

Use of Taser during an arrest in Manurewa, Auckland

INTRODUCTION

1. At about 12.54am on Thursday 15 September 2016, Mr X was arrested after Police witnessed his involvement in a domestic incident on Kerrs Road in Manurewa. During his arrest, Mr X was pepper sprayed and tasered.
2. The Police notified the Independent Police Conduct 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

Summary of events

3. In the early morning of Thursday 15 September 2016, Mr X, aged 17 years, and his girlfriend Ms Y, aged 18 years, were drinking at a park near Kerrs Road in Manurewa. After finishing about a dozen alcoholic drinks each, Mr X and Ms Y left the park and began to walk home.
4. As they were walking along Kerrs Road towards Druces Road, Ms Y said they started arguing and stopped next to a wire fence outside an industrial warehouse. After a few minutes a Police car, with its flashing red and blue lights activated pulled up next to them, and Officer A got out.
5. Mr X, Ms Y and Officer A have different accounts of the events that followed. The different versions of events are set out below.

Use of pepper spray

Mr X's version of events

6. Mr X told the Authority that when Officer A arrived he called him "pig shit" a number of times. He said Ms Y, who was standing next to him, grabbed his face and told him to shut up and not

say anything stupid. However, as she was doing this, Officer A sprayed her with pepper spray. Mr X said he got very angry and “*went nuts*”, telling Officer A to apologise to her.

7. Mr X said Officer A refused to apologise and he became very angry, clenching his fists. At this point, Officer A then sprayed him in the face with pepper spray.
8. Immediately after he was pepper sprayed, Mr X said Officer A yelled: “*Taser, Taser, Taser*”. He then felt a pinch and an electric shock on his left side, causing him to fall over.

Ms Y's version of events

9. Ms Y told the Authority that when Officer A pulled up next to them in his Police car, they had stopped arguing and were instead upset as they had begun talking about the recent death of Mr X's grandmother. As soon as Officer A got out of his car, she said he began to yell at them and Mr X responded by calling him “*pig shit*”.
10. When Mr X called Officer A “*pig shit*”, Ms Y said she put her hand over Mr X's mouth in order to stop him talking. At that point, Ms Y said Officer A sprayed her in the face with pepper spray. Immediately after, Officer A sprayed Mr X in the face. Ms Y said she was then sprayed a second time.
11. After the second spray, Ms Y said she fell to the ground crying and Mr X reacted by getting angry and telling Officer A to apologise. She said Officer A refused to apologise to her, and Mr X got even angrier and began to swear at him.
12. In response, Ms Y said Officer A pushed Mr X back up against the wire fence. However, Ms Y said she was not aware of what happened next, as a female officer arrived and placed her in the back of a Police car. While she was in the car, Ms Y said she was given water for her eyes, and she said she could hear swearing and yelling.

Officer A's version of events

13. Officer A told the Authority that he was driving along Kerrs Road towards Druces Road when he saw a male and a female on the side of the road having a “*physical altercation*”. Officer A said it looked like the male was either trying to barge past the female or push her further into the industrial area away from the residential area on Druces Road.
14. As a result, Officer A pulled over, got out of his car and asked the couple what was happening. In response, Officer A said he was told to “*fuck off pig shit cunt*”. Officer A said he asked Mr X not to be disrespectful and to tell him what was happening. However, Mr X remained verbally aggressive and he continued to try and “*barge [past] or push Ms Y further into the industrial area away from [him]*.”
15. Officer A told the Authority that he found Mr X's “*act and gesture*” to be aggressive and threatening. He said it was evident that his own communication and presence were having no positive effect on Mr X's behaviour and he felt it was necessary to intervene and separate him from Ms Y.

