

# Use of Taser during arrest in Henderson

## INTRODUCTION

1. On the evening of 4 March 2017, a Police officer saw Mr X riding a motorcycle dangerously and followed him to a residential address in Henderson. Mr X fled on foot and the officer discharged his Taser in an effort to apprehend him. Mr X was immobilised by the Taser and fell to the ground, sustaining facial injuries.
2. The Police notified the Authority of the incident, and the Authority conducted an independent investigation. This report sets out the results of that investigation, and the Authority's findings.

## BACKGROUND

3. This section of the report provides a summary of the incident and the evidence considered by the Authority. When quoting or describing the accounts of any officer, complainant or witness, it is not intended to suggest that the Authority has accepted that particular account.
4. Analysis of the evidence and explanations of where the Authority has accepted, rejected or preferred that evidence is reserved for the 'Authority's Findings' section.

### Summary of events

5. On Saturday 4 March 2017, at about 9.18pm, Officer A was driving on Birdwood Road in Henderson when a motorcycle, ridden by Mr X, went past him at high speed.<sup>1</sup> Officer A noticed Mr X cutting corners and riding in what he considered to be a dangerous manner.

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<sup>1</sup> Officer A has been a member of the New Zealand Police for ten years. At the time of the incident Officer A was up to date on his relevant training, including Taser X2 operator and Police Integrated Tactical Training (PITT). Mr X is 34 years old and has previous convictions for drug possession, driving-related charges (including driving with excess breath alcohol), and firearms-related offences.

6. Officer A turned his Police car around at the intersection, intending to catch up with Mr X and signal him to stop. However Officer A lost sight of the motorcycle.
7. Due to a previous incident, the Police helicopter (Eagle) was in the area. Officer A radioed the officer in Eagle, who was able to follow the motorcycle. Eagle informed Officer A that he could see the motorcycle travelling quickly down the wrong side of the road. Eagle directed Officer A to a residential address where Mr X had parked. Officer A parked his Police car on the driveway a few metres behind the motorcycle. He removed the key from the car's ignition, but left the driver's door open.
8. Officer A got out his torch, and also drew his Taser. It was dark, and Officer A could not see Mr X. Eagle directed Officer A to where Mr X was crouched behind a 1.8 metre tall wooden fence near the top of the driveway. Officer A shone his torch at Mr X, and 'laser painted' him with the Taser.<sup>2</sup> Turning on the Taser automatically activates its inbuilt video camera (Tasercam) and flashlight. Officer A did not warn Mr X about the Taser at that stage, but assumed Mr X was aware of it, as he was facing Officer A. In his Tactical Options Report (TOR), Officer A said that he laser painted Mr X because he was actively resisting Police, was potentially assaultive, and could have had a weapon.
9. Officer A told Mr X to come towards him and put his hands up. Mr X did so, coming towards Officer A in what Officer A described as a "*staunch*" manner. Officer A told him to turn around. He said he told Mr X to "*stay there or you'll get Tasered*". Officer A then told Mr X to get onto his knees. Mr X kneeled, dropping his hands to his sides near his pockets. Officer A noticed that Mr X was wearing a baggy jacket, and thought he could have concealed weapons.<sup>3</sup>
10. Officer A is about 160 centimetres tall, whereas Mr X is 190 centimetres tall. Officer A later said that, when assessing the situation at that stage, he took into account the following factors:
  - Officer A was alone;
  - he is of smaller build than Mr X;
  - he believed, due to the circumstances, that Mr X may have had concealed drugs and/or weapons;
  - Officer A was familiar with the area and knew that gang members and drug dealers often used motorcycles at night to transport drugs (referred to as drug runners);
  - his experience with drug runners was that they often carried weapons; and

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<sup>2</sup> 'Laser painting' means to shine the infrared laser sighting system of the Taser on someone. This is usually done as a warning.

<sup>3</sup> When he was later searched, it was discovered that Mr X was wearing a small Adidas satchel, concealed by his jacket. The satchel contained an unopened bottle of beer, a screwdriver, and \$1260 cash. A zip lock bag of crystal methamphetamine was also found near where Mr X had parked his motorcycle.

