

# Arrest of a man in Palmerston North not justified

## Summary of the Incident

1. On Saturday, 26 September 2020, Police arrested a man for disorderly behaviour in Palmerston North. Police say he was yelling at people standing nearby on the footpath. When officers spoke to him, he was aggressive and verbally abusive to them. Police warned him that he would be arrested for disorderly behaviour if he continued with his behaviour. The man yelled at the officers and was arrested.
2. Officers A and B were working together; Officer A was driving the Police car, and Officer B was the passenger. At about 3am their Police car was at the intersection with Ferguson and Princess Streets in Palmerston North. Officer A saw two males, Mr V and Mr W, standing in the middle of Ferguson Street.
3. Officer A says the men were yelling at people standing outside of the McDonald's, on the northern footpath of Ferguson Street. As he drove past the men, Officer A told them to get off the road. The men responded with abuse, and the officers decided to turn around and talk with them. The men crossed Ferguson Street and were standing on the southern footpath when Police stopped next to them.
4. Ms X and her partner, Mr Y, were nearby, also standing on the southern footpath. They say the officers got out of the Police car and were aggressive and confrontational from the outset, yelling and pointing at the men. According to Ms X and Mr Y, the men were initially quiet. They apologised and offered to go home, but the officers did not let the men go. One of the men, Mr V, became upset and challenged the officers about stopping them.
5. Ms X was upset by the aggressive way the officers dealt with the situation and complained to us. Ms X does not know Mr V or Mr W, although her partner, Mr Y, recognised Mr W as someone who went to the same school as him some years ago.
6. Mr V also says the officers were aggressive when they got out of the Police car. Mr W too, described the officers as *“very angry and intimidating”*. Mr V says he became upset because the

officers caused them unnecessary distress; as a result, he challenged them. Accordingly, the communication between Police and himself became “*very ugly and heated*”.

7. Officer A says Mr V continued to yell at people on the footpath and kept on calling him a “*fuckin*g joke.” He warned Mr V that he would arrest him for disorderly behaviour if he kept on behaving that way. The officer asked Mr V if it was necessary to call him a “*fuckin*g wanker.” Mr V then leaned in close to the officer’s face yelling, “*you’re a fuckin*g joke!” The officer arrested Mr V for disorderly behaviour.
8. The officers say that there was a crowd of intoxicated people forming, shouting abuse at them at this point. They placed Mr V into the Police car and took him to the station, where they gave him a formal warning for disorderly behaviour. The officers took Mr V home after releasing him.

## Issues examined by the Authority

**Issue 1:** Was the arrest of Mr V for disorderly behaviour justified?

**Issue 2:** Did Police deal with Mr V and Mr W in an unprofessional way?

## The Authority’s Findings

9. We found that the arrest of Mr V for disorderly behaviour was not justified, and Police should not have given Mr V a formal warning for disorderly behaviour.
10. We also found that the way the officers dealt with the situation was unprofessional.

## Analysis of the Issues

### ISSUE 1: WAS THE ARREST OF MR V FOR DISORDERLY BEHAVIOUR JUSTIFIED?

#### The arrest of Mr V for disorderly behaviour

11. Officer A believes Mr V and Mr W were yelling aggressively at people standing on the footpath outside the McDonald’s. He thought they were aggressive because he saw them throwing their hands into the air as they yelled.
12. Officer A says it was early in the morning. The local bars in the area were closing, and Police regularly have to deal with intoxicated people fighting in the area. Officer A says he was concerned for the safety of the men, which is why he asked them to move off the road. One of the men responded with abuse, shouting something similar to: “*Yeah, I’ll get off the road, you fuckin*g wanker”. The men did not move but continued to yell at people on the footpath.
13. Officer B did not see the men yelling at anyone on the footpath as he was busy on his mobility device.<sup>1</sup> Officer B heard the men yelling abuse at Officer A after he told them to move off the

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<sup>1</sup> A 'mobility device' is either an iPad or an iPhone that Police officers use to access Police databases.

road and advised him that *"we should probably go and speak to them"*. Therefore, it appears Officer B's advice to speak to the men was motivated more by how they spoke to the officers than because they were yelling at the people across the road.

