

ineffective, and he remained in pain for an hour and a half. Mr X alleged that while he was at the station, Officer A pushed him into a wall, which Officer A denies.

7. Police became aware Mr X was diabetic and had a restriction on his driver's licence regarding low blood sugars. He was taken to a medical centre where it was found his blood sugar levels were not low.
8. Mr X was charged with obstruction. He was given a bail condition where he was not allowed to drive, which he disputed. Because of this, and concerns officers had that Mr X would reoffend if released, he was taken to Dunedin Police Station where he spent the rest of the night. In the morning the condition stopping him from driving was removed and he was released on Police bail with a date to appear in court the following week.
9. Mr X made a complaint about Police actions on the same day he was released on bail from the Police station, which the Authority received in December 2017. The Authority initially considered Mr X's complaint would be resolved during the Court process so took no further action.
10. The charge of obstruction was changed at some time before the trial, to resisting an officer. At Mr X's judge-only trial at the District Court in May 2018 the charges against him were dismissed. The Judge made adverse comments about the credibility and actions of Officer A. The Judge did not accept all of Officer A's evidence and expressed concern about what happened that night. He believed Officer A was "*overzealous*" and "*acted in an overly robust manner*".
11. The Authority was advised of the Judge's comments and reopened its file to independently investigate Mr X's complaint.
12. Police conducted an employment investigation and reported to Mr X that they had taken action in accordance with the disciplinary process under the New Zealand Police Code of Conduct.

THE AUTHORITY'S INVESTIGATION

13. The Authority interviewed Mr X, Officers A, B and C, and reviewed Police documentation, including statements and reports. The Authority also reviewed the evidence provided at the trial and the judgment. An Authority investigator visited the scene of the incident.
14. The Authority identified and considered the following issues:
 - 1) Was the arrest of Mr X lawful?
 - 2) Was Officer A's use of force on Mr X justified?
 - 3) Was the appropriate medical care provided afterwards?
 - 4) Was it justified and reasonable for officers to detain Mr X overnight and then to impose a bail condition forbidding him from driving?

THE AUTHORITY'S FINDINGS

Issue 1: Was the arrest of Mr X lawful?

15. The Police Southern Communications Centre (SouthComms) records show Officer A initially called for Officer B to provide backup, saying *"got a vehicle doing a bolt in the airfield"*. Officer A then gave SouthComms the car registration number but did not say he was in a pursuit. Forty-eight seconds after the initial call Mr X stopped to open the gate and he was sprayed within the next two minutes. Officer B arrived to assist with the arrest, and Mr X was reported to be handcuffed within two minutes of being sprayed.
16. Mr X was arrested for failing to stop and obstructing an officer. The arrest for obstruction arose when Officer A attempted to speak to Mr X about him allegedly failing to stop when signalled to do so. In order to determine whether the arrest was lawful the Authority has examined Police actions leading up to the arrest. This has involved considering the accounts given in evidence in court in May 2018 and in interviews with the Authority in July 2019.

Was it lawful for Officer A to signal Mr X's vehicle to stop?

17. Officer A gave evidence in Court that he *"conducted patrols down around the recreation area looking for suspicious peoples."* He knew there had recently been people in the area drinking, taking drugs, lighting fires, and doing wheelies. Officer A said at that time of night there were not many reasons for a vehicle to be there.
18. The Land Transport Act 1998 gives officers the power to stop a vehicle to conduct a breath screening test.² Officer A said he thought the driver of the ute may be under the influence of alcohol and so intended to stop him and conduct a test. Officer A stated that he activated his flashing lights as a signal to stop. This was in accordance with the provisions of the Land Transport Act.
19. The incident took place at the end of Glasgow Street which is situated on the outskirts of town by the airport. It is non-residential and there is no street lighting. The road is not a thoroughfare and there was no other traffic on the road. There were multiple places where Mr X could have pulled over before he reached the gate.

Was Officer A justified in arresting Mr X for failing to stop when signalled?

20. Officer A told the Authority that the ute stopped suspiciously and then drove away before he activated his flashing lights. He said he could tell it was accelerating rapidly because he saw the rear end of the ute sink down and the headlights go up.
21. Mr X, however, told the Authority he did not pause or stop the ute at all on Glasgow Street.

² See paragraphs 116 to 123 for relevant law and Police policies about stopping a vehicle.

