

Complaint of excessive force during arrest in Auckland

INTRODUCTION

1. On 1 October 2015, Mr X was arrested by Police in Auckland after a short vehicle pursuit in Mt Eden. During the arrest, Officer A, a probationary constable, used a Taser on Mr X on two occasions.
2. On 2 November 2015, Mr X made a statement to Police about the circumstances of his arrest. He said that:
 - a) He was running away when he was tasered twice, once in the back and once on the calf;
 - b) Officer A dived on him and pushed him down “*a flight of about ten stairs*”;
 - c) Officer A tried to break his arm at the bottom of the stairs and he bit the officer in an attempt to get him to release the hold on his arm; and
 - d) Officer A told the ambulance officers to “*knock him out*”.
3. The Authority conducted an independent investigation into the complaint. This report sets out the results of that investigation and the Authority’s findings and recommendations.

BACKGROUND

Summary of events

4. On 1 October 2015, Officers A and B were assigned to a report of suspicious activity on Poronui Street, Mt Eden. The caller had told the Police Northern Communications Centre (NorthComms) call taker that they suspected people outside were trying to steal a car.
5. Officers A and B went to the address and found two vehicles, a van and a Porsche, each with a man inside. The officers saw the rear lights of the Porsche turn on, as it was being started, and drove up to the car to talk to the driver (Mr X).

6. Officer A said that Mr X said, “*oh, do you need to talk to me?*”, then reversed the car, as if he was going to park it and talk to the officers. As Officer A started getting out of the car Mr X sped off in the Porsche.
7. The officers followed in their patrol vehicle. Officer B was the driver while Officer A operated the radio. When Mr X failed to stop, Officer A advised NorthComms that they were in pursuit.
8. Due to the increasing risks being taken by Mr X, the officers decided to abandon the pursuit. However, before they could do so, the Porsche drove over road spikes and Mr X stopped. Mr X got out of the Porsche and ran behind a house on Roskill Way which is a no exit street. Officer A said that he immediately chased Mr X yelling, “*stop, stop*”.

Use of Taser

9. Officer A said that Mr X shouted, “*get fucked pig*” at him and kept running. The officer said that Mr X ran behind the house, which he thought belonged to Mr X, and the officer followed him.
10. Officer A thought that Mr X was going to go into the house to get help or a weapon. He told the Authority that his training had taught him that offenders are most dangerous when they are in their home environment and for that reason he decided to use his Taser to stop Mr X before he entered the house. He also considered the possibility that innocent people could be inside the house and therefore be at risk from Mr X.
11. Officer A stated that he considered other tactical options to try to stop Mr X but said he chose his Taser because, at that stage, Mr X was still within optimum¹ firing range. Officer A thought that if Mr X got further ahead then the distance would further limit his tactical options. Officer A also said that he was worried that he might not be able to identify Mr X if he ran into the house, as he had not got a good look at him.
12. Officer A, who was armed with the new Police Taser X2², told the Authority that he tasered Mr X in the leg as he ran away. Mr X removed the two probes and kept running. Immediately afterwards, Officer A tasered Mr X in the back. Only one of the Taser probes made contact with Mr X and he kept running.
13. Officer A told the Authority that he did not warn Mr X that he was armed with a Taser before deploying it, as required by policy (see paragraph 54). Officer A said that he did not have time to do this as he wanted to use his Taser quickly in case Mr X ran out of range.
14. Officer B ran after Mr X and Officer A but did not see Officer A taser Mr X. She said that as she ran past the Porsche, she saw a knife in the driver’s foot well and she formed the view that Mr X was possibly armed and may pose a significant risk to Police.

¹ 2.5 – 4 metres

² The X2 Taser has two cartridges that can be deployed sequentially. Each cartridge has two probes. It enables the operator to have a backup shot which removes any need to manually reload. The X2 will be the only Taser used by NZ Police from 1 January 2017.

15. When she later caught up with them (see paragraph 20), she noticed one Taser barb embedded in the shoulder of Mr X's shirt.