14. Officer A made a U-turn and stopped next to the men. Officer A says that Mr V was abusive and aggressive from the start.
15. Mr V admits that he used abusive language but said he did this only after the officers acted aggressively. Mr V says that the officer also swore at him, but he could not remember what was said anymore. The officers deny swearing at anyone, saying they acted professionally.
16. Officer A warned Mr V that he would arrest him for disorderly behaviour if he continued to behave like that. Officer A says he believed Mr V was at risk of violence from the people he was yelling at.
17. Officer A asked Mr V if it was necessary to call him a *"fucking wanker"* at which point Mr V leaned into his face and yelled in a loud, aggressive voice: *"You're a fucking joke!"* Officer A then arrested him.
18. Both Mr V and Mr W acknowledged they had been drinking but said they were not overly intoxicated. Their recollection of the initial encounter conflicts with that of the officers.
19. Mr W says that as they crossed the road, they heard someone yelling: *"Get off the fucking road!"* They did not know it was a Police officer and shouted back: *"Oh, fuck off!"* They only realised it was Police when the officers turned around and switched on the car's flashing lights and siren.
20. Both Mr V and Mr W deny that they shouted to any people on the footpath before that. Ms X and Mr Y, who was nearby, also say the men were not yelling at anyone when they crossed the road.
21. Ms Z, Mr W's partner, was standing on the footpath outside the McDonald's with her friends. She says she heard someone yell at Mr V and Mr W, and them yelling back. She does not remember what was yelled. When she heard this, she looked up and saw a Police car with its lights and sirens on, stopping next to Mr V and Mr W. We believe that the yelling Ms Z heard was when Police told the men to move off the road and the men's response.
22. There is a difference between the versions of Officer A, who says the men were yelling at a group of people, and Mr V and Mr W, who deny this. Mr V's and Mr W's accounts are supported by Ms Z and also by Ms X and Mr Y, who were independent witnesses. We believe that Ms X and Mr Y have nothing to gain by giving a false account of what they saw, and we accept their accounts.
23. For this reason, we do not accept Officer A's account that Mr V and Mr W were yelling at people on the footpath and, therefore, at risk of violence from them.

## Disorderly behaviour

24. Mr V was arrested for disorderly behaviour. However, it is unclear whether this was under section 3 or 4 of the Summary Offence Act 1981.<sup>2</sup> The charge sheet records Mr V was processed and warned for a violation of section 4 of the Act, but in the officer's explanation, it emerges he also thought section 3 relevant.

### *Section 4 of the Summary Offences Act 1981*

25. Under section 4 of the Act it is an offence if a person behaves in an offensive or disorderly manner in public or uses words that threaten, alarm, insult, or offends a person.
26. In *Brooker v Police*,<sup>3</sup> the Supreme Court considered a person's right to freedom of expression,<sup>4</sup> against the limitations section 4 of the Summary Offences Act places on a person's behaviour. The Court 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.
27. The Court determined that if the behaviour is an expression of someone's opinion, it is not enough if it annoys or even wounds a person's feelings; it has to be disruptive of public order. Causing annoyance, even serious annoyance, is insufficient if the public order is not affected. Disorderly behaviour essentially has to be disruptive of the public order, as considered against circumstances such as the time and place where the behaviour occurs.
28. In *Hooper v Police*,<sup>5</sup> the Court agreed that such behaviour should largely disturb the normal functioning of life in the environs of that place. The Court has set a high bar for when a person's behaviour can be seen as disorderly; any disturbance caused by it must seriously violate the public order.<sup>6</sup>
29. In *Melser v Police*,<sup>7</sup> the Court stressed that any interference with the rights of others must be serious enough to justify the intervention of the criminal law. Therefore, the test for disorderly behaviour is whether there is a violation of other people's rights, to the extent that it risks upsetting the public order.
30. We do not believe that the act of someone misbehaving, being abusive or yelling in public would automatically meet the threshold of disorderly behaviour. Clearly, the law requires the behaviour to seriously interfere with the rights of others, to risk a breakdown of good public order.
31. Officer A says that he believed that Mr V was aggressively yelling at people, and he saw him gesturing. According to the officer, this was at a time and place where Police usually have to

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<sup>2</sup> These sections are set out in full in paragraphs 65 and 66.

