

Officers used excessive force during arrest in Whangārei

Summary of the Incident

1. On 26 May 2019, Police received a 111 call reporting that two brothers were fighting, and their mother could not physically stop or separate them. Officers A and B, probationary constables with 14 and 12 months of service respectively, attended the incident at about 10pm. When the officers arrived they saw a man, Mr Z, sitting on the front deck of the house and yelling. Mr Z did not acknowledge the officers as they approached. He stood up and started to approach his 15-year-old brother, so Officer B stepped in between them. Officer B appealed to Mr Z to calm down and placed his hand on his chest to stop him.
2. Mr Z responded by yelling “*don’t fuckin’ touch me*” and pushed Officer B with two hands. Officer B warned him for assaulting Police. Mr Z pushed Officer B again, and Officer B told him he was under arrest and asked him to put his chest to the van that was parked in the driveway. Mr Z complied, putting his left arm up onto the windscreen and his right arm below him. Officer A put a handcuff on Mr Z’s right wrist and asked him to lower his left arm, but he refused. He then swung both arms around and tackled Officer B, pushing him into the van and breaking the headlight, before pushing Officer A out of the way and running down the driveway.
3. As Mr Z was running down the driveway away from Officer A, she fired her Taser at him, deploying one cartridge, which missed. Mr Z stopped running and Officer B ordered him to lie on the ground, which he did. Officer B pepper-sprayed Mr Z between his eyes with verbal encouragement from Officer A, before placing the remaining handcuff on his left wrist.¹ The officers put Mr Z into the car and took him back to Whangārei Police Station.

Issues examined by the Authority

Issue 1: Was Officer A justified in firing her Taser at Mr Z?

¹ Pepper spray is also known as oleoresin capsicum or OC spray.

- Issue 2:** Was Officer B's use of pepper spray on Mr Z justified?
- Issue 3:** Was it appropriate for Officer A to encourage Officer B to use pepper spray on Mr Z?
- Issue 4:** Did the officers comply with police policy in administering pepper spray aftercare?
- Issue 5:** Did Officer B deliberately push Mr Z's head into the frame of the police car door?

The Authority's Findings

4. The Authority found neither Officer A's use of the Taser nor Officer B's use of pepper spray were justified and constituted excessive uses of force.
5. We also concluded that:
 - 1) Officer B's language when arresting Mr Z was unprofessional and inappropriate;
 - 2) Officer A's encouragement of Officer B to use pepper spray was not necessary and totally inappropriate;
 - 3) While the officers were justified in wanting to leave the address before applying aftercare, they should have applied it immediately on arrival at the Police station; and
 - 4) While Mr Z's head may have hit the frame of the car door when he was being put inside, it was not a deliberate act by Officer B.

Analysis of the Issues

ISSUE 1: WAS OFFICER A JUSTIFIED IN FIRING HER TASER AT MR Z?

6. Mr Z told us that he got angry when Officer B stepped between himself and his brother and placed his hands on him, so he pulled the officer's hands off. When he did that, he said that Officer B "*got like in a fury*", grabbed his left arm and pushed him up against the van. He told us that Officer A yelled at Officer B about tasing him, and Officer B was swearing in his ear and calling him names. Mr Z said that due to an existing shoulder injury, the way that Officer B was holding his left arm was hurting him. When he told Officer B this, he "*grabbed my arm and wrenched on it more*". He told us that when he could not stand the pain any more he "*shrugged him off*" and ran down the driveway.
7. Officer A told us that when Mr Z was up against the van he would not allow Officer B to bring his left hand down to be handcuffed, then suddenly swung both arms around, facing away from the van, tackled Officer B, pushing him onto the van. She said Officer B and Mr Z had a "*scuffle*" on the ground, during which Mr Z was on top of Officer B. Officer A immediately called for backup on her radio. She considered using pepper spray at this point but was concerned about Officer B and other family members being sprayed because they were so close. Officer A said she was standing about one and a half metres back from Mr Z when he suddenly pushed himself

off Officer B, turned around and looked at her. She said that at that point she feared for her safety, noting he still had his handcuff on, which he could have used as a weapon:

He just assaulted [Officer B] so I would – you know he's capable of assaulting me as well and showing that intent. So [Mr Z] ran up to me, pushed me out the way and yeah just was a hard push. Pushed me out the way and then that's when I grabbed my... Taser, aimed it towards [Mr Z] and [Mr Z] ran past me running down the driveway and that's when I pointed the Taser at him and just deployed him, so just deployed one cartridge."

