

The Authority's Findings

8. The Authority found that:
 - 1) Police were justified in using pepper spray on Mr X.
 - 2) Officer A was not justified in jumping on Mr X to prevent his escape.
 - 3) Officer A was not justified in punching Mr X in the head to overcome his resistance to arrest.
 - 4) Officer A was not justified in jumping on and punching Mr X for the purpose of defending himself or others.
 - 5) Police provided appropriate medical aftercare to Mr X.

Analysis of the Issues

9. This incident involved four alleged uses of force. The justification for three of these, the use of pepper spray, Officer A jumping on Mr X's back and punching him are in dispute.
10. Mr X also complained that Police stomped on his head, resulting in a cut on his scalp that required stitches. He does not remember being stomped on but believes that this is the only explanation for his injury. We questioned the officers about Mr X's allegations, and all deny stomping on Mr X or seeing another officer do so. There is a metal drainage grate with a sharp edge where Mr X was pinned to the ground, and we are satisfied that contact with this grate at that time is the likely cause of Mr X's injury. We will not consider that matter further.

ISSUE 1: WERE POLICE JUSTIFIED IN PEPPER SPRAYING MR X?

11. At 1.43am, a Police dog handler (Officer B) saw a suspicious car being driven with its headlights off in a suburban street in Hastings. The officer followed in his patrol car (without pursuing) and found the car parked in a nearby driveway.
12. Officer B saw Mr X getting out of the driver's side of the car. He told Mr X to stay where he was and as he approached, he saw a rifle case on the car's back seat. Mr X ran off.
13. The officer waited with the car and called for assistance because he did not want to leave the unsecured firearm inside the car. Officer A and a colleague arrived. The officers searched the car, and found a .22 calibre rifle and ammunition, a radio scanner, a small amount of cannabis, a methamphetamine pipe, and other drug-related items inside the car.¹ Officer B and his dog unsuccessfully tried to track Mr X.

¹ Section 18 of the Search and Surveillance Act 2012, see appendix paragraph 69.

14. At about 4.30am, Officer B saw Mr X on a footpath. He approached and told him he was under arrest, but Mr X fled again. Officer B and his dog started to track him for a second time while other officers set up cordons.
15. Mr X was found at a construction site, where he was hiding inside a skip bin. Officer B told Mr X that he was under arrest and to give up.
16. Mr X got out of the skip bin and jumped over a temporary fence into an enclosed yard in the construction site. Officer B called for assistance over the Police radio. Officer C arrived and saw Mr X walking around in the yard. He told Mr X that he was under arrest and instructed him to get down on his knees and keep his hands where they could see them. Mr X refused to listen and did not comply with any of his instructions.
17. Mr X jumped the fence, ran up a flight of stairs and tried to open a door into a building. It was locked and he ran down again.
18. Officer A arrived and saw Mr X standing near the bottom of the stairs. He told him to stop where he was, but Mr X climbed back over the fence into the yard and started running around.
19. Mr X told us that when he saw the Police dog, he decided to give up. He jumped onto a wooden fence and told the dog handler he was giving up. He was pepper sprayed by the dog handler. Mr X remembers being pepper sprayed only once.
20. Officer B says he repeatedly told Mr X that he was under arrest and to give up. Mr X said, “*get fucked!*” and “*fuck you!*” Mr X ran towards a wooden part of the fence next to a service lane leading out into the street. Officer B ran towards the wooden fence and sprayed a single burst of pepper spray at Mr X’s head as it came above the fence line.
21. Mr X ran back to the northern end of the yard, still refusing to comply with instructions. This was where Officer A was. Officer A believed Mr X “*showed extreme intent to escape*”, and as Mr X ran towards his side of the fence, he sprayed him. Mr X turned around, and the spray made contact with the back of his head.
22. The law allows Police to use “*such force as may be necessary*” to prevent the escape of someone who takes to flight in order to avoid arrest, or to prevent the escape or rescue of a person after their arrest.²
23. We accept that the officers believed Mr X was trying to evade Police. There were many chances for him to give up, and each time he chose to run away from the officers. All of the officers deny that he said he was giving up. It was reasonable for the officers to conclude that Mr X was trying to escape the yard when he approached the fence and was sprayed.

² Section 40 of the Crimes Act 1961, see appendix paragraph 71.

24. Pepper spray is a relatively low use of force, which policy prescribes officers may use when a person is resisting arrest. It was proportionate and reasonable for the officers to use pepper spray to stop Mr X from trying to escape so he could be arrested.³

FINDING ON ISSUE 1

Police were justified in using pepper spray on Mr X.

ISSUE 2: WAS OFFICER A JUSTIFIED IN JUMPING ON MR X AND PUNCHING HIM IN THE HEAD?