<sup>3</sup> [2007] NZSC 30.

<sup>4</sup> Pursuant to section 14 of the New Zealand Bill of Rights Act 1990.

<sup>5</sup> [2017] NZDC 28741.

<sup>6</sup> *R v Lohnes* [1992] 1 SCR 167.

<sup>7</sup> [1967] NZLR 437.

deal with intoxicated people fighting in public, and he worried this could have resulted in violence towards Mr V.

32. Even if Mr V was yelling at members of the public (which we do not believe happened), this did not occur in a quiet residential area. It happened in a business area, where patrons, some intoxicated, often go to the fast-food outlet. Any yelling would not be unexpected or out of the ordinary. Even if Mr V was gesturing, it does not automatically follow that it was aggressive or challenging in nature. Nor would yelling and gesturing in combination in itself meet the threshold for disorderly behaviour. Without knowing what Mr V was yelling or to whom he was yelling (or gesturing), any belief that his behaviour was intended to start a fight and disrupt the public order is simply guessing.

### *Section 3 of the Summary Offences Act 1981*

33. 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.<sup>8</sup>
34. Officer A says he believes Mr V's behaviour had the potential to provoke a violent response towards himself.
35. Ms Z (Mr W's partner) and her friends were standing on the footpath outside the McDonald's when Mr V and Mr W were said to be yelling "at people on the footpath". Even if the men were yelling, it is a reasonable possibility that they could have been yelling at their friends. This would not have resulted in a violent response toward them. We think the officers should have found out what Mr V was yelling and to whom in the circumstances.
36. Officer A said that Mr V's aggressive behaviour could have caused an issue for other people that evening, making it impossible to "just let him go". We do not take this view; Mr V was verbally aggressive only towards the officers and only in response to their interaction with him. In *R v Ali'Imatafitafi*,<sup>9</sup> the Court found that when a person's conduct is likely to cause a reaction from Police only, it will not amount to disorderly behaviour. This is because the only outcome of such behaviour is a Police response, and there is no actual threat to the public order.
37. We do not think there was a genuine threat to the public order in this case.

### *Power to Arrest*

#### Legal authority to arrest

38. Section 315(2)(a) of the Crimes Act 1961 allows a Police officer to arrest any person without a warrant who disturbs the public peace or commits an offence punishable by imprisonment.<sup>10</sup>

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<sup>8</sup> Bruce Robertson J (ed) *Adams on Criminal Law* (online looseleaf ed, Thomson Brookers) at [SO3.04].

<sup>9</sup> [2007] NZCA 329.

<sup>10</sup> Section 315 of the Crimes Act is set out in paragraph 67.

This power to arrest someone without a warrant, deals with offences that are actively committed in the presence of an officer.

39. *Brooker v Police* judged that section 4 of the Summary Offences Act is a comparatively minor offence which is not punishable by imprisonment; however, it is considered a breach of the peace and, therefore, an offence for which a person may be arrested without a warrant.
40. We do not believe Officer A could lawfully arrest Mr V under section 315(2)(a) of the Crimes Act because no offence was committed in his presence. Mr V's yelling and gesturing did not meet the required elements for the offence of disorderly behaviour.
41. In the alternative, section 315(2)(b) of the Crimes Act allows a Police officer to arrest a person without a warrant if they have good cause to suspect the person has committed a breach of the peace or an offence punishable by imprisonment. This power to arrest someone without a warrant differs from the power in section 315(2)(a) in that it deals with past events, specifically those instances where Police have reasonable grounds to believe that an offence has been committed.
42. Similarly, section 39 of the Summary Offences Act allows a Police officer to arrest a person without a warrant if they have good cause to suspect a person has committed certain offences under the Act (this includes offences of disorderly behaviour pursuant to sections 3 and 4 of the Act).<sup>11</sup>

