

Complaint of excessive force and unjustified arrest in Porirua

INTRODUCTION

1. On Sunday 16 April 2017, Police arrested Mr X at a petrol station in Porirua, using force.
2. On 23 April 2017, Mr X complained to the Authority about the arrest, stating that Officer A unreasonably ordered him to get back into his partner's car after she stopped for Police, and pepper sprayed him when he would not comply. Mr X also complained that he was pulled to the ground and bitten by a Police dog while being arrested. Mr X's friends also complained about events that night.
3. The Authority conducted an independent investigation. This report sets out the results of that investigation and the Authority's findings.

BACKGROUND

4. 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, the Authority does not intend to suggest that it has accepted that particular account.
5. 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

6. At approximately 12:40am on Sunday 16 April 2017, Ms W was driving a station wagon along Mungavin Avenue in Porirua. Mr X, Ms W's partner, was the front seat passenger and their friends, Ms Y and Ms Z, were in the back seat. Mr X, Ms Y and Ms Z had been drinking together during the evening, and Ms W was the sober driver.¹

¹ Mr X said that he had drunk eight cans of 5% Jack Daniels bourbon and cola drinks between 6:30pm and 11:30pm that evening.

7. Officer A (a Police dog handler) and Officer B had stopped a car outside the Z petrol station on Mungavin Avenue, and were speaking to the occupants. As Ms W drove past, Ms Y yelled: *"Fuck the Police!"* through the open rear window of the station wagon. Officer A said that he heard this yelled twice from approximately 30 metres away. Ms W said she was unaware that Ms Y had done this because she was listening to music and concentrating on driving, and continued driving across the motorway overbridge, towards the Mobil petrol station on Kenepuru Drive so that Mr X could buy some cigarettes.
8. Officer A returned to his marked Police dog van and drove after Ms W with the intention of stopping the station wagon and checking whether the driver was sober. He activated his emergency flashing lights as he followed the station wagon onto Kenepuru Drive. Ms W saw the flashing lights of the Police dog van as she turned into the forecourt of the Mobil petrol station and parked beside the petrol pump closest to the petrol station shop.
9. Officer A parked behind Ms W and radioed Police Central Communications Centre (CentComms) to advise that he was conducting a vehicle stop, quoted the station wagon's registration plate and requested CentComms provide him with information about the station wagon. He was advised that there were no Police alerts attached to the station wagon or the registered owner. Officer A got out of the Police dog van, leaving it running with the keys in the ignition (as per his usual practice), and started to walk towards the driver's door of the station wagon.
10. Mr X opened the front passenger door but did not get out immediately. Ms W said that Mr X was *"grabbing his [Eftpos] card"*. Officer A later told the Authority that he could see Mr X moving around in his seat and reach under it, and that this formed part of his risk assessment as he made his approach.
11. CCTV cameras mounted high over the forecourt and rear of the Mobil petrol station recorded much of the ensuing interactions between Mr X, his companions and Police. The CCTV footage is shot from a 'bird's eye perspective' rather than from the perspective of Officer A and Mr X, and does not include an audio recording.
12. While Officer A was approaching the station wagon, Mr X got out of the front passenger seat of the station wagon and started walking towards the rear of the vehicle. He told the Authority that he intended to walk to the petrol station shop to buy cigarettes at the night pay window, and thought that Officer A wanted to speak to Ms W (rather than him) because she was the driver.
13. However, as soon as he got out of the station wagon, Mr X said that Officer A yelled at him to get back into the vehicle. When Mr X asked why, Officer A yelled at him to *"get the fuck back into the car now!"* Ms W said she heard Officer A yell: *"Get back in the car"* in an aggressive tone.
14. Mr X said that he replied: *"Nah, I'm going to buy cigarettes"* and continued to walk between the back of Ms W's station wagon and the front of the Police dog van, towards the petrol station shop. Mr X later said that Officer A offered no explanation about what he was doing wrong, or why he should get back in to the station wagon.

15. Conversely, Officer A denied swearing at Mr X and said he spoke to Mr X in a friendly manner, asking him to *“jump back in the car fella until I’ve finished having a chat.”* Officer A said that Mr X ignored this instruction, continued walking towards him and his Police dog van and replied: *“You don’t fucking control me!”*
16. Officer A said he then instructed Mr X more assertively to *“get back in the car until I have finished speaking to you.”* Mr X again replied: *“You don’t fucking control me!”*
17. Officer A explained to the Authority that he wanted Mr X to get back in the station wagon because he:
 - a) wanted the occupants of the station wagon to stay in front of him where he could observe and assess the potential risk they posed to him; and
 - b) did not want Mr X to be able to get past him and drive off in the Police dog van, or prevent him from getting to his Police dog should he need to.
18. Officer A told the Authority that Mr X was a *“big guy”* and he assessed that Mr X’s uncooperative behaviour and aggressive demeanour could lead him to become assaultive: *“He got straight out of the car and stormed to me...he hasn’t stopped or slowed...”* Officer A also asserted that he had stopped *“hundreds of cars”* and this was the first time that someone had come at him in such a manner.
19. As Mr X passed the rear of the station wagon on his way towards the petrol station shop, Officer A moved into Mr X’s path to direct him back towards the station wagon.
20. Mr X said he stepped out of Officer A’s reach and stated *“don’t touch me”* before reiterating that he was just going to buy cigarettes.
21. Conversely, Officer A said that Mr X deliberately stepped towards him and made a forward movement, causing Officer A to believe that Mr X was about to head butt him, before stepping quickly to his left, and moving past Officer A.
22. Officer A said that Mr X’s actions only cemented his assessment that Mr X was agitated, aggressive and assaultive. Officer A did not believe that Mr X was merely making his way towards the night pay window of the petrol station shop to buy cigarettes (which he had not heard Mr X mention). Officer A strongly suspected that Mr X was acting aggressively to deliberately distract him from approaching the station wagon and speaking to the driver, or finding something in the station wagon that the occupants were trying to keep hidden.
23. He warned Mr X for trying to obstruct him from carrying out his lawful duties,² and removed his pepper spray from its holster in case he needed to defend himself.
24. The CCTV camera footage shows the following:

² Summary Offences Act 1981, section 23.

