

Use of a Taser on a man fleeing Police in Parnell

OUTLINE OF EVENTS

1. On Friday 15 June 2018, Mr X and his partner, Ms Y, were arguing. In the early afternoon Mr X drove them to a Police office in Parnell, Auckland, as he wanted to seek advice about their domestic situation. As Mr X and Ms Y continued to argue, they attracted the attention of an officer who approached them. Ms Y soon walked off with the couple's two young children. Mr X spoke briefly with the officer and provided his details, and sometime later returned to the family's apartment in Parnell.
2. The officer did not consider the argument between Mr X and Ms Y to warrant Police intervention, but thought it prudent to request that someone check on the welfare of the children later that afternoon. He reported the matter to the Police Northern Communications Centre, which dispatched Officers A and B to conduct the check. At this time, Officers A and B had been in Police for one year.
3. The officers arrived outside the family's apartment at about 5pm. They found Mr X in his car, about to drive out in search of Ms Y and the children who had not yet returned home. Upon checking the Police database, Officers A and B learned that Mr X had an outstanding 'warrant to arrest' for non-payment of fines totalling over \$3,000.
4. Mr X asked the officers not to arrest him, and said he would sort out the fines. He explained to the officers that he was needed at home to administer his son's cancer medication every morning and evening. He then took the officers up one flight of stairs and into his apartment to show them the medication as proof.
5. Ms Y and the children arrived home, and Ms Y became upset that Police were there. Officer A decided it was best to separate Mr X and Ms Y, by arresting Mr X. He directed Mr X to give his son the medication, after which the officers would take Mr X into custody. Meanwhile, Officer B decided to call their sergeant, Officer C, for advice on whether it was necessary to arrest Mr X.

6. Mr X went to the kitchenette area of the apartment, appearing to begin to prepare the medication, but instead decided to flee from the officers to avoid being arrested. He ran to the balcony, and Officer A immediately chased after him. Mr X jumped over the balcony's railing onto the concrete about four metres below. As Mr X landed, he broke his ankle.
7. Unaware of this, Officer A drew his Taser, put one of his legs over the balcony's railing and fired the Taser at Mr X. A scene examination later revealed that this Taser discharge missed Mr X, with both barbs lodging in a wooden fence nearby.
8. Mr X attempted to stand and Officer A, believing that Mr X was starting to run off, fired the Taser again. Both barbs connected with Mr X and he fell forward onto the ground.
9. Officer B went down to handcuff Mr X, and more officers arrived at the scene. Officer B called for an ambulance which took Mr X to hospital.
10. Police investigated the incident and found Officer A had breached Police policy by using the Taser in these circumstances. Police decided to address this as a performance issue and gave Officer A further training and supervision.
11. Police also notified the Authority of this incident, which the Authority independently investigated. This report sets out the results of that investigation and the Authority's findings.

THE AUTHORITY'S INVESTIGATION

12. The Authority interviewed Mr X, Ms Y, and a man who witnessed Mr X jumping off the balcony, as well as Officers A, B, C and the officer who initially spoke to Mr X. The Authority also visited the scene of the incident and reviewed documentation produced by the Police investigation.
13. The Authority identified and considered the following issues:
 - 1) Was it necessary for Police to arrest Mr X in the circumstances?
 - 2) Was Officer A's use of the Taser lawful and reasonable?
 - 3) Did Police provide appropriate medical assistance?

THE AUTHORITY'S FINDINGS

Issue 1: Was it necessary for Police to arrest Mr X in the circumstances?

14. Police had a warrant to arrest Mr X for non-payment of fines totalling over \$3,000, and therefore had legal justification for taking Mr X into custody.
15. Mr X explained to the officers that his two-year-old son was being treated for neuroblastoma, a rare form of cancer. The family had moved from Christchurch to Auckland for the son to receive a bone marrow transplant and be closer to the Starship Children's Hospital for treatment.

