

# Use of force during arrest and detention in Masterton

## Summary of the Incident

1. At about 9.13 pm on 27 December 2019, a Police officer (Officer A) arrested a man (Mr X) for obstruction after he prevented the officer from speaking to a person, whom the officer believed to be the driver of a fleeing car (Mr Y).<sup>1</sup>
2. Mr X tried to evade the arrest, leading to Officer A pepper spraying him. Officer B arrived to assist, and Mr X surrendered. Mr X was handcuffed and walked to the patrol car when he stopped and challenged Officer A to fight, spitting at him. Officer A took Mr X to the ground, and he was restrained until other officers arrived.
3. Mr X was detained at the Masterton Police station. He says that custody staff kept him awake; refusing to turn off the light and kicking the door whenever they checked on him. Mr X says he damaged the light fitting and unscrewed the fluorescent light bulb to darken his cell so that he could sleep.
4. Police saw the damaged light and Officers C and D moved him to another cell. While being walked down the corridor, Mr X spoke aggressively to the officers and clenched his fists. Officer C believed Mr X was about to hit him, and he punched him in the head. According to Mr X the officer knocked out his front left tooth.
5. On 9 March 2020, Mr X complained to the Authority. We referred the matter to the Police to investigate under our oversight. We also conducted an independent investigation, during which we interviewed Mr X and the officers involved.

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<sup>1</sup> See appendix, paragraph 107.

## Issues examined by the Authority

- Issue 1:** Was Officer A justified in pepper spraying Mr X?
- Issue 2:** Was the force used to restrain Mr X, after his arrest, justified?
- Issue 3:** Was Officer C justified in punching Mr X?
- Issue 4:** Was Mr X's overall treatment in Police custody appropriate?

## The Authority's Findings

6. The Authority found that:
- 1) Officer A was justified in pepper spraying Mr X.
  - 2) Officer A was justified in taking Mr X to the ground to restrain him.
  - 3) There is no evidence that excessive force was used when Police restrained Mr X.
  - 4) Officer C was legally justified in punching Mr X in self-defence.
  - 5) Mr X was given appropriate aftercare to cleanse him from the pepper spray.
  - 6) Police did not kick Mr X's cell door and did not refuse to turn off the light.
  - 7) We cannot make a finding on whether Police gave Mr X timely access to a lawyer.
  - 8) Mr X was not given the medical care he should have received for a head injury when he was first received into custody.

## Analysis of the Issues

### ISSUE 1: WAS OFFICER A JUSTIFIED IN PEPPER SPRAYING MR X?

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7. Officer A was sent to a complaint of a car doing burnouts in Masterton. When he arrived, he saw the car revving its engine and spinning its wheels. As the car drove past him, he could not see who the driver was.
8. After a brief pursuit, the officer found the car parked in a nearby parking lot. Mr X (the owner of the car) stood next to the front passenger door, and Mr Y, stood next to the driver's door. Mr Y claimed to be the driver. Independent witnesses later told the Police that before the officer arrived, the driver and passenger changed places (meaning Mr X was the driver).
9. Officer A, believing Mr Y was the driver, wanted to talk to him. Mr X continuously interrupted the officer and shouted at him, making it impossible for him to talk to Mr Y.

### Mr X's account

10. Officer A told Mr X to move away from the car and leave the area. He refused, saying the car belonged to him and he had done nothing wrong. Officer A took out his pepper spray and warned Mr X to leave.
11. Mr X told the officer he had no right to use the pepper spray and to put it away. The officer sprayed him in the face. Mr X wore spectacles and said the pepper spray did not really affect him. He challenged the officer to do it again and the officer sprayed him a second time. According to Mr X, Officer A never told him he was under arrest, nor read him his rights. He was first told he was being arrested when Officer B arrived.