- 1) The Police van parks behind the station wagon. Mr X opens the front passenger door almost immediately but remains in his seat for approximately nine seconds. He can be seen reaching down and behind him. Officer A gets out of the Police dog van and starts to approach the station wagon.
- 2) Mr X gets out of the front passenger seat and walking towards the back of the station wagon.
- 3) Mr X appears to make eye contact with Officer A (who is standing near the back right hand corner of the station wagon and holding a torch in his right hand).
- 4) Officer A gestures with his head towards the station wagon.
- 5) Mr X continues walking around the back of the station wagon, then turns left to walk towards the petrol station shop.
- 6) Officer A turns back towards Mr X and moves into his path.
- 7) As Officer A moves into Mr X's path, he extends his right arm towards Mr X in a blocking motion.
- 8) Mr X brings his arms up to chest height, side-steps and forcefully pulls his arms away from Officer A.
- 9) Mr X continues walking towards the front left corner of the shop, gesturing towards it.
- 10) Both Officer A and Mr X then move out of the frame towards the shop. Mr X briefly reappears before moving out of the frame again.

Use of pepper spray

25. The next sequence of events was not caught by the CCTV camera as Officer A and Mr X had moved out of frame.
26. Mr X said that he had taken "two or three" steps away from Officer A, towards the night pay window (which was approximately five paces ahead of him) when he was pepper sprayed from "the side and behind me...as I was walking off." Officer A was approximately two and a half metres away at this point, and said he asked Officer A: "Did you just pepper spray me?" Having received no response from Officer A, he walked towards the night pay window to buy his cigarettes.
27. Ms W confirmed Mr X's account. She told the Authority that she saw Mr X side-step Officer A and then saw Officer A extend his arm and "drench" the side of Mr X's face with pepper spray as he passed the door of the petrol station shop. She said:

"I seen like a side, like a quick movement and that was [Mr X] walking around trying to like getting around him and he kept on walking and I seen the cop walking and then stretching his arm out and I seen the pepper spray..."

28. Conversely, Officer A said that he pepper sprayed Mr X front-on, *“directly in front of his face and eyes,”* in order to defend himself because Mr X stepped directly towards him again, in a manner that made him believe he was about to be head butted. He could not recall whether he warned Mr X that he was about to use pepper spray before spraying him.
29. Officer A then told Mr X that he was under arrest. Officer A later explained that he was initially unsure whether the pepper spray had been effective, because Mr X was able to walk away to the night pay window and buy cigarettes.
30. Officer A made a radio call for urgent assistance. The Authority has listened to the transmission, but was unable to discern the specific message as the transmission was prematurely cut off. However, it is possible to hear a man shouting in the background.
31. The CentComms dispatcher directed Porirua units to go to the Mobil petrol station to assist. Officers B, C, D, E, F and G responded. Officers D, E and F later told the Authority that they could tell from his tone that Officer A was in serious need of help. Officers D and E commented that in their experience it was unusual for Police dog handlers to call for assistance unless absolutely necessary.
32. At this point, Mr X said his face started to *“burn”* and he could no longer see properly. He told the Authority that he felt *“so vulnerable”* and *“started freaking out”* because he could not see where Officer A was and was not sure what he was going to do next:

“...I couldn't do anything. I couldn't see. I didn't know what to do and like all I could [hear was] him talking behind my back [and] walking around. I didn't know if he was going to hit me or grab my arm and crank it up, put it in a, you know put me in a headlock or whatever, I don't even know so I couldn't see so I started freaking out.”

33. Ms W said that she *“panicked,”* got out of the station wagon and went over to the night pay window where Mr X and Officer A were standing. She could see tears pouring down Mr X's cheeks.
34. Ms Z, seated in the back seat of the station wagon, started recording these events on Ms Y's cell-phone. The cell-phone footage includes an audio recording.
35. The cell-phone footage shows Mr X standing in front of the night pay window rubbing his eyes, while Ms W talks to Officer A. Officer A appears relaxed, and turns his back to Mr X for a couple of seconds to speak to Ms W. He can be heard telling her to *“go and hop into the car.”* He then assures Mr X that *“he's going to be fine”* and tells Ms W *“as soon as he starts playing the game”* he will give Mr X something that will *“make it not hurt.”*
36. Ms W then asks Officer A: *“What's wrong with you?”* to which Officer A replies: *“What's wrong with me?”* Ms W says: *“He's drunk, you're not drunk.”* Ms Z then turns the cell-phone camera and Ms Y narrates what she has seen. When the camera returns to Mr X, Ms W and Officer A, Ms W and Mr X are still protesting. Officer A points and tells Ms W to go back to the car. Ms W tells Officer A that she'll take Mr X home.

37. Ms Y and Ms Z get out of the car and approach Mr X, still recording. The footage shows Mr X pacing in front of the night pay window, saying: *“He just pepper sprayed me for no reason.”* Ms Y is heard affirming this and requests Officer A’s *“badge number.”* Mr X then walks around the corner of the petrol station shop while saying: *“You don’t control me, you don’t own me!”* Officer A follows him.