25. Mr X told us that after he had been pepper sprayed, several officers told him to get down on the ground. He lay face down onto the ground and saw three officers opening a part of the fence. He says the officers came through the fence and attacked him while he was lying on the ground. Although he does not remember being jumped on, Mr X remembers subsequently being punched.
26. Conversely, Officer A says Mr X moved into the middle of the yard after he was pepper sprayed. Officers C and E helped Officer A to lift a section of the fence from its footing, creating an opening through which the officers entered the yard.
27. Officer A says he went through the fence first and saw Mr X *“was kneeled down rubbing his eyes”* about five to seven metres away from him. He judged the pepper spray was taking effect. Officer A says Mr X went from a kneeling to a prone position on his stomach. He believed Mr X was *“either trying to evade my tackle or me pinning him to the ground.”* He did not think Mr X was giving up.
28. In assessing the situation, he was also mindful that Mr X might be armed or concealing some other weapon in his baggy clothing or be affected by drugs. He assessed Mr X needed to be brought under control quickly.
29. Officer A ran and jumped onto Mr X’s back, breaking the fall with his knee. He landed with his knee on Mr X’s upper-right shoulder, near the base of his neck.
30. Officer A is of large build, and we believe this force is the likely cause of the rib fractures, punctured lung, and fractured neck vertebrae suffered by Mr X.
31. While kneeling on Mr X’s back, Officer A says Mr X held both his arms underneath him. He told Mr X to release his arms and tried to pull Mr X’s arms out to apply handcuffs, but Mr X kept them rigid and would not give them up. Officer A says he believed Mr X continued to pose a risk by possibly having a weapon when he held his hands under his body and would not release them.
32. Officer A punched Mr X a couple of times to the right side of his head to force him to release his hands. He describes these as short, fast punches.

³ Police policy on the use of pepper spray, see appendix paragraph 83.

33. He again told Mr X to release his arms, but Mr X continued to hold them underneath him. Officer A again punched Mr X on the right side of his head. Officer A says he was aware that Officer C was present, but was not aware that Officers D and E had also arrived to help control Mr X.
34. We asked Officer A about the force he used, and his reasons for doing so. He told us he believes he was justified in jumping on Mr X's back and punching him in order to overcome the force Mr X was using to resist arrest.⁴
35. He also says he was acting in self-defence and defence of others.⁵

Was Officer A legally justified in jumping onto Mr X's back to prevent him from escaping?

36. Section 39 of the Crimes Act empowers Police to use "*such force as may be necessary*" to overcome any force used in resisting an arrest, or the execution of any sentence, warrant, or process. However, section 39 does not apply to jumping on Mr X's back, as kneeling or lying on the ground cannot be considered as force used to resist the arrest.
37. Officer A says he also interpreted Mr X's actions as evasive, and that Mr X went to the ground to evade his tackle. Section 40 of the Crimes Act empowers an officer to use reasonable force to prevent a person escaping custody.
38. In order to have used force in these circumstances, Officer A had to have believed on reasonable grounds that Mr X was actually fleeing to escape or avoid arrest.
39. There is an unresolved difference in the accounts as to whether Mr X was already lying down, or in the process of moving to the ground, when Officer A started running towards him. Further, Officer D says several officers, including himself, yelled at Mr X to get down on the ground. It appeared to Officer D as if Mr X obeyed his instructions and went onto the ground. Officer A says he did not hear these commands. Officer E told us that he assisted Officer A and C in lifting the fence from the ground. According to Officer E Mr X was already lying down on the ground when they lifted the fence, before Officer A ran at, and jumped onto Mr X.
40. Officer A says he did not think Mr X was giving up. He says it was not clear what Mr X was trying to do by going to the ground, but it was possible he was trying to dodge or escape.
41. However, Officer A also knew that Mr X was affected by pepper spray, was within a fenced yard, and other officers and a Police dog were present.
42. Consequently, we do not accept that Officer A reasonably believed that Mr X was fleeing or otherwise attempting to avoid arrest at that time. Officer A was therefore not justified under section 40 in jumping on Mr X as he did.

⁴ Section 39 of the Crimes Act 1961, see appendix paragraph 70.

⁵ Section 48 of the Crimes Act 1961, see appendix paragraph 72.

Was Officer A justified in punching Mr X in the head to get him to release his arms?