### Officer A's account

12. Mr X was aggressive and confrontational, preventing him from speaking to Mr Y by continually interrupting him. Mr X wasn't listening to anything he said and could not be reasoned with. Given his behaviour, he thought Mr X was intoxicated or under the influence of drugs. (Mr X denies that he took any drugs but says he had been drinking, although he says he was not overly intoxicated).
13. Officer A asked Mr X to move away from the car but he came close-up to the officer, yelling at him to get into his car and leave. Officer A thought Mr X was squaring up to fight and took out his pepper spray. At this point, the officer also called for back-up over the Police radio.
14. Officer A says he warned Mr X several times that he would be arrested for obstruction if he continued. Mr X refused to listen to him, and he arrested Mr X for obstruction. Officer A told Mr X repeatedly that he was under arrest and instructed him to turn around and put his hands behind his back. Mr X refused to comply with any of Officer A's instructions and he reached out to take hold of Mr X's wrist.
15. Mr X stepped back, and Officer A discharged a single burst of pepper spray into his face; Officer A denies spraying him twice.

### The two accounts

16. Mr X denies speaking to the officer aggressively, he also denies being the driver of the car earlier.
17. Independent witnesses in nearby caravans saw the driver and passenger changing places, they also heard the interaction between Mr X and the officer. The witnesses say the officer did not speak in a raised voice, but Mr X was extremely aggressive and yelling, to the extent that they became concerned for the officer's safety. They did not think Mr X's behaviour was normal and also thought he was possibly intoxicated.
18. It is unlikely several witnesses would independently give the same false account of what they heard. In addition, Officer B says that when Officer A called for back-up, he heard a male yelling aggressively in the background of the radio transmission. For these reasons, we accept Officer A's account.

### Was the force justified?

19. Section 40 of the Crimes Act allows Police to use reasonable force to prevent someone from fleeing to avoid arrest or fleeing after they had been arrested.<sup>2</sup>
20. In order to rely on section 40, the officer must believe, on reasonable grounds, that the person is actually fleeing to escape or avoid arrest.
21. If so, the degree of force used must be reasonable and proportionate.

### *Did Officer A reasonably believe that Mr X was fleeing to avoid arrest?*

22. After Mr X was told he was under arrest, he refused to comply with Officer A's instructions to turn around and put his hands behind his back. When Officer A reached out to take hold of Mr X, he stepped back.
23. In the context of the circumstances, Mr X was actively avoiding the attempt to arrest him by stepping back after being told he was under arrest.
24. This is affirmed by Mr X's subsequent action, where he evades Officer A by running around in the parking yard, until Officer B arrives.

### *Was it reasonable and proportionate to pepper spray Mr X to prevent his escape?*

25. Police policy allows officers to use pepper spray when someone is actively resisting an arrest, such as running away from an officer.<sup>3</sup>
26. Officer A tried communicating with Mr X, but this was unsuccessful. Officer A was alone with both Mr X and Mr Y to contend with. Given Mr X's aggressive behaviour, Officer A believed it was likely that Mr X would assault him if he used physical force to try and restrain him. Additionally, a physical struggle would have exposed Officer A to increased risk if Mr Y became involved.
27. Officer A chose to use pepper spray because the risk of injury would be less than any physical force used. We accept that the use of the pepper spray was in line with Police's policy on when it is allowed. The test is finely balanced in this case, but in the circumstances described in paragraph 26, we find the use of pepper spray was reasonable.

### FINDING ON ISSUE 1

Officer A was justified in pepper spraying Mr X.

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<sup>2</sup> This is an objective test, see appendix, paragraph 108.

<sup>3</sup> See appendix, paragraph 120.

## ISSUE 2: WAS THE FORCE USED TO RESTRAIN MR X, AFTER HIS ARREST, JUSTIFIED?

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28. Officer B was the first officer to arrive in response to Officer A's call for back-up. When Officer B arrived, Mr X stopped running and surrendered.