Mr X runs away from Officer A

38. At this point, Mr X said that he *“panicked”* and ran around the back of the petrol station shop to *“get away”* from Officer A. Officer A ran after him, calling out to him to stop. Ms W, Ms Y and Ms Z followed.
39. A CCTV camera mounted at the back of the petrol station shop recorded the next sequence of events (see paragraph 63). In addition, Ms Y and Ms Z each recorded events using Ms Y’s cell-phone.
40. After a short distance, Mr X stopped running and walked back towards the rear left corner of the shop. He said this was because he was aware that Officer A was a Police dog handler (he had heard a Police dog barking from the Police dog van), and he knew that he could not get away from a Police dog. Ms W walked towards Mr X and started hugging him. Mr X said that he was very upset and confused about what he had done to warrant this response from Officer A.
41. Meanwhile, Officer A ran to his Police dog van to get his dog. He made another muffled, radio call, advising that Mr X was attempting to run away. The urgency in Officer A’s voice can be clearly heard, and dog can be heard barking in the background. The CentComms dispatcher repeated the message: *“Copy Delta. Units copy that. Believe offender is possibly trying to do a runner.”*
42. Officer C was the first officer to arrive at the Mobil petrol station after hearing Officer A’s initial radio call (see paragraph 30). He drove into the forecourt and paused to assess the situation. He said that he saw Officer A with his Police dog on a lead walking across the forecourt towards a group of people, including a man and woman embracing, at the rear left-hand corner of the shop.
43. Officer C said, at this point, he already knew that *“a male or a person”* had been sprayed with pepper spray and that they were under arrest. However, he told the Authority that he did not know why that person was under arrest. He did not believe he had time to ask Officer A for a briefing as it was important to secure the male before he ran away again.
44. It is unclear how Officer C came to have this knowledge. Officer A recalls telling Officer C on his arrival that Mr X had been arrested for obstruction, but Officer C does not recall having had a conversation with Officer A. Officer C thought that the fact that a person had been sprayed and was under arrest might have been broadcasted over the radio. The recording of the radio transmissions made that night did not disclose this information.

Mr X is arrested

45. Officer A positioned himself with his Police dog to the left of Mr X and the three women. Officer C walked behind Officer A and approached Mr X from behind. He said that he calmly told Mr X that he was under arrest, took hold of Mr X's left arm and applied a handcuff.
46. Officer C said that Ms W, Ms Y and Ms Z were "screaming" and Mr X told him to "fuck off" before pulling his arm out of Officer C's grip and walking away. Officer C followed Mr X and grabbed his arm again. Officer C said that Mr X "tensed up" and "clenched his fists" and swung a backhanded punch which connected with the side of Officer C's face, stunning him.
47. Mr X denied deliberately punching Officer C, stating that he twisted side-to-side and whacked the officer's hands away in defence of himself, because he did not want any Police officers to touch him. He said he could not see due to the effects of the pepper spray, and kept his eyes closed because they were stinging, so he did not know who was around him or how many Police officers were present.
48. During this scuffle, Officer C's Taser was knocked off his utility belt and fell to the ground. This was later picked up by another officer.
49. Officers D and E had also arrived at the rear entrance to the petrol station, and parked their patrol car near to where the scuffle was occurring. Officer D said that he saw Mr X pull away from and punch Officer C. He thought Mr X was assaultive as he was "flailing his arms aggressively", and looked like he was intending to hit someone else. He told the Authority that he briefly considered using pepper spray or a Taser to incapacitate Mr X, but other people (including Officer C) were too close by to use these options without risking affecting them. He decided to put Mr X in a headlock "to stop him from assaulting someone else."
50. Meanwhile, Officer B (who had arrived separately) and Officer E went to keep Ms W, Ms Y and Ms Z from approaching Mr X while the other officers were attempting to restrain him. Officer E recalled that the three women were within two to three metres of Mr X and the other officers, and were yelling that the officers should not be restraining Mr X, as he had done nothing wrong.
51. Ms Z told the Authority that Officer E took the cell-phone she was using to film events from her and told her that she couldn't record. Officer E then "pulled me by arm and pushes me out of the way." Ms Z said that Ms Y ran towards Officer E and said "that's my phone" before taking it from Officer E, who gave it back. Ms Z recalled that Ms Y gave her the cell-phone to continue filming (in fact, the CCTV footage shows that Ms Y retained the cell-phone and filmed events until Mr X was fully restrained.³
52. Officer E explained that two of the young women (Ms Y and Ms Z) in particular started waving their hands in her face, and she thought there was a risk that she was about to be assaulted. She put her hands up and grabbed Ms Z's hands, unintentionally taking the cell-phone that Ms Z was holding. Officer E said that she did not know that Ms Z was holding a cell-phone until it

³ See paragraph 63.

was in her hand. Conversely, she also told the Authority that she took the cell-phone, because she thought Ms Z was going to “whack” her with it.

53. Officer E said she returned the cell-phone within “five seconds” to Ms Y (who was standing close by, Ms Z having walked further away), because she “didn’t need her phone.” Officer E recalled Ms Z in particular complaining that the cell-phone had been taken away from her.
54. When Officer D placed Mr X in a headlock, both overbalanced and fell to the ground, with Officer D underneath Mr X. Officer D’s back and the left side of his face and forehead were pressed against the concrete.
55. Mr X said that he immediately tried to get up by pushing down with his hands on Officer D’s back, but another officer (Officer C) continued to push him back down. He said that, during this phase, he did not intentionally assault any of the Police officers trying to restrain him, explaining that he was just trying to get away from them, and whacking their hands away without any particular aim.
56. Officer D said he felt “incredibly vulnerable” underneath Mr X, and could not move. Mr X deliberately punched him in the face, which Officer D was unable to block. Officer D said he attempted to punch Mr X on the side of his body to prevent further punches. However, Officer D explained he was completely reliant on his colleagues to remove Mr X.
57. Officer C said that he saw Mr X deliberately striking Officer D in the head at least twice with a closed fist. Officer C said he considered other tactical options, including pepper spray and a baton (he had dropped his Taser) but discounted either option as effective or safe in the circumstances. Instead, Officer C tried to drag Mr X off Officer D’s back, with Officer E’s help, over several seconds, but Mr X tensed up and Officer C could not move him. Officer E said that she saw Officer D’s face turning red and was concerned that he could not breathe. Officer C told the Authority:

