

Summary Report

Complaint of excessive force following arrest in Auckland

INTRODUCTION

1. On Monday 29 December 2014, Police arrested Mr X who had fled from the scene of an attempted burglary in Mangere East, Auckland. The arresting officer (Officer A) reported to his supervisor that an assisting officer (Officer E) used excessive force to subdue Mr X by 'stomping' on his head.
2. The Police notified the Independent Police Conduct Authority of the incident and the Authority conducted an independent investigation. This report sets out the results of that investigation and the Authority's findings.
3. In investigating the incident, the Authority has interviewed Officers A, B, C, D, E, and F and the independent witnesses, Mr V and Mrs V. The Authority has also examined the Police investigation file, which included Police statements and the transcript of the radio traffic from the Police Helicopter, Eagle. Mr X was initially unavailable and later declined to be interviewed by the Authority. Police also approached Mr X and he declined to make a statement.

BACKGROUND

4. At about 3:30pm on Monday 29 December 2014, Police were notified of two people trying to break into a house in Kiwi Esplanade Mangere East, Auckland.
5. Officers A and B and Officers C and D were on patrol nearby in two separate police cars and advised the Northern Communications Centre (NorthComms) that they were available to attend. Both units immediately drove to Kiwi Esplanade.
6. While the officers were on route, Eagle, who was on patrol overhead, provided updates over the radio advising that they were observing the scene and could see two male offenders at the address.

7. Following Eagle's report, Officers C and D drove to the rear of the property to wait for Officers A and B to arrive.
8. Officer E, a dog handler, was also dispatched to the burglary. While on the way, he heard Eagle radio that the two men had jumped a fence and left the property. Eagle then guided the officers to intercept the two men. Officer E decided to stand himself down and make himself available to attend other jobs as he was satisfied sufficient Police were in attendance.
9. As Officers A and B arrived at the address, they saw two men that matched the offenders' description, running down the street, away from the house. Officer B said he parked his patrol car as close to the men as possible and, with Officer A, got out of the car and chased them on foot.
10. Officer B quickly apprehended Mr Y, who was compliant.
11. Officer A ran after Mr X and apprehended him. Mr X, who was physically much bigger than Officer A, complied with his instructions to lie on the ground. Due to his compliance and because of the size difference, Officer A told Mr X to move to a nearby parked vehicle so that he could use the side of the vehicle to help him when he was handcuffing Mr X.
12. As they moved to the vehicle, Officer A said Mr X started playing up and tried to stand behind a family who were watching the events from the side of the road. As the father (Mr V) moved his family away, Officer A told Mr X to turn around so he could handcuff him.
13. Officer A said Mr X turned around so that his hands were trapped between himself and the vehicle. He said he held Mr X up against the vehicle and asked him to place his hands behind his back. Mr X refused, and instead kept his hands clenched and tucked in front of him, up against the vehicle.
14. As this was happening, Officers C and D arrived and went to assist Officer A.
15. Officer A continued to instruct Mr X to place his hands behind his back, but Mr X did not comply and resisted Officer C's and D's attempts to pull his arms out from behind him.
16. In order to handcuff Mr X, Officers A, C and D decided to take him to the ground. Mr X still had his hands clenched in front of him, so Officer C held Mr X's upper left arm, while Officer D held onto his upper right arm. Officer A then tackled Mr X around the knees. Mr X ended up lying face down on the ground with his arms underneath him.
17. Officer A instructed Mr X to bring his arms out, but Officer C said Mr X *"continued to try and pull his hands underneath him and generally resist"*.
18. At this point, Officer C *"struck"* Mr X with his knee *"three, maybe four times under his arm to try and get him to release his arm."* When Mr X failed to comply, Officer C said he *"squeezed"* his earlobe. However, this was also ineffective.

