

Use of force in Counties Manukau Custody Unit not justified

1. On 9 June 2021, Mr X was detained in the Counties Manukau Custody Unit. During his time there he told a Police officer he had been assaulted by Custody Unit staff. Although the allegation was recorded, it was not investigated.
2. On 11 August 2021, Mr X was transferred from prison back to the Custody Unit for a Court hearing. Soon after arrival, he assaulted Custody Officer A and was subsequently restrained by other custody officers.¹ Custody Officer A punched and kicked Mr X while he was being restrained.
3. Mr X explained that, following his experience on 9 June, he believed he would be assaulted again when he returned to the Custody Unit on 11 August 2021, and this was why he attacked a custody officer on that day. We are therefore satisfied the two incidents are linked and should be investigated and reported on together.
4. The 11 August 2021 incident was notified to the Authority on 12 August 2021, as required by section 13 of the Independent Police Conduct Authority Act 1988.² On 16 May 2022, Mr X complained to the Authority he had been assaulted in the Custody Unit on 9 June 2021.

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

² Section 13 says: "Where a Police employee acting in the execution of his or her duty causes, or appears to have caused, death or serious bodily harm to any person, the Commissioner shall as soon as practicable give to the Authority a written notice setting out particulars of the incident in which the death or serious bodily harm was caused."

The Authority's Findings

Issue 1: Was Mr X assaulted on 9 June 2021 by Counties Manukau Custody Unit staff?

Although we are concerned about how Mr X came to be injured on 9 June 2021, in the absence of corroborating evidence and with conflicting accounts, we are unable to conclude whether Mr X was assaulted by Custody Unit staff on 9 June 2021.

Mr X's allegation of assault and the cause of his injuries should have been investigated by Police in accordance with policy.

Issue 2: Did Custody Officer A use excessive force on 11 August 2021?

Custody Officer A was justified in striking Mr X in self-defence when he was first attacked.

Custody Officer A was not justified in striking Mr X while he was being restrained.

Analysis of the Issues

ISSUE 1: WAS MR X ASSAULTED IN THE COUNTIES MANUKAU CUSTODY UNIT ON 9 JUNE 2021?

What happened on 9 June 2021?

6. On 9 June 2021, Mr X was transferred from prison to the Counties Manukau Custody Unit for a Court hearing.
7. Mr X told us he became involved in an argument with one of the custody officers. Mr X says the argument started when he had asked for a newspaper to read while in the cell, and the custody officer was "cheeky" towards him.
8. Mr X says he was taken out of the cell by two Custody Unit staff members and they assaulted him in the corridor. Mr X describes the two Custody Unit staff members as "one big and [the] other not big". Mr X says they were wearing black uniforms, which identifies the custody officers as Authorised Officers rather than sworn Police officers.
9. Sergeant C, who was in charge of the Custody Unit, recorded in Mr X's custody record:

"[Mr X] was brought over from Court-side. He was bleeding from the nose when received. He mentioned he was assaulted by officers from Court-side.³

He was given advice on how to make a formal complaint once released but refused to take paperwork."

³ There are two sets of custody cells: those in the Counties Manukau Police station and connected to the Police station by a tunnel another set of cells ('Court-side') in the District Court building.

10. Sergeant C told us he could not recall much detail about the incident, but remembers he advised Sergeant D (the officer in charge of the Court-side cells) to ensure a Tactical Options Report (TOR)⁴ was completed, documenting this advice in the custody record. However, a TOR was not completed.
11. Sergeant D told us that he could not recall the specific incident. He stated that he was relatively new in the role at the time, but that his normal process would be to ensure that a TOR was completed if custody staff had used force on a detainee. Sergeant D stated that it was possible that he had asked for a TOR to be completed, but it was not done. Sergeant D accepts that a TOR should have been completed if the injury to Mr X was the result of the use of force by custody staff.
12. Mr X subsequently identified Custody Officer B as the “big” custody officer who assaulted him on 9 June 2021 (see paragraph 33). Custody Officer B recalls that Mr X had been disruptive, which included kicking the cell door. Custody Officer B denies that he was involved in any physical altercation with Mr X, and says he saw no incident in which Mr X could have been injured.

Was Custody Officer B responsible for Mr X’s injuries?

