

Unjustified strike in Manukau District Court cells

1. In January 2023, in accordance with our Memorandum of Understanding, Police notified us of an incident they were investigating where a custody officer in the Manukau District Court cells struck a detainee on the side of his head.¹
2. We conducted an independent investigation into the matter. During our investigation, we reviewed statements and Police interviews, and we interviewed the custody officer who struck the detainee (Custody Officer A) and two other custody officers who were present during the incident. We attempted to speak with the detainee, Mr X. However, he did not wish to engage with us.
3. CCTV footage captured the incident from two different angles. The footage was limited in that it only showed the custody officers and Mr X from the neck down, nor was there a sound recording. However, the footage provided us with clear evidence of the body positions of the parties involved during this incident.

The Authority's Finding

Issue: Was Custody Officer A's use of force justified?

Custody Officer A's use of force was unnecessary because there were other, less forceful options he could have used. Therefore, it was unjustified.

¹ Custody officers (also known as Authorised Officers) are non-sworn Police employees who have responsibility for managing the health, safety and secure custody of detainees.

Analysis of the Issue

THE AUTHORITY'S ROLE

4. After supervising a Police investigation or conducting an independent investigation, the Authority's statutory responsibility is to:

"... form an opinion on whether or not any decision, recommendation, act, omission, conduct, policy, practice, or procedure which may be the subject matter of the investigation was contrary to law, unreasonable, unjustified, unfair or undesirable."

5. The Authority must convey its opinion to Police, and may make whatever recommendations it regards as appropriate. The Authority's jurisdiction is wide ranging, and expressly includes reaching a view as to whether or not the Police should consider commencing civil (disciplinary) or criminal proceedings.

ISSUE: WAS CUSTODY OFFICER A'S USE OF FORCE JUSTIFIED?

6. In use of force cases such as this, the Authority must consider:
 - a) whether (judged by the civil standard: on the balance of probabilities) the officer's use of force was unjustified; and
 - b) if so, whether we recommend Police:
 - i) take civil or disciplinary action against the officer; or
 - ii) consider charging the officer with assault.

What happened?

7. On the morning of Tuesday 24 January 2023, Mr X, a high-ranking gang member, was brought into the Manukau District Court custody unit as he was to appear in Court that day. He had also been in the unit for a Court appearance the previous day.
8. Custody staff say that Mr X was argumentative, demanding, and slow to comply with instructions throughout the duration of his time in the custody unit.
9. The first interaction Custody Officer A recalls having with Mr X was soon after Mr X's arrival, when going to his cell. It is unclear whether this interaction occurred on the Monday or on Tuesday, the day Custody Officer A struck Mr X. (In his initial use of force report on the incident,²

² Officers are required to complete a tactical options report when they have 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. Custody Officer A completed his report within a couple of days of the incident occurring. He was interviewed by Police in May and by us in August 2023.

and when interviewed by Police, Custody Officer A said it occurred on the Monday. However, when speaking with us he said it was on the Tuesday.)

10. In the interaction, Custody Officer A was stationed at a whiteboard which contained the names of detainees and their allocated cell number. As Mr X came past, he stopped in front of the whiteboard and stood reading it. Custody Officer A instructed him to make his way to his cell. Mr X told Custody Officer A to “*Fuck up*” and said he was not going anywhere.
11. Initially, in his use of force report, Custody Officer A said he used his open hand to physically escort Mr X to his cell. Mr X actively pulled away from him, saying: “*Pig shit don’t touch me*”. Upon reaching his cell, Mr X said “*Fuck the Police*” in a loud voice. However, in his subsequent interviews with Police and us, Custody Officer A recalled Mr X went to his cell on his own and no physical contact occurred between them at this time.
12. Custody Officer A says he did not deal with Mr X again until about 1pm on the Tuesday when he went to his cell to tell Mr X his lawyer was there to speak with him. On his way down the corridor, Mr X stopped to talk to a person in another cell. Custody Officer A told him to ‘move along’ to which Mr X responded: “*Fuck the Police, fuck the pigs*”. Custody Officer A says he used his hand to try to guide Mr X along the corridor, but Mr X shook his hand off. Mr X then challenged Custody Officer A to a fight, and threatened him, saying: “*I want to shoot you and your family.*” He continued to abuse and threaten Custody Officer A until entering the room to speak with his lawyer.
13. Custody Officer A told us he felt that Mr X targeted him when he threatened and challenged him: “*I do not know why he picked on me but I believe a lot of the behaviours, it’s always these prisoners wanna prove themselves by picking on the big guys.*”
14. About ten minutes later, Mr X came back into the corridor. Custody Officers A and B were speaking with a detainee in Cell 3, when they heard Mr X swearing at detainees in other cells. They say Mr X appeared very angry after his lawyer’s visit.
15. Mr X walked down the corridor with his hands by his side and paperwork rolled up in his left hand. Custody Officer B stood in the middle of the corridor facing Mr X and told him to go to his cell.
16. Meanwhile, Custody Officer A came out of Cell 3. Footage shows Custody Officer A was holding objects, such as a whiteboard marker or rolled up notes of a similar length to a pen, in each of his hands. We are unsure exactly what these were and Custody Officer A did not mention them in any account he provided.
17. Footage shows Mr X took a step around Custody Officer B then continued to walk down the corridor near Cell 3.
18. Custody Officer A says he told Mr X to stop swearing and to go back to his cell. Footage shows Mr X took another few slow steps down the corridor with Custody Officer A standing on his left side and Custody Officer B walking directly behind them.

