

DECISION

10th August 2017

IN RESPECT OF THE 26 COMPLAINTS MADE BY MEMBERS OF THE PUBLIC ON THE USE OF CAPTOR SPRAY AT THE HOUSE OF ASSEMBLY PROTESTS ON 2 DECEMBER 2016

Fact - every person in Bermuda is entitled to lawfully protest and express their views

26 Complaints made - the Process

Following the gathering and protests by members of the general public Friday, December 2nd at the House of Assembly, the Police Complaints Authority (PCA) received 26 separate complaints against Officers of the Bermuda Police Service (BPS), concerning the actions of the Officers on duty and the deployment of captor spray by Officers against a backdrop of what was generally considered by those participating in the protest to be a lawful and peaceful assembly at and around the House of Assembly grounds.

Subsequent to the investigation and release of the **“Report on the Protests at House of Assembly...”** by the **National Police Coordination Centre (NPoCC)** ordered by Government House which concentrated on the deficiencies of the BPS Command Structure, the PCA conducted its investigation into the 26 complaints received against the Officers.

The PCA is an independent body created by an Act of Parliament and our powers do not extend beyond those given by Parliament. Our primary function is set out in section 5, subsection (1) of the Police Complaints Authority Act 1998 -

“5. (1) The functions of the Authority are—

*(a) to receive complaints alleging any misconduct, neglect of duty or negligent performance of duty **by an officer,**”*

The process in dealing with the 26 complaints that there had been misconduct by Officers included interviewing junior and senior members of the BPS, reviewing multiple video sources, including news media footage, Police Body Cam footage and social media video content. This was done to gain clarity on the specific complaints received by the PCA to ascertain if they had merit and whether there had been misconduct, neglect of duty or negligent performance of duty by an Officer in relation to the use of Captor Incapacitant Spray.

During the course of the PCA investigation, it became clear that the Officers who were on the front line of the demonstration acted in accordance with the Policies issued by the BPS to its members in relation to the Use of Force and Captor Incapacitant Spray. The interviews conducted under oath by the PCA coupled with video footage reviewed were in alignment with previous written statements made by the Officers immediately subsequent to the events at the HOA.

The deployment of Captor Spray, commonly known as Pepper Spray, occurred in two situations.

The first situation was during the attempt to clear a pathway for the Officers who were tasked with forming a “Bubble” to enable access to the vehicle gate of the HOA on Parliament Street but were prevented by protesters from achieving their goal. The “Bubble” squad was surrounded by a crowd deemed to be hostile and the Officers in the squad could not move forward or backward. The Officers inside the Parliament Grounds tried to prevent injury to their colleagues by dispersing unruly and violent individuals from the front of the gates to

allow the “Bubble” to enter the gates. This Bubble tactic was unsuccessful.

The second instance was when the Captor spray was used to try to retrieve a colleague who was in danger of injury from certain members of the public making up the crowds. The use was to allow Officers to safely remove from harm a colleague who was surrounded by the crowds.

It is important to note that evidence and documentation confirms the use of Captor Spray in volatile situations is the least injurious form of action to take when dealing with unruly crowds. Evidence suggests that other forms of control such as baton use, brute force, arm to arm combat, tasing etc., is far more likely to cause long-term harm to the targeted offenders and/or to the police officers.

The Law states that persons who block or cause to be blocked access to the House of Assembly commit an unlawful act - sections 12 and 13 of the Parliament Act 1957 and Section 20 of the Summary Offences Act.

The House was going to sit that morning to debate, among other business, the Airport Redevelopment Concession Bill 2016. However, the Speaker informed BPS before 10am that the House would not sit that day. Based on this, the BPS decided not to remove the then few protesters who were blocking the gates. However, later in the day, possibly around 12:30pm, the Speaker informed Commanders that he wished the House to sit that afternoon. By this time, there were many more protesters. The Commanders ordered their Officers to secure access to the House for the Parliamentarians. Officers were given orders to get control of the entry gates to the House of Assembly when, with hindsight but as also advised by some at the time, the better course was

to do nothing. The Officers then followed their orders and used the Bubble tactic which was intended by the Commanders to create an opening in the crowd and allow the Officers to control the gates.