43. Officer A says Mr X held his hands rigid under his body and would not release them when directed so he could be handcuffed. He instructed Mr X to release them and punched him in the head several times to get him to release his hands. He says he also thought there was a possibility that Mr X was holding a weapon underneath his body, and this added to his urgency to get him under control.
44. Officers C, E and D say they arrived in a matter of seconds after Officer A landed on Mr X's back. Officers C and D each took hold of an arm, and Officer E restrained Mr X's legs. The officers confirmed Mr X was holding his hands inward, but they managed to pull them from underneath him and safely handcuffed him.
45. There is no doubt that at this stage Mr X was forcefully resisting being handcuffed and that Police were entitled to use force to overcome that. We accept that Officer A reasonably believed that this was the case.
46. However, we do not accept that it was reasonable for Officer A to punch Mr X in the head several times to get him to release his arms, even believing there was a remote possibility that he could have a weapon on his person.
47. Officer A was aware that Officer C was present and heard other officers yell at Mr X (as well as Officer B, although he was controlling his dog) and could have waited a few moments for assistance to pull Mr X's arms out from under him and secure him. In other words, the force used in punching Mr X was simply unnecessary to overcome his resistance; evidenced by the fact that Officer C and D managed the same with less force.
48. As a less forceful option was available for Mr X to be secured and handcuffed, Officer A's use of force was not justified.

Was Officer A legally justified in jumping on Mr X and punching his head to defend himself or his colleagues?

49. Officer A says he seized an opportunity and used force to bring Mr X under control before the situation escalated to the point where he or his colleagues were hurt.
50. A Police officer may use force for the purpose of defending themselves or another if the force is reasonable in the circumstances, as the officer believed them to be.⁶
51. The legal test for section 48 is subjective in relation to the officer's view of the circumstances and their purpose in using force, and objective in relation to whether the force was reasonable in those circumstances.

⁶ Section 48 of the Crimes Act 1961, see appendix paragraph 72.

What were the circumstances as Officer A believed them to be? (a subjective test)

52. Officer A says he believed that Mr X posed a threat to himself and his colleagues, due to the contents of the car he had run from and his persistence in trying to get away from Police. Specifically, he says he believed Mr X could:
- be armed as he had run from a car containing a firearm;
 - have picked up a weapon of opportunity from the skip bin or construction yard;
 - be concealing a weapon within the baggy clothing he was wearing; and
 - be under the influence of methamphetamine making him more unpredictable and dangerous to deal with. His behaviour was erratic and the contents of the car he had run from indicated that he had access to drugs.
53. Officer A says there was a window of opportunity, while Mr X was kneeling and distracted by the pepper spray, to “get him [Mr X] under control” and prevent the situation from escalating to the point where he or his colleagues were hurt.
54. He believed he had limited tactical options available to him. The tactical options used so far, the communication and pepper spray, had not been effective in controlling Mr X. Officer A also considered that a Taser may not be effective as Mr X’s baggy clothes could hold the Taser bars away from his body, preventing the electric current from causing neuromuscular incapacitation.
55. Officer A believed Mr X continued to pose a risk by having a weapon when he held his hands under his body and would not release them. He was aware that Officer C was behind him, but was not aware that Officers D and E were also nearby to help control Mr X.

Do we accept that Officer A genuinely believed the circumstances to be as he described?

56. We accept Officer A perceived Mr X posed a level of threat based on the possibility that he might have had a concealed firearm or other weapon. We also accept that, had Mr X possessed a weapon, this could have had serious consequences for the officers dealing with him; even more so if Mr X was affected by methamphetamine.
57. However, we do not accept that he perceived the threat as more than a remote possibility for the following reasons:
- Officer A described the risk as ‘possible’ and not ‘likely’ when speaking to us.
 - Officer A did not have any evidence on which to base his belief that Mr X was armed, other than the contents of the car Mr X had run from. Officer A did not say he saw a weapon on Mr X, nor did he say that Mr X threatened anyone.
 - Further, if Officer A thought Mr X was looking for a weapon in the yard, it was more likely than not that he did not already have one. Again, Officer A did not see Mr X pick one up.

- The fact that Officer A, an experienced officer, did not hesitate to run towards Mr X, exposing himself to the threat of weapons, speaks to his perception there was a low likelihood that the threat would eventuate.

58. We also do not accept that Officer A perceived an imminent risk, that required immediate action. Officer A spoke of taking a “*window of opportunity*” while Mr X was in a vulnerable position. He acted at a time of his choosing to prevent the possibility of the threat escalating, rather than at a time forced upon him by the actions of Mr X. It was a tactical decision, rather than a reaction to an immediate and pressing threat.

Was Officer A’s use of force against Mr X for the purpose of defending himself/herself or another?

59. We accept that Officer A acted to defend himself and others by preventing Mr X from reaching for, and using a potential weapon, as he says. Even though the threat was unlikely, the belief was genuinely held, and we have no reason to believe Officer A jumped on and punched Mr X purely because he wanted to harm him.

