

getting it off the road. A few seconds later the driver of the Subaru stopped, about nine minutes after the pursuit had begun. The Subaru had travelled about 19 kilometres.

6. Officer B got Mr X out of the Subaru while Officer C got the passengers out on the other side of the vehicle. Both officers presented their guns and ordered the suspects to lie face-down on the ground, where they were handcuffed.
7. Several people raised concerns about Officer B's use of force at this point:
 - a) Mr X said Officer B used excessive force on him by "*stabbing*" him in the face with his pistol.
 - b) Officer A, who arrived on the scene and went to assist Officer B with Mr X, recalled that Officer B lunged at Mr X in a manner that suggested he was about to hit him.
 - c) Several witnesses, including Officer A, said Officer B walked around to the passenger side of the car and held his pistol to Mr Y's head while he was handcuffed and lying on the ground.
 - d) Mr Y and three ambulance crew members who stopped at the scene (Ambulance Officers D and E, and Nurse F) alleged Officer B also kicked Mr Y. Ambulance Officer D said Police were "*efficient and effective*" and very professional, up until this incident.
8. Police charged Officer B with 'common assault' regarding the alleged kicking of Mr Y, and 'assault with a weapon' regarding his use of the firearm. Police stood Officer B down and deferred employment proceedings until the outcome of the criminal proceedings were known. He was acquitted on both charges at a jury trial.
9. Police notified the Authority of the incident, and the Authority independently investigated before the trial. The Authority then assessed the evidence given at trial and found it was broadly consistent with what it had already heard and supports the Authority's findings.

THE AUTHORITY'S INVESTIGATION

10. The Authority interviewed Officers A, B and C, as well as the occupants of the fleeing car and the ambulance crew. The Authority also reviewed Police documentation of the incident, including statements and reports.
11. The Authority identified and considered the following issues:
 - 1) Did Police conduct the pursuit in accordance with policy?
 - 2) Was Officer B's use of force on Mr X lawful and reasonable?
 - 3) Did Officer B kick Mr Y?
 - 4) Was Officer B justified in holding his pistol to Mr Y's head?

THE AUTHORITY'S FINDINGS

Issue 1: Did Police conduct the pursuit in accordance with policy?

Decision to pursue and initial risk assessment

12. Officer A signalled the driver of the Subaru, Mr X, to stop. When Mr X saw the patrol cars, he accelerated and overtook other cars to escape Police.
13. When talking to the Authority, Officer A made it clear that his decision to pursue was largely because he was acutely aware the suspects had been involved in an aggravated robbery:³

"...there's a bit more onus to stay with the car rather [than] abandon it... In this case it was a stolen vehicle... We knew he had four guys in there that were from the aggravated robbery and they were failing to stop."

14. Police did not know who Mr X, Mr Y and Mr Z were, and as they were in a stolen vehicle the Subaru's registration details would not help identify them. The Authority accepts that the fact these were unidentified and violent offenders created an urgency to apprehend them at the time.
15. Mr X and Mr Y later said they were initially travelling between 170 and 180 kph, but Officers A and B believed it was between 120 and 140 kph. Officer A said: *"I don't think we were getting up to high, silly speeds because of that rain... I was quite surprised how slow we were going..."*
16. Officer A also said there was quite a lot of open road, and not a lot of traffic as it was early in the morning:

"I don't think they were pushing it, they weren't kind of doing stupid moves... they were driving... pretty sensibly. They weren't on the wrong side of the road, they weren't overtaking and stuff like that."

17. The Authority finds that Police were justified in beginning the pursuit after Mr X failed to stop, because they believed the need to apprehend the suspected offenders outweighed the risks posed by the pursuit.

Use of road spikes

18. Officer C requested permission from the Police Northern Communications Centre (NorthComms) to set up road spikes 500 metres south of Waimangu Road.⁴
19. All four of the Subaru's tyres were spiked. The tyres started to disintegrate, with Officer A reporting their rubber was *"going everywhere"*. Mr X continued to drive but at a slower speed.