“...I was quite concerned because it’s a concrete forecourt and [Officer D]...with this solid guy on top of him punching him in the head and I couldn’t...do anything”

58. Officer A had been watching events from a slight distance, and said he saw Mr X deliberately use his forearm to push Officer D’s head into the concrete. Officer A said he was mindful that Mr X’s three female companions were very upset and still in close proximity, and he was not sure how many other Police officers had arrived to help control the situation. He yelled at Mr X to get off Officer D. Officer B also stated that Officer A loudly directed Mr X to get off Officer D.
59. He judged that he needed to act in order to protect Officer D. He said that he considered other tactical options, such as a Taser, but did not have one available to him. Ensuring the other officers were clear, he brought his Police dog close to Mr X and commanded it to bite Mr X’s right leg, then used the strength of the Police dog to pull Mr X off Officer D:

“I’ve given the dog, basically fed the dog onto his leg with the rouse command, used the dog, so pain compliance from the dog and pulled him off and throughout the time I’m saying, you know, telling him to, “Get off, get off.””⁴

60. Mr X said that he felt he was being pulled in different directions by the officers, and was still trying to stand up, when he felt something “squeeze” then “clamp down” on his leg and start to tug. Mr X was rolled over and saw the Police dog biting his leg and dragging him.
61. Officer A said that within five seconds Mr X had stopped putting pressure on Officer D’s head, and had been dragged sufficiently away from Officer D for Officer A to judge that the Police dog should be removed. Officer A stopped the Police dog from biting and pulled it back, but a portion of Mr X’s trousers got stuck in the Police dog’s teeth, causing the trouser leg to rip.
62. Officer D felt Mr X’s weight lift from him and he rolled away. Officers C and D were able to restrain Mr X, who continued to struggle, then stood him up and took him towards a Police car. Two other Police officers, Officers F and G, arrived and started speaking with Ms W, Ms Y and Ms Z. Mr X struggled against being placed in the Police car, but was eventually subdued and driven to Porirua Police Station where he was treated by a doctor for his dog bite injuries. He was released on bail at approximately 2:30am.
63. The Authority analysed the CCTV footage of this phase of the incident, which shows:
 - 1) Mr X running behind the petrol station shop, chased by Officer A. Officer A then turns to his left and runs out of the frame back towards the forecourt. Mr X also stops running and starts walking back to the left rear corner of the petrol station shop.
 - 2) Ms W, Ms Y and Ms Z (who is filming events on the cell-phone) walk quickly towards Mr X. Ms W hugs Mr X, who is rubbing his eyes. Ms Y and Ms Z walk towards the forecourt and out of the frame.
 - 3) Officer A and his Police dog enter the frame and stand to Mr X’s right. Ms Y is facing Officer A, then turns towards Officer C as he walks around Officer A and then approaches Mr X from behind. Ms Y puts her arms out towards Officer C as he moves towards Mr X. Officer C puts his left hand on Mr X’s arm. Mr X pulls away and wheels around in an anticlockwise direction, while Officer C holds onto his arm.
 - 4) A Police car turns into the rear of the petrol station from Station Road and parks. Officers D and E get out and start running towards the group. Officer B also walks in to the frame beside Officer C. Ms Z stands to Officer C’s left, filming events on the cell-phone.
 - 5) Mr X starts slapping at Officers C and D, who are trying to grab his arms.
 - 6) Officer D uses his right arm to put Mr X in a headlock, however they spin around, and fall over with Officer D underneath. Officer C bends over them. Officer A is standing with

⁴ Pain compliance means the direct and intentional use of force by a constable that causes pain to the subject, usually evidenced by the subject showing and/or verbalising pain.

his Police dog in the background, while Officers B and E continue to attempt to keep Ms W and Ms Y from getting too close. Ms Z is at a slight distance, filming events.

- 7) The scuffle between Mr X and Officers C and D moves out of frame. Ms Z approaches the scuffle holding the cell-phone. Officer E, positioned to Ms Z's right, looks towards Ms Z and stretches her left hand towards her and appears to grab something from Ms Z's hand, although the camera's view is obstructed by Officer D at this moment. A second later, when Officer B has moved, Ms Z's hands are empty and she turns towards Officer E, who appears to have passed something from her left to her right hand. Four seconds later, Ms Y moves into the frame from Officer E's right side, grabs an object from Officer E's hand.
- 8) Approximately five seconds later, Officer A can be seen to have applied the Police dog to Mr X's right leg, and is pulling Mr X backwards. Officer C has hold of Mr X's left arm and Officer D, who has rolled out from underneath Mr X, is holding on to Mr X's right wrist. Officers E and B continue to prevent Ms W, Ms Y and Ms Z from approaching by positioning themselves in front of them. Ms Y is using the cell-phone to film events.
- 9) As soon as Officer D is back on his feet, Officer A removes the Police dog from Mr X. Mr X is struggling, and Officers C and D restrain Mr X face down on the ground. Ms Y is still filming and can be seen approaching and pointing towards Officer A and his Police dog. Officer E approaches her, with her arm outstretched, causing Ms Y to move backwards and away from Mr X. Ms Y continues to point towards the Officers A, B and C. Officer E directs Ms Y to the left and out of the frame.
- 10) Officers C and D eventually sit Mr X up and walk him towards a Police car. The three women can be seen remonstrating with the other officers.

