



IPCA

Independent Police
Conduct Authority

Mana Whanonga Pirihiimana Motuhake

Force used to arrest man in Palmerston North justified but search while in custody inadequate

1. On 14 September 2021, the Courts issued a warrant to arrest an 18-year-old male (Mr X). On 18 June 2022, Police had been attempting to locate and arrest Mr X for nine months. Due to Mr X's criminal history and information Police had regarding him, they considered Mr X posed a high risk to the public and was a priority offender.
2. At about 12.15pm on 18 June, a team of five officers went to a house in the suburb of Awapuni, Palmerston North to locate and arrest Mr X. Mr X was inside and when he became aware Police were approaching, he jumped out of a window to get away. On the boundary of the property, Mr X then climbed over a corrugated iron fence and onto the roof of an adjoining small structure. Two officers, Officers A and B, called to Mr X to stop, that he was under arrest, but Mr X continued to flee.
3. Officer A called again to Mr X to stop, and when he did not, the officer fired a 40mm sponge round¹, which struck Mr X in the back. Mr X fell from the roof and then continued running, managing to get away from the initial team of officers before being stopped by officers in an outer cordon. Mr X surrendered and was taken into custody.
4. At the Palmerston North Police cells, Mr X was seen by a Police doctor who found he did not need further medical attention. When alone in his cell, Mr X was able to retrieve a length of cord from his tracksuit pants and create a makeshift noose which he fixed to the cell door and placed around his neck. Fortunately, an officer found Mr X before he suffered serious harm, and he was taken to hospital where an examination found no injury or concerns.

¹ A XM1006 high density sponge round is fired from a 40-millimetre gas launcher with a range of about 30 metres. The weapon is designed to be non-lethal.

5. Mr X's mother later complained that he had been shot at, treated harshly, and allowed to attempt suicide. Police investigated and found nothing of concern. We also carried out an investigation.

The Authority's Findings

Issue 1: Was an officer justified in shooting at Mr X with a 40mm sponge round weapon?

Officer A was justified in firing a 40mm sponge round weapon at Mr X to prevent his escape under section 40 of the Crimes Act 1961.

Issue 2: Did Police complete a proper search of Mr X while in custody and adequately consider his wellbeing?

Police did not complete a proper search of Mr X. However, Police did adequately address his wellbeing.

Analysis of the Issues

ISSUE 1: WAS OFFICER A JUSTIFIED IN SHOOTING AT MR X WITH A 40MM SPONGE ROUND WEAPON?

What happened?

6. In his Tactical Operations Report (TOR²), Officer A described arriving at the house in his vehicle, parking it across the driveway, and running up one side of the house.
7. Officer A then observed Mr X climbing a corrugated iron fence that ran down that side of the property.
8. Officer A told the Authority he challenged Mr X saying, "Police, don't move" while Mr X continued over the fence and onto the roof of a greenhouse that was in the adjacent property. Officer A could hear the other officer, Officer B, a Police dog handler, in the adjacent property also challenging Mr X to stop.
9. Officer A's perceived cumulative assessment (PCA) placed Mr X in the 'assaultive' range of the Tactical Operations Framework (TOF), in reaching that PCA he considered Mr X's extreme motivation to escape, his recent possession of firearms, a propensity for violence, gang status, and refusal to follow instructions.

² By policy, officers are required to submit a Tactical Options Report (TOR) when they have used force on a person.

10. Officer A says that as Mr X was in recent possession of firearms, he believed that Mr X could have concealed a cut-down firearm under his clothes, even though he did not appear to be carrying a firearm.

11. Regarding the need to fire the 40mm sponge round weapon, Officer A told us:

“So, in that instance I believed he was fleeing, he was gonna assault people and do whatever he had to do to escape. So, by deploying the 40 mm I was hoping that the pain would be sufficient to cause him to stop and to surrender, and he could then be handcuffed without any further force being used, or it was going to slow him down enough that we could then capture him before he caused any more harm.”

What are the possible justifications for Officer A’s use of force in these circumstances?