22. Police should display flashing blue and red lights and/or sound a siren when wanting a vehicle to stop. In his interview with the Authority, Officer A said: *“Unless he was driving with his eyes shut, there is no way that he couldn’t have seen those [flashing] lights.”*
23. Mr X told the Authority he had no idea a Police vehicle was following him, and he did not see any flashing lights: *“...the car was way over in behind me and had no lights. How would I even know it was a cop car? I didn’t know what it was.”* Mr X said there were places that he believed he would have seen flashing lights in his mirrors if the officer had them on, despite the bends in the road and passing obstacles such as an aeroplane hangar. The Authority also notes Mr X’s ute had a canopy on which may have blocked his view.
24. Officer A told the Authority he first initiated the fleeing driver incident by activating his siren, but Mr X said there was no siren. Officer A had not included that he had activated it when completing his formal written statement, the day after the incident, and the siren could not be heard in the SouthComms audio recording. When the Authority questioned him about this, Officer A acknowledged that he must not have activated the sirens.
25. The Authority believes Mr X did not initially stop on Glasgow Street, as described by Officer A, since he had no reason to do so. He was focused on getting to his horses, his car was warranted and registered, and he was not intoxicated or trying to evade Police for any reason. Given this, the Authority also believes Mr X did not accelerate in the manner described by Officer A.
26. Officer A estimated they were travelling at speeds of between 60 and 70 kph in the 50 kph area, on a road which has bends and becomes unsealed. When asked why he did not issue Mr X with an infringement notice for speeding or charge him with a driving offence, Officer A said he did not have a radar on and could only estimate the speed. Mr X said he was only going about 40 kph and: *“...you couldn’t do 70 down there, you would’ve crashed.”*
27. Mathematical calculations show it was most likely speeds were less than 35 kph based on the distance of 440m between where Mr X allegedly stopped in Glasgow Street to the gate, and the 48 seconds from when Officer A first said Mr X was *“doing a bolt”* to when he reported Mr X was out of the ute.³ The Authority considers Mr X’s account to be accurate.
28. Officer A told the Authority he considered this was a *“fleeing driver incident”*, but he did not actually initiate a pursuit according to policy. He did not advise SouthComms as required and did not complete a fleeing driver notification form after the incident, as required by policy. When asked why he did not do so, he said it was because it all happened within a short time frame. This is not a valid reason for failing to comply with policy.
29. The Authority considers Mr X’s version of events to be accurate and true; he did not know a Police vehicle was following him, and therefore did not deliberately fail to stop. Moreover, the Authority accepts his statement that he did not stop because he eventually saw the Police vehicle; he stopped because that was his destination. At trial the Judge accepted Mr X’s evidence, and said:

³ Speed = Distance ÷ Time

"I do not accept that he acted inappropriately in his vehicle in any way and I accept what he says, that he was not aware as to what was going on around him...."

30. The Judge was determining whether Mr X had committed an offence of failing to stop. He had to be satisfied beyond reasonable doubt on the evidence before him. In contrast, the question for the Authority is whether Officer A reasonably suspected that Mr X had intentionally failed to stop at the time of the arrest. The Authority has concluded that this threshold is met: Officer A believed that Mr X had seen his Police car and must have seen the lights activated; and there was a reasonable basis for his belief, albeit mistaken. Thus, although Officer A did not initiate the pursuit in accordance with policy, he was legally entitled to arrest Mr X.
31. Having said that, the Authority is of the view that Officer A's actions were unnecessary and unreasonable. While he initially thought that Mr X might be involved in criminal activity, this seems to have been based on his expectation that there would be people behaving inappropriately in the area rather than Mr X's actual actions. There was no evidence at all that Mr X's actions when he drove past Officer A were suspicious. He continued to drive at a slow speed and stopped only 400 metres down the road. Making an arrest for his perceived failure to stop was an over-reaction.

Was Officer A justified in arresting Mr X for obstruction?

32. An officer may arrest any person who they have good reason to suspect is resisting or intentionally obstructing an officer acting in the execution of their duty.⁴
33. Officer A told the Authority he believed Mr X was being obstructive by:

"... getting back into the car, trying to drive away and me having to go up there and get the keys, 'cause he's obstructed me from conducting my routine stop on him."

34. He said Mr X *"just gets straight into abuse, telling me to get f**ked."* He recalled telling Mr X:

*"No, I'm not following you in there [through the gate]. I don't know what's in there. I'm gonna talk to you here about why you didn't stop." [Mr X] says something along the lines of "No, you can get f**ked. I'm going in anyway."*

35. Mr X' version of events was slightly different. He said that as he went back towards the driver's door of his ute, Officer A approached him saying he wanted to talk to him and asking why he did not stop. Mr X said he got into his ute and told Officer A *"I'll just see you in here,"* intending to drive through the gate to where his horses were. Mr X said he was not worried as he had not done anything wrong and therefore thought Officer A must have the wrong person. However, he acknowledged that, when Officer A turned the keys off, he responded by saying *"What the f**k?"*. Mr X also said it was at this time Officer A told him he was under arrest for failing to stop.

⁴ See paragraphs 124 and 125 for relevant law on arrests and resisting or obstructing an officer.