³ See paragraph 82 for Police policy regarding fleeing drivers.

⁴ See paragraphs 83 and 84 for Police policy regarding the use of road spikes.

Initial attempts to force the Subaru off the road

20. The Subaru then crossed into the wrong lane several times with cars coming towards it, in very heavy rain and with poor visibility. Officer B said abandoning the pursuit was “*not an option*” for him, as the Subaru was so out of control that it was a danger to everybody else on the road.
21. As the Subaru slowed down after being spiked, Officer B reported to NorthComms: “*Speed 70... Vehicle’s sliding around. He’s just lost a tyre. He’s completely sideways now. He’s spun out... Missing two wheels on the right.*” Officer A asked for permission to “*get him off the road*”, which was granted. Officer A then made two unsuccessful attempts to nudge the Subaru off the road.
22. A short time later Officer B asked: “*Permission to ram him off the road, Comms?*” The Subaru was travelling at 70 kph. This time NorthComms denied permission due to the speed. Officer B reported the Subaru was “*sliding all over the place*” and requested permission again, which was not granted.

Driving alongside the Subaru

23. The Subaru drove about 5.5 km after it was spiked, which took about 5 minutes. During this time, Officer B occasionally drove alongside the Subaru, attempting to keep it on the correct side of the road in order to protect oncoming traffic.
24. About one kilometre north of the Tamaki Māori Village, Mr X slowed down to 36 kph and Officer B began driving alongside the Subaru. He told NorthComms: “*I’m on the wrong side [of the road], moderating.*” The dispatcher warned him not to attempt to overtake the Subaru while it was spinning.
25. Officer B said:

“Given that it was clear that the driver could not control the vehicle, I moved past [Officer A] and onto the right side of the centre line, alongside the fleeing vehicle. I did this in an attempt to keep it from entering onto the wrong side of the road and colliding with any oncoming vehicles. The left side of my patrol car made contact with the right side of the fleeing vehicle several times.”

26. Officer B acknowledged that when he drove up alongside the Subaru it was a risky position to put himself in, as he was only two or three feet away from the occupants of the Subaru and did not know if they had a gun. He felt that he did not have any other option as, due to the Subaru’s lack of control, he needed to use his vehicle to try to control it and provide some protection for people in oncoming vehicles.
27. However, located in this position, Officer B’s vehicle created a risk to oncoming traffic when he was driving alongside the Subaru. In this area of State Highway 5, the road alternates between having single lanes in both directions, one lane single and the other double, and double lanes in both directions. It is difficult to ascertain what the situation was each time Officer B drove alongside the Subaru, but when he drove alongside it between Highlands Loop Road and the

point where the Subaru stopped, both lanes were single. Visibility was also very poor due to the heavy rain.

28. Nonetheless, the Authority accepts that Officer B took a calculated risk for the purpose of keeping members of the public safe. This was reasonable because:

- he had more control of his vehicle than Mr X had of the Subaru;
- he had his lights and sirens activated which alerted oncoming traffic;
- traffic was light, as it was early on Sunday morning; and
- Officer B dropped back at times, presumably when he deemed it necessary to avoid oncoming traffic.

Further attempt to force the Subaru off the road

29. The Subaru sped up slightly, so Officers A and B dropped back. As the Subaru went past Tamaki Māori Village it slowed down again. Officer A drove up, putting the front of his car up beside the front of the Subaru, and tried to push it onto the verge. His patrol car connected with the Subaru, but this damaged the steering of the patrol car and forced Officer A to pull over. Officer A was then picked up by a passing member of the public who drove him to where the Subaru stopped a short time later. Officer B took over as the lead patrol car in the pursuit.

30. NorthComms then directed that the Subaru could be pushed off the road only if it was going under 70 kph. The officers were also told the Subaru was “*not to come into town*” (meaning Rotorua). Officer B said the Subaru’s wheels were “*absolutely falling apart*” and it was travelling at about 30 kph. He was driving alongside it in the southbound lane when the Subaru slowed down and then quickly came to a stop about 10 kilometres out of Rotorua.