- he did not know if Mr X had consumed alcohol or drugs.
11. Although Eagle was overhead, Officer A had no immediate backup. It was dark, and he and Mr X were alone down a long driveway. Officer A later wrote in his Police notebook that he believed at that time that if he had tried to physically restrain Mr X, Mr X would have attacked him in order to get away. Officer A did not give specific reasons for this view. However, in his interview with Police, when discussing Mr X's initial compliance with Officer A's instructions, Officer A stated:

*"From my experience in the Police, at times the seemingly compliant and cooperative offenders can often be the most dangerous and lethal, as you don't know what their intentions are and they can often strike violently and without warning."*
  12. In his Police interview, Officer A discussed an increasing prevalence of weapons in the community. He said that it is:

*"...a common occurrence, hence why working in that area you can almost form the belief that [with] a lot of people you are stopping or dealing with there's a high chance that they will have a weapon on them given their involvement in the drug and gang scene."*
  13. Officer A did not know Mr X's identity. However he thought Mr X looked like an offender he had dealt with previously, who had threatened him.<sup>4</sup> Officer A asked Mr X why he had fled from Police, and heard Mr X reply "warrants". Officer A took this to mean that Mr X had current active warrants for arrest.
  14. Officer A's notebook indicates that Mr X was arrested at this time. However, in interview, Officer A stated that he did not explicitly tell Mr X that he was under arrest. Rather, he said "it was apparent ... he was detained ... for his warrants."
  15. While Mr X was kneeling on the ground facing away from Officer A, Officer A radioed for backup. During this time, Mr X got up and ran down the driveway.
  16. Officer A ran after Mr X, following him down the driveway and along the street. Officer A noticed Mr X drop something as he ran.<sup>5</sup> On the Tasercam footage, Officer A can be heard calling out to Mr X, saying "Better stop mate, I'm gonna taser you". Mr X ran around a tree and temporarily out of sight. When Mr X came back around the tree, Officer A thought he saw something glinting in Mr X's hand. He believed that this could possibly be a weapon.<sup>6</sup> Mr X began to run back up the driveway.
  17. At this point, Eagle commented to Officer A via the radio that Mr X may try to get into his Police car. Officer A knew he had left the Police car door open, and at that time could not remember whether or not he had left the keys in the ignition.<sup>7</sup> Officer A said he was concerned

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<sup>4</sup> It was later discovered that Mr X was not the offender he had previously dealt with.

<sup>5</sup> This was later determined to be a packet of cigarettes.

<sup>6</sup> When Mr X was arrested, a set of keys were found near him. Officer A believes that this might be what he saw glinting in Mr X's hand.

<sup>7</sup> As it happened, Officer A had clipped his keys to his belt.

that Mr X might try to get into the Police car or return to his motorbike, and flee the scene, potentially endangering both Officer A and members of the public. Officer A was aware that firearms were locked in a safe in the car. Officer A followed Mr X, again calling “*stop right there, now*” but Mr X kept running up the driveway. Officer A then discharged his Taser at Mr X.

18. The Taser probes connected with Mr X on the back of his left arm and the back of his right thigh, incapacitating him and causing him to fall forwards onto the driveway. He struck his face and lost consciousness<sup>8</sup>. Officer A radioed for backup and then for an ambulance. Officer A advised the dispatcher that Mr X had “fallen face first” and was “breathing pretty hard”.

### *Medical assistance*

19. Another officer arrived about 70 seconds after Officer A’s radio request for backup. The two officers rolled Mr X onto his side and into the recovery position. Mr X was handcuffed with his hands to the front of his body. He seemed to be unconscious at this time. Police stayed with Mr X until an ambulance arrived.
20. Ambulance officers removed and bagged the Taser probes, and provided Mr X with first aid. Other Police, including Officer B, arrived at the scene. Officer B went in the ambulance with Mr X to Waitakere Hospital. Mr X was compliant with ambulance staff, and provided Officer B with his details. In the hospital, Mr X was disoriented. Officer B explained to him that he was in hospital, and that he was under arrest for his warrants and for other charges.
21. Medical notes from that night state that Mr X had a graze to his nose, bruising to his eye, and complained of jaw pain.
22. Mr X was discharged from hospital at 10.54pm, and was held in custody at the Henderson Police Station.
23. Mr X returned to Waitakere Hospital on 5 March 2017, where he was diagnosed with a fractured facial bone. The clinician also noted that Mr X had swelling around the eyes and complained of jaw pain.