64. In addition to the CCTV footage, Ms Y filmed part of this phase of events on her cell-phone. The footage starts at the point in the CCTV footage described in point eight. Relevant cell-phone footage and audio is described below:

- 1) Mr X and Officer D are both on the ground. Officer E holds Mr X's right arm in both hands, and pulls Mr X backwards along the ground, allowing Officer D to roll away from Mr X, and grab Mr X's left hand. Officer A is positioned to Mr X's right, holding his Police dog's collar while it bites Mr X's right leg. In the background, Ms Y yells "*Police brutality!*", while other female voices can be heard screaming and crying. Officer A yells: "*Get off that cop now...get off that cop!*"
- 2) Mr X continues to be dragged backwards, with the Police dog pulling on Mr X's right trouser leg. Officer A leans forward and places his hand on the Police dog's throat. Mr X appears to attempt to stand, but is forced down onto his stomach by Officer C and Officer D (who is now on his feet). Mr X's right trouser leg rips while still caught in the Police dog's teeth (the Police dog is not biting flesh). While this is happening, Mr X yells: "*I did nothing!*" Two female voices are screaming and crying, reiterating that Mr X did nothing, and that what is happening is not fair. A female voice, most likely Ms Z, can be heard to say: "*Get away from her, she'll take your phone.*"

- 3) Mr X is handcuffed to the rear by Officers C and D, while lying face down on the ground. Ms Y turns the cell-phone camera towards Officer A, approaches him and tells him to get his Police dog off Mr X (part of Mr X's trouser fabric is still caught in the Police dog's teeth).

Mr X

65. Mr X received a six centimetre laceration on his upper right thigh from the Police dog bite. It was cleaned and dressed by an ambulance paramedic at the Police station, and a Police doctor inserted six stitches.
66. Mr X was charged with two counts of assaulting a Police officer (with respect to Officers C and D), obstructing Officer A and resisting Police.⁵ After reviewing all the evidence, Police later withdrew all charges with the leave of the Court.

Police involved

67. Officer A had nine years' service in the New Zealand Police and was current in all relevant certifications at the time of this incident.
68. Officer D received grazes to his forehead, right elbow and knee during the arrest. He also received a strain to his right leg.

Complaints

69. Mr X complained that Officer A used force against him and arrested him for merely attempting to buy cigarettes.
70. Mr X, Ms W and Ms Z all complained that Officer A's language and attitude was unprofessional and caused the situation to escalate unnecessarily. He failed to explain why he required Mr X to remain in the station wagon.
71. Ms Z complained that Officer E seized the cell-phone that she was using to record this incident.

Police investigation

72. Police carried out an employment investigation into Officer A's actions.

AUTHORITY'S INVESTIGATION

73. The Authority interviewed Mr X, Ms W and Ms Z and all of the Police officers involved. The Authority visited the scene of the incident on 2 June 2017, has reviewed all the CCTV and cell phone footage, and listened to an audio recording of the relevant radio transmissions. The Authority has also reviewed the Police investigation file.

⁵ Summary Offences Act 1981, sections 10, 21 and 23.

THE AUTHORITY'S FINDINGS

74. The Authority identified and considered the following issues:

- 1) Was Officer A justified in arresting Mr X on the forecourt?
- 2) Was Officer A's use of pepper spray against Mr X legally justified?
- 3) Did the officers who arrived to assist Officer A act lawfully?
- 4) Was Officer A's use of the Police dog legally justified?
- 5) Was Mr X provided with appropriate aftercare?
- 6) Did Officer E unlawfully take the cell-phone from Ms Z?

Issue 1: Was Officer A justified in arresting Mr X on the forecourt?

75. Police have the power to stop a car and speak to the driver under section 114 of the Land Transport Act 1998, provided that this is for the purpose of enforcing or administering the Act. Consequently, Officer A had the lawful right to stop the station wagon and speak to Ms W, as the driver.
76. However, the Land Transport Act 1998 does not give Police the power to require the passengers of the stopped car to follow his or her instructions.
77. Officer A told the Authority that he wanted Mr X (and any other passengers) to remain in the station wagon while he dealt with the driver to minimise the risk to himself in the circumstances (see paragraph 17). He felt threatened by Mr X, and uneasy about approaching the station wagon as he believed this left him in a vulnerable position.
78. As the interaction progressed, he came to believe that Mr X's aggressive demeanour and refusal to follow instructions was intentional, and aimed at diverting him from approaching Ms W to speak to her (Mr X denied that this was the case).
79. It is an offence to intentionally obstruct Police from acting in the execution of their duty, in this case speaking to the driver of the station wagon.⁶ However, no offence is committed if a person ignores any demand that a Police officer is not entitled to insist upon.⁷
80. Since Officer A had no statutory power under section 114 to stop Mr X from getting out of the station wagon and walking across the forecourt, Mr X was entitled to ignore Officer A's directions and go and buy his cigarettes. Consequently, Mr X's arrest for obstruction was unlawful.

⁶ Summary Offences Act 1981, section 23.

⁷ *Police v Amos* [1977] 2 NZLR 564 (SC), at 571-573.

FINDING

Mr X's arrest for obstruction was unlawful.

Issue 2: Was Officer A's use of pepper spray against Mr X legally justified?