At the flight of stairs

16. What happened next is contested. Mr X said that when Officer A caught up with him, he dived on him and pushed him down "*a flight of about ten stairs*" and then tried to break his arm at the bottom of the stairs. Mr X described Officer A as being "*out of control.*"
17. Officer A denied diving on Mr X or pushing him down the steps. He said that, due to the lack of lighting, he had not seen the steps, and had stumbled down them, and it was likely that Mr X had done the same thing. Officer A told the Authority that there was no physical contact between him and Mr X prior to the struggle at the bottom of the steps.
18. Officer A said that he caught up with Mr X at the bottom of the stairs and "*tackled*" him and they both wrestled and fell to the ground. Officer A told the Authority that Mr X became aggressive and resisted arrest.
19. Officer A denied using unnecessary force on Mr X's arm. He said that he used an arm bar³ hold to control Mr X's arm in order to apply handcuffs and that Mr X bit Officer A's left forearm as he was being restrained. Officer A had to go to hospital to get medical treatment for his bite wound.
20. Officer B told the Authority that as she followed Officer A and Mr X, she heard a commotion at the bottom of the driveway and she went to check it out. When she caught up with them, she found them at the bottom of the stairs with Officer A struggling with Mr X. She described Mr X as "*aggressive and actively resisting*" Officer A.
21. Officer B saw Mr X bite Officer A on the left forearm after Officer A put him in an arm bar hold. She confirmed to the Authority that Officer A received a significant injury from the bite.
22. Officer B said that she told Mr X to stop resisting. When Mr X ignored her and continued to struggle, Officer B radioed for backup. She then helped Officer A handcuff Mr X.
23. While Officer B was handcuffing Mr X she noticed an injury to his ear. As it was bleeding, she asked NorthComms to call an ambulance.
24. Mr X was subsequently taken to hospital by ambulance, accompanied by Police, so his ear could be treated and so he could medically assessed following the use of the tasing, as required by policy.

Ambulance/Administration of Medicine

25. Mr X complained that the Police told the ambulance paramedics to "*knock him out*".

³An approved Police hold which involves holding the offender's arm out straight.

26. When spoken to by the Authority, Officer A denied telling the paramedics that Mr X should be “knocked out”. He said that he was not present when the paramedics were attending to Mr X as he was at the rear of the property collecting the Taser cartridge identification tags, as required by policy (see paragraph 57).
27. Officer B also denied telling ambulance staff to “knock Mr X out” and stated it was not her place to tell them how to medicate or deal with a patient.
28. Mr X’s hospital medical records show that Mr X was agitated and aggressive and was given medication to sedate him following his arrest. They also recorded that he received a laceration to his right ear, and complained that he had a sore back, and was given analgesia.

Officer A’s Tactical Options Report

29. As required by policy, Officer A completed his Tactical Options Report (TOR) on 1 October 2015. In this report, he described Mr X as ‘assaultive’ because “*he momentarily turned towards him in a fighting stance*”. Officer A also stated that Mr X was “*highly motivated to escape Police and would not be arrested peacefully. I perceived that he was assaultive⁴*”. Officer A recorded that “*deploying pepper spray⁵ would have required losing control of the offender*”.
30. Officer A gave a very brief statement to the Police on 15 October 2015. In this statement, he does not describe the use of the Taser on Mr X in any detail.
31. The Authority interviewed Officer A on 20 May 2016. In interview Officer A described tasing Mr X twice, in quick succession, as Mr X ran away. Officer A told the Authority that Mr X did not turn towards him in a fighting stance, as he stated in his TOR, and accepted that Mr X was hit in the back with the Taser barb as he ran away.
32. Officer A acknowledged that he included inaccurate information in his TOR. By way of explanation, he said that, at the time he completed it, as a probationary constable, he was still “*coming to terms with the paperwork*”.
33. For this reason, the Authority has relied on what Officer A said in Authority interview when describing the incident (see paragraphs 12 and 13).

Post Taser deployment requirements

34. Officer C, an acting sergeant and Officer A’s immediate supervisor, filled out the supervisor’s section of the TOR two weeks after the incident. He approved both uses of the Taser by Officer A. He noted that he attended the scene as a supervisor, as required by policy (see paragraph 57), and observed Mr X’s behaviour on the night. Officer C told the Authority that he remembered seeing a “*Taser barb in [Mr X’s] upper left shoulder...In the back.*” He recorded on the TOR that he fully supported Officer A’s “*decision making*” and use of Taser.

⁴A person is ‘assaultive’ when showing an intent to cause harm which is expressed verbally or through body language or physical action.

⁵Pepper spray is also referred to as Oleoresin Capsicum or ‘OC’ spray.