### *Tactical Options Report*

24. On 5 March 2017, at about 10.33pm, Officer A completed a Tactical Options Report (TOR) about laser painting and discharging his Taser at Mr X.

### Officer C

25. Officer C, a supervisor, reviewed the TOR. He commented that “*[Officer A] correctly took a conservative approach when dealing with this subject.*” Officer C identified Officer A’s familiarity with the area and the size difference between Officer A and Mr X as key reasons for this decision. He also noted Mr X’s continued efforts to evade capture, saying that “*the fact that the subject had continued to display the intent to avoid and evade capture after countless*

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<sup>8</sup> Officer A wrote in his notebook the following day that Mr X was “breathing but unconscious”.

warnings clearly demonstrated his intent.” Officer C concluded that “[t]he option to deploy the Taser was, given the circumstances [a] measured decision.”

26. Officer C told the Authority that when reviewing Officer A’s TOR in relation to this incident, he viewed the Taser footage and the CCTV footage from the property. Officer C said that the footage showed Officer A in a state of “*heightened anxiety*”. He explained that he could see from the footage that “... *the situation had ... been quite stressful on Officer A and ... he had come to the point where ... the deploying of the Taser was, in his mind, what he believed he needed to do to resolve the issue.*”
27. He noted that Officer A had some “*not insignificant concerns for his safety*”. Officer C talked about the area in which the incident took place, explaining that he knows of at least four or five homicides within a four kilometre radius of the address. Officer C also discussed his previous experience working with Officer A, and his view that Officer A is a measured person.
28. Officer C mentioned another case involving the discharge of a Taser at someone who was running away. He said that he had no issue with tasing while a person is running away per se, but rather, he felt that all of the circumstances needed to be considered, including the necessity of such action.

#### Officer D

29. Officer D reviewed the Taser and CCTV footage. He did not make a finding about whether or not the Taser use was appropriate. However, due to Mr X’s injuries, Officer D concluded that the Authority should be notified of the incident.<sup>9</sup> He sent the TOR to the District Police Professional Conduct Manager for review.
30. When interviewed by the Authority, Officer D explained that he reviewed the Taser footage and the CCTV footage relating to this incident when he was relieving for the Area Prevention Manager. He did not record a view as to the appropriateness or otherwise of Officer A’s use of the Taser, as he knew that it would need to be reviewed by the Police Professional Conduct office. However, when asked by the Authority, Officer D indicated that, knowing what he does now, he thinks that Officer A’s use of Taser was justified.
31. Officer D acknowledged, however, that “*[Mr X] wasn’t in the assaultive range right then and there when the Taser was deployed*”. Officer D concluded that Officer A breached Police policy, but not legislation (see paragraphs 85-101 for relevant law and policy).

#### **Police investigation**

32. Police conducted an employment investigation regarding Officer A’s use of a Taser on a fleeing person.
33. Police spoke to Mr X, who said he had very little memory of that night or the days following.

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<sup>9</sup> Under s13 of the Independent Police Conduct Authority Act 1988, the Police have an obligation to notify the Authority of incidents where a Police employee acting in the execution of his or her duty causes, or appears to have caused, death or serious bodily harm to any person.

34. The Police investigation concluded that Officer A had breached Police policy. Officer A received a disciplinary sanction.

## AUTHORITY INVESTIGATION

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35. The Authority conducted an independent investigation. As part of this investigation, the Authority viewed Taser, CCTV, and video footage taken by Eagle, and monitored the Police interview of Officer A.<sup>10</sup> The Authority also interviewed several people involved in this event, including Officer A and supervising officers. Mr X declined an interview with the Authority. As he had little recollection of the incident, the Authority did not summon Mr X to provide information.<sup>11</sup>

## THE AUTHORITY'S FINDINGS

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36. The Authority considered the following issues:
- 1) Was Officer A justified in arresting Mr X?
  - 2) Was Officer A justified in laser painting Mr X with the Taser?
  - 3) Was Officer A justified in discharging his Taser at Mr X?
  - 4) Did Police provide Mr X with timely and appropriate medical assistance?
  - 5) Did Officers C and D correctly supervise Officer A's TOR?