36. The Authority accepts that Mr X was abusive and that Officer A was right to refuse to follow him through the gate, as he did not know Mr X and did not know the area.
37. However, the Authority does not accept that Officer A had to take the keys from the ignition in order to stop Mr X from getting away. The evidence does not support this. Mr X may have been behaving unco-operatively, but he did not put the ute into gear, release the brake, or accelerate. Nor did he attempt to escape either in the ute or on foot (despite there being a route available along the river); or indicate in any other way an intention to leave the scene. Rather, he told Officer A he would talk to him through the gate, implying he was prepared to communicate, albeit on his terms; made no attempt to physically block Officer A from turning off the ute's engine; and did not consider that he had done anything wrong, so had no reason to believe he needed to resist or obstruct the officer.
38. Moreover, Officer A has given different and inconsistent accounts of his actions regarding the keys:
- a) He did not mention turning off the keys in his tactical options report or his formal written statement which were both completed within three days of the incident.⁵
 - b) He told the Authority that he thought he had pulled the keys out of the ignition (rather than merely turning the ignition off), but he could not remember.
 - c) His evidence in Court was that he pulled the keys out of the ignition.
39. In fact, it transpired that Officer B, who later provided back-up, took the keys out. She had recorded this in her written statement and later told the Authority she was "*pretty sure*" she had been the one to get them out.
40. Officer A told the Judge that he had given Mr X a warning for obstruction, but there is no record of this in his written statement. Officer A conceded to the Authority that he probably did not give the warning.
41. In his tactical options report, Officer A said that Mr X's verbal abuse and refusal to comply with his directions led him to believe that Mr X was passively resistant.⁶ While it is evident that Mr X was being belligerent and abusive, there is no evidence that he refused to comply with a lawful direction or wrongly prevented Officer A from doing what he was entitled to do. There was therefore no reasonable basis for Officer A to suspect that he had committed the offence of obstruction, and he had no power to arrest him for that offence.

⁵ A tactical options report is a report that an officer is required to complete when he or she has used force on a member of the public. The report includes each tactical option and a description of the force used and the reasons for using it.

⁶ According to Police policy, "passive resistance" is a verbal refusal to comply.

FINDINGS ON ISSUE 1

Officer A was lawfully justified in signalling Mr X's vehicle to stop. Officer A did not comply with policy when pursuing Mr X.

Officer A was legally justified in arresting Mr X as he suspected he had committed the offence of failing to stop, but his decision to do so without making further enquiry of Mr X was unnecessary and unreasonable.

Officer A was not justified in arresting Mr X for obstruction.

Issue 2: Was Officer A's use of force on Mr X justified?

42. Mr X said after Officer A lent in and turned the ignition off, he *"got out of the ute to see who [Officer A] actually was, to see if [he] could get a better vision of him."* As he did so, Officer A pepper-sprayed him. Mr X described the pain as unbearable.

Was Officer A justified in using pepper-spray on Mr X?

43. Police policy says: *"All OC [pepper] spray use must be lawful and reasonable, i.e. necessary, proportionate to the situation and with minimum risk to the public, Police and the subject."*⁷

44. Officer A said he used the pepper-spray on Mr X in self-defence. 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."

45. To rely on this justification for his use of force, Officer A's actions must be assessed on the following three questions:

- 1) What did Officer A believe the circumstances to be at the time he pepper-sprayed Mr X?
- 2) In light of that belief, was Officer A's use of the pepper-spray for the purpose of defending himself?
- 3) If it was, was the force used reasonable in the circumstances as Officer A believed them to be?

What did Officer A believe the circumstances to be at the time he pepper-sprayed Mr X?

46. In his tactical options report, written shortly after the incident, Officer A said that, just before he pepper-sprayed Mr X, he believed he was 'assaultive' and reaching for a weapon.⁸ Officer A said:

⁷ See paragraphs 126 to 137 for relevant law and Police policy on the use of force and specifically, the use of pepper-spray.

⁸ 'Assaultive' in the Tactical Options Framework includes someone who displays intent to cause harm, through body language/physical action.

“It was not known why [Mr X] did not stop and his behaviour was very aggressive and confrontational. When he reached towards the centre console area I believed him to be reaching for a weapon of some description. He was non-compliant, aggressive, abusive. This, put together with his actions, I believed he was assaultive and posed an immediate threat to my safety.”

47. Officer A said: *“My thought process was that he’s grabbing something to come out and have a go.”* In his tactical options report, Officer A said he thought Mr X may be reaching into the vehicle for a weapon such as a baton or knife.

48. Officer A’s report, written shortly after the incident, said Mr X had no weapon, but he later told the Authority he was unsure if there were any weapons. In Court, Officer A said there was nothing in the ute, although Police did not conduct a search of the console or any other part of the ute at any stage. This is surprising, in view of Officer A’s stated belief that Mr X was assaultive and possibly had a weapon. Of note, Mr X said his ute was full of different kinds of tools which could be considered weapons.

49. When Officer A turned off the ute and Mr X said, *“Oh no you f**king don’t”*, Officer A said he believed it was a threat. He said at that point he thought, *“shit here we go”*.

50. Officer A believed Mr X’s demeanour as he got out of the ute indicated he may want to fight:

“...the way he was projecting himself physically as well...he was giving himself over like...he wanted to fight, like he was just ready to scrap...I mean I’d given enough room that I thought, ok, he’s just going to stand here and hurl abuse, but he got out and the manner in which he’s gotten out of the vehicle... sort of like with both fists down by his side and puffed out... like he wanted to have a scrap.”

51. Officer A told the Authority Mr X had his fist clenched when he got out of his ute. Mr X denied this. When asked if he saw one clenched fist or two, Officer A said he assumed it was both fists based on the position of Mr X’s hands. If this was the case, he must have realised Mr X didn’t have a weapon in his hand before pepper-spraying him.

52. In his accounts in Court and to the Authority, Officer A described the way Mr X opened the door as *“kicked”*, *“pushed”*, and *“used his foot to swing that door open with force”*. If Mr X did push or kick the door as he got out, it would imply he used some physical force and would support Officer A’s claim that he was assaultive just before he was sprayed. However, Officer A did not mention Mr X using his feet to open the door in his written statement or tactical options report, which were both written shortly after the incident.