19. Officer A said Mr X had his hands turned in and was reaching for the waistline of his shorts but he *“wasn’t sure if he was trying to reach, to dispose of something, evidence maybe or weapons.”* However, Officer A said, *“although he wasn’t complying with us, we were still in a position where...it was controlled basically.”*
20. Officer C said Mr X kept *“thrashing about, side to side”* before Mr V, who remained witnessing the events, came over and tried to assist.
21. Officer B said he could not see what was happening with Officer A as he was dealing with Mr Y. However, he heard a radio call from Eagle saying that the officers were having trouble with Mr X.
22. At one point during their observation, the officers in Eagle discussed landing to assist the arresting officers. However, they did not transmit this conversation over the radio, so NorthComms and the arresting officers were not aware that this was considered.
23. Mr V said Mr X was on the ground and not letting the officers pull his hands behind his back. He said he tried to help by kneeling down by Mr X’s left shoulder and grabbing his left arm and trying to pull it out, but Mr X kept his hands locked underneath him.

Use of force

24. Officers A, C and D all individually told the Authority that they were considering their tactical options, when Officer E arrived. There are different versions of what happened next.

Officer A’s version of events

25. Officer A said Officer E *“just walked up to [Mr X] and started stomping his head.”* He said Officer E told Mr X to bring his arms out and simultaneously raised his *“right foot into a 90 degree angle...and stomped straight down to [his] head”*.
26. Officer A said that Officer E did this three to five times, and was connecting with the left side of Mr X’s head. As a result, Mr X began bleeding from his ear and started screaming. The other officers were then able to pull out Mr X’s arms.
27. On a scale of one to ten, where ten is the maximum force used and one is the minimum force used, Officer A said *“the force [Officer E] used would be 10. Mr X was screaming.”* He said *“I have no idea why [Officer E] stomped on [Mr X’s] head. Although [Mr X] was struggling, I believed at the time the situation was under control with three officers, and Officer C was going to use his spray.”*
28. In his interview with the Authority, Officer A demonstrated Officer E’s ‘stomping’ action by raising his foot nearly 60cm off the ground before bringing his foot down. He said Officer E brought his foot *“straight down to Mr X’s head...with purpose”* and he *“believed straight away it was excessive”*. He does not recall Officer E using his foot to pin Mr X’s head.

Officer C's version of events

29. Officer C said that when Officer E arrived, he was holding Mr X's head with his left hand and squeezing his ear with his right hand to try to gain compliance. Officer E then "*stomped*" on Mr X's head with his foot landing on the back of Officer C's hand. Officer C said this caused a "*slight abrasion*" on his skin and he quickly pulled his hand away before it got hit a second time.
30. Officer C said Officer E was yelling at Mr X that he was under arrest and asked, "*what have you got in your hands?*" Officer C said that Officer E then kept "*stomping on [Mr X's] head another three, possibly four times but very quickly this guy pulled his hands out and put his hands behind his back and got arrested.*"
31. Officer C told the Authority, that at the time of the incident he thought Officer E's actions were "*excessive*". However, the more he thought about it, "*we didn't know if [Mr X] had a weapon or anything tucked in the front of his pants which is what he was trying to get his hands into...he could have done a fair amount of damage to any of us very quickly.*"
32. Officer C said further that they had Mr X relatively under control and Officer E's actions "*probably wasn't needed and that with more struggling or force we could have wrenched his arms free*".
33. Officer C told the Authority that on a scale of one to ten, he would judge the force of Officer E's 'stomp' as a five.

Officer D's version of events

34. Officer D said Officer E "*came out of nowhere*" and began yelling, "*what's he reaching for?*". He said Officer E then asked if Mr X had been searched and Officer C told him no. Officer E then "*stomped*" on the side of Mr X's head until he released his arms. This happened "*four or five times. Just bang, bang*", and Officer E was yelling, "*release your hands. What are you reaching for?*".
35. In his interview with the Authority, Officer D demonstrated Officer E's 'stomping' action by lifting his right leg up 30cm, and bringing it straight down.
36. While this was happening, Officer D said Mr X was looking at the nearby family and yelling out to them, "*look at this police brutality.*"
37. Officer D told the Authority that Officer E's actions were "*definitely excessive*" and on a scale of one to ten, he would judge the force as "*probably a six or seven.*" Officer D said Officer E did not have any cause to do what he did as they had him on the ground. He said "*as far as we were concerned [Mr X] wasn't reaching for anything ... for [Officer E] to come along and do that, without any sort of information on what we'd just been doing, I don't really understand why he did it.*"