8. The Taser probes did not hit Mr Z so he was unaffected by it.²Officer B says after the Taser was discharged he and Officer A chased Mr Z about four metres to the end of the driveway as he crossed the street.
9. Mr Z's mother (Ms X) who was standing close by, told us that Mr Z wrestled Officer B, threw him into her van, smashing the headlight, then tried to run away. When she thought that Police were about to Taser him she walked back towards the house because she did not want to see her son be tasered.

Application of Police policy on Taser use

10. Police policy states that any force, including the deployment of a Taser, must be necessary, proportionate and reasonable in the circumstances.³ Key elements of Police policy on Taser use include that:
 - a Taser may only be used to arrest an offender who is assaultive and where the arrest cannot be effected less forcefully;⁴
 - an officer may use the Taser when their risk assessment gives rise to an honest belief that a subject poses an imminent threat of physical harm to any person;
 - once the likelihood of physical harm is no longer present, the use of the Taser will no longer be necessary, and therefore, no longer be reasonable; and
 - to encourage de-escalation and to warn others nearby, officers must give a verbal warning unless it is impracticable or unsafe to do so.
11. At the time Officer A drew her Taser, Mr Z was running towards her, having tackled Officer B to the ground. Mr Z is around 187 centimetres tall and solidly built, while Officer A is about 155 centimetres tall and slightly built. Mr Z had been in a fight with his brother that had prompted the family and neighbours to call Police, then resisted arrest and assaulted Officer B.

² A discharge of a Taser is "application by firing two probes over a distance from an air cartridge attached to the Taser, or subsequent applications of electrical current via the probes, which are in contact with the subject after firing, in conjunction with a verbal warning".

³ Police policy on Taser use is at paragraph 47

⁴ "Assaultive" means actively hostile behaviour accompanied by physical actions or intent, expressed either verbally and/or through body language, to cause physical harm.

12. We acknowledge that Officer A was a relatively inexperienced probationary constable at the time of the incident. For these reasons we accept that Officer A felt that Mr Z posed an imminent threat of physical harm as he ran towards her. However, at the time that she fired the Taser he was running away from her, crossing the street at the end of the driveway.
13. Officer A acknowledged that at this point Mr Z no longer posed an imminent threat. She also failed to give a verbal warning before discharging the Taser. Officer A's use of the Taser was therefore in breach of Police policy.

Legal justification for the use of a Taser

14. Although Officer A's use of the Taser was in breach of Police policy, we explored whether it was justified in law. Section 40 of the Crimes Act 1961 allows Police to use "*such force as may be necessary*" to prevent escape either prior to or after arrest, provided the force used is reasonable, and there is no reasonably available less violent means to carry out that duty.
15. In our view, to rely on section 40 Officer A's use of force must be assessed against three factors:
 - a) the seriousness of Mr Z's offence;
 - b) the likelihood and degree of the risk that Mr Z was reasonably believed to pose if he escaped; and
 - c) the proportionality of the force that was used as a result.
16. Mr Z was advised he was under arrest for assault on Police, as he had tackled Officer B. We do not consider that the offence was particularly serious, and his actions were caused by Police confronting him while he was in an agitated state.
17. After Mr Z was advised he was under arrest he attempted to escape. Given Mr Z's size it was unlikely that Officer A could have chased him down and physically brought him under control to effect the arrest. She had seen Mr Z tackle Officer B and assumed that he would not be able to assist in catching him. It was dark and it was unlikely that Officers A or B would have been able to catch and restrain Mr Z once he ran away. Although Officer A had called for backup, it is likely that by the time they arrived Mr Z would have fled from the scene.
18. Officer A told us she was concerned that if Mr Z was allowed to escape, he might return to the house later and assault his mother or brother again. However, viewed objectively, this risk was low for the following reasons:
 - there was no imminent threat of physical harm to Mr Z's mother or brother, as he was running away from the scene; and
 - Police could have taken measures to ensure the safety of his family should Mr Z return to the house.