35. Although he did not know Mr X's position in relation to Officer A at the time Officer A deployed his Taser, Officer C told the Authority in interview that he could not see how a barb would be embedded in Mr X's back if he was facing Officer A, as detailed in Officer A's TOR. Officer C further stated that he spoke with Officer A about his TOR but did not discuss the apparent discrepancy between Officer A's account of events and the fact that a Taser barb hit Mr X in the back.
36. Officer D, an inspector and the TOR Reviewer⁶ reviewed Officer A's TOR and viewed the Taser Cam footage. She recorded in the TOR that it was difficult to establish what had occurred from viewing the footage but was satisfied that Officer A had explained the circumstances in his TOR and she concluded, "*on review no issues*".

Taser Cam Footage

37. Officer A's Taser fired two five second discharges⁷ one after the other.
38. As part of its investigation, the Authority viewed Officer A's Taser Cam footage. The footage was poor quality and of limited value and it is not possible to see which way Mr X was facing, when he was tasered, or which part of his body the Taser probe hit.

Mr X

39. Mr X was 38 years old at the time of this incident. He is well known to Police.
40. Following this incident, Mr X was convicted of unlawfully taking a motor vehicle, failing to stop for red and blue flashing lights, assaulting Police, obstructing Police, driving whilst forbidden, receiving property and possessing tools for burglary. He was sentenced to a term of one year imprisonment on all charges.

Police officers involved

41. At the time of this incident, Officer A (a probationary constable) was 20 years old. He graduated from Police College three months before this incident and it was the first time he had deployed a Taser. His Taser certification was current.
42. Officer B (a constable) had served about seven years in the Police at the time of this incident.

⁶ A senior officer, who is an inspector or above, must view the Taser cam footage and decide whether the use of the Taser was justified in accordance with policy. They enter their comments on the TOR after the first supervisor has done so.

⁷ A standard discharge is five seconds and it is automatic once fired.

Law on the use of force

Use of force by Police officers

43. 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.”*
44. Section 40 of the Crimes Act 1961 provides that a Police officer may use necessary force in order to prevent a person from fleeing to avoid arrest, unless the escape can be prevented by reasonable means in a less violent manner.

Use of force for self-defence or defence of others

45. 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 believes them to be, it is reasonable to use.”*
46. 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 on the use of force

Police guidance on use of force

47. 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, 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.
48. 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.
49. An officer 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).

50. 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.
51. Police 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.

Use of Taser

52. Police policy states that a Taser may only be used to arrest an offender if the officer believes the offender poses a risk of physical injury and the arrest cannot be effected less forcefully. A Taser must only be used on a person who is assaultive (defined as *"actively hostile behaviour accompanied by physical actions or intent, expressed either verbally and/or through body language, to cause physical harm"*) and cannot be used on a person who uses passive resistance in relation to Police.
53. Police policy expressly states that a Taser should never be used against an uncooperative but non-aggressive person to induce compliance.
54. To encourage de-escalation and to warn others nearby, officers must give a verbal warning in conjunction with the deployment of a Taser unless it is impractical or unsafe to do so. The warning relevant to the presentation of a Taser is *"Taser 50 000 volts"*. The warning relevant to a discharge or contact stun is *"Taser, Taser, Taser"*.
55. A 'discharge' is an *"application by firing two probes over a distance from an air cartridge attached to the Taser, or subsequent applications of electrical current via the probes, which are in contact with the subject after firing, in conjunction with a verbal warning"*. A 'contact stun' is *"activating the Taser with or without the air cartridge attached while the device is applied to the body of the subject, in conjunction with a verbal warning"*.
56. Police policy also states that subsequent applications and extended cycles of the Taser should be avoided, but where they are unavoidable must be reasonable, necessary and proportionate in the circumstances.
57. The Taser policy further provides that supervisors must:
 - attend the scene as soon as possible and ensure proper aftercare and any appropriate medical attention has been provided;
 - preserve and photograph the scene;

- ensure that all evidence, including discharged cartridges, wires, probes and sufficient (4-5) cartridge identification tags (CIT) are recovered from the scene and secured appropriately;
- determine whether the use of the Taser was in accordance with policy;
- ensure the operator fills out the Taser register;
- ensure the operator submits a Tactical Options Report;
- ensure the operator uploads the incident into Evidence.Com; and
- informs the District Taser coordinator of the incident.

58. The Police policy on Taser aftercare states that a registered medical doctor must examine anyone who is exposed to the application of a Taser as soon as is practicable.

