

Arrest for firearms offence justified

Summary of the Incident

1. The Authority investigated a complaint that Police unlawfully arrested Mr X and detained him for 48 hours after he made public statements criticising Police following the March 2019 terror attack in Christchurch. Mr X complained that senior Wellington-based officers were behind his arrest *'for a completely made-up event for the purpose of silencing me.'*
2. The Authority has previously reported that following the terror attack Police established a process code-named Operation Whakahaumanu to identify individuals who may have been holding extremist views and presented security risks to New Zealanders. The operation was prevention focused and aimed at mitigating the potential for future acts of violence.
3. A number of individuals of interest were identified through a range of sources and the information was assessed to determine their level of risk and what action was required. In many cases this involved Police conducting enquiries with the individual and speaking with their friends, family and associates. The process also sometimes included a search of the individual's home or place of work and the seizure of their firearms and firearms licence.
4. On 17 March 2019, two days after the attack, Mr X became a person of interest after he posted a recording on social media where he describes witnessing the shooter's behaviour at a gun club.
5. In the recording Mr X also says he was so concerned about what he had observed that he warned Police about activity at the gun club, but Police failed to act on his warning. Mr X's recording was widely reported in the media after the terror attack.
6. On Saturday, 23 March 2019, Police interviewed and then arrested Mr X. Police laid five charges of unlawful possession of firearms and kept Mr X in Police custody over the weekend.¹
7. On Sunday, an officer from the Auckland-based Police National Security Investigation Team, travelled to Tauranga and interviewed Mr X to assess his security risk.

¹ Pursuant to s45(1) Arms Act 1983

8. When Mr X appeared in court on Monday, Police withdrew four of the charges relating to unlawful possession of firearms and replaced them with one lesser charge of possession of firearms without a licence.²
9. A Police diversion prosecutor told Mr X's defence counsel that Mr X was eligible for diversion for the remaining charges, but diversion was subsequently declined.
10. The prosecution concluded with Mr X pleading guilty to one charge of possession of firearms without a licence. He applied for, and was granted, a discharge without conviction.

Issues examined by the Authority

- Issue 1:** Did Police arrest Mr X because he publicly criticised them for failing to act on information he provided prior to the terror attack in Christchurch?
- Issue 2:** Was Mr X's continued detention lawful?
- Issue 3:** Should Mr X have been offered diversion?

The Authority's Findings

11. The Authority found:
- 1) Police did not arrest Mr X because he publicly criticised them;
 - 2) Mr X's continued detention was lawful;
 - 3) Police did not decline diversion because Mr X publicly criticised Police; and
 - 4) The decision to decline diversion complied with Policy.

Analysis of the Issues

ISSUE 1: DID POLICE ARREST MR X BECAUSE HE PUBLICLY CRITICISED THEM FOR FAILING TO ACT ON INFORMATION HE PROVIDED PRIOR TO THE TERROR ATTACK IN CHRISTCHURCH?

Background

12. Mr X has been a firearms licence holder for a number of years. On 12 February 2019, he voluntarily surrendered his licence to the Tauranga Police Arms Officer. Mr X told Police he was surrendering his licence because he was under stress and *'taking medication to help him balance his thoughts'* due to issues he was having with his former wife. He said his firearms were with a

² Pursuant to s20 Arms Act 1983

friend, Mr Y, a firearms licence holder living in Tauranga. The Arms Officer did not require Mr X to surrender his firearms.