53. Moreover, he has given different accounts of the position of the door before Mr X got out of the ute which give the Authority reason to doubt the accuracy of his versions of the incident:

- d) In his tactical options report, Officer A said he grabbed the door as Mr X tried to shut it.
- e) In his formal written statement, Officer A said Mr X shut the door and attempted to drive off, so Officer A then opened the door.

- f) In his interview with the Authority investigator he said Mr X may have leaned over to get leverage to kick the door open, which implies it was closed or partially closed.
 - g) In evidence in Court, he said he had opened the door to remove the keys. When challenged, he said it may have swung shut or Mr X may have grabbed it as he's moved away. He said, *"I don't know the full circumstances of where the door has gone"*.
54. Mr X is absolutely sure the door was open when Officer A leaned in to turn the ute off. He adamantly denies kicking the door. He said: *"the door is full of tools and sh*t like that... It just didn't happen."*
55. Officer A has also given slightly different accounts of when he took his pepper-spray out:
- a) In his statement, written the day after the incident, Officer A said he took his pepper-spray out as Mr X walked back to the ute door. He said he held it in a concealed position and told him he wanted to have a talk about his driving.
 - b) In his tactical options report (written three days after the incident) and his interview with the Authority investigator (eighteen months after the incident) Officer A said he drew it out after Mr X leaned towards the console.
 - c) In Court, Officer A said he drew his pepper-spray out after pulling the keys out of the ute. (whereas he did not actually take them out, but rather turned the ignition off).
56. If Officer A took his pepper-spray out as Mr X walked back from the gate to his ute, it would indicate Officer A was wary of him early on in the incident and believed there might be the need for him to use force. At this stage all that had happened was that, in Officer A's mind, Mr X had failed to stop and sworn at him. However, if Officer A first withdrew the spray as Mr X exited the vehicle, it would indicate it was more in reaction to Mr X leaning towards the console, possibly pushing/kicking the door, and his demeanour exiting the vehicle.
57. The Authority is not able to reach a view as to which of these scenarios applied, but in either case it appears that Officer A felt there was a threat. He said he believed he needed to respond immediately to the actions of Mr X, who appeared *"very aggro"*. He said he was *"under five metres"* away from Mr X, in a confined area, so the only options he believed would be effective were pepper-spray or empty hand tactics:⁹

"I didn't know that he was going to come hurling out his vehicle like he did, at me... and I just went up. I just sprayed him. I'd come back to give myself room. Night time, shitty ground. I wasn't going to run backwards. If I fell over in a pothole he could've jumped me... I'd given enough space that was safe that if I was to get out and stand there and have a chat it would have been good. However he came out in such a rushed way, not charging, but enough to cause me to think, "oh shit, here we go"."

⁹ 'Empty hand' refers to a weaponless use of force, such as grabbing hold of, pushing, or punching an offender.

58. Mr X said he did not come out of the ute aggressively and he did not even have time to see the pepper-spray or Officer A before he was sprayed. He immediately sat back down in the ute seat, despite being unable to see, which suggests he did not make it very far out of the vehicle.
59. Officer A said he believed he was on his own as the sole officer in an unlit area, however Officer B had given an update just before Mr X was sprayed, saying she was in the area and “*not far away at all*”.
60. Although Officer A’s accounts lack consistency, the Authority is satisfied that his motivation for spraying Mr X was because he genuinely believed Mr X posed a risk and was fearful for his safety. Officer A seems to have formed a heightened expectation that he was dealing with someone who would be assaultive. The Authority recognises contributing factors to this belief include:
- They were in an area known to have had recent criminal activity;
 - Officer A had no prior knowledge of Mr X and was therefore unsure what his behaviour was like; and
 - Mr X’s use of aggressive language.

In light of Officer A’s belief, was his use of the pepper-spray for the purpose of defending himself?

61. Despite the discrepancies in Officer A’s recount of events, the Authority accepts Officer A genuinely believed he might be at risk of physical harm and was needing to defend himself.

Was the force used reasonable in the circumstances as Officer A believed them to be?

62. Based on all accounts the Authority believes the situation had escalated to a level where Mr X was understandably highly frustrated.
63. Officer A did not give a warning before pepper-spraying Mr X, as is required by Police policy. He said he did not have enough time to give him one. If Officer A took the spray out as Mr X walked back to his ute, he would have had time to warn Mr X he would use it if necessary and should have done so. With no warning, Mr X did not realise Officer A was considering him to be assaultive, so had no reason to think his action of exiting the ute would lead to him being sprayed.
64. Mr X estimated the pepper-spraying took place about five seconds after the ute was turned off. The Authority believes Officer A reacted too quickly, considering Mr X was not carrying a weapon and they were separated by a few metres. He had other tactical options he could have used when Mr X got out of the ute. He could have:
- communicated more effectively;
 - maintained the distance between himself and Mr X and warned him he had pepper-spray;
 - created more distance between them;
 - retreated to his patrol vehicle;