Tactical Options Report

59. On the TOR form there is a requirement that the senior officer/inspector reviewing the use of the Taser must view the Taser camera footage and firing log and note that they have done so in their comments.

ISSUES CONSIDERED

60. The Authority's investigation considered the following issues:

- 1) Was Officer A's use of the Taser justified?
- 2) Was Officer A's use of force during the arrest of Mr X reasonable in the circumstances?
- 3) Was the appropriate medical care given to Mr X?
- 4) Did Officer A's supervisors correctly determine whether his use of the Taser was in accordance with policy?

THE AUTHORITY'S FINDINGS

Issue 1: Was Officer A's use of the Taser justified?

61. As outlined in paragraph 8, Officer A called on Mr X to stop but he ignored the officer, swore at him, and kept running behind a house that the officer thought belonged to Mr X.

62. Sections 39 and 48 of the Crimes Act 1961 provide legal justification for Police to use reasonable force to arrest an offender and in defence of themselves or another (see paragraph 43). Section 40 (see paragraph 44) provides that a Police officer may use necessary force in order to prevent a person from fleeing to avoid arrest, unless the escape can be prevented by reasonable means in a less violent manner.

63. However, Police policy states that a Taser may only be used to arrest an offender if the officer believes the offender poses a risk of physical injury and the arrest cannot be effected less forcefully. A Taser must only be used on a person who is ‘assaultive’ (defined as “*actively hostile behaviour accompanied by physical actions or intent, expressed either verbally and/or through body language, to cause physical harm*”) and cannot be used on a person who uses passive resistance in relation to Police (see paragraph 52).
64. In assessing Officer A’s justification for using the Taser, the Authority acknowledges that Officer A was a probationary constable, was inexperienced and was worried that Mr X was about to run into a house where he could receive help, get a weapon or hurt an innocent member of the public.
65. However, Police policy clearly states that a Taser must only be used on a person who is ‘assaultive’. In interview with the Authority, Officer A accepted that Mr X was running away at the time he was tasered and did not turn to face him (see paragraphs 12, 31 and 32). Therefore Mr X was actively resisting (pulls, pushes or runs away – see paragraph 50) Officer A but he was not ‘assaultive’. Officer A’s use of the Taser on Mr X clearly breached policy.
66. In the Authority’s view, there were other, less violent, options available to Officer A. He could have continued with communication or continued chasing Mr X. He also could have radioed NorthComms to request backup and a Police dog to assist with tracking Mr X. In addition, Officer A knew that Officer B was close behind and would be able to assist.

FINDING

Officer A’s use of the Taser was contrary to policy and unjustified.

Issue 2: Was Officer A’s use of force during the arrest of Mr X reasonable in the circumstances?

67. Mr X said that Officer A dived on him and pushed him down “*a flight of about ten stairs*”, and tried to break his arm at the bottom of the stairs. He described Officer A as being “*out of control.*”
68. Officer A denied diving on Mr X or pushing him down the steps. He said he stumbled down the steps in the dark and thought it was likely Mr X had done the same. Officer A told the Authority that there was no physical contact between him and Mr X prior to the struggle at the bottom of the steps.
69. Officer A also denied using any unnecessary force on Mr X’s arm. He said that he was just trying to handcuff Mr X, using an arm bar hold to gain control, but Mr X kept resisting.
70. Officer B arrived after Officer A and Mr X had fallen down the steps. She told the Authority that she had no issues with the way in which Officer A restrained Mr X, as an arm bar is a tactic taught in training. She described Mr X as resisting violently and said that she saw Mr X bite Officer A on his left forearm.

71. After considering all the evidence, the Authority is satisfied, on the balance of probabilities, that Officer A did not dive on or push Mr X down the steps or try and break his arm. It is likely that any arm pain felt by Mr X was due to his continued struggling while he was being restrained in the arm bar.

FINDINGS

Officer A did not dive on or push Mr X down the steps or try and break his arm.

Officer A's use of force to handcuff and control Mr X was reasonable and justified in the circumstances.

Issue 3: Was the appropriate medical care given to Mr X?

Taser aftercare

72. The Police policy on Taser aftercare states that a registered medical doctor must examine anyone who is exposed to the application of a Taser as soon as is practicable (see paragraph 58).
73. Officer B called for an ambulance after noticing that Mr X had sustained an injury to his ear, possibly caused by falling down the stairs. Mr X was taken to hospital in the ambulance and had a thorough examination by a doctor. No injury from the use of the Taser was identified.

