was upset and told Officer C that she would go and stay with her mother for a while. She left Masterton two days later. She returned to Masterton on 12 March 2019 and on that same day contacted Police, signing a witness statement alleging that in contravention of his bail conditions not to contact her:
 - when Mr W broke into her house on 23 February he climbed through her kitchen window, yelled at her for having him arrested the previous day for another similar break-in, threw her onto the ground, spat at her and squirted gel around her bedroom. She explained that she did not have a chance to show Police what he had done at the time because they left immediately to find him;

- the following day (the night of 24 February) he again came to her house and she told him to leave;
 - on 25 February he texted her and asked if he could come around again;
 - that night as she was leaving with a friend to go away for a while to escape from Mr W, she saw him parked in his car near her house;
 - while she was away Mr W called and messaged her several times;
 - on the day she returned to Masterton, 12 March 2019, Mr W drove passed her, slowing down to yell abuse at her as she was walking by herself.
12. In her statement Ms X said that she believed that Mr W was watching her all the time. She told Police, *“I am really scared because he has no limits. He’s obsessive and has been violent to me in our relationship...the night he broke in I was trying to sleep in my wardrobe. I’m too scared to sleep at the moment because of him, he’s broken in 3 times in a row”*.
13. Officer A was working late shift on 12 March 2019 and read Ms X’s witness statement. He was aware that Ms Y had previously told Police that Mr W was with her on the night of the alleged burglary on 23 February 2019 but told the Authority that it was plausible that Mr W had left her house without her knowing. Officer A also considered that the number of times Mr W had contacted Ms X placed her at risk of harm from Mr W and so decided to act on the complaint. It had already been arranged for his staff and three dog handlers who were visiting from Wellington to execute a number of outstanding arrest warrants that evening, so Officer A decided to add Mr W’s arrest to the tasks to be completed.

Threat assessment by Police before entering property

14. Officer A told the Authority that he held a briefing with the five officers prior to travelling to Ms Y’s house, at which he discussed each of the people they intended to visit that night, including Mr W. Factors covered included their power of arrest, power of entry, the environment, the roles of each officer, associates of the targets and any alerts in the Police database relating to the target.
15. Officer A told the Authority that in formulating his threat assessment he searched the Police database for relevant alerts. One of the alerts related to Mr W having illegally possessed firearms in the past. Officer A said that he was concerned that even though those firearms had been confiscated, this history indicated a willingness to acquire firearms illegally, so they could not rule out that he may have access to one. Officer A told the Authority that because of this alert, combined with consideration of the risk posed by the other targets to be visited that night, he decided that the officers should be armed.
16. On 12 March 2019 Police applied a significantly greater amount of resource in terms of both capacity and capability than on 23 February, when two officers visited Ms Y’s address to make enquiries of Mr W in response to the phone call from Ms X. On this occasion, six armed Police

officers and one dog arrived at Ms Y's address to arrest Mr W. He explained this escalation as follows:

"Well firstly, you know, it wasn't just Mr W this night. You know, it was, it was a get together to target more than one wanted person. My intent was that not all of us would go into that address...and furthermore my plan was that if he was home they would peel off and take him back to the station and the rest of us could carry on and go to the next address and the targets were ordered in level of risk. "

17. He told the Authority that his perception of the potential threat posed by Mr W, as briefed to the team, was that he might flee, move inside the address to get a firearm or weapon or resist arrest, meaning that they would need more staff to safely effect the arrest.
18. Officer C told the Authority that on her two previous dealings with Mr W his demeanour had been "pretty fiery". She expected him to resist arrest on this occasion because the last time she had spoken to him he had told her that he was on his last warning, meaning that the Court had told him that if he breached his bail conditions again there was a chance that he would go to jail. There is no evidence that she raised this at the briefing.
19. Officer D told the Authority that he had been under the impression that the alleged burglary and assault on Ms X had occurred the previous night. In Officer D's mind this increased the urgency of the need to locate Mr W and the Authority's perception is that it also significantly heightened his perception of the urgency and risk associated with the incident and may have affected his judgment when handling Mr W as outlined in paragraphs 49 to 50 .