19. Meanwhile, Custody Officer C noticed Mr X had paused in the corridor and was interacting with the custody officers. He made his way down the corridor, approaching them from behind, to check the door of Cell 3 was locked. This placed him about one to two metres from Custody Officers A and B and Mr X.
20. As they slowly walked, footage shows Custody Officer A placed his right hand onto Mr X's left arm in a guiding motion. Mr X stopped walking, turned to face Custody Officer A, and pulled his arm away. Custody Officer A removed his hand and Mr X placed his arms back down by his side.
21. Custody Officer A says Mr X was verbally abusing him, again threatening to shoot him and his family. Mr X repeated his challenge to a fight, saying: "*Me and you one on one?*" Custody Officer A says he told Mr X: "*I'm not your enemy, mate*" and reiterated that he needed to return to his cell. Both Custody Officers B and C corroborate this account.
22. Footage shows that, after Mr X shook Custody Officer A's hand off him, Custody Officer A moved the object from his left hand into his right hand, so his right hand contained both objects.
23. Mr X took another two steps then paused while swapping his paperwork from his left hand to his right. At the same time, Custody Officer A moved to stand in front of him with about one foot-length between them. Custody Officer A faced Mr X, with his left shoulder and torso leaning towards Mr X, and his right arm positioned downwards and slightly behind him.
24. Custody Officer A says Mr X then stepped towards him with an angry look on his face, while saying: "*I'm going to fuck you up.*" He says Mr X's stance, along with the threat, made him believe Mr X was about to assault him.
25. Footage shows Custody Officer A struck Mr X with his right hand.³ Given the angles, the strike appears to have landed on the left side of Mr X's face. The impact caused Mr X to stumble sideways against the wall, suggesting Custody Officer A struck him with significant force.
26. Custody Officers B and C immediately helped Custody Officer A to restrain Mr X. Eight other officers also quickly arrived and assisted in taking the struggling Mr X to ground where he was placed in handcuffs.
27. Having reviewed the footage, we do not believe the step Mr X took immediately before he was struck was directed towards Custody Officer A. Rather, our analysis of the footage leads us to conclude that it was just as likely that Mr X was attempting to walk past Custody Officer A to continue walking down the corridor.
28. Footage shows:
 - when Mr X stepped forward, his foot turned from pointing at Custody Officer A to pointing down the corridor;

³ There is no evidence that Mr X was injured from the strike as custody officers saw no injury and Mr X refused to see a doctor.

- likewise, Mr X's chin (therefore his head) and shoulders turned slightly away from Custody Officer A, to point down the corridor;
- both Mr X's arms remained down by his side in the same position they had been in while walking down the corridor; and
- Mr X remained standing upright with no shift of weight towards Custody Officer A.

Was Custody Officer A justified in using force against Mr X to defend himself or others?

29. Although we are not considering criminal liability here, it is nonetheless necessary to apply the language of the Crimes Act 1961 in assessing whether the force used by Custody Officer A was justified. This is because the power to use force in particular situations is derived from certain provisions of the Crimes Act.
30. Custody Officer A relies on section 48 of the Act, which provides that a person is justified in using "reasonable" force in defence of themselves or another.
31. Under section 48, we must assess Custody Officer A's actions on both:
- a subjective basis (that is, what Custody Officer A genuinely believed); and
 - an objective basis (what a "reasonable" person would have done).
32. This assessment involves three questions which are addressed below.