12. The following provisions of the Crimes Act 1961 provide legal justification for using force in certain circumstances:

- a) Section 39 empowers Police to use *“such force as may be necessary”* to overcome any force used in resisting an arrest or the execution of any sentence, warrant, or process.
- b) Section 40 empowers Police to use *“such force as may be necessary”* to prevent the escape of someone who takes to flight to avoid arrest.
- c) Section 48 provides that any person is justified in using *“reasonable”* force in defence of themselves or another.

13. Officer A in his TOR cited sections 39 and 48 as being the justification for his use of force. We do not consider section 39 applies as Mr X did not use any *“force”* that Police needed to overcome. We also do not consider section 48 applies as no person needed defending.

14. However, Mr X was fleeing from the officers and, when we spoke to Officer A, he confirmed that his use of force fell under section 40. Therefore, we will assess Officer A’s actions against this section.

Was Officer A legally justified in using force against Mr X to prevent his escape under section 40?

15. Section 40 empowers Police to use *“such force as may be necessary”* to prevent the escape of someone who takes to flight to avoid arrest. *“Necessary”* force in this context is force that is proportionate to:

- the seriousness of the offence for which the person is to be apprehended and the public interest in detaining them to bring them to justice;
- the effect of an escape on the likelihood of the person being brought to justice (such as loss of evidence or difficulties in identifying the person and/or apprehending them later); and

- the likelihood and severity of the risk they pose of further offending if escape is not prevented.

16. Under section 40, the Authority must determine:

- a) whether the officer believed on reasonable grounds that the person was fleeing to avoid or escape arrest; and
- b) if so whether the officer's use of force to prevent the escape was reasonable and proportionate.

Did the officer believe on reasonable grounds that Mr X was fleeing to avoid or escape arrest?

17. Upon arriving at the address, Officer A observed Mr X climbing a corrugated iron fence on one side of the property.
18. A person choosing to leave an address in an unusual way, such as by climbing a fence the moment Police arrive, strongly implies that person intends to flee from Police.
19. We consider it was reasonable for Officer A to believe that Mr X was attempting to flee to avoid arrest.

Was the officer's use of force to prevent Mr X's escape reasonable and proportionate?

20. This question requires us to consider the factors set out in paragraph 15.

The seriousness of the suspected offences

21. Mr X had two outstanding charges before the Court, being aggravated robbery and wounding with intent to injure. Aggravated robbery carries a maximum sentence of 14 years' imprisonment and Wounding with intent to injure a maximum sentence of 7 years' imprisonment.
22. Police had information causing them to suspect that Mr X was illegally in possession of a military-style semi-automatic rifle, a long-barrelled semi-automatic shotgun, a cut-down shotgun, and a cut-down high-powered bolt action rifle. Mr X was also a suspect in a home invasion in May 2022 during which a female was assaulted with a firearm.
23. Unlawfully possessing a prohibited firearm carries a maximum sentence of five years' imprisonment.
24. We consider the suspected offences serious in nature.

The consequences of Mr X escaping arrest

25. In Officer A's TOR, he stated:

"Mr X's previous propensity for violence and the time that he had spent on the run lead [sic] me to suspect that Mr X would do whatever it took to avoid arrest

and that could involve Mr X using a firearm against Police or members of the public.”

26. Officer A also stated that when he fired the sponge round weapon at Mr X he was:

“...not effectively cordoned and was able to flee over a fence but I knew that Mr X was likely to come into contact with wider Police cordons or members of the public as he continued to flee; I suspected Mr X may use force against those persons to facilitate his escape.”

27. Finally, regarding his decision to act immediately, Officer A stated:

“I decided that I needed to act immediately as any delay in apprehending Mr X would result in other harm to Police and the public. I knew that Mr X had previously been difficult to locate and was actively offending with firearms so any delay in apprehending him would likely have resulted in further victimisations.”

28. Officer A’s belief as to the consequences of Mr X escaping must be objectively reasonable, in other words a reasonable person in Officer A’s position would likely arrive at the same conclusion.

29. In short, it appears Officer A believed that if he did not stop Mr X from escaping:

- Mr X would do whatever it took to avoid arrest, including using force and potentially firearms;
- any delay in apprehending him would likely have resulted in further victimisations; and
- Mr X may have escaped entirely, as he was previously difficult to locate.