Police authority to enter onto property and ability to effect arrest

20. The six Police arrived at Mr W's address and entered the property. Two of the officers approached the front door, two stood further back and two walked down the side of the house.
21. Implied licence is a common law rule that allows Police, and anyone else, to enter a property with the implied consent of the occupier in order to communicate with them for a legitimate law enforcement or any other reasonable purpose.
22. It was within the ambit of an implied licence for Police to enter Ms Y's property and knock on her front door to make enquiries relating to the allegations, including whether Mr W would accompany them to the police station. However, it is clear from Court decisions that implied licence does not extend to accessing the rear of the property unless nobody responds to a knock on the front door and the person goes to the rear to see if anyone can be roused there. Officers E and F therefore had no lawful authority to go around to the rear of the property.

Was Mr W arrested?

23. Before the two officers reached the door Ms Y, who had seen them coming, opened the door and asked what they wanted. Shortly after, Mr W appeared behind her. One of the officers' present described Ms Y to us as being "loud and argumentative" throughout the exchange,

making it difficult for them to talk to Mr W. The officers asked Mr W to come outside to talk, but he refused to do so. They then told him he was under arrest and he took a step backwards in the hallway. The officers became concerned that he would try to run towards the back of the house.

24. Under section 35 of the Bail Act 2000, a defendant on bail (as Mr W was) can be arrested without a warrant under certain circumstances, including that Police believe on reasonable grounds that the person has contravened a bail condition. ¹ Police believed that Mr W had breached conditions of his bail.
25. The officers did not physically place their hands on Mr W when telling him he was under arrest because he refused to come out of the house. In New Zealand it is accepted that in certain circumstances words can be enough to effect an arrest:

We therefore hold that the test for whether there has been an arrest, as the basis of an escaping lawful custody charge, is:

*(a) the arrester, by words or conduct, makes it clear to the person being arrested that he or she is no longer free to go where he or she pleases;
and*

(b) the person being arrested knows that he or she is no longer free to leave.²

26. However, at the point of arrest officers must also be able to bring the person being arrested under physical control. They cannot, for example, effect an arrest by advising them by telephone, or shouting at them through the window from the street, that they are under arrest. If Police have no ability to effect their intention to arrest a person, there can be no arrest. Here, Mr W refused to come out of the house, so unless the officers had authority to enter the house to restrain Mr W, no arrest was able to be made.

Did Police have authority to enter the house?

27. Implied licence only extends to a person walking to the front door. It does not provide authority for a person to enter a house if the occupier does not invite them in. The only other sources of authority for Police to enter a house are:
 - 1) an arrest warrant obtained from the Court; or
 - 2) a statutory warrantless power.
28. Police had not obtained a warrant for Mr W's arrest.

¹ Section 35 of the Bail Act 2000 is set out at paragraph 81. It also provides that nothing in that section prevents officers from obtaining a warrant under section 37.

² *Arahanga v R* [2012] NZCA 480 at [53]

Warrantless powers

29. Officer A described the situation to the Authority in this way:

“We didn’t go there with intent to barge into the house, it unfolded like that because of what we were presented with,...the mum obstructing us and him moving in the house, the necessity to move in quick rather than use our communication, that’s not ideal but it was necessary because we didn’t want him to leave our sight and we wanted to stay safe...”

30. The officers told us that when Mr W took a step backwards in the hallway they felt it was necessary to enter the house because they were concerned that he would attempt to escape or potentially attempt to access a firearm. They said that they relied on section 8 of the Search and Surveillance Act 2012. The relevant part of that section provides as follows:

Entry without warrant to avoid loss of offender or evidential material

(1) In the circumstances set out in subsection (2), a constable may—

(a) enter a place or vehicle without a warrant; and

(b) search for and arrest a person that the constable suspects has committed the offence.

(2) The circumstances are that the constable has reasonable grounds—

(a) to suspect that the person has committed an offence that is punishable by imprisonment and for which he or she may be arrested without warrant; and

(b) to believe that the person is there; and

(c) to believe that, if entry is not effected immediately, either or both of the following may occur:

(i) the person will leave there to avoid arrest;

(ii) evidential material relating to the offence for which the person is to be arrested will be destroyed, concealed, altered, or damaged.