13. We know that Mr X suffered an injury to his nose while in the Custody Unit on 9 June 2021. He alleged both at the time and recently the injury was the result of an assault by two custody officers. The Custody Unit record completed by Sergeant C goes some way to support Mr X’s complaint, in that it records Mr X’s allegation and describes his injury.
14. Police instructions state:⁵

“Police will ensure that complaints are investigated in a fair, timely, and effective manner without bias or conflict of interest.

...

Every complainant must:

- *be treated with courtesy, respect and compassion*
- *have their complaint received and actioned promptly*
- *be advised of the procedures for actioning their complaint.”*

15. We acknowledge that Mr X did the right thing in the circumstances; he reported the incident to a responsible officer (Sergeant C). Sergeant C appropriately referred the incident to Sergeant D, who was in charge of the Court-side cells where Mr X says he was assaulted. However, no inquiries were made.

⁴ An officer is required to complete a Tactical Options Report (TOR) when they have 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.

⁵ <https://www.police.govt.nz/sites/default/files/publications/police-investigations-of-complaints-and-notifiable-incidents-210622.pdf>

16. Sergeant D has no specific recall of the incident, but accepts that as Sergeant C documented, he was advised a TOR should be completed, and he was probably informed of an incident involving Mr X. Sergeant D accepts that, possibly due to the workload and being relatively new to the role, he did not make inquiries, although he may have asked his staff to complete a TOR as that was his usual practice.⁶
17. The cause of Mr X's injury and his allegation should have been investigated in accordance with Police policy. Information was readily available at the time to assess Mr X's complaint and ascertain how he was injured. Witnesses could have been identified and statements taken, and memories would have been fresh. Crucially, CCTV footage would also have been available. However, as footage is only kept for 30 days, the footage had been deleted by the time Mr X complained to us in May 2022.
18. While it is clear that Mr X was somehow injured, due to the absence of any corroborating evidence and a conflict in accounts between Custody Officer B and Mr X, we are unable to conclude whether or not Mr X was assaulted by custody staff.
19. Police should have investigated this serious allegation at the time it was made, especially given Mr X's visible injuries and with the knowledge that securing evidence, such as CCTV footage, was time sensitive.
20. We are left with a sense that because the complainant was a detainee, his complaint was not accorded the treatment it deserved, in our view an investigation. Additionally, although it is recorded that Mr X failed to take "*paperwork*" from Sergeant C on how to make a complaint, this is immaterial and entirely separate from Police's obligation to investigate the verbal complaint Mr X had already made.
21. Custody Officer A was also let down by the Police failure to investigate Mr X's complaint. Had there been an investigation in June 2021, it is conceivable that Mr X would not have assaulted Custody Officer A two months later.
22. Whatever happened on 9 June 2021, Mr X says he was left with a sense of grievance so great he decided to assault a custody officer when he returned to the Custody Unit on 11 August 2021.

FINDINGS ON ISSUE 1

In the absence of corroborating evidence and with conflicting accounts, we cannot find that Mr X was assaulted by Custody Unit staff on 9 June 2021.

Mr X's allegation of assault and the cause of his injuries should have been investigated by Police in accordance with policy.

⁶ Sergeant D was instrumental in ensuring that the subsequent incident on 11 August 2021 was reported.

ISSUE 2: DID CUSTODY OFFICER A USE EXCESSIVE FORCE ON 11 AUGUST 2021?

What happened on 11 August 2021?