19. We find that Officer A's use of the Taser to prevent Mr Z's escape was not proportionate to the risk he posed, and therefore not justified under section 40. The officers had other options available to them, such as making enquiries to locate Mr Z later.

FINDING ON ISSUE 1

Officer A's use of her Taser was a breach of Police policy and unjustified in law. It was an excessive use of force.

ISSUE 2: WAS OFFICER B'S USE OF PEPPER SPRAY ON MR Z JUSTIFIED?

20. After Officer A fired her Taser, its camera continued to record. The footage is consistent with the officers' versions of events. Mr Z stopped running and, on Officer B's direction, lay down on his stomach. Officer B knelt on top of him. Mr Z's hands can be seen behind his back, with a handcuff attached to his right wrist. Officer B told us that he was holding his pepper spray, and Officer A admitted that she said, "*fuckin spray him*". Officer B then pepper-sprayed Mr Z between the eyes, at close range.
21. Officer B told us that at the time he sprayed Mr Z, Mr Z was complying with the officers' instructions and his risk assessment placed Mr Z as no longer assaultive or actively resistant, but passive.⁵ Despite this, given Mr Z's previous sudden attack by the van, Officer B said he was concerned that Mr Z could become assaultive again before they had a chance to secure him. Officer B was concerned for his, and Officer A's safety. His intention was to pepper spray Mr Z so he could safely effect his arrest without Mr Z being able to see him.
22. Section 39 of the Crimes Act 1961 provides for law enforcement officers to use reasonable force in the execution of their duties such as arrests and enforcement of warrants.
23. 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*". Police policy states that the use of any force must be considered, timely, proportionate, and appropriate given the circumstances known at the time.
24. Police policy states that pepper spray is an available option when an officer assesses that a person's behaviour is within or beyond the "*active resistance*" range on the Tactical Options Framework, and the situation cannot be resolved by less forceful means.
25. Officer B acknowledged that at the time he pepper-sprayed Mr Z, he was no longer actively resistant. This is backed up by the Taser footage. We acknowledge that the officers were sensitive to the risk that Mr Z's behaviour could escalate. However, Officer B was on top of him and potentially able to match him in strength, and Officer A was standing nearby holding her Taser. The likelihood of Mr Z escaping again or harming either officer was low. Officer B acknowledged that he had less violent tactics available to him, specifically empty-hand tactics

⁵ Active resistance includes physical actions such as pulling, pushing or running away; that is, "*more than verbal defiance*."

and communication.⁶ If he had not been holding the pepper spray, he would have had two hands available for appropriate empty-hand tactics.

26. We note that in his Tactical Options Report (TOR), Officer B stated that he did warn Mr Z before spraying him.⁷ Having viewed the Taser footage we are confident that he did not.
27. Officer B acknowledged that he was “angry” and “fuming”. He also used foul language, taunting Mr Z with “ *fucking tough c**t*” as he lay on the ground. This was not only inappropriate, but also made it apparent to us that Officer B used pepper spray, not because he did not have a less violent means available to effect the arrest, but because he was angry. This breached policy and constituted an excessive use of force under the Crimes Act.

FINDINGS ON ISSUE 2

Officer B’s use of pepper spray when arresting Mr Z was not justified.

Officer B’s language when arresting Mr Z was unprofessional and inappropriate.

ISSUE 3: WAS IT APPROPRIATE FOR OFFICER A TO ENCOURAGE OFFICER B TO USE PEPPER SPRAY ON MR Z?

28. As described in paragraph 20, when Officer A saw that Officer B was holding pepper spray as he knelt on Mr Z, she encouraged him to spray it. She admitted using inappropriate language, but said that she was in a rage and concerned that Mr Z could use his unrestrained right arm, which still had the handcuffs attached, as a weapon against Officer B.
29. As we have found above, pepper-spraying Mr Z constituted an excessive use of force in these circumstances, despite the officers’ concerns as to the risk that Mr Z could still pose. Officer B told us that he would have used the spray even without Officer A’s encouragement, based on his risk assessment. However, he admitted that when he heard Officer A encourage him, he thought she may have seen something that he had not, which could have heightened the risk they were facing.⁸ This suggests that her encouragement did in fact influence his assessment of the situation.