Was Officer A’s use of force against Mr X reasonable in the circumstances as he believed them to be? (an objective test)

60. We accept that officers have to consider potential risks in deciding what tactics they may adopt.

61. However, in this case we have concluded that Officer A must have perceived that the risk Mr X posed to the safety of the officers was both very low and not imminent (however serious the consequences may have been if the risk eventuated).

62. Given that, his actions in jumping on Mr X with his full weight to complete the arrest when Mr X was kneeling and then lying on the ground, were entirely disproportionate to the risk. Officer A was aware that Officer C was close by, and the two of them could have taken physical control of Mr X without exerting significant force. Instead, he used extreme force which caused significant injury.

63. Equally, when Officer A had pinned Mr X to the ground, we do not think it was necessary to punch him. Mr X did not pose such an immediate threat that Officer A could not wait for colleagues to assist him to pull Mr X’s hands out from underneath him and apply handcuffs, which is what ultimately happened.

FINDINGS ON ISSUE 2

Officer A was not justified in jumping on Mr X to prevent his escape.

Officer A was not justified in punching Mr X in the head to overcome his resistance to arrest.

Officer A was not justified in jumping on and punching Mr X for the purpose of defending himself or others.

ISSUE 3: DID POLICE PROVIDE APPROPRIATE MEDICAL CARE TO MR X?

64. Mr X complained that after his arrest, Police refused to let him wash the pepper spray out of his eyes. He was bleeding from his head, but Police did not call an ambulance.
65. Police say Mr X refused first-aid offered on the scene and refused to give his name. Officer F spoke to Mr X, who only mentioned that he had pain from the cut to his head. According to the officer, Mr X was standing, and his breathing seemed normal.
66. Officer F knew that Mr X had been pepper sprayed and applied a water-based aftercare spray and dabbed his face. He asked Mr X to open his eyes to spray some of the aftercare into them, assuring him it would help. A nearby officer saw this. Mr X refused the assistance and did not complain about the pepper spray from this point onwards.
67. As Police did not know his identity, they decided to take him to the station to take his fingerprints. Police arranged for an ambulance to meet Mr X at the gate of the Police station first. Ambulance staff treated Mr X and informed Police that he did not need to go to the hospital straight away. After fingerprinting Mr X, he was taken to hospital.
68. Police cannot treat or provide aftercare to someone without their consent. The extent of Mr X's injuries was unknown at the time. An ambulance was called for Mr X and Police acted on the medical advice given to them. We do not believe Police unreasonably delayed Mr X's medical treatment. He was taken to a hospital immediately after they verified who he was.

FINDING ON ISSUE 3

Police provided appropriate medical aftercare to Mr X.



Judge Colin Doherty

Chair

Independent Police Conduct Authority

11 October 2022

IPCA: 21-6280

Appendix – Laws and Policies

LAW

Searches

69. Section 18 of the Search and Surveillance Act 2012 allows a Police officer to search any person or vehicle without a warrant if the officer has reasonable grounds for believing that someone is incapable of having proper control over a firearm, or a person is in breach of the Arms Act 1983.

Use of force defences

70. 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.”*
71. 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”*, unless the escape can be prevented *“by reasonable means in a less violent manner”*.
72. Section 48 of the Crimes Act 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.”*
73. Under section 62 of the Act, anyone who is authorised by law to use force is criminally responsible for any excessive use of force.

POLICY

Police ‘Use of force’ policy

74. 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.
75. 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.

76. 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.
77. 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.
78. 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)).
79. 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.
80. ‘Empty hand tactics’ refers to a weaponless use of force, such as grabbing hold of, pushing, or punching a person. Officers can use empty hand tactics to distract or control someone and also to defend themselves or others.
81. 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.
82. Ultimately, the legal authority to use force is derived from the law and not from Police policy.

Police ‘Pepper spray’ policy

83. Police policy states that pepper spray may only be used on someone who is actively resisting and then only when the situation cannot be resolved by less forceful means. Active resistance includes physical actions such as pulling, pushing, or running away – that is, “more than verbal defiance”.

Head injury policy

84. The policy states that Police have a responsibility to ensure that people in their custody are managed appropriately in the event of a potential head injury. A head injury may not always be immediately evident, and signs and symptoms can be delayed. Head injuries can result from a knock or punch to the head, the head hitting the ground or an object, being hit by an object, a fall, or a vehicle accident. This may result in concussion, a blood clot, or a bleed to the brain. Any potential head injury occurring as a result of Police activities must be assessed by a medical practitioner.

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 Judge Colin Doherty chairs.

Being independent means that the Authority makes its 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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