#### Good cause to suspect

43. Both sections 315(2)(b) of the Crimes Act and 39 of the Summary Offences Act require that an officer have 'good cause to suspect' that a person has committed an offence before they can arrest them.
44. In *Caie v Attorney-General*,<sup>12</sup> the Court outlined the following guidelines, in considering if a Police officer has 'good cause to suspect':
  - The first step is to determine what information has come to the notice of the arresting officer.
  - That information must be objectively assessed to see if it amounts to 'good cause to suspect'. The officer's view as to the weight of the information is irrelevant.
  - It is sufficient if there is good cause to 'suspect', which is not the same as good cause to 'believe'. 'Good cause to suspect' is a reasonable suspicion. A reasonable suspicion is more than a mere suspicion and less than a belief based on reasonable and probable grounds.
45. Officer A says that Mr V was yelling at a group of people, which might have provoked a violent response towards him. Without knowing what substantively Mr V was yelling or to whom he was yelling it, Officer A did not have 'good cause' for suspecting his behaviour risked provoking

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<sup>11</sup> Section 39 of the Crimes Act is set out in paragraph 68.

<sup>12</sup> [2005] NZAR 703 (HC).

a violent response that could upset the public order. Knowledge of a raised voice is not sufficient. Objectively, we do not think Officer A's stated grounds amounted to anything more than guessing or a mere suspicion.

Failure to make proper inquiries

46. In *Niao v Attorney-General*,<sup>13</sup> the Court judged that the failure to make satisfactory inquiries may be important to the question of whether an officer has 'good cause to suspect'. The Court reflected that the ability of an officer to make inquiries will naturally depend on circumstances, such as:
- the strength or otherwise of the evidence already available to him;
  - the ease with which any inquiries could be made;
  - the likely bearing, which the result of those inquiries would have, on the issue of good cause to suspect;
  - whether delay might lead to the destruction or construction of evidence; and
  - whether the suspect is likely to run off or disappear if an arrest was delayed.
47. On the evidence available to him (i.e., yelling and gesturing), we do not think Officer A had 'good cause to suspect' Mr V committed the offence of disorderly behaviour (under either section 3 or section 4 of the Summary Offences Act).
48. If Mr V and Mr W had been yelling at other people, Officer A should have tried to make some inquiries to find out what was actually happening. It would have been reasonably easy to make inquiries with the affected people. However, the officers did not do this. These inquiries would have resolved any uncertainty about whether Mr V's conduct risked violence and upsetting the public order.
49. When asked why he did not make inquiries, Officer A explained it was not possible as Mr V was intoxicated, acting aggressively, which exposed them to potential risk. In addition, a crowd of intoxicated people formed who became increasingly hostile towards Police. Officer A says it was the safest recourse to remove Mr V from the crowd as soon as possible.
50. We do not believe that the officers could not make simple inquiries. There were two officers; Officer B could fairly easily have spoken to the people on the opposite footpath to find out what or at whom Mr V was yelling. When asked why he did not do so, Officer B said that Mr V was aggressive and he could not leave his colleague to deal with the risk while he went and made inquiries.

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<sup>13</sup> (1998) 5 HRNZ 269 (HC).

51. The people to whom Mr V was reportedly yelling were standing a short distance away, across the road. We accept that Officer B could not leave Officer A to deal with Mr V alone; however, he could have called out to the people to come over. He did not do this.
52. Officer A further checked Mr V's identity and took his driver's licence for this purpose. The officers could have disengaged and asked Mr V to stay put while they went across the road to make inquiries but they did not do this. If Mr V ran away, they had his personal particulars and could easily have found him again.
53. We note that Officer A did not speak to Mr V about why he was yelling at other people. In fact, he spoke to him about calling him a "*fucking wanker*". Officer A arrested Mr V after he leaned into his face and shouted: "*You're a fucking joke!*"
54. We also looked at cell phone footage of Mr V's arrest. The footage captures only a small part of the incident. However, in the recording, the officers are asked by bystanders what Mr V did and why they were arresting him. Officer A responds: "*He doesn't get into an officer's face like that, mate.*" Officer A told us that his response was answering the question about what Mr V had done, not the reason for his arrest. Although the officer's response to the bystanders does not prove the reason for Mr V's arrest, it does, in the context of what happened, and on a balance of probability, suggest this was what Officer A was more concerned with.
55. The video footage shows several people crossing the road and asking Police why they were arresting the men and what Mr V had done. The officers did not ask any of these people if Mr V was yelling at someone or what motivated Mr V's behaviour.
56. We believe the officers should have made relevant inquiries to satisfy themselves that Mr V's behaviour upset the public order or was likely to provoke a violent reaction. They did not do this.