30. Officer A stated that Mr X did not appear to be carrying a firearm, but that Mr X could have been concealing one underneath his clothing.

31. It was speculation that Mr X was likely to use force and/or firearms against other officers or members of the public to facilitate his escape. At this stage Mr X had not used any force or actively resisted (aside from fleeing) to aid his escape.

32. Officer A thought that if he did not manage to stop Mr X while up on the greenhouse, he would have escaped entirely. Officer A noted Mr X was not effectively cordoned although he was mindful Mr X may come across wider Police cordons, and it is apparent that Officer B, a dog handler, was nearby (as he also verbally challenged Mr X). However, the dog handler was delayed by an aggressive dog at the house and there was no certainty that Mr X would come across any other nearby officers.

Other options available

33. Section 40 provides that “such force as may be necessary” may be used “unless in any such case the escape or rescue can be prevented by reasonable means in a less violent manner”.

34. When discussing the other options available to him, Officer A stated that he had a Glock pistol, but even though he suspected Mr X was possibly carrying a firearm, he was not holding one or pointing it at anybody, so Officer A stated it would be disproportionate to use his Glock. He also considered using his Taser or oleoresin capsicum (OC) spray³ but Mr X was 20 metres away, outside the effective ranges of either.
35. We accept that it was not appropriate to deploy the Police dog in the main property, due to the other aggressive dog. It is possible the dog handler, Officer B, may have later been able to track Mr X on foot, however this could have taken some time.

Overall assessment

36. Officer A fired a 40mm sponge round while Mr X was standing on top of a greenhouse, elevated off the ground. The round hit Mr X in the back, and he subsequently rolled on to the ground.
37. Firing a sponge round, especially when the target is in an elevated position, poses a risk of significant harm to the target.
38. Mr X was considered a priority offender and had been evading Police for nine months, he was also a suspect for further offences during that time. Police had information that Mr X had access to multiple firearms and considered that Mr X posed a significant risk to the public if he was not arrested.
39. We consider the use of the 40mm sponge round was a proportionate response when balanced against the risks of Mr X escaping, which were high. This is largely because there were few other options available at the time to safely apprehend Mr X, and while tracking him with the Police dog may have been preferable, Officer B was delayed.

FINDING ON ISSUE 1

Officer A was justified in using the 40mm sponge round weapon against Mr X to effect his arrest to prevent his escape under section 40 of the Crimes Act 1961.

ISSUE 2: DID POLICE COMPLETE A PROPER SEARCH OF MR X WHILE IN CUSTODY AND ADEQUATELY CONSIDER HIS WELLBEING?

What happened after Mr X was arrested?

40. Officer C was patrolling in the area and heard over the Police radio that colleagues were searching for Mr X in Awapuni, so he parked nearby in an outer cordon. Mr X came into view, and Officer C approached him with another officer. Mr X did not resist arrest and was placed in handcuffs.

³ Oleoresin capsicum spray is commonly known as 'pepper spray'.

41. Officer C and the other officer took Mr X back to the Palmerston North Police Station where he was processed. Part of the processing included Officer C searching Mr X and preparing him to be placed into custody.
42. CCTV footage at the Police cells recorded Officer C searching Mr X and as a safety precaution, removing articles of clothing that could be used to cause harm. This would usually include removing the cord from Mr X's trackpants. However, due to the cord being stitched into the middle rear of the pants, Officer C pulled each side and cut the cord that was protruding. This left a portion of the cord still within the garment. Officer C then handed the two cut ends of the cord over the processing counter where they were disposed of.