### Mr X's account

29. According to Mr X, several Police cars came into the parking lot. When he saw Officer B, he stopped and put his hands into the air.
30. Officer A came to him and took hold of his thumb. Officer A bent it backwards and forced his arm up between his shoulder blades. Officer B took hold of his right shoulder. Both officers then slammed him into the ground, resulting in grazes to his forehead and shoulder.
31. Contrary to Mr X's account, Mr Y told Police that Officer B tackled Mr X to the ground.
32. According to Mr X, Officer A grabbed his hair and turned his head so that the left side of his face, faced upwards. The officer then fell with his knee onto his jaw, cracking two of his rear teeth. Mr X says Officer A then struck him in the face with a knee, three or four times. He managed to turn his head away and saw Officer B aiming to kick him in the face. Mr X tried to avoid this kick by turning back when Officer A again struck him in the face with a knee. Mr X believes there was a third officer present who stomped on his legs.
33. Mr X says the officers handcuffed him as tightly as they could, causing nerve damage to his thumb. After he was handcuffed, Officer B picked him up by the handcuffs and wrenched his arms upwards causing him to bend over (so that his head was level with his hips).
34. Mr X says the pepper spray affected him, and he could not breathe. Blood was running down his face and he spat between his legs (as his head was level with his hips). Officer B told him to stop spitting but he could not hold it back. Officer B then tripped him from behind, pushing him forward. Mr X says he was left to free fall with his hands handcuffed behind his back. As he could not brace the fall with his hands, he twisted his body and landed on his right shoulder. The side of his face again impacted with the ground causing further injuries.
35. In his account, Mr Y did not say anything about Mr X being taken to the ground a second time.

### The officers' accounts

36. Both Officers A and B told us Mr X was not tackled or taken to the ground with force. According to Officer B, Mr X went to the ground himself and was handcuffed, whereas Officer A recalls Mr X was standing when he was handcuffed. Both officers say Mr X was compliant and they handcuffed him with little force.
37. According to the officers, Mr X immediately became aggressive after he was handcuffed. He squared up to Officer A and challenged him to fight by yelling, "you four eyes! c\*\*t! take these cuffs off! I'll fight you! I'll take your head!" and "let's go pig shit! let's go one outs!" After saying

this, Mr X spat at Officer A. The officers deny that Mr X's hands were wrenched upwards or that his head was level to his hips, according to them he spat while standing upright.

38. Officer A says he was standing about a metre in front of Mr X when he spat at him. Mr X was not spitting blood but saliva, which landed next to his foot. He believed Mr X might next spit into his face, or storm at, headbutt, or kick him.
39. Officer A decided to take Mr X to the ground to restrain him. The officer placed a straightened arm behind Mr X's head and brought it forward to bring Mr X off balance, causing him to fall to the ground. This contradicts Mr X's account which says that Officer B took him to the ground by tripping him.
40. According to the officers, Mr X was laid on his side, with his hands behind his back. Officer A knelt next to Mr X with both his knees on the ground. Officer A had one hand on Mr X's shoulder and the other on his back. The officer leaned forward, using his body weight to hold Mr X down. Officer A insists this was the only force he used, he denies that he held Mr X by the hair, or that he fell with his knee into his face, or that he struck him with a knee in the face.
41. Officer B says he knelt behind Mr X and did not see any of the force used as described by him. He saw Mr X was bleeding from a cut to his eyebrow, and suspects this was caused when Mr X fell to the ground. Officer B denies that he kicked, or tried to kick Mr X, as described by him.
42. Both officers deny that there was a third officer present who stomped on Mr X's legs. They were the only Police officers present when Mr X was restrained.
43. Other officers only arrived after Mr X had been restrained. They saw Mr X lying on the ground, yelling, *"let me up so I can fight you! take my handcuffs off so this is a fair fight! I want to fucking fight you!"* The officers helped to place Mr X into the back of the patrol car and took him to the Masterton Police station for detention.

### The difference in accounts

44. There are differences in the accounts of Mr X and Mr Y and also between their and the officers' accounts.
45. During the interview, Mr X acknowledged that he might be mistaken about some facts and thinks this is because he had a concussion, after being struck in the face with a knee.
46. Although there is not enough evidence to support Mr X's belief that he was struck in the face with a knee, he may also have been concussed after falling with his head to the ground. In addition, there is also a difference in the accounts as to the degree of Mr X's level of intoxication. It is possible this might have influenced his memory of these events. Because Mr X seems to be mistaken about some facts and his and Mr Y's accounts materially differ, we cannot rely on their accounts as an accurate record of these events.
47. On a balance of probability, we prefer the officers' account as they are generally consistent about what happened.