What did Custody Officer A believe the circumstances to be?

33. Custody Officer A attended a briefing on the Tuesday morning.⁴ In his initial accounts, he recalled staff were told Mr X had been non-compliant the previous day, that he had in the past faced firearms charges, and that he was known by Police to have an assaultive history. He says he was not aware of any specific incidents that had occurred previously between Mr X and custody staff. When speaking with us, Custody Officer A said he could not recall what was said at the briefing. However, he did recall seeing a list saying which gang Mr X was associated with.
34. Custody Officer A says his job was to be in the corridor to ensure detainees were in their cells.⁵ He says, as the unit was short staffed, he was relied upon to just "get the job done". He told us he was unaware Custody Officers B and C were close by at the time he struck Mr X, as he was solely focused on Mr X. However, he was aware custody officers were in the general cell area and believed he could not move away from Mr X as: "To move away from him... is leaving a threat in the corridor and that's a threat to my team, that's a threat to myself."

⁴ Custody Officer A says there was no briefing about Mr X when he came into the custody unit on Monday morning.

⁵ The custody unit was understaffed that day, so rather than escorting detainees when they were moving around the custody unit, the custody officers were stationed at different points and would tell detainees to walk to the next custody officer.

35. Custody Officer A says he decided pre-emptively to strike Mr X because:
- Mr X was swearing at him and threatening him;
 - he felt unsafe and threatened when Mr X advanced towards him while saying something like: *“I’m going to fuck you up now”*;
 - Mr X’s *“... attention and his eyes were switched directly on me”*;
 - Mr X *“... was in a stance where I could see that he’s going to abuse me ...”*;
 - he believed Mr X was going to act on his threats and was capable of doing so; and
 - *“I would be assaulted, I’d be badly hurt. This guy’s a big guy... he’s taller than me... he’s much bigger... in size.”*
36. Although Custody Officer A’s perception is that Mr X was *“much bigger”* and stronger than him, Custody Officer A is also a tall, large man with a muscular physique.
37. Custody Officer A told us he repositioned himself (see paragraph 23), just prior to striking Mr X, because Mr X was making threats, had an aggressive manner, and was advancing towards him. By repositioning himself, Custody Officer A created a situation where, in order to comply with his instructions and return to his cell, Mr X would have to step past him.⁶
38. The accounts of Custody Officers B and C corroborate Custody Officer A’s account that Mr X was verbally threatening and challenging him, and that Mr X’s stance was aggressive before Custody Officer A struck him. Custody Officer C says: *“I definitely felt Mr X was going to assault somebody”* and that he *“seemed to want to take it out on [Custody Officer A].”* Custody Officer B expressed a similar view. Both say they believed Mr X was about to assault Custody Officer A by ‘swinging’ at him.
39. We accept Mr X was verbally threatening Custody Officer A. However, it is not apparent to us from the footage that Mr X’s stance or posture changed as would be expected if he was about to assault Custody Officer A.

Was Custody Officer A’s use of force for the purpose of defending himself or others?

40. Although our analysis of the footage does not support the contention that Mr X stepped towards Custody Officer A intent on assault, we accept Custody Officer A genuinely believed he was doing so, especially taking into account Mr X’s threats towards him. Therefore, we accept Custody Officer A acted to defend himself.

⁶ In addition, there was a fixed, folded chair next to the wall in the corridor, meaning the corridor was slightly narrower at that point.

Was Custody Officer A's use of force against Mr X reasonable in the circumstances as he believed them to be?

41. Custody Officer A says he used an open hand, with his palm striking the side of Mr X's head. He says:

"For me it was... a distraction also, but it was mainly to redirect him away from me as he's advancing towards me and threatening me and that was my way to try and gain compliance."

