

Decision to use force on man in central North Island justified

Summary of the Incident

1. On 10 January 2021, a Police officer went to an address in the central North Island to arrest a man (Mr Z) for breaching his bail conditions. While the officer was attempting to arrest Mr Z, a male relative (Mr X) approached him and intervened. The officer believed he was about to be assaulted, so he punched Mr X in the face.
2. The officer and Mr X exchanged blows before Mr X entered the house, locking the door behind him.
3. After deploying pepper spray at Mr X through an open window, the officer forced the front door and entered, to find that Mr X had escaped through a back window. The following day, Mr X was located at another address and arrested.
4. On 11 January 2021, Mr X's partner complained to the Authority alleging Officer A had used excessive force against Mr X.

The Authority's Findings

5. Officer A was justified in using the force he did against Mr X.

Analysis of the Issues

ISSUE 1: WAS OFFICER A JUSTIFIED IN USING THE FORCE HE DID AGAINST MR X?

Background

6. On 10 January 2021, Mr X was visiting his mother, Ms Y, at her home where she lives with her grandson Mr Z. At the time, Mr Z was on bail, one of the conditions being that he was not to leave the house. The previous evening, Mr Z had left the house and the following day Officer X went to the address to arrest him.
7. At about 10.45am, Officer A arrived at the address, which was in an area he knew well. He had visited on previous occasions and had never encountered any problems. Although Officer A was working alone that day, he believed he was fully capable of arresting Mr Z without incident.
8. When he arrived at the address, Officer A greeted Mr X who was sitting in the carport with a baby in a pram. Ms Y then came to the front door, and Officer A explained to her that he needed to speak to her grandson. Mr Z subsequently came out of the house.
9. While they were standing on the front steps to the house, Officer A told Mr Z that he was under arrest for breaching his bail conditions. At this point Mr X approached Officer A from the carport and intervened, which resulted in Officer A punching Mr X in the face. A fight ensued, after which Mr X and Mr Z retreated inside the house, locking the door.
10. Officer A deployed pepper spray through a window at Mr X, and then broke a glass pane on the front door to gain entry. Officer A found that Mr X had left the house through a back window. He then handcuffed Mr Z, who was still present, and took him to the Police station.

Use of force

Mr X's account

11. Mr X says that he was sitting at a table in the carport, together with his mother and his baby in a pram. The door to the house is within the carport, and Mr X and his mother were sitting about four metres from the door. Mr Z was inside the house.
12. Mr X says that when Mr Z came out from the front door, Officer A approached him and told him he was under arrest but did not explain why.
13. Mr X says that he walked over to where Officer A and Mr Z were standing on the doorsteps. He says that he stood very close to Officer A but did not physically touch him or try to get between the two. Mr X asked Officer A to explain to Mr Z why he was being arrested. He says he was talking calmly to Officer A and was about to walk away when Officer A punched him in the eye.
14. Mr X says that he retaliated by punching Officer A in the face, and a "general fight" broke out between the two, before Mr X was able to run inside the house and lock the door behind him.

15. Mr X says that Officer A deployed pepper spray through an open window at him. He says this was partially effective, so he went into the bathroom to wash his eyes and face before leaving the house through a back window.

Ms Y's account

16. Ms Y was in the carport with Mr X who had come to visit with his baby in a pram. Officer A arrived, and asked to speak with her grandson, Mr Z. When Mr Z came to the door, Officer A told him he was under arrest for having left the house during the night.
17. Ms Y said that Mr X intervened and was talking to Officer A to get him to explain to Mr Z why he was being arrested. She says that Mr X was not touching Officer A, when Officer A punched him in the eye.
18. Ms Y described the fight that followed between Officer A and Mr X, and Mr X's withdrawal into the house. She saw Officer A deploying pepper spray through the window and break the glass in the front door to gain entry into the house.

Mr Z's account

19. Mr Z acknowledged to us that he had briefly left the house the night before to collect his phone from another address, in breach of his bail conditions. He says that when Officer A arrested him on the front doorsteps, he asked if he could go back inside to collect his phone and get dressed.
20. In relation to Mr X approaching them on the doorstep, Mr Z says:

"[M]y uncle must have reached across and grabbed the door handle or something to stop [Officer A] from going inside. ... It happened real fast in about 10 seconds. I turned around and saw [Officer A] punch my Uncle and then Uncle punched him back and they were fighting."