13. Section 28 of the Arms Act provides that when a firearms licence is surrendered, the holder is no longer licensed to possess firearms, firearms parts, or magazines. They must hand in these items and any ammunition if Police instruct them to do so. The Act allows a person who has surrendered their firearms licence, three months to sell their firearms to a person approved by Police.
14. Following Mr X's post on social media outlined in paragraphs 4 and 5 above, Officer A (a Detective Sergeant with the Auckland based National Security Investigation Team assisting with enquiries arising from the terror attacks), contacted Mr X and requested an interview about Mr X's knowledge of the gun club and shooter.
15. Mr X agreed and was interviewed on 20 March 2019 at the Hamilton Police Station by a local officer. He left the station after the interview and Police took no further action other than an exchange of e-mails between officers to clarify the status of Mr X's firearms licence.
16. On Friday, 22 March, at around 4.40am, Police received a 111 call from Mr Z, in Auckland. He told Police his phone had '*been hacked*' because he had been talking on-line to an associate of the Christchurch shooter.
17. Later the same day, Mr Z told Police about an on-line persona by the name of BaneNZ and that he believed BaneNZ to be Mr X. Bane is a fictional mercenary soldier, appearing in movies.
18. Mr Z also told Police that Mr X had been in Auckland in possession of a Steyr rifle and multiple 30-round magazines. Attaching a 30-round magazine to a Steyr rifle means the rifle is configured as a Military Style Semi-automatic (MSSA) firearm. On Facebook, Police found a 2016 photograph of Mr X holding an MSSA firearm with a 30-round magazine attached.
19. In response, Officer A was instructed by the Police National Headquarters Team overseeing the Police response to the terror attack, to identify and manage any risks presented by Mr X.
20. Officer A drafted a letter to be delivered to Mr Y advising him that Mr X had surrendered his licence and was no longer in possession of a current firearms licence. The letter advised that it was a breach of the Arms Act for Mr X to possess any firearms and for Mr Y to supply Mr X with a firearm.
21. Mr X's address at that time was unknown to Police. Officer B (from Tauranga Police) was told to serve the letter on Mr Y.
22. On Friday evening, Mr Z's partner reported to Police that she had returned home to find Mr Z dead in the house from a gunshot wound.
23. Tauranga Police were instructed to urgently locate Mr X and seize his firearms while initial enquires were made into Mr Z's death .

Arrest

24. On Saturday morning, uniformed officers spoke to Mr Y at his home. Mr Y removed two rifles belonging to Mr X from a gun safe and surrendered them to Police. The Steyr rifle was not at this address.
25. While the officers were still at the address, Mr Y received a call from Mr X. Mr X spoke to an officer and explained he was currently fishing. Later the same day Mr X contacted Police to tell them when he expected to return and the boat ramp he would be using.
26. At around 2.50pm, Officer C met Mr X at the boat ramp and Mr X accompanied him to the Tauranga Police Station.
27. Officer C told the Authority he was already working on another urgent enquiry when he was reassigned to meet Mr X, and received a very short briefing. His understanding of the situation was that the focus of his enquiry was to seize Mr X's firearms, specifically the Steyr rifle. He therefore did not provide Mr X with the New Zealand Bill of Rights Act (NZBORA) advice given to suspects at the start of an interview and did not video record the interview.
28. During the interview Officer C received a briefing document from officers based at Police National Headquarters. He questioned Mr X about Mr Z, his movements around the time of Mr Z's death, Mr X's use of social media, the location of his firearms, and the photograph on Facebook of Mr X holding an MSSA.
29. Mr X told Officer C that in addition to the firearms he left in Tauranga, he also had firearms located on a farm in Waikato, where he was currently employed.
30. Officer C passed this information to Police National Headquarters staff, who arranged for Waikato-based officers to visit the farm while Officer C was still interviewing Mr X.
31. Police were advised by the farm owner that Mr X had firearms on the property stored in the gun safe of the stock manager, Mr W. Mr W told Police that he met Mr X around the beginning of March at work. Mr X told him he was a shooter and Mr W said he could store his firearms in his gun safe. Mr X stored the Steyr rifle, a shot gun and two rifles in the safe.
32. Mr W also told Police that Mr X removed one of the rifles from the safe in mid-March and had not returned it.
33. Police seized the three remaining firearms belonging to Mr X, including a Steyr rifle, from the gun safe. Police also found and seized ammunition, bolts, magazines and a barrel from Mr X's room.
34. Mr X told Officer C that the Steyr rifle seized at the farm was not configured as an MSSA, he did not have any 30-round magazines, and the photograph of him holding an MSSA was taken overseas and was not his firearm. Police did not find any 30-round magazines with any of Mr X's firearms.