### Issue 1: Was Officer A justified in arresting Mr X?

37. Officer A saw Mr X riding his motorcycle in what he considered to be a dangerous manner. Eagle then advised Officer A that Mr X was riding on the wrong side of the road and travelling at speed.
38. Driving in a dangerous manner is an offence under sections 7 and 35(1)(b) of the Land Transport Act 1998, and carries a maximum penalty of imprisonment. Therefore under section 315 of the Crimes Act 1961, Officer A was empowered to arrest Mr X without a warrant.
39. Officer A also believed he heard Mr X say he ran because of "warrants". In fact warrants for the arrest of Mr X had been issued by the Courts.

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<sup>10</sup> Monitoring a Police interview involves an Authority investigator sitting in a separate room while the Police interview is undertaken, listening to a live audio feed. At the conclusion of the Police interview, the Authority investigator interviews the Police officer in private, unmonitored by the Police.

<sup>11</sup> The Authority is empowered to summon people under section 24 of the Independent Police Conduct Authority Act 1988.

## FINDING

Officer A was justified in arresting Mr X, as Officer A reasonably believed that Mr X was committing an offence punishable by imprisonment.

### Issue 2: Was Officer A justified in laser painting Mr X with the Taser?

40. Officer A approached Mr X, who was crouched facing away from him in the long grass behind the fence. He drew his Taser and 'laser painted' Mr X. Officer A said that this was because he feared for his safety. It was dark, he had had difficulty in finding Mr X, and they were in a confined space due to the proximity of the fence and patrol car. Although Eagle was above, Officer A was without backup on the ground. Mr X is also significantly taller than Officer A, and the officer believed that he would not be able to control Mr X in a physical confrontation. He therefore laser painted Mr X to deter him from attacking.
41. Due to previous experience in the area, Officer A believed that Mr X may be involved in drug running, and therefore may be armed. Officer A was not sure of Mr X's identity, but thought that he looked like *"an offender I have previously dealt with"* who had threatened him.
42. Officer A told Mr X to *"stay there or you'll get Tasered"*. Mr X initially complied with Officer A's instructions. However, when he crouched back down to the ground, he dropped his hands down to his sides, within reach of his pockets. In order to gain control of the situation, and prevent Mr X from reaching for any concealed weapons, Officer A told Mr X to put his hands on his head. Mr X complied. Officer A continued laser painting Mr X during this time in order to deter Mr X from attacking him.
43. Police policy on the use of a Taser at that time stated that a Taser may only be used where *"the subject's behaviour is in or beyond the assaultive range or has the potential to escalate to within or beyond the assaultive range."* 'Assaultive' is defined as *"showing an intent to cause harm, expressed verbally or through body language or physical action"*.<sup>12</sup>
44. When spoken to by the Authority, Officer A accepted that Mr X was not being assaultive. However, in his view Mr X was actively resisting arrest, and had the potential to escalate to the assaultive range *"at any moment"*. Officer A expressed his view that offenders often make split-second decisions to attack officers.
45. Mr X had been trying to avoid apprehension by Police. However, in the Authority's view, at no time did Mr X's behaviour show an intent to cause harm. For example, Mr X was not:
  - moving towards Officer A;
  - making threats;

<sup>12</sup> Police policy on the use of a Taser now states: *"An operator may show a TASER as a deterrent in situations below the assaultive range on occasions where their perceived cumulative assessment (PCA) is that it is necessary because **the situation** has the potential to escalate to within or beyond the assaultive range"* (emphasis added by the Authority). The focus has changed from the subject's behaviour to *"the situation"* overall.

- posturing violently; or
  - saying that he had, or showing any, weapons.
46. Therefore the Authority does not consider that Mr X was acting in an assaultive or potentially assaultive manner. Although Officer A's assessment of the situation as a whole caused him to fear for his safety, Mr X's behaviour did not meet the required threshold. It follows that Officer A was not justified in laser painting Mr X with the Taser.

### Warning

47. Police policy requires that a warning be given when an officer draws their Taser; the officer must announce "*Taser 50,000 volts*".
48. While policy requires that a verbal warning be given when a Taser is drawn, in this instance Officer A drew his Taser before locating Mr X. Officer A said that when he confronted Mr X, he did not immediately give a verbal warning because he had his torch out and the Taser lights were on Mr X, so he believed that Mr X had seen the Taser.
49. Shortly after presenting the Taser at Mr X, Officer A told him to stay where he was or he would be tasered. Although not the standard warning, the Authority considers that Mr X was made aware that Officer A had a Taser. Although the standard wording should have been used, by telling Mr X to stay where he was or he would be tasered, Mr X was made aware that Officer A had a Taser, giving effect to the purpose of the Policy.