23. On 11 August 2021, Mr X was transferred from prison back to the Custody Unit for another Court hearing. CCTV footage from the Custody Unit recorded what happened next.
24. Mr X's processing on arrival at the Custody Unit was uneventful. Mr X appeared calm as he was searched and directed towards a cell at the end of the corridor.
25. Custody Officer B says he recognised Mr X from his earlier attendances at the Custody Unit as Mr X walked down the corridor. Custody Officer B ushered him towards the cell where Custody Officer A was holding the door open.
26. Footage shows that, as soon as Mr X arrives at the cell, he attacks Custody Officer A, punching him four or five times around the head. Custody Officer A strikes back at Mr X.
27. Having been alerted by the commotion, a number of other custody staff run to help, and Mr X is pushed into a corner at the end of the corridor, still resisting, surrounded by custody officers attempting to restrain him.
28. With Mr X being restrained by three custody officers (and a number of other Custody Unit staff at close hand), Custody Officer A retreats, and holds his head where he had been punched. He then returns and walks around the struggle with Mr X, apparently looking for opportunities to become involved. While doing this, Custody Officer A punches and kicks Mr X at least four times. Another Custody Unit staff member, Custody Officer C, tries to usher Custody Officer A away. Throughout this phase of the incident, Custody Officer A appears to be acting deliberately and with intent, and does not appear dazed or unsteady on his feet.
29. Custody Officer C says that Custody Officer A was "*rarked up*" and shouting at Mr X: "*Don't ever fucking punch me.*" Custody Officer B, while still involved in restraining Mr X, also tries to usher Custody Officer A away from the scene. Custody Officer B told us that, in his view, Custody Officer A's actions were excessive and unnecessary.
30. Mr X was eventually taken to the ground, handcuffed, and led away to a cell. Although Mr X had some superficial injuries to his face, he declined medical treatment.
31. Custody Officer A was taken by a colleague to a local medical centre and was diagnosed with concussion and minor injuries to his face. He returned to the medical centre two days later (on 13 August 2021) and was noted to have swollen eyelids and a split lip that was healing. Custody Officer A says he felt the effects of concussion for some months afterwards, suffering from headaches and photophobia⁷ in particular.

⁷ Photophobia is a sensitivity to light, often experienced by people who have suffered a concussion.

What did Mr X say?

32. Mr X told us he was worried he would be assaulted again when he came back to the Custody Unit on 11 August 2021. He therefore decided to assault Custody Officer A before he was himself assaulted.
33. Mr X told us Custody Officer B was one of the two custody officers who assaulted him on 9 June 2021, and he recognised Custody Officer B from his involvement in the 11 August 2021 incident. Mr X did not recognise Custody Officer A.

What did Custody Officer A say?

34. Custody Officer A says he does not recall the incident because of the concussion he suffered from the blows to his head. He recalls attending the medical centre after the incident, but not the incident.
35. Custody Officer A says, having seen the CCTV footage, he is disappointed in himself and cannot explain his actions. He recognises he should not have got involved in the restraint of Mr X once he (Custody Officer A) had been struck, and instead should have walked away. He offered no mitigation or justification for his actions.

Was Officer A's use of force justified?

36. Custody Officer A has offered no justification for his actions. He says he does not recall the incident, but accepts his actions were wrong. However, we have considered his use of force at two points:
 - When Custody Officer A was first assaulted by Mr X; and
 - Custody Officer A's actions during Mr X's restraint.

Was Custody Officer A's initial reaction to Mr X's assault justified?

37. Mr X punched Custody Officer A without warning. He retaliated, punching Mr X back. We have therefore considered whether Custody Officer A's actions at this point were justified in accordance with section 48 of the Crimes Act 1961, which permits force to be used to defend oneself or others.⁸
38. To rely on a defence under section 48, Custody Officer A's actions must be assessed on both a subjective and an objective basis. This assessment involves three questions:
 - a) What were the circumstances as Custody Officer A believed them to be? (a subjective test.)

⁸ This section is set out in full at paragraph 54.

- b) Was Custody Officer A's use of force against Mr X for the purpose of defending himself or another? (a subjective test.)
- c) Was Custody Officer A's use of force against Mr X reasonable in the circumstances as Custody Officer A believed them to be? (An objective test.)

What did Custody Officer A believe the circumstances to be?

- 39. As stated, Custody Officer A says he cannot recall the incident. However, having seen the CCTV footage of Mr X's assault on Custody Officer A, we accept he would have believed he needed to defend himself from this attack.

Was Custody Officer A's use of force against Mr X for the purpose of defending himself or another?

- 40. Custody Officer A is seen to strike back as he is assaulted by Mr X. We accept that Custody Officer A's punches were to defend himself against Mr X's assault.

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

- 41. Custody Officer A struck back at Mr X only after he had been struck himself, and while Mr X continued to attack him. Custody Officer A applied no tactic more excessive than striking back at Mr X to defend himself from harm. Custody Officer A's actions were reasonable and proportionate.

Was Custody Officer A justified in his use of force towards Mr X while he was being restrained?