81. Because Mr X's arrest was unlawful, all force used by Police to carry out that arrest pursuant to section 39 of the Crimes Act 1961 was also unlawful.⁸
82. However, Officer A told the Authority that he used pepper spray against Mr X not to effect an arrest but in order to defend himself because he believed that Mr X was about to head butt him (see paragraph 28).
83. Section 48 of the Crimes Act 1961 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."*
84. In order to rely on this defence, a person's actions must be assessed on a subjective and objective basis. This assessment involves three questions:⁹
 - 1) What were the circumstances as the person believed them to be (a subjective test)?
 - 2) Did the person use force for the purpose of defending himself or herself or another (a subjective test)?
 - 3) Was the force used reasonable in those circumstances (an objective test)?
85. In addition to examining the legality of the Police's use of force, the Authority must consider whether, as a whole, it believes that the officers' actions complied with Police policy and were reasonable in the circumstances.

What circumstances did Officer A believe he was facing?

86. The Authority must establish what circumstances Officer A believed he was facing at the moment he pepper sprayed Mr X.
87. Officer A told the Authority that Mr X took a step towards him in a manner that caused him to think that Mr X was about to head butt him (see paragraph 28). He said that his belief that he was about to be head butted was supported by what he perceived as Mr X's aggressive body language and defiant behaviour (see paragraphs 18 and 22), as well as an earlier movement which Officer A had also interpreted as an attempt to head butt him (see paragraph 21). It was this earlier movement that caused him to have his pepper spray ready in his hand in case he needed to defend himself (see paragraph 23).

⁸ Section 39 of the Crimes Act 1961 is set out in paragraph 134.

⁹ *Adams on Criminal Law* (Brookers, Wellington, 1992) Crimes Act, para CA48.01.

88. Officer A also said he felt that the circumstances at the time contributed to the vulnerability of his situation and heightened the threat he believed he was facing. It was dark (although the forecourt was lit), he was on his own, and there could be other people in the station wagon who would also act aggressively towards him and prevent him from getting back to his Police van and Police dog if necessary.
89. The Authority accepts that Officer A perceived that Mr X's behaviour was generally belligerent and aggressive. Mr X himself stated that he was annoyed by the situation and told Officer A that he was not going to follow his instructions. Mr X also accepted he had fended off Officer A's outstretched arm when Officer A stepped into his path (see paragraphs 14, 20 and 24).
90. However, the Authority does not accept Officer A's statement that he believed that he was about to be head-butted and finds it implausible.
91. Officer A, and Mr X and Ms W have differing accounts of the moment that pepper spray was used. Officer A stated that he sprayed Mr X full in his face to avert the head butt, while Ms W and Mr X said that he was sprayed from the side as he was walking past Officer A (see paragraphs 26-28). The two accounts are mutually exclusive.
92. Mr X said he was not immediately aware that he had been sprayed, and that it took him a while to feel the effects. His account is corroborated by the facts that he inquired of Officer A: "*Did you just pepper spray me?*" and that he was able to walk to the night pay window seemingly unaffected. Officer A himself commented on the delayed effectiveness of the spray (see paragraph 29). This evidence supports Mr X's assertion that he was sprayed side-on, as otherwise the effect of the spray would have been immediately obvious.
93. The facts therefore support the view that Mr X was sprayed as he was walking past Officer A, and that any aggressive behaviour displayed by Mr X did not constitute, and could not have been perceived as constituting, an imminent head-butt.
94. For these reasons, the Authority does not accept Officer A's statement that he believed that Mr X was about to assault him, whether by way of a head butt or otherwise, and finds it implausible. It is more likely that Officer A simply perceived that Mr X was challenging his authority by refusing to comply with his command to get back in the station wagon.

Did Officer A use force for the purpose of defending himself?

95. It follows that while the Authority accepts that Officer A's assessment of the circumstances caused him to perceive that Mr X was generally acting aggressively, the Authority does not accept that Officer A pepper sprayed Mr X to defend himself.
96. Instead, the Authority considers it more likely than not that Officer A used pepper spray to stop Mr X from walking away from him and failing to comply with his instructions, rather than for the purpose of defending himself. From the outset of this incident, Officer A had a strong and enduring belief that he was entitled to assert his authority and stop Mr X from walking away from him.

Was the force used reasonable in those circumstances?

97. Having found that Officer A was not acting in self-defence, this final question need not be addressed.
98. However, even if the Authority had concluded that Officer A was acting in self-defence and the force used in the circumstances was reasonable for the such purposes, it would have concluded that Officer A's actions overall were unreasonable and unjustified because he had wrongly put himself into a position where a perceived threat arose.
99. Officer A should never have been in that position in the first place. He asserted in submissions to the Authority that Mr X was responsible for his own actions by reacting to Officer A's request that he get back in the station wagon, and that Officer A cannot be held responsible for subsequent events. This overlooks the fact that the situation was of Officer A's own making and resulted from his misplaced belief that he had the right to compel Mr X to comply with his instructions. The fault rests with him and not with Mr X.

FINDINGS

Officer A's use of pepper spray was unlawful and unjustified, because:

- he did not perceive that Mr X was about to assault him, whether by way of a head butt or otherwise; and
- he used pepper spray to stop Mr X from walking away from him and failing to comply with his instructions, rather than for the purpose of defending himself.

Even if the Authority had concluded that he was acting in self-defence and the use of force was reasonable for the such purposes, it would have concluded that Officer A's actions were unreasonable and unjustified because he had wrongly put himself into a position where a perceived threat arose.

Issue 3: Did the officers who arrived to assist Officer A act lawfully?