16. Mr X said he had been trained to prepare his son's chemotherapy medication and had to administer it in the morning and evening. Mr X also said Ms Y was unable to prepare or administer the medication, due to the risk it posed to her fertility. Consequently, Mr X asked the officers if they could use their discretion to allow him to sort his fines out directly with the court, rather than arresting him.
17. Officer B asked Mr X if he could verify his story, and he agreed to take both officers upstairs into his apartment to show them the medication and the process involved in administering it. Mr X took the officers into the kitchenette area and showed them the various medications, syringes and other items he used to administer his son's medication.
18. Officer B asked for Ms Y's mobile number, so she could call her to discuss the situation. Mr X could not recall the number, so he provided Officer B with the mobile number of Ms Y's father. While she was on the phone to Ms Y's father, Officer B walked out to the front stairwell and saw Ms Y and the two children arriving home. Ms Y became very angry that Police were there. Inside the apartment, Ms Y continued to be hostile towards the officers and Mr X. Because of the heated arguing, Officer A took Mr X out to the stairwell area.
19. At this point Officer A decided to arrest Mr X for the fines warrant. He told Mr X to give his son the medication now, and then the officers would take him into custody. Officer A later said the arrest would enable Mr X to sort out his fines warrant, and:

*"I considered issuing a Police Safety Order, however I believed that arresting [Mr X] for his fines warrant would do the same thing and provide them some time to cool off as [Mr X] would be in Police custody overnight."*¹

20. Officer A also told the Authority that Mr X had no other place to stay:

"... but for us dealing with family violence if the person doesn't have the place to stay, we have the place for him to stay ... it's the place just for all the perpetrators, you can stay there and relax."

21. As it was a Friday evening, Mr X was worried he would be held in custody over the weekend and therefore be unable to continue administering his son's medication. He told the Authority: *"No one else is allowed to touch the treatment, right, or get passed on to [administer] the treatment because they don't know how many doses I've given him."* Mr X pleaded with Officer A not to take him to the Police station, but Officer A replied that he would have to go.
22. When interviewed, Officer A initially told the Authority that he had not thought about the fact that arresting Mr X could prevent him from giving his son the chemotherapy medication over the weekend. He thought Mr X just did not want to be arrested. Later in the interview, Officer A said he had advised Mr X there would be a Saturday court session in the morning, and *"You're gonna go home maybe after lunch time."*

¹ A Police Safety Order (PSO) can be issued to a person who is, or has been, in a family relationship with another person, if the constable has reasonable grounds to believe that the issue of an order is necessary to help prevent family violence. A PSO can be issued for up to ten days, and would have required Mr X to leave the apartment.

23. According to Officer A, the arrest was motivated by two factors: firstly, the need to sort out Mr X's fines; and secondly, the need to separate Mr X and Ms Y.
24. While he was quite entitled to execute the warrant for Mr X's arrest, a more considered and empathetic decision by Officer A is likely to have put more weight on the fact that Mr X needed to provide timely medical treatment to his son. Rather than arresting him, Officer A could have arranged for Mr X to make a voluntary appearance at court to sort out his fines.
25. As for the situation between Mr X and Ms Y, there had been no physical violence. Ms Y was clearly upset, but this was triggered by the officers' presence at their apartment. If the officers were nonetheless concerned about leaving Mr X and Ms Y together, they could have further explored the availability of other options for separating them which enabled Mr X to provide his son with the medication he needed on schedule. It appears that Officer A saw arresting Mr X for his fines as the most convenient way to achieve the separation.
26. While Officer A supervised Mr X preparing his son's medication, Officer B sought advice from her supervisor, Officer C, to confirm whether they should arrest Mr X. Officer C later said he was advising Officer B not to arrest Mr X when he heard the commotion of Officer A tasing Mr X.
27. These matters are judgement calls made under pressure. In this case, the Authority considers Officer A made the wrong call.

FINDING ON ISSUE 1

Although Officer A had legal justification for arresting Mr X, it was neither necessary nor desirable to do so in the circumstances.

Issue 2: Was Officer A's use of the Taser lawful and reasonable?

28. Mr X was still at the kitchen bench when, without warning, he quickly ran from the kitchenette out onto the apartment's balcony. He jumped over the balcony's railing onto the concrete below. Unknown to Officer A, Mr X broke his ankle as he landed.
29. Officer A said he originally intended to jump off the balcony to chase Mr X, but did not do so because of the weight of his Stab-Resistant Body Armour. He thought he would break his leg if he jumped.
30. Therefore, Officer A fired his Taser twice from the balcony at Mr X on the concrete below. The first firing missed. Officer A said Mr X then "*stood up, he started running and there was the second contact*". The second firing lasted for a full cycle of five seconds. The Taser camera (TaserCam) footage shows that prior to the second firing Mr X began to stand up, was immediately tasered and fell to the ground.
31. The Taser records show that the Taser 're-energised' twice after the second discharge, for less than one second and then for 1.5 seconds. Officer A told the Authority this happened because his finger accidentally tapped the Taser's 're-energise' button, which is located near the trigger.