### The formal warning

57. Police policy on formal warnings requires that both evidential sufficiency and public interest requirements, as set out in the Solicitor-General's Prosecution Guidelines, are met before a person can be given a formal warning.
58. This means there should be enough evidence to prove an offence in a court before Police may give someone a formal warning.
59. Police did not have enough evidence that Mr V's behaviour risked upsetting the public order or provoke a violent response that could amount to disorderly behaviour. Accordingly, he should not have been given a formal warning.

## FINDINGS ON ISSUE 1

The arrest of Mr V for disorderly behaviour was not justified.

Police should not have given Mr V a formal warning for disorderly behaviour.

## ISSUE 2: DID POLICE DEAL WITH MR V AND MR W IN AN UNPROFESSIONAL WAY?

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60. The officers deny that they were aggressive or used inappropriate language and say that Mr V was aggressive and abusive from the outset. The officers disagreed with the witnesses' accounts of their behaviour. They believed the witnesses were likely intoxicated, anti-police, and mistaken about factual information.
61. The witnesses told us that they had been drinking but say they were not very intoxicated. There are some inconsistencies in what the different witnesses reported, especially about what the officers were saying. By the time they were interviewed, some witnesses could not recall what precisely was said. However, we found the witnesses were generally credible in giving their accounts. We note a Police investigation into the conduct of the officers also found the witnesses to be generally credible.
62. Despite some inconsistencies, all of the independent witnesses say that the officers were unprofessional and aggressive in how they approached and spoke with the men. One of the witnesses, Ms X, said that she is usually *"all for the Police, but that was pretty disappointing just to see."*
63. The Police investigation into the officers' conduct found that how the officers approached the situation was a significant factor in causing it to escalate and that more could have been done to de-escalate the situation. We agree with this finding.

### FINDING ON ISSUE 2

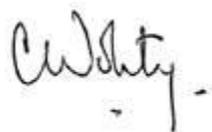
The manner in which the officers dealt with the situation was unprofessional.

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## Subsequent Police Action

64. Following the independent investigation Police have:

- accepted and acknowledged the Authority's findings; and
- apologised to Mr V and removed the formal warning from their system.



Judge Colin Doherty

Chair

Independent Police Conduct Authority

30 November 2021

**IPCA: 20-4980**

## Appendix – Laws and Policies

### LAW

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#### Disorderly behaviour

65. “Section 3 of the Summary Offences Act 1981 –

*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, or incites or encourages any person to behave, in a riotous, offensive, threatening, insulting, or disorderly manner that is likely in the circumstances to cause violence against persons or property to start or continue.”*

66. “Section 4 of the Summary Offences Act 1981 –

(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.”*

#### Power to arrest

67. “Section 315 of the Crimes Act 1961 –

(2) *Any constable, and all persons whom he or she calls to his or her assistance, may arrest and take into custody without a warrant—*

(a) *any person whom he or she finds disturbing the public peace or committing any offence punishable by imprisonment:*

(b) *any person whom he or she has good cause to suspect of having committed a breach of the peace or any offence punishable by imprisonment.”*

68. “Section 39 Summary Offences Act 1981 –

(1) *Any constable, and all persons whom he calls to his assistance, may arrest and take into custody without a warrant any person whom he has good cause to suspect of having committed an offence against any of the provisions of this Act except sections 17 to 20, 25, and 32 to 38.”*

### Formal Warnings

69. Police policy on formal warnings states that:

- Formal warning can be issued from the street or at a Police station for a qualifying offence that meets evidential sufficiency and public interest requirements set out in the Solicitor-General's Prosecution Guidelines.
- The officer must fully consider the circumstances of the incident or investigation against the eligibility criteria and the additional factors above when assessing suitability for a formal warning.
- The evidence available and rationale must be recorded on the file to prove the offence was committed, or a statutory defence applies.

# About the Authority

## WHO IS THE INDEPENDENT POLICE CONDUCT AUTHORITY?

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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?

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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

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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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