Those Officers, some of whom formed the “Bubble” to get control of the gates to gain access to the Parliament, in the course of the operation used Incapacitant spray, variously termed pepper spray or captor.

Fact- The use of Captor Spray falls towards the lower end of the BPS Use of Force continuum set out in the BPS USE OF FORCE POLICY which is graduated (para.4.6) as follows:

- a. Officer presence
- b. Communication skills
- c. **Captor** or Taser
- d. Empty hand techniques
- e. ASP baton
- f. Less lethal options (including canine)
- g. Lethal options (firearms)

Officer presence, option (a), and talking to the persons who continued to block access, option (b), had already been used and the protesters had not responded favourably. The General Procedure for the use of Captor Incapacitant Spray at paragraph 6.6 states: -

“A graduated and appropriate level of force in response to varying levels of aggression and violence may include the use of CAPTOR. The decision to use CAPTOR will be dependent on an officer’s assessment of the situation. This will include their own ability to deal with the incident and the threat posed by the subject(s)”.

This together with the Use of Force Policy is distributed to all members of the BPS and the Policy Statement sets out that:-

“2. POLICY STATEMENT

2.1 The Bermuda Police Service (BPS) recognises that its officers may face circumstances when they are required to use force to lawfully execute their duties and that such force must be reasonable, necessary and proportional.

2.2 An officer’s use of force must be based on an honestly held belief that it is necessary, which is perceived for good reasons to be valid at the time. “

Fact - There was no order given by any person in Command that Captor should be used – in every instance on the 2nd December when Captor was used, it was a decision made by the individual officer. This is in accordance with the Use of Force Policy.

Finding – The PCA heard from Officers during the course of sworn examination and we also reviewed media and police footage. Officers reported fearing for their own safety as well as for that of fellow Officers. The appearance of the Officers coming to execute the “Bubble” from Church Street on to Parliament Street galvanized those who were protesting and a dangerous and chaotic period followed. The PCA is satisfied that there was no general command to use Captor. Officers who used it did so in the belief that they were protecting themselves or a colleague and, to use the words of the Policy governing the use of Captor at paragraph 6.5:-

“The use of CAPTOR may be appropriate against:

i) Those offering a level of violence which cannot be appropriately dealt with by lower levels of force;

Fact – Tensions were running high and Police Officers were assaulted, injured and insulted in their attempt to break through the human blockade. The PCA has been informed that a guilty plea was entered by one of those charged with assaulting the Officers and that person was given a 6 month conditional discharge. Another person was convicted of assault of an Officer and sentenced to 12 months in prison. Ten other people were bound over to keep the peace for 6 months.

Determination – the PCA is satisfied that the Officers used Captor spray only when they properly believed that it was necessary. However, the PCA also has determined that the use of Captor could have and should have been avoided but that the Officers had been put in the precarious position that they found themselves by their Commanders.

Overview

We have determined the background as set out above from the review of the media and interviews and also from our reading of the NPoCC Report of ACC Shead and from our interviews of the Commanders and Officers who were involved in the planning and execution of the plans with the intention to ensure that Parliamentarians had access to the House of Assembly on 2nd December 2016.

At approximately 8:30 am on December 2nd there were only a few people at the HOA blocking the gates. If arrests had been made then, there would have been no need to send in the PSU to create a “Bubble”

to provide a corridor for the Parliamentarians to gain access to the HOA. If there was no PSU, and no Bubble tactic (which some of the senior Officers but not the Commanders involved in the planning were of the strong view would not succeed in securing the access needed) there would have been no need for Captor. There was poor decision making by some of the senior Commanders appointed to deal with the situation. Also, the Commanders of the BPS designated to deal with crowd control (in spite of the fact that they had inadequate training), should have strongly urged the Speaker of the HOA to postpone that afternoon's sitting based on the number of protesters and the determination that they were exhibiting. As one Officer informed us, "*People were standing their ground passionately*" and he went on to say "*...but they did not intend to hurt the police. If they had, a lot of people would have been injured.*"