Officer A's account

21. Officer A says that he went to the house to arrest Mr Z. On arrival, he found Mr X sitting in the carport with his baby in a pram, and his mother, Ms Y. Officer A says he explained to them that he needed to speak to Mr Z, and he waited while Mr Z came to the door.
22. Officer A says that he told Mr Z that he was under arrest for having breached his bail conditions the previous evening. Mr Z explained that he had only left the house for a short time to get his phone, but Officer A said he would still have to come with him to the Police Station.
23. At this point, Officer A says that Mr X intervened. In his tactical options report¹ completed immediately after the incident, Officer A says:

¹ An officer is required to complete a TOR when he or she has used a certain level of 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.

“[Mr X] began yelling at me to leave his nephew alone and to do some real work and came over to us and pushed me from behind in the back hard enough to move me slightly.”

24. Officer A says his risk assessment altered at this point and he believed that Mr X was now a threat to him. Officer A told Mr X move away or he would be arrested for obstruction.
25. Officer A says that initially Mr X complied and went quiet, but when Officer A went to follow Mr Z into the house to get dressed and collect his phone, Mr X intervened again by pushing him in the face and chest and being verbally abusive.
26. At this point, Officer A believed that Mr X was becoming more aggressive in his behaviour and he informed Mr X that he was under arrest. Officer A says he was “sandwiched” between Mr X and Mr Z so was unable to deploy his pepper spray and he believed his remaining option was to use closed-hand tactics, so he punched Mr X in the “jaw area” (contrary to Mr X’s assertion that he was punched in the eye).
27. Officer A says the two traded blows. Officer A says that Mr X “started swinging punches” straight away, and Officer A punched back, not being able to back away without the risk of Mr X overcoming him. Officer A stated that at one stage during the struggle, he struck Mr X in the head with his knee.
28. Eventually, Officer A was able to step back and draw his pepper spray, at which point Mr X ran into the house, locking the door behind him. Officer A deployed the pepper spray through an open window towards Mr X but was unsure whether it had any effect.
29. Finding the front and back doors locked, Officer A broke the glass in the front door to gain entry. He believed that it was important enter the house to detain Mr X and Mr Z before they had a chance of escaping.²
30. Officer A drew his Taser on entering the house. He considered that this was necessary, as Mr X was in the “assaultive range” on the tactical options framework.³
31. Officer A found Mr Z in the lounge. He then checked the rest of the house to find that Mr X had left through a rear window. Officer A did not discharge the taser. He then handcuffed Mr Z and took him to the Police Station.

² Officer A’s entry into the house was lawful by virtue of Section 8 of the Search and Surveillance Act 2012, which allows an officer to enter a house without warrant to search for and arrest a person that the officer suspects has committed an offence that is punishable by imprisonment.

³ The tactical options framework (TOF) is a training and operational tool that assists officers to appropriately decide when, how, and at what level to use a tactical option. The TOF guides officers to use force that is necessary and proportionate, given all the circumstances known at the time.

Later events

32. The following day Mr X was located and arrested at another address. He subsequently pleaded guilty to aggravated assault and apologised in writing to Officer A. In his letter, Mr X wrote:

"I ... am apologising to the officer of whom I had assaulted, I wish to take back, and own what I had done, and can only pray that it has caused you no harm.

It is a first ever doing this to an officer of duty for me and do sincerely apologise once again."

Was Officer A's use of force justified?

Punch

33. Officer A told us that he punched Mr X in self-defence, in response to Mr X's increasingly aggressive behaviour. While Officer A does not specifically describe the lawful justification for self-defence in his account of the incident, the Authority has considered his decision to use force in terms of section 48 of the Crimes Act 1961.

34. To rely on a defence under section 48 of the Crimes Act 1961, Officer A's actions must be assessed on the following questions:

34.1 What did Officer A believe the circumstances to be at the time he struck Mr X?

34.2 In light of that belief, were Officer A's actions for the purpose of defending himself?

34.3 Was the force used reasonable in the circumstances as Officer A believed them to be?

What did Officer A believe the circumstances to be at the time he struck Mr X?