### FINDINGS

Officer A was not justified in laser painting Mr X with the Taser, as Mr X was not acting in an assaultive or potentially assaultive manner.

Officer A should have used the standard wording when warning Mr X of the Taser; however his wording carried a similar meaning.

### Issue 3: Was Officer A justified in discharging his Taser at Mr X?

50. When Officer A discharged his Taser at Mr X, Mr X was running away from him, back up the driveway towards his motorcycle and the Police car. Eagle warned Officer A that Mr X may try to get in the Police car. In that moment Officer A could not recall whether he had taken the car keys out of the ignition.
51. Officer A challenged Mr X to "*stop right there, now*". Mr X kept running. Officer A felt that communication was no longer an effective tactic. He considered using oleoresin capsicum (pepper) spray, but as Mr X was facing away at the time, thought that would be ineffective. Officer A also considered using a baton or empty hand techniques; but was not in close enough range to use these options.



52. 18 seconds after he had last warned Mr X about the Taser, Officer A discharged the Taser at Mr X as he continued to flee. The Taser probes hit Mr X in the back of his leg and arm.
53. Officer A later said that he thought he had made the right decision by tasing Mr X. He stated that he could have pulled the trigger at any earlier stage, but did not think it was right at that time. Officer A said that his view of the Police policy was that Police can use a Taser when they believe that there is a likelihood that the person or area they are going to could pose a threat to themselves or others. He commented that he has heard varying advice, both before and after this incident, about when a Police officer may discharge a Taser. He further stated that he had been told that sometimes *“it’s ok to Taser someone in the back”*, but acknowledged that *“every situation is going to be different”*.

#### *Section 48*

54. Officer A said that he was conscious that Mr X might get to the Police car and drive away. He explained that due to Mr X’s conduct, Officer A felt he needed to arrest Mr X to prevent him from escaping and committing further offences, as well as to protect himself from being assaulted or injured.
55. Section 48 of the Crimes Act 1961 provides legal justification for any person, including Police officers, to use reasonable force in defence of themselves or another. ‘Legal justification’ in this sense means that this person is not guilty of an offence or liable to any civil proceeding in connection with their use of force. Police policy is separate from but related to the legal test, and provides guidance on what is considered *“reasonable”* force.
56. In order to rely on a defence under section 48, a person’s actions must be assessed on both a subjective and an objective basis. This assessment involves three questions:
- 1) What were the circumstances as Officer A believed them to be (subjective)?
  - 2) Did Officer A use force for the purpose of defending himself or another (objective)?
  - 3) If force was used for the purpose of defending himself, was the force used reasonable in the circumstances as Officer A believed them to be (objective)?
57. The Authority must then consider whether, as a whole, it believes that Officer A’s actions were reasonable in the circumstances.

#### 1) What were the circumstances as Officer A believed them to be?

58. The following factors founded Officer A’s assessment of the situation:
- he was alone with Mr X;
  - he was not aware if anyone was responding to his call for back-up;
  - it was dark;
  - he was familiar with the area as one where drug running occurs.

- he was “*becoming exhausted*”;
- his assessment of Mr X was that he:
  - was considerably bigger than himself;
  - could have consumed alcohol and/or drugs;
  - might have been a drug runner, in which case, in Officer A’s view, Mr X was likely armed; and
  - might have been someone Officer A was familiar with and had previously been threatened by.

2) Did Officer A use force for the purpose of defending himself or another?

59. Officer A told Police that if there was a fight between him and Mr X, Mr X could have overpowered him and taken his appointments (such as his Taser, pepper spray, baton) and used them against him. Officer A was also worried that if Mr X got to the Police car he would potentially have access to Officer A’s firearms.
60. In some circumstances a pre-emptive action by way of force can be used in self-defence. For example, where acts of confrontation and aggression show a physical attack is certain and imminent. But this was not one of those circumstances. There had been no action taken by Mr X which might have jeopardised Officer A’s safety. Officer A was responding to a fleeing person, who had previously been compliant, and had not shown any indication of aggression. There was therefore no imminent threat at the time Officer A tasered Mr X.
61. Although Officer A may have been concerned about a confrontation with Mr X, it is more likely that his primary reason for tasing him in the back was to prevent him escaping and in order to arrest him. The Authority therefore does not accept that Officer A was acting to defend himself.