Officer E's version of events

38. Officer E said that a short time after standing himself down, Eagle came back on the radio and told him *"the officers are in trouble, keep going Delta"*.
39. The Comms recording of Eagles transmission is: *"just keep going around the waterfront. Now you'll see the two cars in the middle of the road. They're having a bit of trouble with one boy on the right hand side of the road."*
40. Officer E said he turned on his Police dog van's lights and siren, and drove at speed to the scene where he parked approximately 20 metres from where he could see the officers struggling. He said the first thing he could see was an offender on the ground, and two Police officers and a member of the public trying to pin him down.
41. Officer E said Mr X was *"thrashing his elbows around, violently fighting"*. He said Mr X's head and shoulders were lifting and twisting and he could see his head banging on the ground.
42. Officer E said he saw all this happening in the approximately two to three seconds it took him to run from his dog van to the officers. He said he had a sense of urgency because it was obvious the officers needed help and he was aware that burglars carried sharp instruments as a tool of their trade and it was a *"very real possibility that this person was armed"*.
43. Officer E said he began assessing the situation, and mentally ran through his tactical options. He said he did not believe getting his dog out was an appropriate or practical option because of the officers on the ground and the family standing nearby. He said he also thought of his Taser, but, he did not believe this was practical option due to the officers lying on top of Mr X.
44. Instead, Officer E said he had to stop Mr X's head from thrashing around to prevent him from causing a self-injury. He said he *"instinctively [used his] foot, to put downward pressure on [Mr X's] head to try and pin his head down onto the ground."* He said this was a basic wrestling principle of *"control the head, control the body"*. He said he did not lift his foot vertically, instead he moved his foot horizontally, following the movements of Mr X's head in order to pin it down. In his interview with the Authority, Officer E demonstrated this movement and lifted his foot about 20 cm off the ground.
45. Officer E said his first attempt to pin Mr X's head did not work, as he did not use *"efficient force"*. He said he made two or three more attempts because he was worried about how much force to use. He said he *"only wanted to use efficient pressure in order to pin his head. At no stage [did] I have any intent to hurt the person."*
46. In assessing Mr X's risk and behaviour, Officer E said he was initially sitting in the *"assaultive category"* (see paragraph 70) when he ran to help the officers. However, the threat escalated after he successfully pinned his head down because Mr X stated to reach down underneath him. Officer E said he now placed Mr X in a different risk category, *"potentially being that of grievous bodily harm and even death depending on the weapon if he had one."*

47. Officer E said he began to consider his tactical options again. He initially considered OC spray but he did not believe this was a practical option in the circumstances due to the proximity of the other officers. He also considered his baton, but told the Authority that *“no way [am I] going to strike someone on their head in that situation, and [Mr X’s] head was the only thing available because of the bodies that were on him.* Lastly, Officer E said he considered pinning Mr X’s head with his hands, however there was not the physical space to get down to the ground and he did not want to be bitten.
48. Officer E said the situation was happening very fast so he gave Mr X voice commands telling him, *“what’s in your hands, show me your hands.”* When Mr X did not comply, he said he *“deliberately twisted [his] right foot on the side of his head to gain pain compliance”.* Officer E said the effect was immediate and Mr X immediately pulled his hands out from underneath him and complied with the other officers who then handcuffed him.
49. Mr X’s identity was not known by any of the attending Police officers during his arrest.

Mr and Mrs V’s version of events

50. Mr and Mrs V were part of the family who were watching the events from the side of the road.
51. Mr V told the Authority, via an interpreter, that Mr X kept refusing to bring his hands out to his back. Another officer (Officer E) then arrived and pushed his right foot down on Mr X’s head. He said Officer E kept *“twisting”* his foot on Mr X’s face and yelling at him to bring his hands to his back. Mr X then gave up and brought his hands out to be handcuffed.
52. Mr V said Officer E *“didn’t do a big kick, only a little kick to put his foot on the guy’s face, then he twist his foot side to side to make the guy get his hands out.”*
53. Mr V said he remained beside Mr X’s head the entire time until he was handcuffed. However, Officer C told the Authority that Mr V moved away after 30 to 40 seconds, but remained nearby.
54. Mr V said when Mr X was in handcuffs he saw a little blood coming from his nose.
55. Mrs V also witnessed Officer E interact with Mr X. Mrs V said Mr X was not complying with Police instructions and was threatened with OC spray. She said that another officer (Officer E) approached the group, and as soon as he arrived, he *“lifted one leg and stomped on the male who was still struggling with Police, once in the head.”*
56. Mrs V said Mr X immediately placed his hands behind his back and Officer E removed his foot.