- waited for back-up to arrive as he knew Officer C had arrived in the area and would be there shortly; and
 - follow up with Mr X at a later stage. Police had the ute registration number as a starting point for inquiries.
65. In Officer A's tactical options report he estimated Mr X to be between five feet, six inches and six feet tall. Officer A and Mr X are significantly different in size. After meeting both Mr X and Officer A, the Authority investigator agreed with Officer B's description of them: "[Mr X] is just over 5 foot and medium to slim build. Not a big fella. [Officer A] is a strong guy, he would be 5'8. He's a strong, muscular build." The Authority believes if Mr X had tried to fight, Officer A would have had a physical advantage over him and could have used less violent tactics than pepper-spray.
66. The Authority considers the use of pepper-spray was unnecessary and an unreasonable use of force in the circumstances as Officer A described.
67. Section 39 of the Crimes Act 1961 allows for an officer to use reasonable force to overcome any force being used to resist an arrest. As Mr X did not actually use force against Officer A, the Authority finds the use of the pepper-spray was also not justified under this section of the Act.

Did Officer A use force against Mr X, pushing him against the wall at the Police station?

68. Mr X has alleged that once at Balclutha Police Station, Officer A pushed him into a wall, causing him to hit his nose and forehead. He said:

"The patrol doors were open and I was guided out. From the sounds I knew the male officer was guiding me from behind. I then heard him say "watch the wall" – I couldn't see anything and I felt this shove and my face went straight into the wall straight on. It wasn't real hard that did any damage but I was shoved from behind and felt it was intentional."

69. Officer A denies doing this. When the Authority's investigator asked Officer A to recall the incident, he said they were coming through a little door. Mr X was pulling and throwing, "not to a great extent", while Officer A possibly had hold of his left bicep but was not holding him against the wall. He said Mr X was not against the wall, he was standing in front of it. He said Mr X may have leaned on the wall, but he did not recall Mr X making any contact with it.
70. The investigator reminded Officer A of an email he had written a few weeks after the incident, which said:

"As we progressed through the doors to get to the charge room, I had opened the door and was holding him by his left arm. With the effect of the spray his eyes were closed and he was cuffed. I can recall as I was guiding [Mr X] what I thought to try and lean on the wall, I had the door open by this time and then guided him my direction but he did collide with the wall. This wasn't enough to cause any pain etc, he was pretty much leaning against it when he tried to walk off. I believe I said something like, "ooh, watch the wall", it was not a deliberate act."

71. When asked which account was more accurate, Officer A believed the email would be as it was written shortly after the incident. He then said, *"I'm not deliberately ramming him into a door frame. I'm not being a dick and trying to make him hit it."* He said he could understand if Mr X had hit his shoulder on the door frame on the way through, but definitely could not recall him hitting his head.
72. There were no witnesses and no CCTV footage or other evidence to prove or disprove whether Officer A deliberately pushed Mr X.

FINDINGS ON ISSUE 2

Officer A's use of pepper-spray on Mr X was unjustified.

There is insufficient evidence for the Authority to make a finding on whether Officer A deliberately pushed Mr X into the wall.

Issue 3: Was the appropriate medical care provided afterwards?

73. Mr X said when Officer A sprayed him, the pepper-spray took a couple of seconds to work at first and then there was instant burning and stinging in his eyes and he felt like his face was burning off. He couldn't see anything at all, and it took about an hour and a half before he properly regained his sight.
74. No aftercare was administered at the scene as Officer A described Mr X as *"still being abusive and aggressive"*. Officers A and B took Mr X back to Balclutha Police Station, about two minutes away, before aftercare began.
75. Mr X was reported to be uncooperative and abusive at the station. The officers said they did not know Mr X's identity until another officer at the station recognised him, as he would not answer their questions. Officer A said they did not have the ute registration number, which could have given them an indication of who Mr X was. Although he did not recall it, records show he did in fact give SouthComms the registration number while following Mr X's ute.
76. Mr X said he was verbally abusing the officers and refused to answer questions until the pepper-spray was removed from his face. He said as the pain started going away and he began to have more vision, he started complying more. He described the aftercare as *"hopeless"*.

Was the appropriate aftercare provided following the use of pepper-spray?

77. Police policy says after using pepper-spray, Police *"must minimise any residual effects caused by the spray by providing proper decontamination and proper aftercare"*.
78. There is no CCTV footage of the area in which Mr X was treated to confirm timings and aftercare. Police estimate it was 5 to 7 minutes from when Mr X was pepper-sprayed to when aftercare began. Mr X said it was about half an hour after initially being pepper-sprayed, before he was given a couple of bottles of a type of decontaminant spray that did not make any difference.
79. Officer A said there was half a can of new decontaminant spray which they used, but there was not enough, and more cans of the new decontaminant could not be located. Officer A then gave

Mr X the old decontaminant spray which was not effective, which Officer A believes was probably due to it not being the correct one for the type of pepper-spray used at that time. Acting Sergeant Officer C, told Officer A they had to use the old decontaminant spray first because of the cost of the new spray.