Wellbeing checks

43. Officer D was working as the cell supervisor and assisted in processing Mr X. Part of this process was a wellness questionnaire which included several questions about mental health and suicidal ideation. None of the replies from Mr X raised concerns for Officer D.
44. There are three levels of monitoring for a person in Police custody. No monitoring, frequent monitoring, and constant monitoring. The generated result from the screening questions was for Mr X to be categorised as 'no monitoring,' however Officer D used her discretion to upgrade Mr X to 'frequent monitoring', partly because he expressed that he felt pain.
45. We note it is Police policy for people who have been shot with a 40mm sponge round to be classified as 'frequent monitoring' by default, however, this was the first time Officer D, as a supervisor, had a person in custody in this situation, and she was not aware of the policy.
46. We consider that Officer D's decision to upgrade Mr X's monitoring level was a key reason she was able later to find Mr X before he was able to seriously harm himself.
47. As Mr X had been shot with a 40mm sponge round, Officer D arranged for a doctor to see him. Mr X reported pain in his back from the impact. When the doctor assessed Mr X, he recommended that he be given pain relief, and to see his general practitioner if pain persisted.
48. We consider that Police appropriately considered Mr X's wellbeing, up until Officer D found Mr X harming himself. Until that time Police had no reason to believe that Mr X intended to harm himself, with Officer C later expressing surprise to hear about Mr X's actions considering the positive tone of their earlier interactions.

How did Mr X attempt to harm himself?

49. When Mr X was alone in his cell, he was able to remove the remaining cord from his sweatpants, which was about 70cm in length. He then used this cord in an attempt to harm himself.
50. CCTV footage shows Officer D arriving at Mr X's cell. She peers through the cell door flap and calls for assistance over the radio. After opening the cell door, the footage shows Officer D removing the cord.

51. Numerous officers arrived, and placed Mr X in the recovery position with a blanket around him. After about 10 minutes, ambulance staff attended and took Mr X to hospital. Although shaken, he had not suffered any injuries from the incident.

Was the search of Mr X adequate?

52. Mr X was searched multiple times upon arriving at the police custody unit, including with a metal-detecting wand.
53. Mr X's sweatshirt was removed, it appears this was so the officers could take a closer look at his injuries. He was given back his sweatshirt once he was in the processing room.
54. When Officer C cut ends of the cord of Mr X's sweatpants, there was still around 70cm of the cord remaining, inside the seam of the sweatpants and held in place with a small amount of stitching. This was the remaining cord that Mr X used to harm himself.
55. When we spoke to Officer D, she told us that it was usual practice to remove all the cord that is inside clothing, such as in the waistband of sweatpants or hoodies. There are different methods to remove cords depending on the garment, from simply pulling it out to cutting the part it is stitched to.
56. Officer C explained that when the cord was stitched to a garment like sweatpants, typically in the middle of the rear of the sweatpants (halfway in the cord), he would adopt the approach he used with Mr X. Officer C acknowledged this practice was not ideal.
57. We consider the search of Mr X was not adequate due to Officer C not following policy in that an amount of cord was left in his sweatpants.

FINDING ON ISSUE 2

Police did not complete a proper search of Mr X; however, Police did adequately address his wellbeing.

Subsequent Police Action

58. Following the event, Police debriefed and by way of a Lessons Learnt process, made sure that all officers were aware that any clothing containing cords must have the cords entirely removed before allowing a person to wear that item of clothing in custody.



Judge Kenneth Johnston KC

Chair
Independent Police Conduct Authority

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Appendix – Laws and Policies

CRIMES ACT 1961

Section 40(1): Preventing escape or rescue

59. *“(1) Where any person is lawfully authorised to arrest or to assist in arresting any other person, or is justified in or protected from criminal responsibility for arresting or assisting to arrest any other person, that authority, justification, or protection, as the case may be, shall extend and apply to the use of such force as may be necessary—*

(a) to prevent the escape of that other person if he or she takes to flight in order to avoid arrest; or

(b) to prevent the escape or rescue of that other person after his or her arrest—

unless in any such case the escape or rescue can be prevented by reasonable means in a less violent manner:

provided that, except in the case of a constable or a person called upon by a constable to assist him or her, this subsection shall not apply where the force used is intended or likely to cause death or grievous bodily harm.”

POLICY

Police ‘Use of force’ policy

60. The Police ‘Use of Force’ policy provides guidance to Police officers about the use of force and sets out the options available to 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.
61. 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.
62. The overriding principle when applying TENR is that of “safety is success”. Public and employee safety are paramount, and every effort must be made to minimise harm and maximise safety.
63. The TENR risk assessment must balance the ongoing exposure to harm, with the current threat and the necessity to respond. This will determine the Police response.
64. 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).