100. Officers B, C, D, E, F and G responded to Officer A's two radio calls for assistance (see paragraphs 30 and 41).
101. It is unclear whether Officer C, the first officer to arrive, specifically knew that Officer A had placed Mr X under arrest (albeit unlawfully), and had already been pepper sprayed. There are discrepancies in the accounts given by Officers A and C about what information was communicated; and whether this information was communicated in person or over the radio (see paragraphs 42 to 44). As discussed, a recording of radio transmissions does not disclose that it was.
102. However, the fact that Officer A had made two radio calls for assistance, the second of which was made with discernible urgency and indicated that the "offender" was running away, in conjunction with the fact that Officer A and his Police dog were moving towards Mr X and his companions, strongly indicated to Officer C that at least one person in that group was under

arrest, and had previously tried to flee from Police. As the other officers arrived, they witnessed Mr X struggling with Officer C, which, together with the other information they had heard, further indicated that Mr X was under arrest and failing to comply.

103. Consequently, Authority considers that the officers who arrived to assist Officer A made a reasonable assumption that Mr X was under arrest and needed to be taken into custody. The Authority cannot criticise these officers for holding this belief, or for assisting Officer A to secure Mr X.
104. However, as discussed in paragraphs 75 to 81, this arrest was unlawful, and consequently any force used pursuant to section 39 of the Crimes Act 1961 specifically to carry out that arrest was also unlawful.
105. Officer D told the Authority that, rather than using force purely to arrest Mr X, he placed Mr X in a headlock to stop him from punching the officers trying to deal with him, pursuant to section 48 of the Crimes Act 1961. Officer D said he had already seen Mr X punch Officer C in the head, and he assessed that Mr X was angry and assaultive, because Mr X was *“flailing his arms aggressively”* (see paragraph 49).
106. Mr X denied deliberately punching any officers, but conceded trying to whack the officers’ hands away (see page 47).
107. The CCTV footage does not clearly show Mr X distinctly punching Officer C, however it does show Mr X slapping at the officers who are trying to take hold of him. The Authority has considered Officer D’s actions against the legal test.¹⁰ The Authority is satisfied that Officer D genuinely believed that Mr X had lashed out at Officer C, and was about to do so again (whether intentionally or not). He acted to prevent this, and used a restraint technique that applied minimum force to Mr X, having considered other tactical options (see paragraph 49).

FINDINGS

The officers who arrived to assist Officer A made a reasonable assumption that Mr X was under arrest and needed to be taken into custody.

Officer D was justified in using a headlock to attempt to restrain Mr X.

Issue 4: Was Officer A’s use of the Police dog legally justified?

108. Officer A told the Authority that he commanded his Police dog to bite Mr X’s leg in order to defend Officer D, pursuant to section 48 of the Crimes Act 1961.¹¹

¹⁰ This is set out in paragraphs 83-84.

¹¹ The relevant policy regarding the use of Police dogs is set out in paragraphs 144-146.

What circumstances did Officer A believe he was facing?

109. Officer A's earlier interaction with Mr X on the forecourt had caused him to assess that Mr X was in an aggressive and assaultive frame of mind. Officer A had also seen the scuffle occur between Mr X and Officers C and D as they attempted to arrest him.
110. Officer A said he then saw that Officer D become pinned under Mr X, and believed that Mr X was deliberately pushing Officer D's head down onto the concrete. Officer D did not appear to be able to move his head or defend himself. Officers C and E had tried to pull Mr X off Officer D, but were unable to. He could not see any other available officers. Officer A said he felt that, at that point, he needed to intervene to stop Officer D from being seriously hurt (see paragraphs 58-59).
111. Officers C's, D's and E's accounts to the Authority are consistent with Officer A's assessment of the immediate situation. Officers C and E were extremely concerned for Officer D's wellbeing (see paragraphs 56-57).
112. Mr X denied deliberately assaulting Officer D, explaining that he was pushing down on Officer D in an attempt to get up, but was unable to because Officer C was preventing him (see paragraph 55).
113. Neither the CCTV or cell phone footage clearly show this phase of events, although it is possible to see that Officer D is underneath Mr X and the other officers are attempting to intervene (see paragraph 63).
114. The Authority accepts that Officer A believed that Officer D was at risk of further assault from Mr X, and that Mr X needed to be urgently and forcibly removed.

Did Officer A use force for the purpose of defending Officer D?

115. Officer A stated in his post-incident report, and in his interview with the Authority, that he used his Police dog to defend Officer D from continued attack by Mr X.
116. CCTV and cell-phone footage shows that Officer A removed his dog as soon as Officer D was free, and no longer at risk of being hurt, but before Mr X had been fully restrained and handcuffed. This corroborates Officer A's assertion that his purpose was to protect Officer D, rather than to help the officers arrest Mr X.
117. Although the Authority has questioned Officer A's judgment during the earlier interaction with Officer A on the forecourt, the Authority has not found any evidence to indicate that Officer A used force gratuitously at this point during this incident.
118. The Authority accepts that Officer A directed his Police dog to bite Mr X in order to defend Officer D, rather than to expedite the arrest.

Was the force used reasonable in those circumstances?