31. In their submissions to the Authority, the Police supported the view that section 8 was available to the officers. They noted that the section merely requires that an officer has reasonable grounds to believe that one of two circumstances (flight or the destruction of evidence) “may” occur, and that in this case Mr W’s refusal to come outside the house and his retreat down the hallway was sufficient to meet that requirement.

32. The Authority does not agree. As noted at paragraph 26, the Police were not in a position to make a lawful arrest, and even if they had been, that would not in itself have justified the entry. Mr W was entitled to retreat down the hallway and potentially return to the room from which he had come. There was nothing in his actions that made it reasonably likely that he was in the process of fleeing.

33. The Police maintain that the wording “*may occur*” in section 8 signifies merely that an attempted escape must be a possibility. In our view, that was a serious misinterpretation of the law. The Courts have consistently held that the threshold for “*reasonable grounds to believe*” is higher than the threshold for “*reasonable cause to suspect*”, which is the threshold governing arrest powers. In order to be met, it requires a substantial degree of likelihood that the state of affairs exists. On Police’s interpretation (which adds the gloss that the state of affairs must merely be a possibility), the section would have to be interpreted to mean that the Police have a right of entry if they believe that there is a substantial degree of likelihood that there is a possibility that the person will flee. This is manifestly an untenable interpretation and cannot have been the intent of the legislature. It would effectively allow the Police to enter a house by force on almost every occasion in which they have reasonable cause to suspect that a person has committed an imprisonable offence. If Parliament had intended that result, it would have plainly said so.
34. Moreover, the position that Police hold is directly in conflict with established case law on the interpretation of the section. For example, the Court of Appeal has observed that the power vested by section 8 “*is of an extraordinary nature*” and that “*the text and context of s 8 leave no doubt that police officers are authorised to exercise the warrantless power of entry and search only in very narrowly defined circumstances*”.³
35. It is significant that, when the Law Commission and the Ministry of Justice reviewed the Search and Surveillance Act in 2017⁴, they considered submissions that the pre-conditions for the exercise of the power in section 8 were difficult to satisfy in practice and that the threshold should be lowered. However, they concluded that there should be no change and that the solution lay in better Police training.
36. In the course of responding to another complaint that we received involving Police powers to enter a house, Police have acknowledged that there are some problems with the way in which officers are interpreting section 8. They have told us that they will issue a practice note for frontline staff to update them on the Police interpretation of Police powers of entry under section 8.

What should Police have done to effect the arrest of Mr W?

37. The answer is that they had reasonable cause to suspect that he had breached a condition of his bail, which enabled them to obtain a warrant to arrest from the Court under section 37 of the Bail Act 2002. They could then have entered the house under the authority of the warrant by virtue of section 162 of the Criminal Procedure Act 2011. There is no evidence that any consideration was given to that option.
38. What would have been the position if there had been no breach of a bail condition? In that circumstance, the Police would have the ability to obtain a warrant to arrest from the Court only in either of two circumstances:

³ *H v R* [2015] NZCA 49 at [10]

⁴ New Zealand Law Commission and Ministry of Justice (2017) *Review of the Search and Surveillance Act 2012*, pp 226-229

- a charge has been laid (i.e. a prosecution has commenced) and a summons has been issued but not served despite reasonable efforts to do so (section 34 of the Criminal Procedure 2011);
 - a charge has been laid and the judicial officer is satisfied that a warrant is necessary or desirable to compel the attendance of the defendant in Court.
39. There is good reason for this. Statutory provisions creating powers to enter premises have traditionally been interpreted narrowly by the Courts. As is noted in *Adams on Criminal Law*⁵ this is consistent with the right of security against unlawful search and seizure in section 21 of the New Zealand Bill of Rights Act 1990. The filing of a charge in Court is the basis upon which a judicial officer can be satisfied that there is a sufficient basis to issue an arrest warrant.
40. If it had not been for the suspected breach of the bail condition, therefore, the Police would instead have had to lay charges and then seek an arrest warrant. That would have been the appropriate process under the law as it stands.
41. It is clear that no consideration was given to laying charges before a decision was made to arrest Mr W. Indeed, the submissions to the Authority from Officer A, who was in charge of the operation, conceded that the basis for laying charges in respect of the offence of 23 April and other burglaries was questionable, and that it was his intent that an officer complete a DVD interview with Mr W at the Masterton Police Station before deciding whether any charges should be laid.
42. On the basis of this and a number of other cases that have come to the Authority's attention, we are satisfied that the Police as an organisation have been acting on the foundation of a wrong interpretation of section 8, and that this is leading to substantial overreach and illegality in its use.
43. In this situation, section 8 was not available to Police, making the officers' entry into Ms Y's house unlawful. It follows that the arrest of Mr W was also unlawful.
44. The Authority also notes that not only did Police rely on a warrantless power of entry into the house when they should not have done so, but they then failed to complete the statutory notification to the Commissioner that is required for warrantless powers.⁶