65. A key part of an officer's decision about when, how, and at what level to use force depends on the actions of, or potential actions of, the people involved, and depends on whether they are: cooperative; passively-resisting (refuses verbally or with physical inactivity); actively resisting (pulls, pushes or runs away); assaultive (showing an intent to cause harm, expressed verbally or through body language or physical action); or presenting a threat of grievous bodily harm or death to any person.
66. 'Empty hand tactics' refers to a weaponless use of force, such as grabbing hold of, pushing, or punching a person. Officers can use empty hand tactics to distract or control someone and to defend themselves or others.
67. The policy states that any force must be considered, timely, proportionate, and appropriate given the circumstances known at the time. Victim, public and Police safety always takes precedence, and every effort must be taken to minimise harm and maximise safety.
68. Ultimately, the legal authority to use force is derived from the law and not from Police policy.

Police policy – use of the 40mm sponge round weapon (part of the Use of Force chapter)

69. The New Zealand Police's mid-range less lethal tactical option is a 40mm sponge round projectile deployed by a 40mm launcher, the eXact iMPact XM1006. It is one of several tactical options under the Tactical Options Framework and can only be applied in situations within and beyond the assaultive range, as outlined in the framework.
70. The sponge round weapon is only to be used by qualified Armed Offenders Squad (AOS) and the Special Tactics Group (STG) members.
71. Sponge rounds are designed to be used from between 1.5m and 35m and the Police optimal distance for deployment is between 5 to 25 metres. This is beyond the range of a Taser, which is out to 4.5m with OC Spray and baton being used at closer ranges.
72. Police may use a sponge round weapon to:
 - defend yourself or others if you fear physical injury to yourself or others, and you cannot reasonably protect yourself or others less forcefully.
 - arrest an offender if you believe on reasonable grounds that the offender poses a threat of physical injury, and the arrest cannot be effected less forcefully.

- prevent the escape of an offender if you believe on reasonable grounds that the offender poses a threat of physical injury to any person, and the escape cannot be prevented less forcefully.
- resolve an incident where a person is acting in a manner likely to physically injure themselves and the incident cannot be resolved less forcefully.
- deter attacking animals to defend yourself or others.

73. The sponge round weapon must not be deployed until:

- The subject has been asked to surrender unless it is impractical and unsafe to do so.
- It is clear they cannot be arrested without first deploying the weapon.
- Further delay in apprehending the subject would be dangerous or impractical.

74. Medical attention must be provided immediately the subject asks for medical attention or, in the officers' opinion, the subject appears to be suffering from a medical condition, pre-existing or otherwise (e.g., exhibiting symptoms associated with excited delirium, or symptoms associated with a mental health issue).

75. Where a person is detained in custody after being shot with a sponge round, the arresting officer must endorse the charge sheet to indicate that the prisoner has been:

- subject to a Health and Safety Management Plan for a Person in Custody (POL705).
- constantly monitored until examined by a Registered Medical Doctor.
- monitored according to the Registered Medical Doctor's advice.

About the Authority

WHO IS THE INDEPENDENT POLICE CONDUCT AUTHORITY?

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

We are not part of the Police – the law requires us to be fully independent. The Authority is overseen by a Board, which is chaired by Judge Kenneth Johnston KC.

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

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

WHAT ARE THE AUTHORITY'S FUNCTIONS?

Under the Independent Police Conduct Authority Act 1988, the Authority receives and may choose to investigate:

- complaints alleging misconduct or neglect of duty by Police;
- complaints about Police practices, policies and procedures affecting the complainant in a personal capacity;
- notifications of incidents in which Police actions have caused or appear to have caused death or serious bodily harm; and
- referrals by Police under a Memorandum of Understanding between the Authority and Police, which covers instances of potential reputational risk to Police (including serious offending by a Police officer or Police actions that may have an element of corruption).

The Authority's investigation may include visiting the scene of the incident, interviewing the officers involved and any witnesses, and reviewing evidence from the Police's investigation.

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

THIS REPORT

This report is the result of the work of a multi-disciplinary team. 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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