119. Mr X was pushing down on Officer D's head for several seconds. Two Police officers tried to pull Mr X off. The other available officers were engaged in managing Mr X's female companions. Officer B recalled Officer A yelling at Mr X to get off Officer D (see paragraph 58).
120. The Authority accepts that time was of the essence, as Officer D was in a dangerous position. He was at risk of receiving head injuries and suffocation (he received grazes to his forehead). Having observed that his colleagues could not remove Mr X, the Authority accepts that he reasonably believed he needed to act to help Officer D.
121. Officer A said that he considered other tactical options, but none were available to him (he did not have a Taser and he had already used pepper spray without significant effect). The Police dog was the next, least-forceful tactical option available to Officer A to both discourage Mr X from continuing to push Officer D down, and as additional strength to drag Mr X off.
122. The CCTV and cell-phone footage support Officer A's evidence that he had control of his Police dog throughout this phase of events, and removed it from Mr X's leg as soon as Officer D was free.
123. Policy requires the Police dog handler give a verbal warning to an offender prior to deploying the Police dog. Officer A said that he had directed Mr X several times to get off Officer D (see paragraphs 58, 59 and 64), and Mr X had ignored this directions. He was confident that Mr X was aware that the Police dog was present (having both seen it approach and heard it barking). It was impractical and unsafe to take the time to specifically warn Mr X about the presence of the Police dog as Office D needed immediate assistance.
124. In a perfect world, Officer A would have verbally warned Mr X about the presence of the Police dog as part of his direction to get off Officer D.¹² However, the Authority accepts that it was reasonable for Officer A to deploy the Police dog without specifically warning Mr X. The situation was dynamic, Officer D was at risk and the presence of the Police dog was obvious to all present, including Mr X.

FINDING

The use of the Police dog was lawful and reasonable in the circumstances.

Issue 5: Was Mr X provided with appropriate aftercare?

125. Police have a duty of care towards people who are injured while in their custody. The Authority is satisfied that Police provided Mr X with adequate care once he was taken into custody. He was provided with timely medical assistance for his injuries by paramedics, and by a doctor at the Porirua Police Station (see paragraph 65).

¹² See paragraph 145 for the relevant policy.

FINDING

Police provided Mr X with appropriate medical care.

Issue 6: Did Officer E unlawfully take the cell-phone from Ms Z?

126. Police cannot take a person's property, without a lawful reason.
127. Ms Z complained that Officer E took Ms Y's cell-phone from her when she was using it to film events (see paragraph 51). Ms Z believed that this was deliberate, to stop her from filming Mr X's arrest.
128. Officer E did not dispute that the cell-phone ended up in her possession, and provided inconsistent explanations for why this happened: that she was unaware that Ms Z was holding a cell-phone and it ended up in her hand when she was fending Ms Z's hands away; and that she took the cell-phone intentionally because she thought Ms Z was going to "whack" her with it (see paragraph 52).
129. The CCTV footage supports Ms Z's complaint that Officer E took the cell-phone intentionally. As described in paragraph 63, point seven, Officer E appears to be deliberately reaching for and taking the cell-phone. Ms Z's arms and hands are not near Officer E at the point the cell-phone is taken. The Authority therefore finds Officer E's version of events implausible.
130. Although the cell-phone was only taken from Ms Z for approximately four seconds before Ms Y recovered it from Officer E, it should not have been taken from Ms Z at all.

FINDING

Officer E unlawfully took Ms Y's cell-phone from Ms Z.

CONCLUSION

131. This incident was in the most part unlawful and unnecessary. What should have been a straight forward interaction between Officer A and Ms W escalated into a violent confrontation without good reason. As a passenger, Mr X was entitled to leave the station wagon and walk to the petrol station shop unimpeded. What occurred could have been avoided if Officer A acted reasonably and lawfully.
132. It is vital that Police officers are clear on their powers of arrest, detention and seizure of property, and have a sound understanding of the law and policy around use of force.
133. The Authority has determined that:
 - 1) Mr X's arrest for obstruction was unlawful.

- 2) Officer A's use of pepper spray was unlawful and unjustified, because:
 - a. he did not perceive that Mr X was about to assault him, whether by way of a head butt or otherwise; and
 - b. he used pepper spray to stop Mr X from walking away from him and failing to comply with his instructions, rather than for the purpose of defending himself.
- 3) Even if the Authority had concluded that he was acting in self-defence and the use of force was reasonable for the such purposes, it would have concluded that Officer A's actions were unreasonable and unjustified because he had wrongly put himself into a position where a perceived threat arose.
- 4) The officers who arrived to assist Officer A made a reasonable assumption that Mr X was under arrest and needed to be taken into custody.
- 5) Officer D was justified in using a headlock to attempt to restrain Mr X.
- 6) The use of the Police dog was lawful and reasonable in the circumstances.
- 7) Police provided Mr X with appropriate medical care.
- 8) Officer E unlawfully took Ms Y's cell-phone from Ms Z.



Judge Colin Doherty

Chair
Independent Police Conduct Authority

13 December 2018

IPCA: 16-2139

Use of force

Law on use of force

134. 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.”*
135. 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.”*
136. Under section 62 of the Act, anyone who is authorised by law to use force is criminally responsible for any excessive use of force.

Police policy on use of force

137. 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.
138. 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.
139. 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)).
140. 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.

141. The policy states that any force must be considered, timely, proportionate and appropriate given the circumstances known at the time. Victim, public and Police safety always take precedence, and every effort must be taken to minimise harm and maximise safety.

Use of oleoresin capsicum (pepper) spray

142. Pepper spray is used by Police to subdue people; it causes a stinging sensation and generally makes people very compliant so as to avoid further aggressive behaviour.
143. 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”*.

Use of a Police dog

144. Police dog handlers must consider all tactical options in situations that require use of force. They must consider whether a lesser, more appropriate use of force is available before deploying a Police dog. The law sees little difference between dogs, when used as a means of force, and other methods and implements used by Police, such as firearms, Taser and batons.
145. Police officers operating a Police dog are personally responsible for the use of force by the dog. They must be satisfied, before releasing the dog, that the use of force is justified in the circumstances. They must call on the person to desist unless impracticable to do so and ensure that the extent of the force used by the dog is kept to a minimum possible in the circumstances.
146. Police dog handlers must have control of their dog at all times during deployment. Control means that the dog is under immediate physical or voice control and the dog responds to that control.

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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