16. In order to ensure Ms Y's safety and his own, Officer A said he then stepped forward to arrest Mr X for threatening behaviour. Officer A said he did not know exactly what had transpired between Mr X and Ms Y prior to his arrival, and he did not feel that he had "*enough [evidence] for male assaults female ... so threatening behaviour seemed an appropriate arrestable offence.*"
17. At the same time, Officer A radioed the Northern Communications Centre (NorthComms) for assistance.
18. When he stepped forward, Officer A said he grabbed Mr X's left wrist, twisted it up behind his back, and pushed him face first towards the wire fence. As he has done so, Officer A said he attempted to radio NorthComms a second time to request urgent back up.
19. While Mr X was pushed up against the fence, Officer A managed to lock one handcuff on Mr X's left wrist. However, because he was pulling and pushing away, Officer A was unable to maintain control over Mr X and handcuff his right wrist. Officer A said Mr X continued to "*thrash*" his body around so he decided to step away from him. Due to the handcuff still hanging from Mr X's left wrist, Officer A said he retreated to the safety of his Police car, about two and a half metres away.
20. When Officer A stepped back, he withdrew his pepper spray from his utility belt and held it up towards Mr X and warned him that he would be sprayed. Officer A said Mr X continued to get more aggressive, and he became concerned that Mr X's behaviour would escalate and he would hit Ms Y, who had remained standing next to Mr X.
21. Officer A described Mr X as "*puffing*" up and getting louder. He said Mr X's body language became more aggressive and Mr X was pointing at him. Given that Mr X had already pushed and pulled away from him, Officer A said his "*perceived cumulative assessment of his behaviour was at least active resistant*" (refer to paragraphs 78-79).
22. When Mr X's behaviour did not change, Officer A used a "*one second spray, aiming for his face*". Officer A said this had no visible effect on Mr X and "*he continued in his aggressive manner*". After waiting ten seconds, he sprayed him again. Officer A said he was not sure if Ms Y received any cross contamination from the spray, as she was facing away from him when he deployed the spray, and she soon disappeared off to his left.
23. Officer A told the Authority that the spray appeared to have the opposite effect to what he had intended and Mr X continued to behave aggressively, yelling out that he should apologise. At the time, Officer A said he did not know what he was supposed to be apologising for.

Use of Taser

24. Due to the pepper spray having no effect, Officer A pulled his Taser out. He said he flicked it on and held it by his side while telling Mr X to get on the ground. Mr X refused to get on the ground and he continued pointing, shouting and puffing himself up. Officer A said he was also concerned about the handcuff hanging off Mr X's left wrist as it could potentially be used as a weapon. At this point, Officer A said he radioed NorthComms for a third time.

25. Officers B and C, who were conducting bail checks in the area, heard Officer A over the radio and began to drive towards Kerrs Road.
26. After radioing for help, Officer A said Mr X started to advance on him. At this point Officer A said he raised his Taser in Mr X's direction and told him not to move any further. When Officer A aimed the Taser, two red dots appeared on Mr X's chest. Officer A said he alerted Mr X to the dots and told him to do as he was told and to get on the ground. At the same time, Officer A said he stepped forward and grabbed Ms Y, who had returned to Mr X's side, and pulled her back and away from Mr X.
27. While Officer A was aiming his Taser at Mr X, Officers B and C arrived at the scene. Officer B told the Authority that when they arrived, she saw Officer A armed with a Taser, standing approximately two–three metres away from Mr X, who was standing with his back against a fence. Standing next to Mr X was Ms Y, who Officer B said was crying and rubbing her eyes.
28. Officer B said she could hear Mr X yelling at Officer A to say sorry to his girlfriend. At this point, Officer A told her that Ms Y had received some backlash from the pepper spray, so she took Ms Y by the arm and walked her over to the Police car. Officer B said she then placed her in the back seat.
29. While Officer B was helping Ms Y, Officer C said he moved forward and stood next to Officer A. Officer C said Officer A was telling Mr X to get on the ground, but Mr X was ignoring him, swearing aggressively and moving forward and back.
30. Officer C told the Authority that Mr X's behaviour was:

“extremely aggressive ... he had his hands clenched, arms out at shoulder height ... puffing himself up. All indications of what someone does when they want to have a scrap ... given all of that I placed [Mr X] in the assaultive range”.
31. Due to Officer C's assessment of the situation and because he was worried about the handcuff swinging off Mr X's left arm, he said he pulled out his pepper spray and pointed it at Mr X.
32. Although he considered Mr X to be assaultive and had pulled out his pepper spray, Officer C said he soon decided against using it as he did not think that spraying Mr X for a second time was going to help build a rapport. As a result, and because Officer A was still pointing his Taser at Mr X, Officer C decided to put his pepper spray away and slowly approach Mr X.
33. Officer C said he approached Mr X cautiously with his arms fully extended so that he could push Mr X back if he decided to lash out at him. As he got closer to Mr X, he said Mr X asked him for a handshake. Officer C said he offered Mr X his hand as he wanted to build a rapport and calm him down.
34. While Officer C was shaking Mr X's hand and talking to him, Officer A said he could see Mr X starting to calm down so he put his Taser away. He then stepped forward to help Officer C apply the handcuffs.