### *Use of force in taking Mr X to the ground*

48. Officer A says he took Mr X to the ground in self-defence, and the force he used is justified under section 48 of the Crimes Act.<sup>4</sup>
49. Section 48 provides that any person, including a Police officer, is legally justified in using reasonable force in defence of themselves or another.
50. The legal test for self-defence is subjective, based on the officer's view of the circumstances and their purpose in using the force; and objective about whether the force was reasonable in the circumstances, as the officer believed them to be.

### *What were the circumstances as the officer believed them to be?*

- Officer A says that Mr X made several threats that he wanted to fight (see paragraph 37).
  - Mr X spat at him, this exposed him to health risks.
  - Mr X might next spit into his face, or run at, or headbutt, or kick him.
51. We note that Officer B, independently, had similar concerns, and believed Mr X was about to assault Officer A.
  52. In view of Mr X's behaviour, we accept Officer A reasonably believed Mr X was assaultive.<sup>5</sup>

### *Was Officer A defending himself?*

53. Officer A took Mr X to the ground to restrain him, because he (Mr X) "*can't kick and punch and spit when (he's) on the ground*". The officer's intention was to prevent Mr X from assaulting or continuing to assault him.
54. We accept Officer A used force with the intention to defend himself.

### *Was it reasonable for Officer A to take Mr X to the ground in the circumstances, as he believed them to be?*

55. Officer A believes the threat posed by Mr X was imminent. He was making threats to assault the officer and spat at him while in close proximity to him. Further delay could have allowed Mr X to spit into his face, headbutt, or kick him. Officer A responded to a fast-paced situation that was unfolding before him. The officer's belief is supported by Mr X's behaviour at the time, who challenged him to fight.

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<sup>4</sup> See appendix, paragraph 109.

<sup>5</sup> According to Police policy, 'assaultive' means someone who displays intent to harm, through body language or physical action. See appendix, paragraph 116.

56. Officer A admits that it was not the safest way to take a handcuffed person to the ground but felt, under the circumstances, it was the only option available to him to deal with the immediate risk Mr X posed.
57. In these circumstances, we do not think it would have been possible for the officer to discuss, or plan, a safer way for taking Mr X to the ground. Doing so would not have prevented Mr X from spitting, kicking or head-butting Officer A.
58. We accept that the force used in taking Mr X to the ground was reasonable in the circumstances, as Officer A believed them to be.

## FINDING ON ISSUE 2

Officer A was justified in taking Mr X to the ground to restrain him, there is no evidence that excessive force was used when Police restrained Mr X on the ground.

## ISSUE 3: WAS OFFICER C JUSTIFIED IN PUNCHING MR X?

### Mr X's account

59. Mr X says he was angry and sore and wanted to go to sleep. He asked custody staff several times to turn off the cell's light but was ignored. Police officers also kicked the cell door, to wake him up, when they checked on him.
60. He damaged the light fitting inside his cell and unscrewed the fluorescent light tube. Mr X was woken up by two officers (Officer C and D), who moved him to another cell.
61. Mr X knows Officer C from previous dealings with the Police. As he was walked down the corridor, Officer C asked him, *"Fuck what's gotten into you... why are you so angry?"* Mr X replied, *"Fuck, look at my face, like, what do you expect me to be? You c\*\*\*s beat me up."*
62. Mr X says he was walking to the new cell, but he stopped to say something when Officer C punched him in the mouth. He was grabbed and rushed into a wall and from there, moved into the new cell. Mr X says that Officer C knocked out his front left tooth. The tooth lodged into his lip, and once inside the cell, he pulled it out.
63. Officer D came to Mr X afterwards and helped him to phone a duty solicitor. A doctor also came and examined him.
64. Before Mr X was released, Officer C apologised to him saying he would understand if he wanted to make a complaint. Officer C gave him a note with the names and badge numbers of Officer A and himself.
65. Officer D took Mr X home after his release.