FINDINGS ON ISSUE 1

Officers E and F acted unlawfully in going to the rear of the property.

The Police entry into Ms Y's house was unlawful.

Mr W's arrest was unlawful.

The officers failed to complete the statutory notification required when a warrantless power is exercised.

⁵ Simon France (ed), *Adams on Criminal Law: Offences and Defences* at [CA315.11]

⁶ This statutory requirement is set out at paragraph 79

ISSUE 2: WAS THE USE OF FORCE DURING MR W'S ARREST LAWFUL AND REASONABLE?

45. As a starting point, because the Police entry into Ms Y's house and arrest of Mr W were unlawful, any force used during that arrest is also unlawful. However, reasonable force used in self-defence can still be lawfully justifiable.
46. The exchange at the front door and the entry into Ms Y's house is described at paragraphs 1 and 20.
47. Mr W told the Authority that he got a fright because he did not know what was going on and said, "I only took one step, I only moved my leg backwards". Officer B said that when Mr W started to step back he got worried as he was not sure whether Mr W would try to run and get a weapon or hide.
48. Mr W told the Authority:

"They came up to the door and said, 'Mr W you're under arrest'. I took a step back and said, 'what am I under arrest for?' They said, "don't move", then came and started grabbing me, trying to push me to the ground straight away, there was two of them holding me and they shoved me through to the dining room and pushed me up against the wall...They grabbed my arms, one grabbed my neck, that's how he moved me around, then my shoulder hit the wall...Then I got flipped to the ground, 2 dudes grabbed my arms, one dude grabbed my toe."

Officer D's use of force

49. Ms Z said she saw the Police push Mr W back along the hallway, through the doorway into the open plan dining room area and that one Police officer was holding Mr W by the throat. She told the Authority that an officer was strangling Mr W: "his eyes were bulging and he just couldn't breathe properly".
50. Officer D told the Authority that his hands were around the top of the collarbone or bottom of the neck of Mr W, although he acknowledged that his hands may have moved upwards while he was holding Mr W against the wall. In his Tactical Options Report he stated;

*"I was not squeezing or preventing him from breathing at any stage, or cutting off blood flow to the brain. Only pinning him to the wall."*⁷
51. When the Authority asked Mr W how it felt when Officer D's hands were around his neck his first reply was that it "felt like I was being dominated, that's how it felt, like it was – yeah, that's all" and that he did not think that it affected his breathing. While on reflection he said that perhaps he could not breathe okay, his greater concern was with his toe being bent back, which is discussed at paragraph 68. He was relatively ambivalent when the Authority asked him about the force used around his neck. If it had happened in the way described by Ms Y and

⁷ A tactical options report is a report that an officer is required to complete when he or she has used 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.

Ms Z, the Authority is of the view that it would be etched firmly in his memory. Mr W saw a doctor two days after the arrest, and the doctor did not note any bruising to the neck area. The doctor also did not record Mr W advising him or her of any injury or trauma around the neck area.

52. The Authority considers that on balance it is likely that Officer D did use considerable force on the lower part of Mr W's neck but that, while his hands may have moved upwards while pushing Mr W against the wall, he was not attempting to cut off Mr W's air or blood supply.

Was Officer D's use of force lawful and reasonable?