35. As he stepped forward, Mr X saw him again and began to thrash his left hand about. Officer A said he was still worried about the handcuff hanging off Mr X's hand, so he stepped back and pulled out his Taser again.
36. As Officer A stepped back, Officer B, who had left Ms Y in the Police car, walked over and took hold of Mr X's left arm. Officer B said she and Officer C then tried bring Mr X's arms behind his back so they could apply the other handcuff to Mr X's right arm. However, they were unsuccessful as Mr X remained tense the whole time.
37. Officer B told the Authority that, although Mr X was resisting them by tensing up, he was not trying to hit anyone by flailing about with his arms. Instead, he had "tunnel vision" towards Officer A and kept yelling, "just say fucking sorry to my girlfriend".
38. Officer B said her assessment of Mr X's behaviour was that he was:
- "not assaultive because if he had wanted to assault one of our officers by now, he had the chance to by swinging his left arm onto my partner ... he was just actively resistant"*.
39. Due to Mr X's focus on Officer A, Officer B said she felt that Officer A should have walked away and let her and Officer C deal with him.
40. In contrast, Officer A said Mr X began yelling and screaming, making physical threats and thrashing about. He felt that Mr X was "at least in the assaultive range" and said that Officers B and C were "completely ineffectual in controlling him".
41. Despite the officers holding Mr X on either side, Officer A said Mr X was able to advance on him by moving forward and back. At this point, Mr X then leant forward and spat at his feet. Officer A said he immediately raised his Taser and told Mr X, "oh buddy this is what you are going to get if you carry on like that".
42. As Officer A was about to arc¹ his Taser to show Mr X the electrical current as a way to deescalate the situation, Mr X leant forward and spat again. Officer A said the spit flew across the left side of his arm. At this stage, Officer A said he pointed his Taser at Mr X and fired one shot, while simultaneously yelling "Taser, Taser, Taser". The shot was effective as Mr X immediately dropped to the ground.
43. Officer A told the Authority that he used his Taser because "it was the least violent means available to him at that time". He said he considered other options such as "officer presence, officer communication, OC spray², delay, disengage, get more staff or go back hands on". However, the pepper spray had no positive effect on Mr X's behaviour, the empty hand tactics used by Officers B and C were ineffectual, and he could not physically help the officers because Mr X was spitting.

¹ To 'arc' a Taser means to increase the voltage output and re-energise the cartridge probes

² Oleoresin Capsicum Spray, otherwise known as pepper spray

44. Officer A said he continually delayed, disengaged, and re-assessed the situation before he felt it was necessary to deploy his Taser to defend himself.
45. Officer C told the Authority that at the time Mr X was tasered, he had placed Mr X in the low assaultive range because he was trying to move towards Officer A despite being held back by himself and Officer B. When Mr X spat at Officer A, there was force being used, and although it was not a punch or a kick, it was intended to cause harm. Officer C said, *“spitting at someone is still considered assaultive behaviour ... which would then allow a Taser to be discharged.”*
46. However, Officer C said that if he was in Officer A’s position:

“I would not have used a Taser ... because it’s spitting. It’s not going to cause me to end up in hospital ... the force is less than a punch or a kick ... even though I would have classed [it] as assaultive behaviour, I would have tried to bring the male down to the ground instead of discharging a Taser.”
47. Officer B told the Authority that she was surprised to hear the Taser being deployed. Although she understands that spitting can be classed as an assault, which under the tactical option framework means that a Taser can be deployed, in her opinion, being assaulted is getting punched or kicked. In this situation, Officer B believed that Mr X was being actively resistant.

Aftercare and post Taser deployment requirements

48. Immediately after Mr X was tasered, Officer A removed the Taser probes from Mr X’s lower abdomen.
49. At 2am, Mr X was assessed by a doctor as required by Police policy following the use of a Taser (see paragraph 92).
50. At 3.01am, Officer A completed a Tactical Options Report (TOR), outlining what actions he had taken and the reasons for them.
51. At 7.17am on 15 September 2016, Officer D reviewed Officer A’s TOR and viewed the Taser Cam footage. He recorded in the supervisor’s section of the TOR that he did not support Officer A’s actions and recommended that the matter be *“referred to Police Professional Conduct for categorisation and review”*.
52. In his statement to Police on 19 September 2016, Officer D said he did not believe the tasering was *“proportional to the threat nor reasonable in the circumstances much less necessary”*. Officer D said that this was based on the fact that Mr X was not armed, he weighed about sixty kilograms, and he had only spay towards Officer A, who was standing back at the time. Officer D also noted that there were two officers in the process of handcuffing Mr X.
53. In addition, Officer D did not believe that an offence had been committed, and therefore the arrest was not required. He said Officer A would have understood this, if he had asked the *“right questions ... at the start of the incident.”*

54. Officer E, an Inspector and the TOR Reviewer³, reviewed Officer A's TOR and viewed the Taser Cam footage. In a Police statement, he noted that he did not believe that the use of the Taser was warranted in this situation. Officer E then referred the matter to the Police Professional Conduct Office for their review and investigation if required.
55. On 19 October 2016, the Taser Assurance Forum reviewed Officer A's TOR. The forum found that:

"individuals involved in the incident had opportunities to establish physical control and therefore may well benefit from an additional debriefing and potentially training with a focus to increasing their knowledge and skills".