## The officers' account

66. Police records show that there was a shift change at the station, about 36 minutes into Mr X's detention. Officer C was the shift supervisor for the night shift that was coming on duty.
67. As he arrived, Officer C heard a detainee banging on a cell door and yelling. The previous shift's Watchhouse Keeper,<sup>6</sup> Officer E, told him that it was Mr X, that he had been pepper sprayed, and that he was agitated. As part of his custody evaluation, Mr X was assessed as needing care and frequent monitoring (requiring at least five checks per hour at irregular intervals).
68. In addition, Officer C spoke to Officers A and B, who told him what happened during Mr X's arrest.
69. Officer D was assigned as the night shift Watchhouse Keeper and did regular checks on Mr X. He describes these as difficult because Mr X would try to hide himself; he used his clothes and mattress to obscure visibility into the cell, and also stuck wet toilet paper against the cell's observation window.
70. When Mr X covered part of the observation window with wet toilet paper, Officer C spoke to him and told him he would be released on bail, but he had to calm down first.
71. During one of his checks, Officer D saw that the cell was dark and noticed the light was damaged. He called out to Mr X, but he did not respond. Officer D informed Officer C of what occurred.
72. Officer C says his immediate concern was that Mr X might have injured himself with live electricity and he responded to an emergency. As such, he did not take his pepper spray (as he did not anticipate using it), nor was there time to think about a safety plan on how Mr X could best be removed from the cell.
73. Because there was a safety hazard, the officers went to check on and move Mr X to a new cell. When Officer D opened the cell door, Mr X got up from underneath his mattress with his fists clenched. Officer D says, *"...this gave me a bit of a fright. I was concerned at what he might do next."* The custody footage shows Officer D stepping back and standing behind the half-closed cell door.
74. Officer C informed Mr X that he was going to be moved to a new cell. Mr X appeared to have settled down and pushed his way out of the cell. Officer C only had to move Mr X a short distance and says he likely did not want to be handcuffed. Insisting that Mr X be handcuffed might aggravate him. The officer believed the best way for moving Mr X was to try and get his cooperation through communication and guiding him along.
75. Officer C remembers that Mr X was aggrieved by the injuries he sustained during his arrest, and he appeared to confuse him with the arresting officer, or in the least, he was blaming all Police officers for what happened to him, by saying, *"you c\*\*\*s are all the same."*

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<sup>6</sup> The watchhouse keeper is, among other duties, in charge of looking after people in the cells.

76. According to Officer C, Mr X was aggressive when he said this. He first had one fist clenched and took a couple steps. Mr X stopped and turned to face him, having both fists clenched. Given his aggressive behaviour, Officer C believed Mr X was about to hit him. In response, he struck Mr X with a closed fist on his right ear. The officer denies that he punched Mr X in the mouth or that he knocked out his front left tooth.
77. The custody footage of this incident shows that Officer C grabbed Mr X from behind, after he was punched. Mr X tried to break free from the officer's hold and moves to a wall in the corridor by his own motion. Mr X was not pushed or run into the wall. As he neared the wall, he braced with his hands and is then moved into the new cell without further incident.

### Mr X's tooth injury

78. Officer C denies that he was responsible for dislodging Mr X's tooth. The officer points out that the custody footage shows that Mr X was brought into the station, already missing a front left tooth. The officer believes the footage also shows him punching Mr X on his right ear as opposed to his mouth. We think the footage is too unclear to say this with certainty.
79. Mr X, in turn, explains that he had a relatively large gap between his two front teeth and that this is what is seen in the custody footage. He has shown us his photo on his driver's license, issued two months before his arrest. In it, a large gap can be seen between his front teeth.
80. Mr X visited a dentist three days after the incident. The dentist recorded that his upper left tooth was displaced from its socket. We note in the dental photos that there is a large gap between Mr X's right tooth and the empty left tooth socket. The dentist further noted evidence of existing bone loss caused by a medical condition. This means that it might not have required much force to dislodge the tooth.