Were Police justified in using their patrol cars to force the Subaru off the road?

31. Using Police vehicles to force a fleeing vehicle off the road is not an approved tactic in the Police’s ‘Fleeing driver’ policy, and most officers are not trained to do it.⁵ It is dangerous and, as demonstrated by this case, it can cause significant and costly damage which may prevent or hinder Police vehicles from being able to continue driving.

32. However, in some situations the threat posed by the fleeing vehicle may justify the risks posed by Police forcing it off the road. Under sections 39 and 40 of the Crimes Act 1961, officers may use “*such force as may be necessary*” to overcome any force used in resisting arrest, or to prevent a person from escaping to avoid arrest.⁶ In both cases the force will only be justified if the arrest cannot be carried out or the escape cannot be prevented “*by reasonable means in a*

⁵ Only Armed Offenders Squad (AOS) and Special Tactic Group (STG) members, who are trained in the tactic, can perform a ‘non-compliant vehicle stop’. Such a stop may be authorised during an AOS or STG operation, in situations involving a mobile armed fleeing driver “*where there is no other timely practical method of containing the fleeing driver or neutralising the threat they present*”.

⁶ The Court of Appeal has determined that “*such force as may be necessary*” means such force as is reasonable in the circumstances as the person who used the force reasonably believed them to be – R v Haddon [2007] NZAR 135 (CA), at para 40.

less violent manner”.⁷ Police policy also states that the use of any force must be considered, timely, proportionate and appropriate given the circumstances known at the time.

33. Officer B said:

“[Mr X, Mr Y and Mr Z’s] intent was unknown, however given their recent actions of committing an armed robbery, trying to flee Police and driving the stolen vehicle until it physically could no longer be driven, this demonstrated their will to escape/avoid arrest. I believe that they would be intent and capable of causing harm in their pursuit to avoid arrest and escape.”

34. Officer B pointed out that the suspects continued to drive after being spiked, despite the vehicle being out of control. Officers A and B described the risks posed by the Subaru as:

- *“... all four wheels on the car had disintegrated yet they continued to carry on. There was no stopping them...”*
- *“... the driver was repeatedly losing control, spinning out and then driving off again...”*
- *“... [the vehicle was] almost like fishtailing along because they were just on their rims...”*

35. Mr X agreed that the car was out of control. He said: *“...the steering was shit ‘cos the tyres were popped so I was having to keep it like 30 k otherwise it would just slide out.”*

36. Mr Y, a passenger in the Subaru, said after the car hit the road spikes:

*“...it started sliding like really out of control... I was panicking for the other cars on the road, you know, ‘cos I don’t give a f**k about us but for civilians and people just travelling that’s what bothers me sort of thing. I’m not out to hurt people.”*

37. Officer B said he thought: *“I’m going to have a car coming around the corner any minute doing 100 and it’s going to drive straight into him... if I don’t do something about it we’re going to have a head on crash...”* Officer B said he had been keeping the Subaru to the left of the road but it was *“just getting too dangerous”*. Officers A and B believed they needed to take immediate action to protect other road users.

38. The Authority accepts that the Subaru did pose a significant risk to other road users, and the officers reasonably believed they had no other less forceful options to stop it, having already successfully spiked its tyres. They could not be sure how long it would take for the Subaru to be unable to continue driving. Therefore, Officers A and B were justified under sections 39 and 40 of the Crimes Act in using their patrol cars to try to force the Subaru off the road.

FINDINGS ON ISSUE 1

Officer A was justified in initiating the pursuit.

Officers A and B were justified in using their patrol cars to try to force the Subaru off the road.

⁷ See paragraphs 73 to 81 for relevant law and Police policies on the use of force.

Issue 2: Was Officer B's use of force when apprehending Mr X lawful and reasonable?