80. Mr X said one of the officers at the Police station said, *“just f**king hose him down”*, but another officer said that could make the effects worse, so they did not hose him. Officer A said he wet a towel for Mr X to try to give him some relief.
81. Police National Headquarters said Balclutha Station had ordered and received further canisters of the correct decontaminant in the months following the incident, in 2017. In 2019, when the Authority asked Officer A if the situation with the decontaminant sprays is now resolved, he said there are still issues around having the correct decontaminant available.
82. Officer C said her understanding was that the old and the new decontaminant sprays were the same product, but in a different container and with different packaging. When she had been doing an order for more decontaminant spray, she was told it was *“exactly the same stuff”*.
83. Mr X said when he was throwing the tissues away, he was missing the rubbish bin because he could not see and that Officer A *“was doing his nut about that”*. Officer A said: *“Not one tissue made it in. He spat all over the floor and refused to put anything in the bin... it took longer than it should’ve.”*
84. The Authority accepts the officers attempted to relieve the effects of the pepper-spray on Mr X, however an effective decontamination spray should have been available. This, alongside Officer A’s manner, added unnecessarily to Mr X’s distress.

Was the appropriate medical treatment provided relating to Mr X’s diabetes?

85. The Police database alerted the officers to Mr X being diabetic, and Mr X said he told them he was. Officers A, B and C all said Mr X’s behaviour at the station caused them to believe he may be having a diabetic episode. Officer C said, it *“appeared that [Mr X] had been drinking. He was slurring his words”* and was *“a bit aggressive”*.
86. Officer A said they were *“trying to talk to him. We’re trying to figure out...why is he so agitated, and why his behaviour was what it was right at the start.”* Mr X said he told Officer A his bad mood was not related to his diabetes but was a result of Officer A using the pepper-spray on him.
87. Mr X also told the Authority Officer A *“tried doing a bit of a bargain with me”*, implying he may be better off if he said his diabetes was causing him to get in his bad mood. Mr X said he told Officer A to *“get stuffed”*.
88. Mr X said he told officers he knew his blood sugar was high, and that he wanted to go home to get his own medication. Officers A and B took him to the local hospital where it was confirmed his blood sugar was high. Officer A said a nurse offered to give Mr X an injection to bring his

blood sugar down, but Mr X said no, and that he would do it at home. Mr X was then taken back to the station.

89. The Authority believes Police acted appropriately in taking Mr X for a medical check-up.
90. Overall, officers ensured Mr X received appropriate medical care, however the Authority believes the situation was made worse by:
 - Police not taking into account Mr X's understanding of his current blood sugar levels; and
 - the officers not allowing Mr X to access his own medication from home and self-administer it.

FINDING ON ISSUE 3

Officers attempted to provide appropriate aftercare for Mr X regarding the pepper-spray, however this was unsatisfactory due to the lack of effective decontamination spray, which should have been available.

Officers provided appropriate medical care concerning Mr X's diabetes.

Issue 4: Was it justified and reasonable for officers to detain Mr X overnight and then to impose a bail condition forbidding him from driving?

91. When considering whether to release someone on bail, officers must consider if they are eligible for bail and what risk they may pose to themselves and to the public.¹⁰
92. A condition may be attached to bail if officers have reasonable grounds to believe it necessary to ensure the defendant:
 - appears in court on a specified date;
 - does not interfere with witnesses or evidence; or
 - does not commit any offence while on bail.

Was it reasonable to forbid Mr X to drive?

93. At Balclutha Police Station a decision was taken to charge Mr X with failing to stop and obstructing Police, which was later changed to resisting Police. Mr X was going to be bailed to appear in court within the next week. As part of the bail a condition was to be imposed forbidding Mr X to drive a motor vehicle for an unspecified amount of time. Officer A and his supervisor, Officer C, have different recollections around whether they made the decision to impose the condition not to drive collectively or whether Officer C made it on her own.
94. Officer A believed that, because of Mr X's high blood sugar level and his current behaviour, he was in an unfit state to drive. He said he discussed this with Officer C and then told Mr X he would be forbidden from driving for 12 hours. Officer C said forbidding Mr X to drive for 12

¹⁰ See paragraphs 138 to 145 for relevant law and Police policy on granting bail and detaining someone.

hours did not fit with legislation so she and Officer A would have had a conversation about what condition they could impose.

95. When Mr X was told he was not going to be able to drive he replied by saying something along the lines of “*You can get f**ked. I’m gonna be driving my car again within 5 minutes of getting out of here.*” Officer C said she asked Mr X if that condition would cause undue hardship, but he refused to answer her, and got angry and aggressive with her.

96. Officer C told the Authority she discussed what Mr X’s manner of driving was like with Officer A, and if there were any issues around him driving any further:

“... it was decided that that was the cause of the offending and to ensure that he didn’t put anyone else at risk, a condition of not to drive is where we looked at.”

97. Officer A told the Authority he did not consider a manner of driving charge regarding Mr X’s speed, and that Mr X had remained within the lane and was not swerving. Records show Officer C had asked about Mr X’s manner of driving and Officer A had stated it was fine.

98. Officer C said she was concerned that Mr X would reoffend with his driving and that his aggressive nature would put people at risk:

“... [Mr X’s] behaviour was escalating when we had him and he was still very aggressive towards me, and there was concern if we released him at that point and time ... would’ve led to re-offending.”

99. As Mr X’s manner of driving had not been an issue, the Authority believes there was no justification for saying he would “reoffend” with his driving.