Events post arrest

57. Once back at Counties Manukau Police station, Officer B said he saw blood coming from Mr X’s ear and the side of his face. A short time later, Officer A approached Officer B and said Officer E had been *“quite aggressive and full on with the arrest”.* Because Officer A was a junior officer, Officer B said they both went and discussed their concerns with their supervising Sergeant, Officer F, that day.

58. In the meantime, Officer C, on the advice of Officer E, spoke to the custody sergeant and said that Mr X needed to be seen by a doctor. Mr X was later examined at the Police station, and the doctor's notes show Mr X had a large area of redness on the skin, swelling behind his left ear, and a small cut on his ear lobe. He also had tender swelling to the back right side of his head. The doctor's notes said Mr X had no *"head injury or need for specific monitoring."*
59. A couple of days later, on 31 December 2014, Officer F said Officers C and D approached him about the incident. He said Officer C expressed his concern about Officer E's action, saying they were *"in his mind excessive and unjustified."* Officer F said Officers A, C and D submitted their tactical options reports through to him and he then notified the Professional Conduct office of their concerns.

Mr X

60. No weapon was found on Mr X when he was searched.
61. Mr X pleaded guilty to resisting arrest and burglary arising from these events. He has yet to be sentenced.

The officers involved

62. At the time of the incident:
- 62.1 Officer A had served six months with New Zealand Police.
 - 62.2 Officer B had served five years with New Zealand Police.
 - 62.3 Officer C had served four years with New Zealand Police.
 - 62.4 Officer D had served one year with New Zealand Police.
 - 62.5 Officer E had served 20 years with the New Zealand Police.

Use of Force by Police

63. Section 39 of the Crimes Act 1961 provides for a Police officer to use reasonable force in the execution of their duties such as arrests. 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.”*
64. Section 40 of the Crimes Act 1961 provides that a Police officer may use necessary force in order to prevent a person from fleeing to avoid arrest, unless the escape can be prevented by reasonable means in a less violent manner.
65. Section 48 of the Crimes Act 1961 states: *“Everyone is justified in using, in 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.”*
66. Section 62 of the Crimes Act 1961 makes a Police officer criminally responsible for any excessive use of force.

General Guidelines on use of force

67. The Police Use of Force policy provides guidance to Police officers about the use of force. The policy sets out the options available to Police officers when responding to a situation. Police officers have a range of tactical options available to them to help de-escalate a situation, restrain a person, effect an arrest or otherwise carry out lawful duties. These include communication, mechanical restraints, empty hand techniques (such as physical restraint holds and arm strikes), OC spray, batons, Police dogs, Tasers and firearms.
68. Police policy provides a framework for officers to assess, reassess, manage and respond to use of force situations, ensuring the response (use of force) is necessary and proportionate given the level of threat and risk to themselves and the public. Police refer to this as the TENR (Threat, Exposure, Necessity and Response) assessment.
69. An officer 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).

70. A key part of an officer's decision to decide when, how, and at what level to use force depends on the actions, 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.
71. 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.

THE AUTHORITY'S FINDINGS

Was the force used by Officer E to arrest Mr X excessive?