39. Officer B was driving alongside the Subaru and said he was surprised when it suddenly came to a stop. He said he *"shot forward a fraction"*, realised he was not in an ideal position as he was too far forward, and he thought: *"given my position I need to get out of my car and deal with these offenders right now."* He had a quick look but could not see any of the other patrol cars, so at that point believed he was on his own with the occupants of the Subaru.
40. Officer B drew his pistol and ran straight to Mr X's door. He opened the car door and pointed his pistol at Mr X. Officer B then grabbed Mr X by his clothes and pulled him out of the Subaru with one hand. Officer B said he did this with some urgency, while saying something like: *"Get out of the f**king car, get on the f**king ground"*. Officer B said he also informed Mr X he was under arrest. Officer B put Mr X face-down on the ground and knelt on his back *"to prevent any escape"*.
41. As noted above, under sections 39 and 40 of the Crimes Act 1961, officers may use *"such force as may be necessary"* to overcome any force used in resisting arrest, or to prevent a person from escaping to avoid arrest.
42. Officer B said: *"The offenders were of a size and build that given the opportunity they could have the capability to overpower us, take our firearms and patrol cars."*
43. The Authority agrees that Officer B was justified in aiming his firearm at Mr X, using manual force to drag him out of the car, and kneeling on his back, for the following reasons:
- Officer B believed he was on his own;
 - the Subaru occupants needed to be arrested as soon as possible;
 - the occupants were known to have crowbars which they had used to rob the store;
 - as the driver, Mr X had actively tried to escape to avoid arrest as demonstrated by his fleeing from Police;
 - Mr X had shown he was willing to cause injury to the Police officers and possibly members of the public by failing to stop, even when the Subaru lost control and made contact with the Police vehicles;
 - Mr X only stopped after all of the Subaru tyres had disintegrated, which indicated he was not willingly surrendering to Police; and
 - other tactical options (such as communicating with Mr X, or presenting pepper spray or a baton) may not have been as effective at this stage.

Mr X's statement that Officer B "stabbed" him in the face with his pistol

44. Mr X told the Authority that Officer B "stabbed" him in the face with his pistol, three times or more, saying, "Who the f**k are you c**ts?" and "How does it feel to have a gun waved in your f**kin face?"
45. Officer B adamantly denied doing this. He said he would have been aggressive with his choice of words, as over the years he has found it is the best way to get offenders to respond to what he is saying, but he had no reason to do what Mr X has alleged and did not have the time to poke somebody in the face.
46. There were no other witnesses to this alleged use of force. The Authority finds there is insufficient evidence to support this allegation.

Officer A's statement that Officer B "lunged" at Mr X

47. When Officer A came to help, Officer B had applied one handcuff to Mr X. Officer A knelt on Mr X's back to cuff the other hand. He said as he did this, Officer B "kind of lunged" at Mr X as if he was going to hit him. Officer A put his body in between Officer B and Mr X to block a potential hit. Officer A said Officer B looked "wound up" at the time and "it felt to me that he was coming in to have a go at the offender for what he's done." Officer B then backed away and Officer A put Mr X in the handcuffs.
48. Officer B denied that he was going to punch Mr X. He said: "There was no time – I was concerned about [Mr Y and Mr Z] on the other side of the car."
49. Mr X did not mention seeing Officer B specifically lunge at him or indicate he might punch him; however, this may have been because he was face down. Mr X said Officers A and C's treatment of him was good, but Officer B "had a problem".
50. The Authority believes it is likely Officer B did lunge at Mr X as if he was going to hit him. It finds the account of Officer A to be credible and has also taken into account Officer B's demeanour at the time. Although the independent witnesses in the ambulance did not see the detail of this incident due to Mr X's position on the ground, they described Officer B's behaviour immediately afterwards as being "agitated", "angry", and "mad", which is consistent with the evidence of Officer B and the alleged behaviour. As Mr X was under control, there was no justifiable reason for Officer B to have lunged at him.