53. Officer D stated that his actions in pushing and holding Mr W against the wall with his hands around his lower neck were justified by sections 39, 40 and 48 of the Crimes Act 1961. The Authority has established that the arrest of Mr W was not lawful, which means that sections 39 and 40, which relate to force used to effect a lawful arrest or prevent escape during arrest, do not apply. The only possible legal justification for Officer D's use of force is therefore section 48 of the Crimes Act, which allows anyone to use force in self-defence.⁸

54. To rely on this justification for his use of force, Officer D's actions must be assessed against the following three questions:

- 1) What did Officer D believe the circumstances were at the time he pushed Mr W against the wall and then when he applied force to the lower neck?
- 2) Was Officer D acting in defence of himself or others?
- 3) Was Officer D's use of force reasonable in the circumstances as he believed them to be?

What did Officer D believe the circumstances were at the time he pushed Mr W against the wall and then when he applied force to Mr W's lower neck?

55. Officer D told the Authority that when Mr W stepped back in the corridor, his threat assessment was that he did not want Mr W to escape or get any further into the house where he could arm himself with a weapon, given the firearms alert in the Police database and Mr W's aggressive posturing when Police were trying to talk to him. Officer D said that Officer B grabbed Mr W by the arm but Mr W broke free, and that he (Officer D) grabbed him by the shoulders and pushed him through the doorway.

56. The Authority considers that Officer D used this initial force for the purpose of preventing Mr W from escaping, not in self-defence. It was therefore unlawful because the Police entry and arrest were unlawful as outlined in paragraph 53. The unlawfulness of the arrest also meant that when Mr W attempted to break free and engaged in aggressive posturing, he was simply resisting an unlawful use of force. He was entitled to do so, provided his resistance went no further than required for that purpose.

⁸ This legislation is set out in paragraph 82 to 84.

57. Officer D wrote in his Tactical Options Report and told the Authority that he then felt a “pull or a tug” and looked down to see Mr W’s hand on his Taser. In his report he wrote *“my [threat assessment] at this point was that if he was able to get my taser and somehow incapacitate me that he would have access to my firearm”*.
58. Officer D said that in reaction to this, he placed one hand on top of Mr W’s hand to keep the Taser in the holster. He put his other hand on the top of Mr W’s collarbone or at the bottom of his neck and pushed him hard against the wall so he would not have the opportunity to draw the Taser or reach for Officer D’s pistol. It was this use of force that is described at paragraphs 49 to 52.
59. On 3 May 2019 Police received an anonymous Speak Up notification (on-line) alleging that:
- Officer D grabbed Mr W by the throat and threw him to the ground and this was unnecessary as there were other officers present; and
 - Officer D is lying when he says that Mr W grabbed his Taser.
60. The Authority asked the officers who witnessed the arrest if they raised any concerns about the use of force with a supervisor or sent a Speak Up notification. They all denied doing so. The Authority therefore cannot be sure if the person who sent the notification witnessed the arrest or is just reporting hearsay. For this reason the Authority has not placed any weight on this notification.
61. In deciding whether Officer D’s claim that Mr W reached for his Taser is plausible, the Authority has considered a range of factors. Mr W is emphatic that he did not try to grab the Taser and that it would not have been possible to do so because there were three officers “shoving” him around. No other officer present said they saw the attempt, although they also could not rule out the possibility. However, Officer D did tell Officer A about the perceived attempt immediately after the event, which is consistent with what he wrote in his report (albeit 12 days after the event) and what he told the Authority. He said to the Authority that while Officer B grabbed Mr W’s left hand, his right hand was free and in the vicinity of his Taser, because Officer D wears his Taser on the left side, making it possible that his hand could have at least knocked the Taser.
62. The Authority considers that it is more likely than not that Mr W did not try to grab the Taser, because it found him to be a credible witness for the following reasons:
- 1) he made some concessions that did not put him in a good light, for example admitting to previous interactions with the Police and admitting a breach of bail to Police of which they were not otherwise aware;
 - 2) he did not exaggerate in his description of the force used against him, with his account consistent with the medical report from the doctor who saw him two days later;
 - 3) he did not make the complaint; and

4) when he was not sure of an answer when the Authority interviewed him, he admitted that he was not sure.

63. Even though the Authority finds that on the balance of probabilities Mr W did not try and grab the Taser, it accepts that Officer D believed that he did, because of the officers' heightened sense of risk, discussed at paragraphs 14 to 19.

Was Officer D's use of force for the purpose of defending himself or another?