3) Was the force used (tasing Mr X in the back) reasonable in the circumstances as Officer A believed them to be?

62. Given the Authority has found Officer A was not acting in self-defence, this question need not be answered.

*Sections 40*

63. Section 40 of the Crimes Act 1961 allows Police to use force to prevent escape either prior to or after arrest provided the force used is reasonable, and there is no reasonably available less violent means to carry out that duty. Officer A told Police later that although he had not specifically advised Mr X that he was under arrest, it was “*obvious that he was detained and had been caught by Police*”.

64. Although Officer A said he was becoming exhausted in the chase, Mr X was very unlikely to escape Police. Mr X was tracked at all times by Eagle, and while he may have been running towards the police car, the risk of him using it to escape was negligible. The Authority considers that there were a number of less violent ways in which Officer A could have carried out his duties. For example, Officer A could have stopped chasing Mr X down the dead-end driveway, and waited for backup to assist in arresting him. Alternatively, if Mr X rode away on his motorcycle, Eagle could have followed him, and Eagle and Officer A could have liaised with the Police Communications Centre to organise Police cordons to locate and detain Mr X.
65. Officer A told the Authority that if Mr X *“was allowed to ride away on his bike again this would have increased the danger for all other road users”*. He said that Mr X’s previous manner of driving indicated that the public would be put at risk if he were able to leave the scene. Although Mr X had been riding at speed, and occasionally on the wrong side of the road, the Authority notes that he was driving in a residential area late at night, and that there was minimal traffic on the road. Given the presence of Eagle and that other officers were already on their way to assist, the Authority considers that Mr X would likely have been detained quickly, with minimal risk posed to the public, if he were to have escaped.
66. As Officer A had other options available to him at the time, his use of force in discharging the Taser against Mr X was not reasonable.

#### Police policy on use of force

67. Police policy specifies that a Taser cannot be discharged unless the subject’s behaviour is assaultive (defined below above at paragraph 43), and expressly states that a Taser should never be used against an uncooperative but non-aggressive person to induce compliance. Although Officer A’s assessment was that Mr X might soon be assaultive, he was running away at the time he was tasered and was not assaultive as defined by policy. Mr X was therefore not posing an immediate threat to Officer A or anyone else.
68. Taser use is not permitted in such a situation. Therefore, the Authority finds that Officer A breached the Police policy on use of force and was not justified in discharging the Taser.

#### Warning on discharge

69. Police policy requires that an officer yell *“Taser, Taser, Taser!”* when discharging a Taser. This warning must be given, unless it is impractical or unsafe to do so. Officer A did warn Mr X that he had a Taser, and warned him that he would use his Taser (implying that this was if Mr X did not comply). Eighteen seconds before discharging the Taser, he again warned Mr X he had a Taser and called on him to stop. However, Officer A did not give any warning at the time of discharge and thus was in breach of the policy.

#### Other comment

70. The Authority accepts that the factors discussed above at paragraph 57 influenced Officer A’s assessment of the situation, and that he formed the subjective view that Mr X was dangerous and potentially assaultive.

71. However, while Officer A's experience with drug runners in the area was relevant background information, Mr X himself had not acted in any manner which indicated he might become violent. It would seem the sense of isolation, apprehension and vulnerability felt by Officer A led him to interpret Mr X as being more of a threat than the evidence available at the time suggested. While it is prudent to be ready to respond to any change in an individual's behaviour, this should not be done pre-emptively before such behaviour is exhibited.
72. Police policy provides a framework for officers to assess, reassess, manage and respond to potentially dangerous situations. This helps them to ensure their response is necessary and proportionate to the risk to themselves and the public. They must then choose the most reasonable response available to them to deal with the tangible threat that they face. In this instance, the Authority considers that Officer A's reaction was pre-emptive in nature, rather than in response to a specific threat from Mr X.

## FINDINGS

Officer A was not justified in discharging his Taser at Mr X. Although Officer A felt vulnerable, Mr X's behaviour was not assaultive, and Mr X was not presenting an immediate threat. Officer A had other options available to him.

Officer A's use of the Taser was an excessive use of force.

Officer A breached Police policy by not giving a warning at the time he fired the Taser.