100. Of note, Mr X’s licence has a requirement that he not drive if his blood sugar is lower than 4.2. The normal range is between 4 and 8, with Mr X’s usually being around 12. As Mr X’s blood sugar level was 24.8 at the hospital, this was not a valid reason to stop him from driving. Mr X’s licence is subject to annual reviews but he had recently sent the required information to the New Zealand Transport Agency so this should not have been a contributing factor in the decision-making for the Police.

101. Mr X’s breath test results had shown he was not intoxicated.

102. Officer C, possibly in consultation with Officer A, appears to have made the decision to bail Mr X with the condition not to drive largely based on his abusive language and lack of co-operation rather than any offence he had committed.

103. Later at Dunedin Police station, Officer D reviewed Mr X’s situation and made the decision to not impose the bail condition of not being able to drive. She said there were three issues she considered:

- a) Bail conditions and charges: Failing to stop for red and blue lights is a fines-only offence with no mandatory disqualification.

- b) Diabetes: She acknowledged Mr X's blood sugar level was high but that it was not a breach of his licence conditions at this level. She could not identify any other occurrences that related to his diabetes and driving.
- c) Hardship: Mr X is the sole parent of two teenage girls and driving was his occupation.

The Authority believes Officer D's decision-making was well-considered and appropriate.

104. The Authority considers the bail condition of not driving was unjustified and the reasoning for it was flawed. There was no reason to think Mr X would not turn up to court, and there were no witnesses or evidence at risk of being interfered with. The Authority does not accept Officers A and C had any cause to believe Mr X would commit an offence.

Was it necessary to detain Mr X overnight?

105. Police policy says the detention of someone must be "*reasonable or necessary*". It is considered to be arbitrary detention if someone is detained "*for an unnecessarily long time*" or "*when in the circumstances of the case, the less serious option of commencing proceedings against them by way of summons would have been a more appropriate response*".

106. Mr X recalls arriving at Dunedin Police Station at about 4am. He told them he needed some diabetes medication, so he was taken to hospital. Back at the station, he slept in a cell until 7.30am, when he was told he would be bailed to appear in Court in six days' time and the condition not to drive would not be imposed.

107. The Authority does not believe it was necessary or reasonable to transfer Mr X to Dunedin Police Station or to detain him overnight as his demeanour and bad temper were due to being pepper-sprayed and were not valid reasons to detain him.

Did the Police endeavour to provide Mr X with his lawyer?

108. By law, people who are arrested or detained have the right to consult and instruct a lawyer without delay.

109. Mr X said he told officers he wanted a lawyer and was told they would appoint him one. He said he wanted his own one, and was told by one of the officers, "*No, no, we appoint you one. It's the only one you'll be getting.*" Mr X said he told them to "*get f**ked*" and did not speak to a lawyer until after he was released.

110. Officer A said Mr X could not provide details of his lawyer so was given a list to choose from. He said there is a lack of understanding amongst Police around whether officers are allowed to call other lawyers or look them up on the computer to get their details and ring them. Officer A said his gut feeling is that Police could make a reasonable attempt to look up a lawyer's details for a defendant.

111. The Authority believes it was reasonable for Mr X to want his own lawyer and officers should have made an attempt to locate him.

FINDING ON ISSUE 4

It was unreasonable for Officers A and C to impose a bail condition forbidding Mr X from driving.

Mr X's overnight detention was not justified or reasonable.

Police should have attempted to locate Mr X's lawyer.

CONCLUSIONS

112. The Authority concluded that:

- 1) Officer A was lawfully justified in signalling Mr X's vehicle to stop. Officer A did not comply with policy when pursuing Mr X.
- 2) Officer A was legally justified in arresting Mr X as he suspected he had committed the offence of failing to stop, but his decision to do so without making further enquiry of Mr X was unnecessary and unreasonable.
- 3) Officer A was not justified in arresting Mr X for obstruction.

113. Regarding the use of force, the Authority found that:

- 4) Officer A's use of pepper-spray on Mr X was unjustified.
- 5) There is insufficient evidence for the Authority to make a finding on whether Officer A deliberately pushed Mr X into the wall.

114. Regarding the aftercare provided to Mr X, the Authority found that:

- 6) Officers attempted to provide appropriate aftercare for Mr X regarding the pepper-spray, however this was unsatisfactory due to the lack of effective decontamination spray, which should have been available.
- 7) Officers provided appropriate medical care concerning Mr X's diabetes.

115. The Authority believes that:

- 8) It was unreasonable for Officers A and C to impose a bail condition forbidding Mr X from driving.
- 9) Mr X's overnight detention was not justified or reasonable.
- 10) Police should have attempted to locate Mr X's lawyer.

A handwritten signature in black ink, appearing to read 'C. Doherty'.

Judge Colin Doherty

Chair
Independent Police Conduct Authority

24 March 2020

IPCA: 17-1218

Stopping a vehicle

Law on requiring a driver to stop

116. Section 114 of the Land Transport Act 1998 provides for enforcement officers to signal or request the driver of a vehicle to stop a vehicle as soon as is practicable. An enforcement officer in a vehicle following another vehicle may, by displaying flashing blue, or blue and red, lights or sounding a siren, require the driver of the other vehicle to stop.
117. The driver of a vehicle that is stopped by an enforcement officer must remain stopped for as long as is reasonably necessary for the enforcement officer to complete the exercise of any powers conferred, or duties imposed, on an enforcement officer by this Act.
118. An enforcement officer may arrest a person without warrant if the officer has good cause to suspect the person of having failed to comply with the request to stop.