35. Mr X also told Officer C that when he surrendered his licence four weeks earlier, he did not receive any instructions about his firearms and was currently selling them. He surrendered his licence because he was depressed and stressed and handed in the licence on a 'time out' basis.
36. Mr X confirmed he sold a rifle to a person in Auckland in mid-March.
37. After briefing staff at Police National Headquarters, Officer C returned to the interview room and provided Mr X with the advice given to suspects under the NZBORA. He also advised Mr X he was *"arrested for the unlawful possession of the Steyr rifle believed to be an MSSA weapon, and the ammunition located in the car earlier."*
38. Mr X signed a typed statement which recorded the information he provided during the interview and set out the grounds for his arrest.
39. Officer C told the Authority that after a discussion with staff at Police National Headquarters, he was told to charge Mr X with five charges of unlawful possession of a firearm. Proving these charges requires evidence that Mr X intended to use a firearm for an unlawful purpose. The charges related to the firearms, firearms parts and ammunition located at the Waikato property, and ammunition located in Mr X's vehicle in Tauranga.
40. Officer C said he laid the charges because at the time he was aware enquiries were being made by other staff although he was not personally aware of the details.
41. However, on Monday morning Officer C discovered that there was no relevant additional information, and he therefore concluded that there was insufficient evidence to prove Mr X intended to use the firearms for an unlawful purpose and that a lesser charge of possession in breach of licence was appropriate.
42. After further discussion involving both District and Police National Headquarters staff, it was decided to proceed with a charge of possession in breach of licence in relation to the firearms stored in the safe of the farm in Waikato.
43. Mr X pleaded guilty to that charge and was later discharged without conviction.
44. The Authority considers that following unsolicited contact from Mr Z, it was reasonable for Police to be concerned about Mr X's access to firearms, specifically the Steyr rifle, because he had recently surrendered his licence citing emotional and psychological reasons for doing so.
45. Police were justified in arresting Mr X after discovering he was in possession of firearms while unlicensed and had firearms at a location previously unknown to them. The initial charges laid of unlawful possession of firearms were inappropriate because Police had no evidence that Mr X intended to use the firearms for an unlawful purpose, but this was corrected, and the charges withdrawn.
46. The arrest was reasonable and based upon the information Police had at the time about Mr X's licence status and the physical location of his firearms. It was unrelated to Mr X's public criticism of Police.

FINDING ON ISSUE 1

Police did not arrest Mr X because he publicly criticised Police.

ISSUE 2: WAS MR X'S CONTINUED DETENTION LAWFUL?

47. Police received information about Mr X from Mr Z throughout the day on Friday. On Friday evening Police were told Mr Z had died and commenced enquiries to locate Mr X and seize his firearms the next day.
48. Mr X accompanied Officer C to the Police station at about 2.50pm on Saturday and was arrested and charged at about 5.50pm, after providing a statement. The next available court day was Monday.
49. Regarding the decision not to release Mr X on Police bail, Officer C's supervisor, Officer B, told the Authority there was some discussion between the arresting officer, who was keen to bail Mr X, and staff at Police National Headquarters, who had a view he should not be bailed. Officer B says it was his decision to not bail Mr X.
50. One of Officer B's reasons for not granting bail was that Mr X was charged with firearms offences and had a history of domestic violence incidents, with one woman living locally. Officer B had also seen Mr X's post criticising the Police the week prior to his arrest and in that post *"he started launching into his ex-partner and he wasn't speaking very nicely about her at all."*
51. Officer B told the Authority:
- "... there were a number of phone calls during that day [with PNHQ staff] who had a view he shouldn't have bail, I agreed ... didn't debate it because I thought it was appropriate, it didn't influence me."*
52. When asked about the difference between the charges laid over the weekend, and the lesser charge remaining when Mr X appeared before the court, Officer B said:
- "My view on bail would not have changed... it was firearms charges and a domestic background... my view might have come back a bit if I hadn't seen the video and the way he was talking about one of his partners."*
53. Officer B says he was aware an officer was coming from Auckland to speak to Mr X on Sunday but denies holding Mr X in custody *"to keep him on tap"* and says it was never discussed.
54. Officer B says he was unaware that when Mr X surrendered his licence, he had not been required to surrender his firearms. He says:
- "... what I was presented with was a chap that shouldn't have had firearms, had sold one of those firearms to a person in Auckland... and in Waikato was able to help himself to the safe and had a previous domestic history."*

55. The Authority has viewed Mr X's recording about the terror attacks and in the recording he says: *"... my ex-wife is a ***, makes my life hell, I've been through a lot, I'm stressed. The last thing I want to do is f***kin hurt someone."*
56. Police can grant bail under section 21 of the Bail Act 2000 if they consider it prudent to do so, but there is no obligation to release a person on Police bail.
57. The Police Bail Policy provides that Police bail should be granted if no risks are identified of re-offending, risks to the safety of a victim or where bail conditions will adequately mitigate any risks.
58. Police reassigned an officer from another critical incident and investigation to locate Mr X and seize his firearms. Police also arranged a mental health assessment for Mr X while he was in custody.
59. The Authority is satisfied that detaining Mr X until the next available court sitting was lawful and based on an assessment of potential risk and not because Mr X publicly criticised Police.

FINDING ON ISSUE 2

Mr X's arrest and detention was lawful.

ISSUE 3: SHOULD MR X HAVE BEEN OFFERED DIVERSION?