Use of force for defence

32. Officer A maintained that his use of the Taser was justified under section 48 of the Crimes Act 1961, which states:

“Every one 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.”

33. To rely on this justification for his use of force, Officer A’s actions must be assessed on the following three questions:

- 1) What did Officer A believe the circumstances to be at the time he tasered Mr X?
- 2) In light of that belief, was Officer A’s use of the Taser for the purpose of defending himself or others?
- 3) If it was, 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 tasered Mr X?

34. Officer A said that, before Mr X fled:

“I could tell that [Mr X] was agitated. He was really upset that Police [were] going to take him to the custody [unit]. He didn't want to go. He was crying and upset that Police [were] going to detain him.”

35. Officer A said he unclipped his Taser’s holster, because he did not know what was going to happen and the kitchen is a dangerous area: *“... there’s weapon opportunity, [there] can be a knife or something. I just have to keep an eye on him the whole time.”*

36. According to Officer A, Mr X pushed Ms Y *“really hard”* as he ran to the balcony. However, Mr X told the Authority Ms Y was not in his way and he did not touch her. Ms Y said she was sitting by the door to the balcony, and confirmed Mr X did not touch her as he ran past.

37. In his Tactical Options Report (TOR),² Officer A described Mr X as ‘assaultive’, which under Police policy means *“intent to cause harm, expressed verbally, through body language, or physical actions”*. He said:

“[Mr X’s] intent was to escape Police custody and [he] was prepared to assault his partner in the process in order to get away.... I was concerned that if he got away he would get into neighbouring properties and other members of the public may be at risk.”

38. Officer A told the Authority he had tasered Mr X because: *“...he just did something to his partner and he just escaped my custody.”* When asked whether Mr X was a danger to anyone after he

² 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.

jumped from the balcony, A said, *“Well at that stage I would say I’m not sure really”*, but Mr X might go to the people living downstairs and *“may kick someone down so I decided to stop him....”*

39. The Authority does not agree that Mr X was assaultive, because it considers that Mr X had not displayed any violent or threatening behaviour. Even if he did push past Ms Y, his clear intention was to get to the balcony and escape rather than inflict harm on her. Furthermore, he had no weapon and was not being arrested for a violent offence.
40. However, Officer A had relatively little experience as a Police officer and it is clear from his descriptions of the danger Mr X posed that he was highly sensitive to potential risks. While Mr X and Ms Y denied that Mr X had pushed her, it is possible that Mr X brushed or pushed past her on his way to the balcony, given the confined space of the apartment. For these reasons the Authority does not consider that Officer A was dishonest about his perception that Mr X had assaulted Ms Y.
41. Nonetheless, the Authority does not accept that Officer A genuinely believed Mr X posed a risk to Ms Y or his neighbours at the time Officer A tasered him. As noted above, Officer A himself acknowledged that he was not sure Mr X was a danger to anyone at that point. His suggestion that Mr X might enter neighbouring properties and *“kick someone down”* was speculative and far-fetched. Officer A was not aware of anyone else being in close proximity to Mr X as he landed on the concrete, and the TaserCam footage shows Mr X did not have the chance to threaten anyone before he was tasered.

Was Officer A’s use of the Taser for the purpose of defending himself or others?

42. The Authority is not satisfied that Officer A fired the Taser to defend himself or others, because Mr X had just run away from the officers and Ms Y, removing any imminent threat Officer A believed he posed to them. As explained above, the Authority does not accept that Officer A believed Mr X posed an immediate danger to anyone else after he jumped from the balcony.
43. Considering the circumstances and the speed in which Officer A used the Taser, it is far more likely that his overriding intention was to stop Mr X from escaping.
44. Therefore, section 48 of the Crimes Act did not provide Officer A with justification to use the Taser against Mr X.

Was there any other justification for Officer A’s use of the Taser?

45. Officer A also said he was justified in using the Taser on Mr X under sections 39 and 40 of the Crimes Act.
46. Section 39 empowers Police to use force that is needed to overcome any force used in resisting an arrest. In this case Mr X did not use force to resist arrest; he ran away.
47. Therefore, the appropriate provision in these circumstances is section 40, which states that Police may use:

“... such force as may be necessary to prevent the escape of [someone who] takes to flight in order to avoid arrest... unless in any such case the escape... can be prevented by reasonable means in a less violent manner.”