64. Officer D told the Authority that the reason he applied force to the top of Mr W's collarbone or the bottom of his neck, in addition to grabbing the hand on the Taser, was that in his experience, "if you've got the top of the head or the, the thing restricted it's very hard for them to then use other parts of their body." The Authority accepts that Officer D used this force to stop what he believed to be Mr W's attempt to take his Taser. When Mr W was perceived to be reaching for the taser, his actions went beyond what was reasonably required to resist an unlawful arrest. As a result, Officer D's use of force at this point was not to continue to effect an unlawful arrest, but for the purpose of defending himself and the other officers from its potential use against them.

Was the force used reasonable in the circumstances as the officer believed them to be?

65. In paragraph 52 the Authority concludes that on balance, it was unlikely that Officer D was attempting to strangle Mr W, despite the perception of Ms Y and Ms Z. On this basis, Officer D's decision to use force against Mr W's collarbone and neck area in order to protect himself from a perceived attempt to take his Taser was reasonable.

Officer D's late submission of his Tactical Options Report

66. Officer D failed to submit his Tactical Options Report within the timeframe required by Police policy, which requires reports to be submitted either before the end of the shift or, with the supervisor's approval, within 72 hours of an incident.

Use of force by other officers during the arrest

67. Officer B grabbed Mr W's arm when he first entered the house to prevent Mr W from escaping. He continued to hold this arm when Officer D was applying force to Mr W's neck. Officer C then grabbed Mr W's right arm. The three officers took him to the ground and, while he was tensing up to resist the force, applied handcuffs. When Mr W was on the ground Officer E entered the house from the rear and assisted in trying to control Mr W by placing Mr W's legs into a locked position. Mr W's recollection of the struggle was as follows:

I don't know, I was just laying on the ground 'cos, and I just – so it was happening pretty fast, all I remember is I was getting my arms yanked around and then I remember one of them down there, well, 'cos I was laying my head facing the kitchen and my feet were facing back towards the door, the outside door and I just remember one of them grabbed my toe and just bent it right back, yeah.

68. After Mr W had been handcuffed, Officers B and C then accompanied Mr W in the patrol car back to Masterton Police Station. In the car Mr W complained about having a sore toe. Two days after the arrest he was examined by a doctor and the exam noted bruising to his left toe and possible bruising to his forehead.
69. While none of the officers told the Authority that they bent Mr W's toes, given that Mr W was only wearing socks at the time it is possible that Officer E did this when controlling Mr W's legs.
70. The force used by officers in the course of arresting Mr W was not excessive. However, in circumstances where the Authority has already established that the arrest of Mr W was unlawful, other than the force used by Officer D in self-defence, all force used to effect the arrest was also unlawful.

FINDINGS ON ISSUE 2

In holding Mr W around the neck area to stop him from grabbing his taser, Officer D was acting in self-defence and therefore the force used was legally justified.

All other use of force by officers during the incident was unjustified and unlawful.

Subsequent Police Action

71. Police investigated this incident. They did not consider the lawfulness of Police entry onto Ms Y's property or whether Police should have obtained a warrant beforehand. However, the investigator recommended that:
 - 1) Officer A should have researched the alleged burglary of 23 February 2019 more thoroughly when formulating his response to Ms X's witness statement on 12 March 2019 as this would have informed a more accurate threat assessment.
 - 2) The decision to arrest Mr W was a reasonable escalation given Mr W's bail history and previous warnings.
 - 3) If Officer A had decided on a more low-level approach with less staff then Mr W may have been more compliant.
 - 4) The force used by Officer D was unfortunate, although technically justified as an act of self-defence.
72. The report recommended that Police be trained in immediately communicating to other officers when an offender attempts to take one of their appointments (for example a taser) or weapons of opportunity. It also suggests debriefing the staff involved about how they research and evaluate previous information in the Police database.
73. Police have subsequently:
 - 1) apologised to the Ms Y, both in person and by letter, for the distress caused;

- 2) repaired the wall in Ms Y's house that was damaged; and
- 3) debriefed staff about the importance of conducting thorough and accurate risk assessments.

74. As detailed at paragraph 36, Police have told us that they will issue a practice note to all frontline staff, which explains the Police interpretation of the extent of their powers to enter a house under section 8. However, if the practice note incorporates the Police view of the law set out in paragraph 33 above, the Authority will continue to disagree with that view until either legislative or judicial clarification of section 8 of the Search and Surveillance Act. The upshot is the Authority may continue to make adverse findings on these issues.