Taser Cam footage

56. During its investigation, the Authority has also analysed the video footage of the incident provided by the camera in Officer A's Taser (Taser Cam footage).
57. The first set of camera footage taken when Officer A initially presented his Taser at Mr X begins recording at 12.38.12am. The recording lasts for 2.27 minutes.
58. The Taser Cam footage begins by showing the Taser sighted on the ground. In the background, a female can be heard crying while Officer A yells *"get down on the ground"* multiple times. After fifty seconds, the Taser is brought up and focused on Mr X, with two red dots visible on his chest. Ms Y can be seen standing partially in front of Mr X, however, Officer A quickly pulls her away.
59. Officer A continues to yell at Mr X, telling him to look at the dot on his chest and to get down on the ground. Mr X remains standing with his arms spread wide. The handcuff is visible hanging off his left wrist, and he yells, *"fucking shoot me ... just say sorry"*. Mr X continues to repeat, *"say sorry"* and appears to be very angry, bouncing up and down.
60. At the same time, Officer C can be heard in the background telling Mr X to relax and chill out. Mr X's focus shifts from Officer A to Officer C and he visibly calms down.
61. After thirty seconds of communicating, Officer C approaches Mr X and takes hold of his right hand. Officer A then turns off the Taser and the Cam footage ends.
62. The second Taser Cam footage begins recording at 12.40.56am, and lasts for 1.05 minutes.
63. The Taser Cam footage shows the Taser sighted on Mr X's lower abdomen, while Officers B and C are standing on either side of him, holding his arms. Mr X is yelling at Officer A, *"you want a fucking hiding cunt"*, while Officer B is telling him to calm down.
64. Officers B and C are seen trying to force Mr X's hands behind his back, however, Mr X is resisting by holding his body tight. While this is happening, Officer A is telling Mr X to put his hands behind his back. Mr X responds by saying, *"I'm not going to until you say sorry to my Mrs"*.

³ A senior officer, who is an inspector or above, must view the Taser Cam footage and decide whether the use of the Taser was justified in accordance with policy. They enter their comments on the TOR after the first supervisor has done so.

65. Mr X remains focused on Officer A and is able to move forward and back slightly despite Officers B and C holding onto his arms. At one point as he moves forward, Mr X spits toward the ground, in front of Officer A. Officer A tells Mr X *“Oh ho ho do that again and you’ll get this buddy”*.
66. Mr X then spits again and Officer A immediately fires his Taser, hitting Mr X in the abdomen. The Taser discharge noise (electric pulses) can be heard in the background, and Officer A yells *“Taser, Taser, Taser”*.

Mr X

67. Mr X was 17 years old at the time of this incident. He is of slight build and has no previous convictions.
68. Mr X was arrested for resisting arrest, common assault and behaving in a threatening manner that was likely in the circumstances to cause violence against persons. The charges were withdrawn by leave on 9 June 2017 as part of ‘the Police adult diversion scheme (diversion).’⁴

LAWS AND POLICIES

Power to arrest

Disorderly behaviour

69. Section 3 of the Summary Offences Act 1981 states:

“Every person is liable to imprisonment for a term not exceeding 3 months or a fine not exceeding \$2,000 who, in or within view of any public place, behaves, or incites or encourages any person to behave, in a riotous, offensive, threatening, insulting, or disorderly manner that is likely in the circumstances to cause violence against persons or property to start or continue.”

Power to arrest

70. Under section 39 of the Act, law enforcement officers and any person who is called to assist an enforcement officer:

“may arrest and take into custody without a warrant any person whom he has good cause to suspect of having committed an offence against any of the provisions of this Act except sections 17 to 20, 25, and 32 to 38.”

Law on the use of force

Use of force by Police officers

71. 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.

⁴ Diversion is a scheme that provides an opportunity for Police to deal with some offences and/or offenders without going through formal court prosecution. The purpose of diversion is to address offending behaviour that has resulted in charges.

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.”*

Use of force for self-defence or defence of others

72. 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.”*
73. Under section 62 of the Act, anyone who is authorised by law to use force is criminally responsible for any excessive use of force.