Law on breath screen testing

119. Section 68 of the Land Transport Act 1998 provides for enforcement officers to require a driver of a motor vehicle on the road to undergo a breath screening test without delay.

'Fleeing driver' policy

120. The decision to commence, continue, or abandon a fleeing driver pursuit must be continually assessed and reassessed in accordance with the TENR (Threat-Exposure-Necessity-Response) risk assessment tool. The overriding principle of the Police fleeing driver policy is that: "Public and staff safety takes precedence over the immediate apprehension of the offender".
121. During a pursuit, warning lights and siren must be simultaneously activated at all times. The Communications Centre must also be advised immediately if there is a fleeing driver and a pursuit has been initiated.
122. The pursuing staff member who is responsible for undertaking radio communications should provide the pursuit controller with timely and consistent situation reports (when it is safe to do so). Where additional information is required or yet to be transmitted, the dispatcher or pursuit controller should prompt for the required details. The lead vehicle driver must also comply with all directions from the pursuit controller.
123. As part of a flexible response model, all suitable tactical options should be considered, or requested, to safely apprehend the fleeing driver. This may include not pursuing or abandonment.

Arrests

Law on power to arrest

124. Section 315 of the Crimes Act 1961 provides that a constable can arrest without warrant any person whom he or she has good cause to suspect has committed an offence punishable by imprisonment.

Law on resisting or obstructing a Police officer

125. Under section 23 of the Summary Offences Act 1981, every person is liable to imprisonment for a term not exceeding 3 months or a fine not exceeding \$2,000 who resists or intentionally obstructs, any constable acting in the execution of his duty.

Use of force

Law on the use of force

126. 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 enforcements 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.”*
127. Section 40 of the Crimes Act 1961 allows for law enforcement officers to apply necessary and reasonable force when someone is attempting to avoid arrest by escaping or fleeing.
128. 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.”*
129. Under section 62 of the Act, anyone who is authorised by law to use force is criminally responsible for any excessive use of force.

‘Use of Force’ policy

130. 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.
131. 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.

132. 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)).
133. 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.
134. 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.

'Oleoresin capsicum (pepper) spray' policy

135. 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.
136. 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"*.
137. After using pepper-spray officers must *"minimise any residual effects caused by the spray by providing proper decontamination and proper aftercare"* and accompany and monitor the person for at least 45 minutes or until the symptoms or effect are no longer apparent.

Bail and detention

Law on Police bail

138. The Bail Act 2000 says a defendant has the right to be bailed if they are charged with an offence that is not punishable by imprisonment. They also have the right if the offence is punishable by less than three years imprisonment and the defendant has no previous convictions for an offence punishable by imprisonment.
139. Police employees may grant bail to a defendant who is charged with an offence and has been arrested without a warrant, if they consider it prudent to do so. (This requires an officer to consider public safety and safety of the defendant.)

140. Every defendant who is granted bail must personally attend court at the specified time. Other conditions may be imposed to ensure the defendant appears in court, does not interfere with any witness or evidence against the defendant, and does not commit any offence while on bail. Officers must have a reasonable basis to believe the imposed conditions are necessary to minimize risks.
141. In order to bail a defendant, officers must consider whether the person has a right to be bailed. Factors officers may also take into account include:
- The nature and seriousness of the offending.
 - The strength of evidence and likelihood of conviction.
 - The seriousness of the punishment likely to be imposed for a conviction.
 - The defendant's character and past conduct/criminal behaviour.
 - Any history of offending on bail or breaching court orders.
 - The likely length of time before trial.
 - Other special matters relevant to the case's circumstances, e.g. likelihood of retribution after confrontation between gangs.

Law on the rights of people arrested or detained

142. The New Zealand Bill of Rights 1990 says everyone has the right not to be arbitrarily arrested or detained. They have the right to be informed of the reason for their arrest or detention and to consult with a lawyer without delay. They have the right to have the validity of the arrest or detention "*determined without delay*" and to be released if the arrest or detention is not lawful. Everyone who is arrested for an offence has the right to be charged promptly or to be released. They also have the right to be treated with humanity and respect.

'Bail' policy

143. After someone is arrested for an offence, Police must decide whether to hold the person in custody while waiting for them to appear in court, or to release them on Police bail. "*Bail is release from court or police custody on conditions including that a person comes to court when next required and addressing other risks they may pose if released pending the hearing of their case.*" Public safety is a key consideration when making decisions around bail.

'Arrest and Detention' policy

144. You must have legislative power to arrest or detain that person, and the arrest or detention must be reasonable or necessary in that particular case.
145. Everyone has the right not to be arbitrarily arrested or detained if the arrest or detention is unreasonable or unnecessary in the particular case, or while the initial detention was appropriate, the detention continued for an unnecessarily long time.

146. It may also be arbitrary detention if you arrest a person when in the circumstances of the case, the less serious option of commencing proceedings against them by way of summons would have been a more appropriate response.

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 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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