- 42. Although Mr X continued to resist, he was being restrained by a number of Custody Unit staff, who at the same time made efforts to shepherd Custody Officer A away from the scene. However, Custody Officer A returned at least twice to punch or kick Mr X. Custody Officer A is described as shouting and swearing at Mr X, and very angry.
- 43. To his credit, Custody Officer A has not attempted to justify his actions. While he states he does not recall the incident, he says he is disappointed by what he did, that it was out of character, and recognises he should have walked away.
- 44. Sections 39, 40 and 48 of the Crimes Act 1961 set out justification for the use of force. These sections can justify an officer's use of force if a person is using force to resist arrest or other process (section 39), is using force to escape or avoid arrest (section 40), or the force used by the officer is in defence of himself or others (section 48).
- 45. Custody Officer A has accepted that he had no justification for his actions, and we agree with his honest self-assessment. Mr X was being restrained by other Custody Unit staff, and Custody Officer A's punches and kicks were not justified by any section of the Crimes Act 1961.
- 46. Notwithstanding Custody Officer A's acceptance that his actions were not justified, Police submitted that we have not given enough consideration to the fact that Custody Officer A had suffered concussion, and the "possible if not likely effect concussion would have had on Custody Officer A's action." Police have not provided any evidence that a concussion would have had any relevant effect on, or have caused, Custody Officer A's behaviour.

47. While we accept without question that Custody Officer A was subsequently diagnosed with concussion, we do not accept that this is a justification for his actions because:
- In the CCTV footage of the incident, Custody Officer A was obviously hurt by the blows he received, lifting his hands to his face and head after he had been struck by Mr X. However, Custody Officer A quickly appears to gather himself, and at this point does not seem affected at all. He moves deliberately and with apparent intent, moving around the group of custody officers who were struggling to restrain Mr X, seemingly looking for an opportunity to get involved.
 - Custody Officer A was not dazed, and appeared in control of his actions. Shouting “*don’t ever fucking punch me*”, and being described as “*rarked up*” is the picture of a man angered that he had been assaulted without reason or warning, not one rendered unaware of his actions. Custody Officer A’s strikes at Mr X appear deliberate, and delivered with intent.
48. We also note that the Police employment investigation into Custody Officer A’s actions did not offer up the diagnosis of concussion as a defence or even mitigation for his actions.⁹ In contrast, the investigation report states that Custody Officer A “*has acted with frustration and aggression once he was placed into a fight or flight scenario*”. On that point, we agree with Police.
49. In summary, while Custody Officer A was justified by section 48 in his use of force when he was first attacked, he was not justified in the force he used once other custody officers had become involved and Mr X was being restrained. Although Mr X continued to resist, other custody officers were bringing the incident under control, and there was no need for Custody Officer A to strike Mr X.

FINDINGS ON ISSUE 2

Custody Officer A was justified in striking Mr X in self-defence when he was first attacked.

Custody Officer A was not justified in striking Mr X while he was being restrained.

Subsequent Police Action

50. The Authority elected to oversee the Police investigation of the incident in which Custody Officer A struck Mr X.¹⁰ The purpose of such oversight is to ensure that the subsequent Police investigation is thorough and reaches appropriate conclusions.¹¹
51. In June 2022, the Police investigation concluded that Custody Officer A did not use excessive force on 11 August 2021 in the restraint of Mr X. In addition, the Police investigation made no connection between the incidents of 9 June and 11 August 2021. On receipt of the Police investigation findings, the Authority decided that the Police investigation had reached an incorrect conclusion.

⁹ Report dated 30 June 2022.

¹⁰ Section 17(c) of the Independent Police Conduct Act 1988.

¹¹ Section 19(a) of the Independent Police Conduct Act 1988.

52. As set out in detail above, the Authority performed its own investigation into the incident¹² and we have disagreed with the Police findings.
53. We note with some concern that this matter is bookended by inadequate Police inquiries. In stark terms, by their inaction on 9 June 2021, Police ignored Mr X's allegation of assault, and the subsequent Police investigation effectively excused Officer A's use of force on 11 August 2021.



Judge Colin Doherty

Chair
Independent Police Conduct Authority

16 March 2023

IPCA: 21-8599 (11 Aug 2021 incident)

22-13608 (9 June 2021 incident)

¹² Section 19(b) of the Independent Police Conduct Act 1988.

Appendix – Laws and Policies

Section 48 – Self- defence and defence of another

54. *“Every one 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.”*

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. 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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