Policy on the use of force

Police guidance on use of force

74. The Police’s *Use of Force* policy provides guidance to Police officers about the use of force. The policy sets out the options available to Police officers when responding to a situation. Police officers have a range of tactical options available to them to help de-escalate a situation, restrain a person, effect an arrest or otherwise carry out lawful duties. These include communication, mechanical restraints, empty hand techniques (such as physical restraint holds and arm strikes), OC spray, batons, Police dogs, Tasers and firearms.
75. 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.
76. Police define TENR as:
 - ‘Threat’ is about how serious the situation is (or could be), and the present or potential danger the situation, environment, or suspect presents to themselves, other members of the public or Police. Police must assess the threat posed by the suspect, based on all available information including what they see and hear, and what is known about the suspect.
 - ‘Exposure’ is about the potential harm to Police employees, Police operations, Police reputation and to others. Exposure can be mitigated through assessment and planning.
 - ‘Necessity’ is the assessment to determine if there is a need for the operation or intervention to proceed now, later or not at all.
 - ‘Response’ means the proportionate and timely execution of Police duties aided by the appropriate use of tactics and tactical options.

77. The overriding principle when applying TENR is 'safety is success'. 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.
78. An officer must also constantly assess an incident based on information they know about the situation and the behaviour of the people involved; and the potential for de-escalation or escalation. The officer must choose the most reasonable option (use of force), given all the circumstances known to them at the time. This may include information on: the incident type, location and time; the officer and subject's abilities; emotional state, the influence of drugs and alcohol, and the presence or proximity of weapons; similar previous experiences; and environmental conditions. Police refer to this assessment as an officer's Perceived Cumulative Assessment (PCA).
79. 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.
80. 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.

Oleoresin Capsicum (Pepper) spray

81. 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.
82. The Police Manual states that an officer only use pepper spray when it is *"lawful and reasonable i.e. necessary, proportionate to the situation, and with minimum risk to the public, Police and the subject."*
83. The 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"*.
84. The policy requires that, before pepper spray is used on a person, the person is warned that non-compliance will result in them being sprayed, the person is given a reasonable opportunity to comply, and other people nearby are warned that spray will be used.

Use of Taser

85. Police policy states that a Taser may only be used to arrest an offender if the officer believes the offender poses a risk of physical injury and the arrest cannot be effected less forcefully. A Taser

must only be used on a person who is assaultive (defined as *“actively hostile behaviour accompanied by physical actions or intent, expressed either verbally and/or through body language, to cause physical harm”*) and cannot be used on a person who uses passive resistance in relation to Police.

86. Police policy expressly states that a Taser should never be used against an uncooperative but non-aggressive person to induce compliance.

87. To encourage de-escalation and to warn others nearby, officers must give a verbal warning in conjunction with the deployment of a Taser unless it is impractical or unsafe to do so. The warning relevant to the presentation of a Taser is *“Taser 50 000 volts”*. The warning relevant to a discharge or contact stun is *“Taser, Taser, Taser”*.

88. 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”.

89. A ‘contact stun’ is *“activating the Taser with or without the air cartridge attached while the device is applied to the body of the subject, in conjunction with a verbal warning”*.

90. Police policy also states that subsequent applications and extended cycles of the Taser should be avoided, but where they are unavoidable must be reasonable, necessary and proportionate in the circumstances.

91. The Taser policy further provides that supervisors must:

- attend the scene as soon as possible and ensure proper aftercare and any appropriate medical attention has been provided;
- preserve and photograph the scene;
- ensure that all evidence, including discharged cartridges, wires, probes and sufficient (4-5) cartridge identification tags (CIT) are recovered from the scene and secured appropriately;
- determine whether the use of the Taser was in accordance with policy;
- ensure the operator fills out the Taser register;
- ensure the operator submits a Tactical Options Report;
- ensure the operator uploads the incident into Evidence.Com; and
- informs the District Taser coordinator of the incident.

92. 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. It also states that mental health patients are among those at greatest risk from any harmful effects of a Taser.

Tactical Options Report

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

ISSUES CONSIDERED

94. The Authority's investigation considered the following issues:
- 1) Was Officer A justified in stopping and speaking to Mr X and Ms Y?
 - 2) Did Officer A have reasonable grounds to arrest Mr X?
 - 3) Was Officer A's use of pepper spray justified?
 - 4) Was Officer A's use of the Taser justified?
 - 5) Was appropriate medical care given to Mr X after he was tasered?
 - 6) Did Officer A's supervisors correctly determine whether his use of the Taser was in accordance with policy?