Administration of Medicine

74. Mr X complained that Officer A told the ambulance paramedics to "knock him out".
75. Officer A told the Authority that he never said that and he was not even present when the paramedics were attending to Mr X.
76. The Authority has also spoken to Officer B about this allegation. She denied telling the ambulance paramedics to "knock Mr X out".
77. Mr X's hospital records state that he was tasered and then fell down ten concrete steps. They record that he was agitated and aggressive and he was given medication for sedation following his arrest. He received a laceration to his right ear and complained that he had a sore back and was given pain relief for that by the hospital staff.
78. After considering all the evidence, the Authority is satisfied, on the balance of probabilities, that Officers A and B did not tell the paramedics to "knock Mr X out" and left the administration of medication to the paramedics' professional judgement.

FINDINGS

Mr X received appropriate medical care after being tasered.

Officers A and B did not direct the ambulance paramedics to sedate Mr X.

Issue 4: Did Officer A's supervisors correctly determine whether his use of the Taser was in accordance with policy?

79. The Taser policy requires a supervisor and an inspector to determine whether the use of the Taser was in accordance with policy (see paragraph 57).

Officer C

80. As stated in paragraph 29, Officer A recorded in his TOR that Mr X stopped running, and "*momentarily turned to face [Officer A] in a fighting stance*", resulting in Officer A's deployment of the Taser.
81. Officer C, Officer A's immediate supervisor, signed off Officer A's TOR two weeks after the incident. Officer C recorded on the TOR that he had attended the scene and observed Mr X's behaviour on the night. He said that he agreed that the deployment of Taser was the appropriate tactical response and that he fully supported Officer A's "*decision making*".
82. However, when spoken to by the Authority, Officer C said that he saw a Taser barb positioned on Mr X's back, near his shoulder blade. Officer C acknowledged that he could not see how it was possible for a Taser barb to strike Mr X's back if Mr X had been facing Officer A, as described by Officer A in his TOR.
83. Based on the information available to him at the time he received the report, the Authority considers that Officer C should have noticed the inconsistency and questioned Officer A on it rather than finding that Officer A's use of the Taser complied with policy. Given Officer A's inexperience, Officer C should have carried out greater scrutiny of Officer A's actions and should have ensured that Officer A received assistance when preparing his TOR.
84. The Authority does not agree with the determination of Officer C in the TOR. Given the information available to Officer C, he should have recognised that Officer A breached Police policy in his use of the Taser, as Mr X was not 'assaultive' when he was tasered in the back while running away.

Officer D

85. Officer D, the TOR Reviewer viewed the Taser Cam footage, and Officer A's TOR, as required by policy (see paragraph 59).
86. Officer D noted that the Taser Cam footage was unclear. Based on her review of Officer A's TOR which included his description of Mr X turning to face him, she found that his use of the Taser complied with policy. Unlike Officer C, Officer D did not attend the scene and witness the placement of the Taser barb in the back.

FINDINGS

Officer C should have identified the apparent discrepancy between the description in the TOR and the placement of the barb and questioned Officer A in relation to this.

Officer C wrongly determined that Officer A's use of the Taser complied with policy.

Officer D complied with the reviewing requirements of the Taser policy. Based on the information available to her, her decision that Officer A's use of the Taser complied with policy cannot be criticised.

CONCLUSIONS

87. The Authority has reached the following conclusions on the balance of probabilities:
 - 87.1 Officer A's use of the Taser was contrary to policy and unjustified;
 - 87.2 Officer A did not dive on or push Mr X down the stairs and the use of force used to arrest Mr X was reasonable and justified in the circumstances;
 - 87.3 Mr X received appropriate medical care after being tasered;
 - 87.4 Officers A and B did not direct ambulance staff to sedate Mr X;
88. Officer C should have identified the apparent discrepancy between the description in the TOR and the placement of the barb and questioned Officer A in relation to this;
89. Officer C wrongly determined that Officer A's use of the Taser complied with policy;
90. Based on the information available to her, Officer D's decision that Officer A's use of the Taser complied with policy cannot be criticised.



Judge Sir David Carruthers

Chair
Independent Police Conduct Authority

23 February 2017

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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 Sir David J. Carruthers.

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.



Whaia te pono, kia puawai ko te tika

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