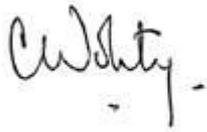
60. Diversion is a way in which the Police Prosecution Service (PPS) exercises discretion enabling eligible offenders to complete activities to avoid the possibility of receiving a conviction. Decisions to grant diversion are based on offence and offender criteria set out in the Adult Diversion Scheme Policy. The policy provides that PPS is responsible for applying the diversion scheme and only PPS prosecutors can decide if diversion is offered to an offender.
61. When considering diversion, the prosecutor must ensure that both offender and offence-based criteria are met and must also consider the views of any victim and the officer in charge of the case.
62. The Policy states that the circumstances of the offending should suggest that the public interest would not be compromised if the offence was dealt with through diversion but does not provide any further guidance relating specifically to firearms offences.
63. In March 2019, Police Prosecutor, Officer D, was responsible for managing the diversion scheme in Tauranga.
64. After receiving a request for diversion for Mr X, Officer D consulted the Arms Officer and the officer in charge of the case, Officer C. He advised Mr X's lawyer that Mr X was eligible and would be considered for diversion.

65. Officer B told the Authority that he was made aware that diversion was being considered and was uncomfortable with the decision to offer diversion for a firearms offence against a background of previous domestic issues.
66. On 23 April 2019, Officer B sent an e-mail to the Police National Manager of the National Security Investigation Team stating:
- “Prosecutions have been asked to consider diversion for these offences by [Mr X’s] solicitor and are of the view that on the face of it he is eligible. I have suggested that given the strong interest in this man at the time of his arrest that they should hold fire on a final decision. Can you give me an indication of your views re diversion for Mr X.”*
67. The National Manager replied the same day stating his view was that Mr X should not be offered diversion because of his *‘flagrant disregard for the requirements of the Arms Act.’*
68. Officer B advises that after the National Manager reinforced his view that diversion should not be an option, he *“communicated to Officer D that he should not approve diversion.”* Officer D told the Authority that after advising Mr X’s lawyer that Mr X was eligible for diversion:
- “I heard from [Officer B] that the matter was linked to [the terror attack in] Christchurch.. that is when I told the lawyer, no I won’t divert it put him through the Court then nothing’s been brushed under the carpet ... there’s a lot of public interest in this and I’d rather it went through the system as per normal.”*
69. Officer D says the decision to decline the request for diversion was made by him and he did not speak to anyone about the decision other than *“on a local level”*. He changed his view because although the offence may have been suitable for diversion, he was concerned that Mr X was publicly linked to an incident with a high level of public interest involving the use of firearms.
70. The Authority is satisfied that Officer D’s decision to reverse his original advice to Mr X’s lawyer regarding eligibility for diversion complied with Policy. It was not influenced by Mr X’s public criticism of Police.

FINDING ON ISSUE 3

Police did not decline diversion because Mr X publicly criticised Police.

The decision to decline diversion complies with Policy.

A handwritten signature in black ink, appearing to read 'C. Doherty', with a horizontal line underneath.

Judge Colin Doherty

Chair
Independent Police Conduct Authority

15 April 2021

IPCA: 18-2297

Appendix – Laws and Policies

LAW

71. Section 28(2) of the Arms Act 1983 states:

On the revocation or surrender of a firearms licence, the holder of the licence

- (a) ceases to be licensed to possess any arms item or ammunition under the licence or any endorsement on it; and
- (b) must, on demand, deliver any arms item or ammunition in their possession or under their control to a member of the Police.

72. Section 28(3) of the Arms Act 1983 states:

A person whose firearms licence is revoked or surrendered may at any time within 3 months, or any longer period that the commissioner may allow, sell, or otherwise dispose of any arms item or ammunition in their possession or under their control to a person approved for the purpose by a member of the Police.

73. Section 45 of the Arms Act 1983 states:

- (1) Every person commits an offence and is liable on conviction to imprisonment for a term not exceeding 4 years or to a fine not exceeding \$5,000 or to both who, except for some lawful, proper, and sufficient purpose,
 - (a) carries; or
 - (b) is in possession ofany firearm, airgun, pistol, prohibited magazine, restricted weapon, or explosive.

In any prosecution for an offence against subsection (1) in which it is proved that the defendant was carrying or in possession of any firearm, airgun, pistol, prohibited magazine, restricted weapon, or explosive, as the case may require, the burden of proving the existence of some lawful, proper, and sufficient purpose shall lie on the defendant.

About the Authority

WHO IS THE INDEPENDENT POLICE CONDUCT AUTHORITY?

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

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

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

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

WHAT ARE THE AUTHORITY'S FUNCTIONS?

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

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

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

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

THIS REPORT

This report is the result of the work of a multi-disciplinary team 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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