THE AUTHORITY'S FINDINGS

Issue 1: Was Officer A justified in stopping and speaking to Mr X and Ms Y?

95. Ms Y accepts that she and Mr X had been arguing while they were walking home. However, she states that at the time Officer A arrived they were no longer arguing, and instead crying because they were talking about the death of Mr X's grandmother.
96. Officer A told the Authority that while driving along Kerrs Road in the early morning, he saw Mr X acting in a threatening manner towards Ms Y. He said it appeared as though Mr X was pushing Ms Y into an isolated industrial area.
97. Officer A was concerned about Ms Y's wellbeing and pulled his Police car over to talk to the couple.
98. Given the time of day, the location and Officer A's concerns that a crime may have occurred, he had a duty to stop and intervene in order to ascertain Ms Y's wellbeing.

FINDING

Officer A was justified in stopping and speaking to Mr X and Ms Y.

Issue 2: Did Officer A have reasonable grounds to arrest Mr X?

99. Sections 3 and 39 of the Summary Offences Act 1981 allows the Police to arrest a person without warrant if they have reasonable cause to suspect that the person has committed or is committing the offence of disorderly behaviour. That offence comprises riotous, offensive, threatening, insulting or disorderly behaviour that is likely to cause violence against other persons or property to start or continue.
100. As noted above (refer to paragraphs 95-98), Officer A pulled over to speak with Mr X and Ms Y because he was concerned about Ms Y's wellbeing.
101. Mr X and Ms Y told the Authority that when Officer A approached them, Mr X immediately began to call Officer A "*pig shit*".
102. Officer A said that he asked them what was happening but Mr X was disrespectful and verbally aggressive and it appeared that he was still trying to push Ms Y into the industrial area. He said he did not know exactly what had happened between Mr X and Ms Y before he arrived, but he was concerned about Ms Y's safety and his own.
103. Due to Mr X's aggressive and threatening acts and gestures, Officer A said he had reasonable grounds to arrest Mr X for "*threatening behaviour*" (refer to paragraph 16).
104. The Authority accepts that Mr X's actions constituted threatening behaviour under section 3 of the Summary Offences Act 1981. However, the Authority is of the view that Officer A's action in arresting Mr X was ill-considered and premature, and that he should have taken more time to continue communicating with the parties with a view to de-escalating the situation.

FINDING

Officer A's action in arresting Mr X was lawful but premature in the circumstances.

Issue 3: Was Officer A's use of pepper spray justified?

105. Sections 39 and 48 of the Crimes Act 1961 provide legal justification for Police to use reasonable force to arrest an offender and in defence of themselves or another.
106. Police policy (see paragraph 81-84) states that an officer may only draw and deploy pepper spray against a person that is actively resisting an officer (defined as physical actions such as pulling, pushing or running away – that is, "*more than verbal defiance*"), and where the situation may not be resolved by less forceful means. The officer must also verbally warn an offender that the pepper spray will be used.
107. Mr X and Ms Y both accept that when Officer A approached them, Mr X began to verbally abuse him by calling him "*pig shit*" a number of times. However, they both complain that when Ms Y tried to stop Mr X from swearing, Officer A deliberately sprayed her in the face with pepper

spray. Mr X said this caused him to “got nuts”, clench his fists, and yell at Officer A to apologise. Officer A responded by spraying him in the face.

108. In contrast, Officer A said he immediately found Mr X’s behaviour to be aggressive and threatening. He said that his own communication and presence had no positive effect on Mr X’s behaviour, and because he remained concerned about Ms Y’s welfare (refer to paragraphs 100-103), Officer A decided to arrest Mr X for threatening behaviour.
109. As Officer A was trying to handcuff Mr X, he began to thrash his body around. As a result, Officer A was only able to successfully apply a handcuff to one of Mr X’s wrists before he had to back away. As he backed away, Officer A withdrew his pepper spray, and warned him that he could be sprayed.
110. Officer A told the Authority that his “*perceived cumulative assessment of [Mr X’s] behaviour was at least active resistant*”. He said Mr X had a handcuff hanging off his wrist and he was getting more aggressive. Due to his concern, Officer A said he radioed NorthComms requesting back up, at least two times. When Mr X did not calm down after he was warned, Officer A used a “*one second spray, aiming for [Mr X’s] face*”. When the spray had no effect, Officer A sprayed Mr X again.
111. Officer A said that Mr X soon began yelling at him to apologise to Ms Y. However, Officer A did not understand why as he was not aware if Ms Y received any cross contamination.
112. It is evident that pepper spray was used, however, there is a conflict in evidence as to the circumstances in which Officer A used the spray. It is clear from the Taser Cam footage that Mr X had a handcuff hanging off one wrist. This gives weight to Officer A’s version of events as he states that he only sprayed Mr X after he resisted being handcuffed and was becoming more aggressive. It is also clear from Ms Y and Mr X’s statements that Mr X was, from the beginning, verbally abusive to Officer A. Given this, the Authority accepts that Mr X’s behaviour, in resisting being handcuffed, thrashing his body about and swearing at Officer A, amounted to active resistance. Therefore, the Authority considers that Officer A was entitled to use pepper spray on Mr X in order to arrest him.
113. In relation to Mr X’s complaint that Officer A deliberately sprayed Ms Y, the fact that Mr X persisted in asking for an apology even when the other officers showed up, gives some credibility to his statement that she was sprayed. However, while the Authority accepts that Ms Y was affected by the spray, due to the clear conflict in evidence, we cannot make a finding as to whether Ms Y was deliberately sprayed.