### Issue 4: Did Police provide Mr X with timely and appropriate medical assistance?

73. As can be heard in the Tascam footage, Officer A called for an ambulance within moments of discharging his Taser. Officer A appropriately advised that Mr X had fallen face first and that he "was breathing pretty hard". Officer A's notebook entry states that Mr X was "breathing but unconscious".
74. Officer A waited until he had backup before approaching Mr X, and attempting to either handcuff or move him into the recovery position. He told the Authority that he was mindful that he was on his own, so he was staying a safe distance from Mr X. Fortunately, backup arrived very shortly after Mr X was incapacitated by the Taser, causing him to strike his face on the driveway and lose consciousness. Once backup arrived, Officer A and another officer moved Mr X into the recovery position.
75. Police policy requires officers to restrain and provide first aid to the person who has been tasered as soon as possible (see paragraphs 102-107). Although Officer A had concerns for his safety, Mr X was lying face down on the ground, unmoving, following the tasing and his subsequent fall. The Authority does not accept that Officer A's concerns for his safety were objectively reasonable, and considers that Mr X did not pose any appreciable risk to Officer A at that time. Rather, Mr X's safety could have been at risk.

76. 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. If consent is given, then the Police should usually remove Taser probes as soon as possible. In this instance, the Taser probes were removed by the paramedics. Police did not state why they did not remove the probes themselves; however they have said that Mr X appeared to be unconscious. While unconscious, Mr X would not have been able to give consent for the officers to remove the probes; therefore it was appropriate for them to wait until ambulance staff arrived rather than remove the probes themselves.

## FINDINGS

Officer A should have provided first aid immediately after tasing Mr X. Once backup arrived, Police provided appropriate medical assistance to Mr X.

### Issue 5: Did Officers C and D correctly supervise the TOR Officer A submitted?

#### *Officer C*

77. Officer C viewed both the Taser and CCTV footage, as well as reviewing Officer A's TOR. Officer C noted the difficult situation that Officer A was in, including his level of stress and the potentially dangerous area in which the incident occurred. However, Officer C should have identified that Mr X was not assaultive at the time that Officer A discharged his Taser, and therefore that Officer A did not comply with the Police's Taser policy.

#### *Officer D*

78. Officer D correctly identified that the matter should be forwarded to the Police Professional Conduct Manager for notification to the Authority. However, he did not make a finding in his review of the TOR. Further, in his interview with the Authority, Officer D said, knowing what he now knew, he thought that Officer A's actions were justified.
79. It was inappropriate for Officer D to rely on information discovered after the event as justification for Officer A's actions. Regardless of information subsequently received about Mr X, Officer D should have realised that Officer A's use of Taser did not comply with police policy and was inappropriate, and made a finding accordingly.

## FINDINGS

Officer C should have noted the inappropriate use of Taser and forwarded it to the appropriate person/body to review.

Officer D appropriately forwarded this matter for notification to the Authority. However, he also should have identified Officer A's inappropriate use of Taser.

## CONCLUSIONS

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80. The Authority finds that:

- 1) Officer A was justified in arresting Mr X;
- 2) Officer A was not justified in laser painting Mr X, as his behaviour was not within the assaultive or potentially assaultive range;
- 3) Officer A was not acting in self-defence, breached Police policy by discharging his Taser at Mr X when Mr X was not acting in an assaultive or potentially assaultive manner and by doing so, used excessive force;
- 4) Officer A failed to give the appropriate warning when he discharged the Taser at Mr X;
- 5) Officer A should have provided immediate first aid once he had tasered Mr X. However, Police provided appropriate medical assistance once backup arrived at the scene; and
- 6) Officers C and D should have identified that Officer A acted in breach of policy by discharging his Taser at Mr X as he was running away.