42. We do not accept Custody Officer A's assertion that he struck Mr X with his open palm. The evidence suggests otherwise. Footage shows Custody Officer A was holding the two objects in his right hand when he struck Mr X. The objects fell onto the mat at Custody Officer A's feet immediately after the strike, which indicates that he let them go immediately after he struck Mr X, or as he withdrew his hand. Custody Officer A must have had his fist closed around the objects to be holding them when he struck Mr X.
43. Based on footage, Custody Officer A made no attempt to push Mr X away from him, as we would expect to see if Custody Officer A's main intent had been to redirect Mr X.
44. The Police 'Use of force' policy provides a framework for officers to apply when making assessments and managing situations,⁷ to ensure any force used is necessary and proportionate given the level of threat and risk posed to themselves and others. Officers must constantly assess an incident based on information they know about the situation and the behaviour of people involved, continually assessing the potential for de-escalation or escalation.
45. Custody Officer A says he did not consider using other options due to the speed in which the incident unfolded and because he was feeling unsafe and threatened.
46. There were other, less forceful options available to Custody Officer A. Custody Officer A could have moved down the corridor, stepping backwards from Mr X to create space between them so he felt less at risk. In our view, there was sufficient room in the corridor for him to be able to do so. He could have requested assistance, having another custody officer deal with Mr X to diffuse the situation. Regardless of whether Custody Officer A was aware of Custody Officer B's and C's presence, he knew there were other officers in the cell block area. Requesting their assistance would have been appropriate given Custody Officer A felt Mr X was deliberately targeting him so he was in a position where he was less likely to be able to effectively de-escalate the situation himself. There was no immediate urgency to place Mr X back in his cell.
47. Our assessment is that Custody Officer A placed himself in a position where he stood closely to an aggressive detainee who was threatening him. This is concerning, especially if he believed he was on his own. It is also concerning that he did not consider there to be other options he could employ to de-escalate the situation which may have eliminated the need for any force to be used.

⁷ See paragraphs 54 to 58.

48. The fact Custody Officer A says he did not know Custody Officers B and C were directly by him demonstrates a lack of situational awareness. Their presence should have been factored into his risk assessment and decision-making around how to best manage the situation.

Conclusion

49. Custody Officer A's descriptions of Mr X's actions are not supported by the CCTV footage. Further, Custody Officer A's claim he struck Mr X with his palm is inaccurate, based on the footage.
50. Even on the basis that Custody Officer A believed that he was about to be assaulted, he had less forceful options available to him such as moving away from Mr X or pushing him away to redirect him. Given these considerations, our conclusion is that striking Mr X in the head was unnecessary and unjustified.
51. Applying the civil standard of proof (on the balance of probabilities), we have no doubt that Custody Officer A's conduct constitutes a breach of the Police Code of Conduct.⁸ We disagree with the Police finding that Custody Officer A's actions did not contravene the conduct prescribed in the Code of Conduct. Custody Officer A has now resigned from Police. Had he remained employed by Police, in our view, Police should have considered disciplinary proceedings.
52. We have also considered whether Police should charge Custody Officer A with assault. Applying the criminal standard of proof (beyond reasonable doubt) we are not persuaded that the evidence is adequate to establish that Custody Officer A is not entitled to rely on section 48, that is to say, that he acted in self-defence having regard to:
- multiple custody officers testify to the fact Mr X had been behaving aggressively and threatening staff on both the Monday and Tuesday;
 - Mr X had been threatening to assault Custody Officer A just prior to the strike;
 - it cannot be discounted that Custody Officer A may have genuinely believed Mr X was stepping forward, about to assault him; and
 - Mr X has not been prepared to provide his account of what happened during the striking incident which suggests he would not willingly participate in a court process.

⁸ The Police Code of Conduct sets out general guidance and minimum behavioural expectations for anyone employed by New Zealand Police. A breach of the code may result in a Police decision to take disciplinary action in its capacity as an employer.

53. Therefore, we agree with the decision not to charge Custody Officer A.

FINDING

Custody Officer A's use of force was unnecessary because there were other less forceful options he could have used. Therefore, it was unjustified.

A handwritten signature in blue ink, appearing to read 'Kenneth Johnston', is centered on the page.

Judge Kenneth Johnston KC

Chair
Independent Police Conduct Authority

20 June 2024

IPCA: 23-16717

Appendix

'USE OF FORCE' POLICY

54. The Police's 'Use of Force' policy provides guidance to Police officers (including custody officers) about the use of force. The policy sets out the options available to officers when responding to a situation. Officers have a range of tactical options available to them to help de-escalate a situation, retrain a person, or otherwise carry out lawful duties. These include communication, mechanical restraints, empty hand techniques (such as physical restraint holds and arm strikes), and pepper-spray.
55. 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).
56. 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).
57. 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.
58. 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.

BEWARE!

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About the Authority

WHO IS THE INDEPENDENT POLICE CONDUCT AUTHORITY?

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

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

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

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

WHAT ARE THE AUTHORITY'S FUNCTIONS?

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

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

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

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

THIS REPORT

This report is the result of the work of a multi-disciplinary team. At significant points in the investigation itself and in the preparation of the report, the Authority conducted audits of both process and content.



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