FINDINGS ON ISSUE 2

Officer B was justified in aiming his pistol at Mr X, and in pulling Mr X out of the car and onto the ground when the Subaru stopped. This use of force was lawful and reasonable.

There is insufficient evidence to support the allegation that Officer B "stabbed" Mr X in the face with his pistol.

On the balance of probabilities, Officer B did lunge at Mr X and there was no justifiable reason for him to do so.

Issue 3: Did Officer B kick Mr Y?

51. Officer B went around to the side of the Subaru, pistol in hand, to where Mr Y and Mr Z were lying face-down on the ground, handcuffed. It is alleged that Officer B then kicked Mr Y.
52. Some of those who witnessed the incident expressed concern at Officer B's demeanour prior to the kicking incident:
- Nurse F described Officer B as pacing back and forth looking *"really wound up and agitated"*.
 - Ambulance Officer D said it looked like something had snapped and the controlled arrest suddenly morphed into a violent reaction by Officer B. He said his manner suddenly appeared to change.
 - Mr Y said he had no problem with Officer A and C's actions but felt like Officer B made it *"personal"* and that he had an aggressive attitude.
53. Officer B denied being angry: *"I didn't have time to be angry... I was probably a little wound up."*
54. Both ambulance officers and the nurse said Officer B kicked Mr Y while he was lying on the ground, before putting the pistol to his head:
- Ambulance Officer D said Officer B was standing beside Mr Y calmly, then suddenly kicked him twice in the torso. She thought it seemed unprovoked. She distinctly remembered that Mr Y's face was on the ground at the time as she was concerned about the safety of Mr Y and Mr Z, considering the amount of water running across their faces.
 - Ambulance Officer E said:

"I saw [Officer B] place his foot on the arrested man's back who was still lying face down on the ground handcuffed. The guy on the ground [Mr Y] from what I could see lifted his head and said something to the officer. I then saw the officer kick the guy on the ground once or twice in the side by his ribs."
 - Nurse F said Officer B kicked Mr Y about four times towards the bottom of his ribs. When asked if the kicks were like nudges, the nurse said Officer B did not have a big swing up, but it was enough to *"give him a good kick"*.
55. Mr Y said that, after he was handcuffed, Officer B came and kicked him in the leg, leaving a big bruise. Mr Y admitted he was high on methamphetamine at the time but said he *"wasn't being aggro or violent"*. He said he did not report the injury to Police as he felt there would not have been any point.
56. Officer B denied kicking Mr Y, but thought his foot may have hit the side of Mr Y's thigh. He also said: *"... later on once everybody's over here [on that side of the Subaru] I stood with a foot on him and that's just to stop him from wriggling around, trying to move away...."*

57. The Authority recognises that witnesses can perceive the same factual situation differently. Regardless of the differences in recall of details by the witnesses to this incident, it is clear that four witnesses all saw Officer B kick Mr Y while he was on the ground. The Authority is satisfied that Officer A and the three witnesses in the ambulance did see this occur, and it rejects the denials of Officer B.
58. The Authority finds the kicking to be unnecessary as Mr Y was already lying down on the ground in handcuffs and did not pose a genuine threat of escaping or harming anyone. In these circumstances the use of force was not justified under sections 39, 40 or 48 of the Crimes Act 1961.

FINDING ON ISSUE 3

Officer B kicked Mr Y, an action that was unjustified and unreasonable.

Issue 4: Was Officer B justified in holding his pistol to Mr Y's head?

59. There are differing accounts of what happened next:

- a) Mr Y said:

"[Officer B] then proceeded to pull his gun out and put it to my head while I was handcuffed lying on the ground and threatened to shoot me... do something, so that he could shoot me. You know, make a move so I can shoot you sort of thing."