**Judge Colin Doherty**

Chair  
Independent Police Conduct Authority

**24 May 2018**

**IPCA: 16-1766**

### Arrest/detention

81. Section 315 of the Crimes Act 1961 empowers a Police officer to arrest and take into custody:

*“... any person whom he or she finds ... committing any offence punishable by imprisonment or any person whom he or she has good cause to suspect of having committed ... any offence punishable by imprisonment.”*

82. The Land Transport Act 1998 states in section 35(1)(b) that a person commits an offence who *“drives ... on a road at a speed or in a manner which, having regard to all the circumstances, is or might be dangerous to the public or to a person”*.<sup>13</sup>

### Use of force

#### Law

##### Use of force by Police officers

83. Section 39 of the Crimes Act 1961 allows Police officers to use reasonable force in carrying out their duties, such as arrests and enforcement of warrants. Specifically, officers may use *“such force as may be necessary”* to overcome any force used in resisting the officer carrying out their duty.
84. Section 40 of the Crimes Act 1961 empowers a Police officer to use necessary force in order to prevent a person from fleeing to avoid arrest.
85. The justification to use force under sections 39 and 40 are both limited by the requirement that force is not used where the Police’s purposes *“can be carried out by reasonable means in a less violent manner”*.
86. 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 for self-defence or defence of others

87. 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.”*

#### Policy

##### Police guidance on use of force

88. 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 options available to them to help de-escalate a situation, restrain a

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<sup>13</sup> S35(1)(b) carries a possible penalty of imprisonment for a term not exceeding 3 months

person, make an arrest or otherwise carry out lawful duties. These include communication, mechanical restraints, empty hand techniques (such as physical restraint holds and arm strikes), pepper spray, batons, Police dogs, Tasers and firearms.

89. Police policy provides a framework for officers to assess, reassess, manage and respond to potentially dangerous situations. This helps them to ensure their response is necessary and proportionate to the risk to themselves and the public.
90. 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 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).
91. An officer's decision about using force will largely depend on the actions of, or potential actions of, the people involved. These are categorised as:
  - 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.
92. Police policy provides guidance as to what level of force by Police may be appropriate depending on the response they are faced with. Ultimately, the authority to use force is derived from the law and not from Police policy.
93. 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

94. Many Police officers, including Officer A, carry Tasers as a matter of course. To carry a Taser routinely, a Constable must be a Level One responder with a current NZ Police First Aid certification, NZ Police TASER operator's or instructor's certification, and NZ Police PITT certification.
95. 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 made less forcefully. A Taser must only be used on a person who is within or beyond the assaultive range (defined as "*actively hostile behaviour accompanied by physical actions or intent, expressed either verbally and/or through body language, to cause physical harm*"), or has the potential to escalate to within or beyond the assaultive range. Laser painting



96. Police policy allows Laser Painting of a subject as a visual deterrent, in conjunction with a verbal warning.
97. To encourage de-escalation and to warn others nearby, officers must give a verbal warning when presenting or discharging a Taser, unless it is impractical or unsafe to do so. The warning for the presentation of a Taser is *"Taser 50 000 volts"*.

#### *Discharge of Taser*

98. 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"*. The warning for a discharge or contact stun is *"Taser, Taser, Taser"*.
99. Police policy expressly states that a Taser should never be used against an uncooperative but non-aggressive person to induce compliance.

#### Aftercare

100. Police 'Taser' policy requires that the officer who discharged the Taser must ensure that the person hit by the Taser is provided with the appropriate level of aftercare and is constantly monitored until examined by a registered medical doctor.
101. The officer is required to apply appropriate first aid, and to seek medical assistance if the subject's safety appears to be at risk at any stage. When a person has been tasered, Police should, if reasonably practicable and safe to do so seek to gain control of the subject while they are incapacitated. It is recommended that the subject be placed lying on their side or sitting at the earliest possible opportunity.
102. Once restrained, a subject should not be left in a position which interferes with their breathing.
103. The 'Taser' policy recommends that Police officers remove Taser probes from a subject with the subject's consent at the earliest opportunity. If the subject does not consent to the officer removing the probes, then the officer should leave the probes in place, take care to minimise discomfort, and call for a medical professional at the earliest opportunity.
104. When the subject has been restrained, the Policy also requires that an officer reassure the subject about the temporary effect of the Taser, and instruct them to breathe normally to aid recovery.
105. The policy also notes that where the use of a Taser leads to an arrest, the arresting officer must ensure that the Bill of Rights and caution are given immediately following arrest. They must then be repeated after the person has sufficiently recovered from the effects of the Taser, when they are capable of understanding the statement.

Tactical Options Report

106. A constable must submit the Tactical Options Report (TOR) form to their supervisor before the end of the shift in which they used force, or with their supervisor's approval, within 3 days/72 hours of this shift and prior to any rostered days off or leave during this period.
107. The TOR form includes 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.

### 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.



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