FINDING

Officer A’s use of pepper spray on Mr X was justified.

Due to a conflict in evidence, the Authority is unable to make a finding as to whether Ms Y was deliberately sprayed.

Issue 4: Was Officer A's use of the Taser justified?

114. Sections 39 and 48 of the Crimes Act 1961 provide legal justification for Police to use reasonable force to arrest an offender in defence of themselves or another.
115. The overriding principle when using a Taser is that it can only be used in situations within and 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*") and cannot be used on a person who uses passive resistance in relation to Police. Police policy also expressly states that a Taser should never be used against an uncooperative but non-aggressive person to induce compliance.
116. As discussed in paragraphs 74-80, all officers receive training about the appropriate use of force when responding to an incident. The TENR operational threat assessment is a tool designed to help officers make better decisions by having officers assess the threat, manage the exposure, consider the necessity of intervention and ensure any response is proportionate and based on a risk assessment of threat, exposure and necessity.
117. Officer A said he presented his Taser at Mr X when the pepper spray appeared to have no positive effect on his behaviour. He considered Mr X to be in the assaultive range (refer to paragraph 79) due to his body language, his refusal to comply with directions and the threat of Mr X potentially using the handcuff as a weapon.
118. Officer A's assessment of Mr X is supported by Officer C, who on arrival considered Mr X to be "*extremely dangerous*" (see paragraph 30). The Taser Cam footage also shows Mr X being angry and verbally abusive.
119. Due to Officer A having his Taser pointed at Mr X, Officer C told the Authority that he decided to try a lower level of approach, and talked to Mr X in order to build a rapport. The Taser Cam footage shows that Officer C's approach was effective, as Mr X's focus shifted to Officer C and he visibly calmed down. In response to Mr X's reaction, Officer A put his Taser away.
120. While Mr X was talking with Officer C, Officer A approached Mr X again in order to help Officer C to handcuff Mr X. Officer A said this resulted in Mr X thrashing about and he became concerned once again about his behaviour. As a result, Officer A stepped back and pointed his Taser at Mr X. At this point, Officer B arrived and took hold of Mr X's left arm.
121. Officer B described Mr X as having "*tunnel vision*" towards Officer A. Despite her and Officer C each holding onto Mr X's arms, Mr X remained focused on Officer A, yelling for him to apologise. While the officers were struggling to handcuff Mr X, he managed to lean forward and spit twice in the direction of Officer A.
122. After Mr X spat the second time, Officer A fired his Taser.
123. At the time of the spitting, Officer A considered Mr X to be in the assaultive range. Based on this threat assessment, and because he believed Officers B and C were ineffective at controlling Mr X, Officer A determined that it was necessary to use his Taser. When making the decision,

Officer A said he ruled out other tactical options (which included officer presence, communication, pepper spray, delay and disengagement and calling for more backup) and as a result, he believed the Taser was *“the least violent means available to him at the time.”*

124. Officers B and C both acknowledged that spitting is considered assaultive behaviour. However, they told the Authority that other tactical options, such as using empty hand tactics to bring Mr X to the ground (see paragraph 46) or Officer A walking away (see paragraph 39), would have been more suitable in the circumstances.

125. In the Authority’s view, Officer A did not appropriately consider whether his use of the Taser was necessary and proportionate given the circumstances. The overarching principle of the TENR tool is to minimise harm and maximise safety. It is evident from the Taser Cam footage that Officers B and C were standing on either side of Mr X and holding onto both of his arms. Although it is clear that Mr X was resisting their efforts to handcuff him, his resistance appears to be primarily driven by his focus on Officer A, who remained standing directly in front of him. Although Mr X managed to spit in Officer A’s direction twice, in the Authority’s view this was only an application of low level *“force”* as it does not appear that the spit made contact with Officer A. Even if the spit had made contact, there would still have been a question about whether Officer A’s response to use his Taser was proportionate.