Conclusions

75. The Authority found there was no legal basis for entering into Ms Y's house for the purpose of arresting Mr W. It follows that Mr W's arrest was also unlawful.

76. The Authority also found that:

- 1) Officers E and F acted unlawfully in going to the rear of the property;
- 2) The way in which Officer D placed his hands around Mr W's lower neck did not constitute strangulation. It was justified under section 48 of the Crimes Act because he was acting in self-defence; and
- 3) All other force used by the officers in affecting the arrest of Mr W was unlawful because the arrest was unlawful.



Judge Colin Doherty

Chair
Independent Police Conduct Authority

29 October 2020

IPCA: 18-2195

Appendix – Laws and Policies

Search and surveillance

77. Section 8 of the Search and Surveillance Act 2012 provides:

Entry without warrant to avoid loss of offender or evidential material

(1) *In the circumstances set out in subsection (2), a constable may—*

(a) enter a place or vehicle without a warrant; and

(b) search for and arrest a person that the constable suspects has committed the offence.

(2) *The circumstances are that the constable has reasonable grounds—*

(a) to suspect that the person has committed an offence that is punishable by imprisonment and for which he or she may be arrested without warrant; and

(b) to believe that the person is there; and

(c) to believe that, if entry is not effected immediately, either or both of the following may occur:

(i) the person will leave there to avoid arrest:

(ii) evidential material relating to the offence for which the person is to be arrested will be destroyed, concealed, altered, or damaged.

78. The case of *Tararo v R* [2010] NZSC 157 considered the nature of ‘implied licence’ as it applies to Police entering private property for law enforcement purposes. At paragraph 14 of the judgment Tipping J, in the majority judgment, stated:

Members of the public, including police officers, may go to the door of private premises in order to make enquiry of an occupier for any reasonable purpose. In the course of doing so they may take photographs, if to do so is reasonable in order to accomplish that purpose. Police officers may avail themselves of this licence for law enforcement purposes. But they cannot invoke the licence to do anything that by law requires a warrant.

79. Section 169 of the Search and Surveillance Act 2012 provides:

Any constable who exercises a warrantless entry power, search power, or surveillance power conferred by Part 2 or Part 3 of this Act must provide a written report on the exercise of that power to the Commissioner or a Police

employee designated to receive reports of that kind by the Commissioner as soon as practicable after the exercise of the power.

80. The New Zealand Bill of Rights Act 1990 provides at section 21 that

Everyone has the right to be secure against unreasonable search or seizure, whether of the person, property, or correspondence or otherwise.

Arrest without warrant under Bail Act 2000

81. The relevant components of section 35 of the Bail Act are as follows:

(1) Any constable may arrest without warrant a defendant who has been released on bail by a court or Registrar or Police employee if the constable believes on reasonable grounds that—

(b) the defendant has contravened or failed to comply with any condition of bail.

Nothing in this section prevents a constable from seeking a warrant to arrest a defendant under section 37.

Use of force

82. Section 39 of the Crimes Act 1961 provides for law enforcement officers to use reasonable force in the execution of their duties such as arrests and enforcement of warrants. Specifically, it provides that officers may use “*such force as may be necessary*” to overcome any force used in resisting the law enforcement process unless the process “*can be carried out by reasonable means in a less violent manner*”.
83. Section 40(1) of the Crimes Act 1961 provides for Police officers to use reasonable force to “*prevent the escape of that other person if he takes flight in order to avoid arrest*”.
84. Section 48 of the Crimes Act 1961 states: “*Everyone is justified in using, in the defence of himself or herself or another, such force as, in the circumstances as he or she believes them to be, it is reasonable to use*”.
85. Under section 62 of the Act anyone who is authorised by law to use force is criminally responsible for any excessive use of force.
86. Police policy states that a constable must submit the TOR form or Unintentional/Unauthorised Discharge form, or Use of Tactical Options on an Animal(s) form to their supervisor before the end of the shift in which they used force, or with their supervisor’s approval, within 3 days/72 hours of this shift and prior to any rostered days off or leave during this period.

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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