35. Officer A recalls Mr X being verbally abusive and being pushed by him in the back, chest and face. Officer A felt that Mr X's behaviour was becoming more aggressive.

36. In his TENR assessment, Officer A says:

36.1 the threat posed by Mr X had increased as he had not responded to communication, and he was becoming more aggressive in his behaviour;

36.2 there was potential for harm to Officer A, with both Mr X and Mr Z present;

36.3 there was a need to act immediately to defend himself from being assaulted by Mr X; and

36.4 he was unable to draw his taser or pepper spray due to being "sandwiched" between Mr X and Mr Z.

37. We accept that these were the circumstances that Officer A believed them to be.

In light of that belief, were Officer A's actions for the purpose of defending himself or others?

38. Officer A says he felt increasingly threatened by Mr X's actions, and the potential involvement of Mr Z. We accept that Officer A's use of force towards Mr X was for the purpose of defending himself.

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

39. There is a conflict of accounts about whether Mr X physically touched Officer A when he approached the doorstep:
- 39.1 Mr X and Ms Y both stated that Mr X did not touch Officer A before being punched. Mr Z's account was less clear on whether there was physical contact between Mr X and Officer A.
- 39.2 Officer A says that Mr X was pushing him in the back, chest, and face, as well as being verbally abusive.
40. Officer A says he could not withdraw due to the close proximity of Mr X and Mr Z, he was in a semi-enclosed space (a carport), and he was not able to deploy his pepper spray. He says he had hoped Mr X would back down after being punched, but this did not deter him and a fight broke out.
41. We believe that Mr X was being obstructive, and his subsequent letter of apology appears to acknowledge that he assaulted Officer A.
42. We accept that Officer A believed Mr X was becoming increasingly aggressive. We also accept that Officer A's options were limited. It seems unlikely that Officer A could have withdrawn from the situation, as we accept he was in between and in close proximity to Mr X and Mr Z. We therefore accept that the single punch to Mr X's face to repel his attack was reasonable in the circumstances.

Use of pepper spray

43. Officer A relied on section 39 of the Crimes Act 1961 to justify his use of pepper spray. This section empowers the use of force when someone is using force to resist arrest. We believe Officer A was mistaken in his reliance on this section, because by the time he used the spray, Mr X had fled into the house and Officer A's main intent was to prevent his escape. Accordingly, we have considered Officer A's use of force against section 40 of the Crimes Act 1961, which empowers Police to use such force as is necessary to prevent the escape of a person after their arrest.
44. *Necessary force* in this context is force that is proportionate to:
- 44.1 The seriousness of the offence for which the person is to be apprehended and the public interest in detaining them in order to bring them to justice; and
- 44.2 The degree and severity of the risk they pose if escape is not prevented.

How serious was the offence for which Mr X was liable to arrest and what was the public interest in bringing him to justice?

45. Mr X initially obstructed Officer A in his attempts to arrest of Mr Z, and then became aggressive towards Officer A, with them subsequently trading blows before Mr X fled into the house. Although the offence of obstruction is at the lower end of the scale in terms of seriousness of offending, Officer A was entitled to affect the arrest without Mr X intervening and we consider there is a public interest and expectation that he was able to do so. We therefore believe Officer A was entitled to use some force to prevent Mr X's escape.

What was the degree and severity of the risk that Mr X was reasonably believed to pose if the escape was not prevented?

46. Mr X had clearly demonstrated the intent and ability to use force against Officer A when they exchanged blows, however we consider it unlikely that Mr X posed a serious risk to anyone else if his escape was not prevented. Therefore, we have considered whether the force used was proportionate in the circumstances.

Was the force used by Officer A reasonable?

47. Police policy on the use of pepper spray includes its use to prevent escape after arrest and provides it can be used when an officer's assessment of a situation is that a person's behaviour is within or beyond the active resistant range on the Tactical Options Framework, and the situation cannot be resolved by less forceful means. The policy describes a person as 'actively resisting' when they are using non-assault physical actions such as pushing or running away in an attempt to prevent control by Police.
48. As outlined above, we accept that it was appropriate for some force to be used to prevent Mr X's escape. Officer A's verbal instructions to Mr X had already proved ineffective and he was prevented from immediately entering the house to physically restrain Mr X. We therefore find the use of pepper spray was reasonable in the circumstances (although it was not particularly effective through a partially open window) and was in compliance with Police policy.