Mr Y did not see the pistol, but said: *"... I could feel the steel on my face, so it wasn't like he held it back from me or anything, he put it right in my face..."*

- b) According to Officer A, Officer B grabbed Mr Y by the scruff of the neck and lifted him up off the ground. He placed the front of the barrel of his pistol onto the side of Mr Y's temple and said something like *"How do you f**king like that?"* Officer B then pushed Mr Y back onto the ground.
- c) The two ambulance officers and nurse also saw Officer B put the pistol to Mr Y's head. Ambulance Officer D said: *"I thought the officer was going to shoot him."*
- d) Officer C was dealing with Mr Z while Officer B was with Mr Y. She said Officer B bent over Mr Y and pulled his hoodie off him. Mr Y turned his head when Officer B pulled the hoodie back.⁸ Officer B said something like, *"Who are you? Where are you from?"* Officer C recalled Officer B having his firearm in his hand: *"I wouldn't say he was presenting [his pistol] or pointing it at anyone from my observations."* She said Officer B was neither calm or aggressive: *"I'd say his voice was probably a little louder than it would be conversationally and that he was direct."*

⁸ There is some discrepancy about what Mr Y was wearing. Photos show it to be a sleeveless t-shirt, but it is unclear if it had a hood.

60. Officer C's recollection is different from that of Mr Y and the other four witnesses. The Authority considers the accounts of the four witnesses to be a more accurate version of events and accepts their evidence on the issue.

61. Officer B said Mr Y and Mr Z were lying on their stomachs on the road and "it appeared that they were handcuffed with their hands behind their back." Mr Y "partially rolled over and said, "F**k you c**ts". This caused Officer B to question whether Mr Y was, in fact, handcuffed:

"Given the situation I dived on top of [Mr Y] telling him to get his face back on the road... I put my left hand on top of his head to push his head back down but it was raining very heavily at the time and [Mr Y] either had very short hair or no hair which made it difficult to get a grip on the back of this head. I then moved my left hand to his collar area behind his head while yelling at him to get back on the ground and pushing him down. I still had the Glock pistol in my hand and had this aimed at him. [Mr Y] then lay on the ground. I moved to his rear to check that he was in fact handcuffed, which he was. I gave him a brief search..."

62. Officer B told the Authority, when he pushed Mr Y down, the "firearm was still pointing at him and I have no doubt it was pointing at his head". He said his finger was always outside the trigger guard and the pistol was not 'actioned' (meaning it was not ready to fire if the trigger was pulled, as there was no bullet in the chamber). Officer B told the Authority he was not sure how far away the pistol was from Mr Y's head, but later said at trial that he thought it was 6 to 12 inches away and may even have accidentally touched his head.

63. Three of the witnesses said they saw Officer B pull Mr Y's head up, though Officer B said he pushed it down. Based on the accounts of witnesses, the Authority believes Officer B pulled Mr Y up by the clothing at the back of his neck.

64. Officer B told the Authority he aimed the pistol at Mr Y in self-defence, in accordance with section 48 of the Crimes Act 1961. In order to rely on this justification for his use of force, Officer B's actions must be assessed against the following three questions:

- 1) What did Officer B believe the circumstances to be at the time he aimed the pistol at Mr Y's head?
- 2) Was Officer B's use of the pistol for the purpose of defending himself or others?
- 3) If so, was the force used reasonable in the circumstances as Officer B believed them to be?

1) What did Officer B believe the circumstances to be at the time he aimed the pistol at Mr Y's head?

65. In his interview with the Authority, 11 months after the incident, Officer B said:

- a) He initially believed the situation was under control based on what he saw when he first went around to the passenger side of the Subaru. He said Mr Y appeared to be handcuffed due to the position he was in, though he had not confirmed this himself.