48. The Court of Appeal has determined that *“such force as may be necessary”* to prevent an escape means such force as is reasonable in the circumstances as the person who used the force reasonably believed them to be.³
49. Police policy also provides that the use of a Taser must be *“necessary, proportionate and therefore reasonable in the circumstances”*, and officers must have *“an honest belief that the subject poses an imminent threat of physical harm”*.
50. The Authority accepts there were no *“less violent”* options than a Taser which Officer A could have used to prevent Mr X’s escape. However, for the reasons set out above, the Authority finds that it was not necessary for Officer A to taser Mr X in the circumstances. The use of that level of force was not proportionate to the nature and purpose of the arrest, or the risk Mr X posed. It was therefore unreasonable.

FINDING ON ISSUE 2

Officer A’s use of the Taser was not lawful or reasonable in the circumstances.

Issue 3: Did Police provide appropriate medical assistance?

51. After using the Taser, Officer A remained on the balcony shouting at Mr X, telling him to stay there and not move. Ms Y was yelling at Officer A, asking why he had tasered Mr X. Officer B was still on the phone and heard the commotion as she was talking to Officer C.
52. Officer A told Officer B to go down and handcuff Mr X, which she did. Officer B said Mr X sounded as if *“he [was] in excruciating pain”* and said something like *“Oh my ankle, my hips”*. Shortly after, other officers arrived and they tried to make Mr X comfortable by sitting him up against a wall and removing the handcuffs.
53. Officer B called for an ambulance. Mr X said the ambulance staff removed the Taser probes, before taking him to hospital where he received treatment for his broken ankle.

FINDING ON ISSUE 3

Police provided appropriate medical assistance to Mr X.

³ R v Haddon [2007] NZAR 135 (CA), at para 40.

CONCLUSIONS

54. The Authority found that:

- 1) Officer A's use of the Taser was not lawful or reasonable in the circumstances;
- 2) although Officer A had legal justification for arresting Mr X, it was not necessary in the circumstances; and
- 3) Police provided appropriate medical assistance to Mr X.

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

Judge Colin Doherty

Chair
Independent Police Conduct Authority

17 October 2019

IPCA: 17-2564

Law on the use of force

55. 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 enforcements 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.”*
56. Section 40 of the Crimes Act allows for law enforcement officers to apply necessary and reasonable force when someone is attempting to avoid arrest by escaping or fleeing.
57. 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.”*
58. Under section 62 of the Act, anyone who is authorised by law to use force is criminally responsible for any excessive use of force.

‘Use of Force’ policy

59. The Police’s ‘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, retrain 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.
60. Police policy provides a Tactical Options Framework (TOF) 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 assessment as the TENR (Threat, Exposure, Necessity and Response).
61. 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).
62. A key part of an officer’s decision to decide 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. Ultimately, the legal authority to use force is derived from the law and not from Police policy.

63. 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 take precedence, and every effort must be taken to minimise harm and maximise safety.

‘Taser’ policy

64. A Taser is one of a number of tactical options available for use within the Police’s Tactical Options Framework. The use of a Taser must be *“necessary, proportionate and reasonable in the circumstances”*.
65. An officer may use the Taser when their risk assessment makes them honestly believe that someone poses an imminent threat of physical harm to a person. If there is no longer the likelihood of physical harm the use of a Taser is not necessary or reasonable. A Taser can never be used on a person whose behaviour is below the ‘assaultive’ range, for example when someone is merely actively or passively resistant. Officers should submit a Tactical Options Report after they have used a Taser on someone.
66. When carrying a Taser, it must be in the load state inside an approved holster. Officers should give a verbal warning of *“TASER, TASER, TASER!”* when showing or using a Taser, unless it is not practical or safe to do so. This is to warn others nearby and to try to de-escalate the situation.
67. A registered medical doctor must examine anyone who is exposed to the application of a Taser as soon as is reasonably practical.

ABOUT THE AUTHORITY

Who is the Independent Police Conduct Authority?

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

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

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

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

What are the Authority's functions?

Under the Independent Police Conduct Authority Act 1988, the Authority:

- receives complaints alleging misconduct or neglect of duty by Police, or complaints about Police practices, policies and procedures affecting the complainant in a personal capacity;
- investigates, where there are reasonable grounds in the public interest, incidents in which Police actions have caused or appear to have caused death or serious bodily harm.

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

This report

This report is the result of the work of a multi-disciplinary team of investigators, report writers and managers. At significant points in the investigation itself and in the preparation of the report, the Authority conducted audits of both process and content.



PO Box 25221, Wellington 6140
Freephone 0800 503 728
www.ipca.govt.nz