72. Under law and Police policy, officers must use the minimum force required in the circumstances.
73. Officers A, C and D told the Authority that when Officer E approached, Mr X was non-compliant and resisting being handcuffed. However, although Mr X was not complying, all three officers said that they believed they were in a position where they had the situation under control and with a bit more struggling could have handcuffed Mr X. They were also all considering their next tactical options to gain Mr X's compliance.
74. All three officers provided the Authority with accounts of Officer E arriving at the scene and promptly 'stomping' on Mr X's head three to five times. All three officers describe Officer E's actions as "excessive" and all made their concerns known to their supervisor in the days following the incident. In addition, Officers A and D demonstrated Officer E's actions to the Authority investigator.
75. Although Officers A, C and D acknowledge that they did not know at the time if Mr X had a concealed weapon, they did not believe that was a serious risk.
76. Officer E said he arrived at the scene with a sense of urgency because it was a "very real possibility that [Mr X] was armed" and Eagle had said over the radio that the officers were having a bit of trouble. On seeing the officers struggling with Mr X, he said he immediately began assessing the risk and thinking about what tactical options were available to him. Due to the proximity of the officers and witnesses to the offender, Officer E said using his dog, Taser, or OC spray were not practical options.
77. Officer E also said that he had to stop Mr X's head from thrashing around to prevent him from causing a self-injury. He said he "instinctively [used his] foot, to put downward pressure on [Mr X's] head to try and pin his head down onto the ground." He said he made a number of attempts because he was worried about how much force to use. Officer E said he only wanted to use "efficient pressure" in order to pin his head and had no intention to hurt Mr X. He said the threat escalated after he pinned Mr X's head down because Mr X stated to reach down underneath him. He said he was concerned Mr X may have a weapon so he was yelling at him to bring back his hands. When Mr X did not comply, Officer E said he "deliberately twisted [his] right foot on the side of [Mr X's] head to gain pain compliance"
78. Witnesses Mr V and Mrs V both saw Officer E arrive to help the other officers who were struggling with Mr X. Mrs V, who was standing a short distance away, said as soon as Officer E arrived, he raised his leg and "stomped" once on Mr X's head.
79. Mr V said he saw Officer E "push" his foot down on Mr X's head and twist his foot from side to side on his face. Mr X immediately placed his hands behind his back.

80. The Authority accepts that Officer E did not use the maximum level of force when his foot connected with Mr X's head, as the injuries he received do not support this. The Authority also accepts that Mr X was struggling with the three officers present and was not fully under control, as he was not handcuffed. However, the Authority finds that he was under sufficient control so that he did not pose a risk to others.
81. As noted above, Officer E gives two justifications for his actions: firstly, that he believed that Mr X may be armed; and secondly, that he was preventing Mr X from harming himself by thrashing his head around.
 - 81.1 In relation to Officer E's belief that Mr X may be armed, the Authority notes that Officer E arrived on the scene without any prior knowledge of what had transpired. Other than what he had heard over the radio, he did not interact with the other officers apart from asking whether Mr X had been searched; and, by his own admission, he assessed the situation in the two to three seconds it took him to run from the dog van to the officers. Even if Officer E acted as he did because he had a fear that Mr X may have had a weapon, the Authority finds that he had no reasonable basis for having that view or for believing that the officers already at the scene were not capable of averting such a threat if it existed.
 - 81.2 In relation to Officer E's view that he was preventing Mr X from harming himself by thrashing his head around, the Authority notes that no other officer reported that Mr X was thrashing his head around. It is also accepted that Officer C had his hand on Mr X's head, at the time Officer E used force, which would have been sufficient to stop his head from repeatedly hitting the ground.
82. After considering all the available evidence, the Authority prefers the version of events given by Officers A, C and D and considers that Officer E's explanations are untenable. When Officer E approached, Mr X was on the ground surrounded by three officers. He was not an immediate risk of harm to the people present. Officer E had the time to talk to the other officers to find out what tactics they were using and what risk Mr X posed. Officer E did not take this opportunity; instead, he immediately brought his foot forcefully down on Mr X's head. There were other alternatives available to Officer E including communication, assisting the officers with physically wrenching Mr X's arms out or using the approved tactic of baton strikes to his triceps.
83. Although there are variations in the descriptions of how Officer E acted, it involved, at a minimum, the violent application of force on at least two occasions, to gain compliance, which was not justified in the circumstances.

84. This conclusion has been reached on the civil standard of the 'balance of probabilities'. This standard sets a lower threshold for proof than that required for criminal liability, the threshold for which requires evidence sufficient to demonstrate guilt 'beyond reasonable doubt'. Therefore, the Authority's finding does not necessarily mean that the threshold for criminal prosecution has been met in this case.

FINDING

Officer E's use of force on Mr X amounted to excessive force and was therefore contrary to law.

CONCLUSION

85. The Authority finds, on the balance of probabilities, that Officer E's actions constitute excessive force and were contrary to law.

A handwritten signature in black ink, appearing to read 'David Carruthers', written in a cursive style.

Judge Sir David Carruthers

Chair
Independent Police Conduct Authority

20 August 2015

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 Sir David J. Carruthers.

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



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