- b) When Mr Y said “F**k you c**ts”, he believed it was in a threatening way and Mr Y was about to “flare up” and “do something” to him. Officer B now perceived him to be a major threat.
- c) He feared Mr Y would cause death or grievous bodily harm. In his mind, Mr Y was clearly ‘assaultive’,⁹ or had the potential to be: *“Given the circumstances, the fact that they’ve just robbed a dairy, all – everything else that’s gone on. I know we’re dealing with some fairly serious sort of criminals.”*
- d) He was aware that Officer C had found a firearm in the Subaru and that the car occupants had committed an aggravated robbery, and so believed there was a possibility Mr Y had a weapon on him:

“Now given [Mr Y’s] demeanour, what he’s just said, he’s rolled over, I’ve got no idea... I can’t see his hands, [are they] handcuffed? I don’t know. Has [Mr Y] got a weapon down the back of his pants? ... Has he got a gun down there? I don’t know....”
- e) He considered stepping back and presenting the Taser while instructing Mr Y to get back on his stomach, but he did not want to use the Taser while the rain was heavy and there was a lot of water on the road.¹⁰ The pistol was in his hand and was the first available tactical option, and he believed the threat was immediate.

66. The Authority is not satisfied that Officer B genuinely believed Mr Y presented a threat of death or grievous bodily harm as he claimed, at the time he pointed the pistol at Mr Y, for the following reasons:

- a) Officer B completed a Tactical Options Report the day after the incident. All he said about the incident with Mr Y was: *“I then dealt with the front passenger, [Mr Y], ensuring that he was in fact handcuffed.”* Officer B made no mention of feeling that Mr Y posed a threat at that time and that he felt the need to present his pistol to defend himself. The purpose of a Tactical Options Report is for officers to explain what their assessment of a situation was and why they chose the tactical option they used.
- b) Mr Y was lying on his stomach, face down, when Officer B approached him and stood one or two metres away from him. Mr Y’s hands were pulled back behind his back, in handcuffs. He was wearing a sleeveless shirt. It is unclear why, as Officer B claims, he did not see the handcuffs. According to Mr Y and witnesses, he also did not take hold of Mr Y’s hands after diving on him, which might be expected if he genuinely believed Mr Y’s hands were possibly not secured.
- c) While the witnesses cannot speak to Officer B’s view of the circumstances, their evidence indicates that Mr Y was in no position to be posing any threat. Ambulance Officer E said, regarding Officer B: *“the guy’s life wasn’t in danger or anything remotely like that... [Mr*

⁹ According to Police policy, ‘assaultive’ means someone who displays intent to cause harm, through body language or physical action.

¹⁰ According to Police policy, Tasers can be used in the rain, unless there is a possibility the person being tasered could drown.

Y] wasn't making – or didn't appear to be making any attempt to move or wriggle off, he just lay face down on the road....”

- d) None of the ambulance crew said they saw Mr Y roll over, though they did say it looked like Mr Y said something. Ambulance Officer D thought all Mr Y might have been able to do was to try and get up and run off, which from her perspective, would have been easily controlled. Officer B could have simply checked and confirmed that Mr Y was handcuffed, rather than ‘diving’ on top of him, pushing his head down and aiming his pistol at him.

67. The Authority accepts Officer B’s assertion, given at trial, that his mindset was that he needed to dominate the situation. Based on the accounts of witnesses, that Officer B’s demeanour was more aggressive than was necessary in the situation, considering Mr X, Mr Y and Mr Z were quickly secured once the Subaru stopped.

2) Was Officer B’s use of the pistol for the purpose of defending himself or others?

68. As the Authority has found that Officer B did not genuinely believe Mr Y posed a threat, it follows that Officer B’s use of the pistol was not to defend himself or others and cannot be justified under section 48 of the Crimes Act 1961. Therefore, the Authority need not consider the third question.

Was Officer B justified in holding his pistol to Mr Y’s head for any other reason?

69. Section 39 of the Crimes Act provides that officers may use force to overcome any force used in resisting arrest, and section 40 of the Act states they may use force to prevent a person from escaping to avoid arrest. In both cases the force must be reasonable in the circumstances as the person who used the force reasonably believed them to be.

70. Officer B was not justified in aiming his pistol at Mr Y under these provisions, as Mr Y was not in a position to effectively resist or escape Police custody, and did not show any intention to, based on what others observed. Although Officer B has argued that he believed Mr Y did pose a threat of resistance and escape, the Authority does not accept he actually believed this. Furthermore, even if that belief was genuine, it was not reasonable.