Presentation of Taser

49. Officer A entered a house in which the two men had run, having drawn his Taser.
50. The Police Tactical Options Framework states that an officer is entitled to use a low degree of force when a person is within the range of active resistance. In this case, Officer A presented his Taser at Mr Z, but turned it off once it was apparent that he would comply with Officer A's instructions. The Police policy on the use of force describes Officer A's presentation of a Taser as a 'show' of force.
51. The Police investigation concluded that Officer A's presentation of the Taser complied with Police policy. This states that an officer may show a Taser (which includes presentation, laser painting, or arcing) as a deterrent in situations below the assaultive range on occasions where the officer's risk assessment (PCA) is such that it is necessary because the situation had the potential to escalate to within, or beyond, the assaultive range.

52. We are satisfied that Officer A's presentation of the Taser complied with Police policy, as Mr Z was actively resisting (having run into the house), and Mr X had been assaultive.

FINDINGS ON ISSUE 1

Officer A was justified in his use of force against Mr X.

Officer A was justified in his use of pepper spray towards Mr X.

Police investigation

Police reviewed the incident following receipt of the complaint. Police concluded that Officer A's use of force was justified and complied with Police policy. However, the Police investigation also found that Officer A's decision to enter the house on his own under the circumstances was not tactically prudent from the perspective of risk to his personal safety. This was addressed with Officer A by way of a lessons-learnt conversation which we agree was appropriate.



Judge Colin Doherty

Chair
Independent Police Conduct Authority

7 December 2021

IPCA: 21-6136

Appendix – Laws and Policies

LAW AND POLICY

Law

53. Section 40 of the Crimes Act 1961 empowers Police to use “such force as is reasonably necessary” to prevent escape.
54. 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.”
55. Section 8 of the Search and Surveillance Act 2012 allows a Police officer to enter a house without warrant to search for and arrest a person that the officer suspects has committed an offence that is punishable by imprisonment.

Police policy

56. The Police ‘Use of Force’ policy provides guidance to Police officers about the use of force. The policy sets out the options available to Police officers when responding to a situation. Police officers have a range of tactical options available to them to help de-escalate a situation, restrain a person, effect an arrest, or otherwise carry out lawful duties. These include communication, mechanical restraints, empty hand techniques (such as physical restraint holds and arm strikes), OC spray, batons, Police dogs, Tasers and firearms.
57. Police policy provides a framework for officers to assess, reassess, manage and respond to use of force situations, ensuring the response (use of force) is necessary and proportionate given the level of threat and risk to themselves and the public. Police refer to this as the TENR (Threat, Exposure, Necessity and Response) assessment.
58. The overriding principle when applying TENR is that of “safety is success”. Public and employee safety are paramount, and every effort must be made to minimise harm and maximise safety.
59. The TENR risk assessment must balance the ongoing exposure to harm, with the current threat and the necessity to respond. This will determine the Police response.
60. Police officers must also constantly assess an incident based on information they know about the situation and the behaviour of the people involved, and the potential for de-escalation or escalation. The officer must choose the most reasonable option (use of force), given all the circumstances known to them at the time. This may include information on: the incident type, location and time; the officer and subject’s abilities; emotional state, the influence of drugs and alcohol, and the presence or proximity of weapons; similar previous experiences; and environmental conditions. Police refer to this assessment as an officer’s Perceived Cumulative Assessment (PCA)).

61. A key part of an officer's decision about when, how, and at what level to use force depends on the actions of, or potential actions of, the people involved, and depends on whether they are: cooperative; passively-resisting (refuses verbally or with physical inactivity); actively resisting (pulls, pushes or runs away); assaultive (showing an intent to cause harm, expressed verbally or through body language or physical action); or presenting a threat of grievous bodily harm or death to any person.
62. The policy states that any force must be considered, timely, proportionate and appropriate given the circumstances known at the time. Victim, public and Police safety always takes precedence, and every effort must be taken to minimise harm and maximise safety.
63. Ultimately, the legal authority to use force is derived from the law and not from Police policy.

About the Authority

WHO IS THE INDEPENDENT POLICE CONDUCT AUTHORITY?

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

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