FINDING ON ISSUE 3

Officer A’s encouraging Officer B to use pepper spray was unnecessary and totally inappropriate.

ISSUE 4: DID THE OFFICERS COMPLY WITH POLICE POLICY IN ADMINISTERING PEPPER SPRAY AFTERCARE?

30. Police policy states that certain steps must be taken after using pepper spray in order to minimise its effects and ensure the person’s safety.

⁶ ‘Empty hand’ refers to a weaponless use of force, such as grabbing hold of, pushing, or punching an offender.

⁷ An officer is required to complete a TOR when he or she has used a certain level of 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.

⁸ Officer B admitted this in his Police statement, Tactical Options Report, and his interview with the Authority.

31. Officer B told us that he decided it would be more prudent to wait until they arrived at the Police station with Mr Z to apply aftercare. He was concerned that in family harm events other family members can behave unpredictably, even if they had called Police in the first place.
32. Officer B told us there was a delay of about 15 minutes in applying aftercare because of the time it took to return to the Police station.
33. Mr Z estimated that he waited a further 10 minutes once at the station, and recalls that before they left Ms X's address the officers sat in the car and talked to his family members for a while.
34. Police policy does not stipulate a time within which aftercare should be provided, and we accept Officer B's rationale for wanting to leave the address as soon as possible. If there was a further 10-minute wait at the station, however, then the officers left it too long. They could have applied aftercare on arrival at the station before leaving the car and processing Mr Z.

FINDING ON ISSUE 4

While the officers were justified in wanting to leave the address before applying aftercare, they should have applied it immediately on arrival at the Police station.

ISSUE 5: DID OFFICER B DELIBERATELY PUSH MR Z'S HEAD INTO THE FRAME OF THE POLICE CAR DOOR?

35. Mr Z has complained to the Authority that when Officer B put him into the Police car he pushed him into the closed door, then as he was getting in pushed him again, and his head hit the doorframe, which hurt. Mr Z says that Officer B then grabbed Mr Z and "*threw him*" into the car.
36. He believed Officer B deliberately pushed his head into the doorframe. When questioned, Officer B acknowledged that he pushed Mr Z with force into the car, and he does not exclude the possibility that Mr Z's head could have hit the frame as he went in. After speaking to Officers A and B we are satisfied that they were forthright in their explanations and that if Mr Z's head did hit the door frame, it was not deliberate.

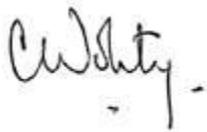
FINDING ON ISSUE 5

While Mr Z's head may have hit the frame of the Police car door, it was not a deliberate act by Officer B.

Subsequent Police Action

37. Police have investigated Mr Z's complaint and found that:
 - Officer A's Taser use was justified under sections 39, 40 and 48 of the Crimes Act; and
 - Officer B's use of pepper spray was an excessive use of force and should not have been done at such close range. However, in light of the inexperience of the two officers, the matter should be resolved through the employment process rather than criminal charges.

38. The Police criminal investigation was dealt with using the restorative practice process, which involved the two officers meeting with the complainant to resolve the matter. Police also apologised to the complainant and offered compensation. They determined that a further employment investigation was not required.
39. Unlike Police, we have not considered Officer A's Taser use in the context of section 48 of the Crimes Act, which allows a person to use reasonable force in defence of themselves or another person. This is for two reasons:
- d) Officer A did not seek to rely on section 48 in her Tactical Options Report; and
 - e) in order for force to be justified under section 48 the threat must be perceived as real and imminent. Although Officer A said she was concerned that Mr Z could return to the house and pose a threat to his brother or mother, at the time Officer A fired her Taser Mr Z was running away, both from her and from where his brother and mother were standing. There was therefore no imminent threat.