### Use of force in punching Mr X

81. Officer C says he punched Mr X in self-defence, and he believes the force he used is justified under section 48 of the Crimes Act.<sup>7</sup>

#### *What were the circumstances as the officer believed them to be?*

82. Officer C says he considered the following as part of his risk assessment:
- Mr X was assaultive to staff earlier during his arrest, saying that he wanted to fight them.
  - This was the first opportunity he had to follow through on this threat, because he was now outside of his cell and not handcuffed.
  - Mr X jumped up aggressively when Officer D opened the cell, showing he was still angry.

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<sup>7</sup> See appendix, paragraph 109.

- Earlier, Mr X was aggressive inside the cell; he kicked the observation window (Officer C saw a footprint on it) and damaged the light fitting, indicating he did not want to be in there.
  - In all likelihood, Mr X also did not want to go into the new cell, and he stopped following instructions to move along.
  - Mr X said, *“I hate you all c\*\*s”* which meant he was holding Officer C jointly responsible for what happened to him during the arrest.
  - Mr X clenched his fists and tensed up; his *“loaded”* fists is what indicated that he was about to hit someone.
83. The test here is not about the objective reasonableness of Officer C’s belief but rather if his belief was honestly held. Where a person is acting under an honest but mistaken belief, they will still be justified to act in defence of themselves or others, provided the belief was genuinely held.<sup>8</sup>
84. Officer C has arthritis in his hands and a condition called Dupuytren’s which causes him pain and discomfort. He has had several surgeries and his hands are deformed to an extent. He says, because of this, he is usually protective of his hands, and he would not have struck Mr X if he did not think it was critically necessary in that moment.
85. Officer C first used verbal communication and tried to guide Mr X along. He was not aggressive or forceful with Mr X at that stage. Officer C says he believed Mr X was about to hit him when he turned towards him with *“loaded fists”*.
86. The custody footage shows, just before Officer C raised his arms to punch Mr X, Officer D placed his hand on his pepper spray. Officer D was standing behind Officer C who could not see what his colleague was doing. This shows that both officers, independently believed there was an imminent risk unfolding.
87. We accept that Officer C would not have used his hands, given his medical condition, if he did not honestly believe that it was necessary. The fact that Officer D, independently and instinctively reached for his own pepper spray, just before Mr X was punched, lends weight to Officer C’s belief that there was an imminent risk. We accept Officer C genuinely believed that Mr X was about to hit him.

*Was Officer C’s use of force against Mr X for the purpose of defending himself?*

88. According to Officer C, *“The only reason I punched him is because I thought he was going to punch me, and I had no choice.”*
89. We accept that Officer C’s intent was to act in self-defence.

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<sup>8</sup> Fairburn v R [2010]

*Was Officer C's use of force against Mr X reasonable in the circumstances, as he believed them to be?*

90. This question requires us to objectively assess the reasonableness of Officer C's actions in light of his belief that Mr X was about to hit him.
91. Officer C perceived Mr X was aggressive, of large build, and had his fists clenched. Officer C says he was in close proximity to Mr X and believes it would have been easy for Mr X to hit him. He believed Mr X was immediately going to punch him and he had no choice but to respond to this threat by punching Mr X with a closed fist to his head.
92. In looking into the reasonableness of force used, a person's response should not be "*weighted to a nicety*" and evidence that they only did what they "*honestly and instinctively thought was necessary*" will be "*most potent evidence*" that it was reasonable in the circumstances.<sup>9</sup>
93. In considering the above and in accepting Officer C's belief about the threat he was facing; we think his response was proportionate to the perceived threat. We accept that the force he used was reasonable in the circumstances as he believed them to be.

### FINDING ON ISSUE 3

Officer C was legally justified in punching Mr X in self-defence.

## ISSUE 4: WAS MR X'S OVERALL TREATMENT IN POLICE CUSTODY APPROPRIATE?

### Decontamination of the pepper-spray

94. Mr X says the officers washed the pepper spray from him by hosing him down with a firehose.
95. Officer F told Police that he applied first aid relief to Mr X in the patrol car and when they arrived at the station, they took him to a purpose-built basin where they applied cold water to his face to wash off any residual pepper spray.
96. The custody footage shows the officers walking Mr X down a corridor, where he is washed out of view of the cameras. When Mr X is walked back up the corridor, his head and the front of his t-shirt are wet. Mr X's arms and the side of his t-shirt are still dry, suggesting that he was not hosed down.
97. Appropriate aftercare was given to Mr X in washing off any residual pepper spray.