126. After examining all the available evidence, the Authority considers that Officer A’s use of the Taser was excessive and unjustified. Police policy clearly states that officers must ensure that any force used is necessary and proportionate given the level of threat and risk to themselves and the public. Mr X is of slight build and was being restrained by two officers at the time he was tasered. It is clear to the Authority that once Officer A considered Mr X to be assaultive, he was not prepared to consider less violent means of resolving this situation. As an experienced officer, Officer A should have known that sometimes, to de-escalate a situation, an officer needs to remove himself from the scene. In this instance, Officer A should have backed off, removing himself from Mr X’s line of sight, and allowed Officers B and C to deal with Mr X.

127. The Authority believes it is important to note that this is an incident that would not have ended in the manner that it did if Officer A had not tried to re-engage with Mr X. It is clear that Officer A was the target of Mr X’s anger, and that Mr X visibly calmed down when his focus shifted onto Officer C. The events that followed were caused primarily by Officer A’s decision to re-engage with Mr X, and resulted in serious consequences for Mr X.

FINDING

Officer A’s use of the Taser was excessive and unjustified.

Issue 5: Was the appropriate medical care given to Mr X after he was tasered?

128. The Police policy on Taser aftercare states that a registered medical doctor must examine anyone who is exposed to the application of a Taser as soon as is practicable (see paragraph 92).

129. Officer A removed the Taser probes from Mr X shortly after he was tasered.

130. Police custody records show that Mr X was assessed by a doctor approximately one hour 20 minutes after he was tasered.

FINDING

Mr X received appropriate medical care after he was tasered.

Issue 6: Did Officer A's supervisors correctly determine whether his use of the Taser was in accordance with policy?

131. The Taser policy requires a supervisor and an Inspector to determine whether the use of the Taser was in accordance with policy (see paragraph 91).

Officer D

132. As required by policy, Officer D reviewed Officer A's TOR and Taser Cam footage. He also ensured that all supervisory requirements detailed in paragraph 91 were completed.

133. Officer D did not approve of Officer A's Taser deployment, recording in the TOR that the matter be "*referred to Police Professional Conduct for categorisation and review*".

Officer E

134. Officer E, the TOR Reviewer, viewed the Taser Cam footage as required (see paragraph 93) and reviewed and signed Officer A's TOR in accordance with policy. Officer E agreed with Officer D's assessment and did not believe that the use of the Taser was warranted. Officer E referred the matter to the Police Professional Conduct Office for an independent investigation.

FINDING

Officer D complied with the supervisory requirements of the Taser policy and correctly determined that Officer A's use of the Taser was in breach of policy

Officer E complied with the reviewing requirements of the Taser policy and correctly determined that its use was in breach of policy.

CONCLUSIONS

135. The Authority has reached the following conclusions on the balance of probabilities:

135.1 Officer A was justified in stopping and speaking to Mr X and Ms Y.

135.2 Officer A's action in arresting Mr X was lawful but premature in the circumstances.

135.3 Officer A's use of pepper spray on Mr X was justified. Due to a conflict in evidence, the Authority is unable to make a finding as to whether Ms Y was deliberately sprayed.

135.4 Officer A's use of the Taser was excessive and unjustified.

135.5 Mr X received appropriate medical care after he was tasered.

135.6 Officer D complied with the supervisory requirements of the Taser policy and correctly determined that Officer A's use of the Taser was in breach of policy; and

135.7 Officer E complied with the reviewing requirements of the Taser policy and correctly determined that its use was in breach of policy.



Judge Sir David Carruthers

Chair
Independent Police Conduct Authority

18 July 2017

IPCA: 16-0546

ABOUT THE AUTHORITY

Who is the Independent Police Conduct Authority?

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

It is not part of the Police – the law requires it to be fully independent. The Authority is overseen by a Board, which is chaired by Judge Sir David J. Carruthers.

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

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

WHAT ARE THE AUTHORITY'S FUNCTIONS?

Under the Independent Police Conduct Authority Act 1988, the Authority:

- receives complaints alleging misconduct or neglect of duty by Police, or complaints about Police practices, policies and procedures affecting the complainant in a personal capacity;
- investigates, where there are reasonable grounds in the public interest, incidents in which Police actions have caused or appear to have caused death or serious bodily harm.

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



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