Judge Colin Doherty

Chair
Independent Police Conduct Authority

21 January 2021

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Appendix – Laws and Policies

Legislation

Use of force

40. 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 the enforcement of warrants. Specifically, it provides that officers may use *“such force as may be necessary”* to overcome any force used in resisting the law enforcement process unless the process *“can be carried out by reasonable means in a less violent manner”*.
41. Section 40 of the Crimes Act states:
- (1) *Where any person is lawfully authorised to arrest or to assist in arresting any other person, or is justified in or protected from criminal responsibility for arresting or assisting to arrest any other person, that authority, justification, or protection, as the case may be, shall extend and apply to the use of such force as may be necessary—*
- (a) *to prevent the escape of that other person if he or she takes to flight in order to avoid arrest; or*
- (b) *to prevent the escape or rescue of that other person after his or her arrest—*
- unless in any such case the escape or rescue can be prevented by reasonable means in a less violent manner.*
42. Under section 62 of the Crimes Act anyone who is authorised by law to use force is criminally responsible for any excessive use of force.
43. Section 66 of the Crimes Act provides that:
- (1) *Everyone is a party to and guilty of an offence who –*
- (a) *Actually commits the offence; or*
- (b) *Does or omits an act for the purpose of aiding any person to commit the offence;*
- (c) *Abets any person in the commission of the offence; or*
- (d) *Incites, counsels, or procures any person to commit the offence.*

Policy

Police risk assessment and threat framework

44. The Police threat assessment methodology 'TENR' (Threat Exposure Necessity Response) is a decision-making process that supports the timely and accurate assessment of information directly relevant to the safety of Police and others. The response to any given situation must be considered, timely, proportionate, and appropriate. The overriding principle when applying TENR is that of 'safety is success'.
45. The Tactical Options Framework (TOF) is a training and operational tool that assists constables to appropriately decide when, how, and at what level to use a tactical option(s). The TOF guides constables to use force that is necessary and proportionate, given all the circumstances known at the time.
46. There are five categories in the PCA, which are represented in the TOF.

| | |
|-------------------|---|
| Cooperative | Willingly responds when approached. |
| Passive resistant | Refuses verbally or with physical inactivity. |
| Active resistant | Pulls away, pushes away, or runs away. |
| Assaultive | Intent to cause harm, expressed verbally and / or through body language and / or physical action. |
| GBH or death | Shows action intended to or likely to cause grievous bodily harm or death to any person. |

Police Taser policy

47. Police policy states:

"The deployment of a TASER is a use of force and as such, its use must be necessary, proportionate and therefore reasonable in the circumstances.

You may use TASER to effect lawful purpose in situations where you fear imminent physical harm to yourself or some other person. Therefore, if you use TASER, you will need to show that there was a risk of physical harm likely to occur at any moment. Once the likelihood of physical harm is no longer present, the use of TASER will no longer be necessary, and therefore, no longer be reasonable."

48. The Taser may be used as a tactical option to show force in the following ways:

| | |
|----------------|---|
| Presentation | Drawing and presenting the device at a subject as a visual deterrent, in conjunction with a verbal warning. |
| Laser painting | Turning the device on and overlaying the laser sighting system of the TASER on a subject as a visual deterrent, in conjunction with a verbal warning. |
| Arcing | Activating the device as a visual deterrent, in conjunction with a verbal warning. |

Use of Oleoresin Capsicum Spray (pepper spray)

49. Before using pepper spray, Police are to consider communication and other less serious tactical options (e.g. control and restraint techniques or empty handed tactics not needing equipment) for resolving and controlling an incident. You must be satisfied when using pepper spray that the person is resisting (by more than passive resistance) or attempting to prevent police from lawfully controlling or arresting them.
50. Before using pepper spray, unless impractical, Police must:
- warn the person that non-compliance will result in them being sprayed
 - give the person a reasonable opportunity to comply before being sprayed
 - warn other people nearby that spray may be used.
51. After using pepper spray Police must:
- Minimise any residual effects caused by the spray by providing proper decontamination and proper aftercare as in the 'OC Spray Training Manual'.
 - Ensure the person's face is not covered and they are not left lying face down with their hands cuffed behind their back. This may lead to positional asphyxia, where the position of the body interferes with breathing.
 - Accompany and monitor the person for at least 45 minutes or until the symptoms or effects are no longer apparent.

About the Authority

WHO IS THE INDEPENDENT POLICE CONDUCT AUTHORITY?

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

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

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

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

WHAT ARE THE AUTHORITY'S FUNCTIONS?

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

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

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

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

THIS REPORT

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