### Kicking the cell door and refusing to turn off the light in his cell

98. Officer D denies that he kicked the cell door when he checked on Mr X. According to the officer, Mr X did not ask him to turn off the light inside his cell.
99. From looking at the custody footage, we did not see any officers kick the cell door.

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<sup>9</sup> Palmer v R [1971]

100. In the minutes before and after the light goes out in Mr X's cell, he can be seen standing by the window, being active, making signs at the camera and pasting wet toilet paper onto the observation window. It is clear that Mr X did not damage the light in his cell so that he could sleep. Mr X likely did not ask Officer D to turn the light off for that purpose.

### Access to a lawyer and medical care

101. Officer D explained that he did not receive Mr X when he came into custody, but he took over from the previous shift. According to the officer, Mr X first asked him to speak to his lawyer and see a doctor after Officer C punched him. When asked, he facilitated this.

102. Officer E, the previous Watchhouse Keeper, says she does not remember Mr X's custody stay anymore. She looked at the custody footage but could not remember what Mr X said when he came into custody. She also does not remember interacting with him. We can therefore not make a finding as to whether Mr X was ignored when he asked to speak to a lawyer or to see a medical doctor.

103. However, we think Police should have called a doctor to assess Mr X when he came into their custody. It is clear from the custody footage that Mr X came into the Police station with blood and injuries to his face and head (most notably his eyebrow). We have looked at the custody evaluation completed for Mr X and, except for the pepper-spray, none of his injuries were recorded. Police records show that the custody evaluation was completed by Officer E, who as Watchhouse Keeper, had overall responsibility for his care.

104. In addition, Officers A and B knew that Mr X had injured his eyebrow when he fell with his head to the ground. They should have told the custody staff receiving him, how Mr X got the injury.

105. Police policy on 'Head injuries' states that any potential head injury, occurring as a result of Police activity, must be assessed by a medical practitioner. This includes instances where someone hits their head to the ground whether an injury can be seen or not (in this case his injury was visible).<sup>10</sup>

106. Mr X's risk evaluation was incomplete, and he was not afforded the medical care he should have received for a head injury when he was first brought into custody. A medical doctor was only called to see him after he was punched by Officer C.

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<sup>10</sup> See appendix, paragraph 121.

#### FINDINGS ON ISSUE 4

Mr X was given appropriate aftercare to cleanse him from the pepper spray.

Police did not kick the cell door or refuse to turn off the light in Mr X's cell.

We cannot make a finding on whether Police afforded Mr X timely access to a lawyer.

Mr X was not given the medical care he should have received for a head injury when he was first received into custody.



**Judge Colin Doherty**

Chair

Independent Police Conduct Authority

**22 March 2022**

**IPCA: 20-2630**

## Appendix – Laws and Policies

### LAW

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#### *Resisting Police (obstruction)*

107. Section 23 of the Summary Offences Act 1981 makes it an arrestable offence if a person resists or intentionally obstructs a Police officer acting in the execution of his/her duty.

#### *Use of force defences*

108. Section 40(1) of the Crimes Act 1961 allows Police officers to use reasonable force to prevent the escape of a person who flees to avoid arrest or who flees after their arrest. The force used to prevent the escape will only be justified if the escape could not be prevented in a less violent manner.
109. 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.”
110. 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

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#### *Police ‘Use of force’ policy*

111. 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.
112. 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.
113. 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.
114. 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.

115. 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)).
116. 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.
117. '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.
118. 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.
119. Ultimately, the legal authority to use force is derived from the law and not from Police policy.

#### *Police 'Pepper spray' policy*

120. 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*

121. 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?

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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 of investigators, report writers and managers. At significant points in the investigation itself and in the preparation of the report, the Authority conducted audits of both process and content.

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