FINDING ON ISSUE 4

Officer B aiming his pistol at Mr Y’s head was unjustified and unreasonable.

CONCLUSIONS

71. The Authority has found that:

- 1) Officer A was justified in initiating the pursuit.
- 2) Officers A and B were justified in using their patrol cars to try to force the Subaru off the road.
- 3) Driving alongside the Subaru was a reasonable calculated risk.
- 4) Officer B was justified in aiming his pistol at Mr X, and in pulling Mr X out of the car and onto the ground when the Subaru stopped. This use of force was lawful and reasonable.
- 5) There is insufficient evidence to support the allegation that Officer B “stabbed” Mr X in the face with his pistol.
- 6) Officer B most likely did lunge at Mr X and there was no justifiable reason for him to do so.
- 7) Officer B kicked Mr Y, an action that was unjustified and unreasonable.
- 8) Officer B aiming his pistol at Mr Y’s head was unjustified and unreasonable.

72. The Authority and Police completed a joint review of Fleeing Driver events and published a report on 15 March 2019. This contained eight high-level recommendations. One of these was for Police to investigate allowing officers to carry out a non-compliant vehicle stop on offending vehicles that have been successfully spiked and are travelling at low speeds. Given that this review is ongoing, the Authority does not need to make any additional recommendations following this incident.



Judge Colin Doherty

Chair
Independent Police Conduct Authority

28 April 2020

IPCA: 17-2294

Law on the use of force

73. 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.”*
74. Section 40 of the Crimes Act 1961 provides for law officers to use *“such force as may be necessary”* to stop an offender from escaping if they flee to avoid arrest.
75. 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.”*
76. Under section 62 of the Crimes Act 1961, anyone who is authorised by law to use force is criminally responsible for any excessive use of force.

‘Use of force’ policy

77. 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, retrain 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.
78. Police policy provides a Tactical Options Framework (TOF) 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 assessment as the TENR (Threat, Exposure, Necessity and Response).
79. 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).
80. 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.

81. 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.

'Fleeing driver' policy

82. Police must continually assess the threat and risks when deciding to begin, continue, or abandon a pursuit. The pursuit should be *"resolved as safely and as quickly as possible whilst using the least amount of force."* In a pursuit, the environment changes quickly so risks must be identified and managed as efficiently and safely as possible. *"Safety is prioritised and risks minimised."* Non-compliant vehicle stops can only be done by AOS or STG members who are trained in the tactic. They can only do them when there is no other better method able to be used to contain the fleeing driver or stop them from being a threat.

'Tyre deflation devices' policy (Road spikes)

83. Tyre deflation devices (TDDs) can be used where no other, less dangerous, means of stopping the vehicle are reasonably available, and where they can be used without an unjustified risk to any person. Permission must be given by the pursuit controller or can be self-authorised by an officer based on their risk assessment. The overriding principle when Police deploy TDDs is that safety of themselves and others must be the primary consideration at all times.
84. When using the 'Pull' method of deployment, the officer must wear a high visibility jacket and be mindful of all traffic, as this method requires them to cross the road.

'Firearms' policy

85. Firearms are one of a range of tactical options that Police can use. They must be used only when *"lawful, necessary, proportionate and reasonable in the circumstances"*. Officers may carry and may show a firearm as a deterrent when their risk assessment of the situation is that it could be within the death/grievous body harm range of the Tactical Options Framework. Principles that apply to when offenders are armed include:
 - If the offender is acting in a way that makes casualties likely, Police must act immediately to prevent this.
 - Treat all armed offenders or offenders believed to be armed, as dangerous and hostile unless there is definite evidence to the contrary.
 - Where practical, Police should not use a firearm unless it can be done without endangering other persons.

86. Officers must complete a Tactical Options Report (TOR) when a firearm is used, explaining why they decided to use the firearm.

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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