Concerns

1. Lack of planning and poor communication were major features of the BPS response to the protesters at the House of Assembly on 2nd December, 2016. Some examples are:
 - a. One of the more senior Officers who was at the HOA had not even been informed what the tactical plan was. He was not even sure who the Silver Commander was. (In fact, another officer mistook who was Silver Commander). This was not the Officer's fault – he was only told last minute on the day to go to the House and inform the protesters that by blocking access it was an unlawful act
 - b. Senior officers had a view that if a Commander had been on site from the beginning it may have made a difference.

2. The Commanders who were tasked with the planning of strategy and tactics had no experience or training in the area of public order and the control of large crowds.

Further, in spite of experienced officers (one from the UK with extensive public order training up to the Gold Level) stating outright that the Bubble tactic would not work, it remained as the tactic of choice. The Officers instructed to carry out the order tried their best but they found themselves in a very difficult situation made worse by protesters being shocked at their appearance. In fact, the reaction to them created a heightened spiral of violence and resistance. The NPoCC Report (paras 4.13 and 4.14) is entirely critical of this Bubble tactic:-

“4.13 Given the numbers of protesters present, their demeanour and relative lack of BPS resources, the use of the 'bubble tactic' was always likely to be unsuccessful and indeed this was flagged by at least one of the Bronze Commanders on the ground who voiced his reservations. Given the pressure the command team was undoubtedly feeling to enable the House to sit, coupled with the lack of experience and training for dealing with this type of event, the commanders' concerns were not heard. To utilise full shield tactics would have represented a wholly disproportionate response to the criminality that was being experienced and with the 'bubble' unlikely to be effective, the only realistic alternative at this stage was to abandon the debate and for the police to take no further action (other than to gather evidence to substantiate subsequent prosecutions).

4.14 It is not entirely clear what the 'bubble tactic' was trying to achieve. Normally a bubble protects people within it for movement through a crowd, for example an arrest team to get them to a point in a crowd to enable the apprehension of a specific offender. In this case, there was no-one in the 'bubble' and therefore it can only be assumed that they were trying to get to the gate to secure it and facilitate access. The reality of the situation however meant that even if they had been able to secure the gate, the protesters were in such numbers that they could easily have moved to block access further away from the gate. In essence, there were no resources securing any ground the PSU may have managed to take and therefore the tactic was futile.”

The circumstances that led to the Bubble tactic being used are torturous. The Speaker had determined earlier on that Friday that the House would not sit. If it had been decided that the House would sit, the

police would have had a relatively easy task of gaining control of the gates from the few protesters that were present early on. However, at around 12:15pm, he informed the Commissioner of Police that he did want the House to sit. The Officers, having stood down, were urgently assigned the task of ensuring that the parliamentarians would be able to enter the House. The Bubble tactic had been decided earlier on as the preferred course of action by the Commanders. There was no further reconsideration of this tactic. The Officers were mobilized and sent on their task. Sometime before they reached Parliament Street, the Speaker spoke with the Commanders and told them that he had then decided that the House would not sit. **The decision that the House would not be sitting, made sometime before 1pm, did not reach the Commanders in time to order the cancellation of the Bubble tactic.** The lines of communication were confused and then communication between the Officers and the Commanders proved impossible once the members of the Bubble were engaged with the protesters – no radio communication was possible as they either could not reach their radios being caught up in the crowd or they could not hear them and it ended up with senior officers trying to get close to the Officers to shout instructions and one Bronze Commander on the ground (again having only being appointed as such that morning) making the decision himself that the Officers should withdraw.

Conclusion

This was a bad day for Bermuda, the BPS and the protesters, many of whom had only intended to be there to peacefully make known their views.

It was bad for Bermuda, as it rekindled memories of darker times.

It was bad for the BPS as it brought to light many inadequacies in the service that had accumulated over time and which demonstrated a total inability to deal with public order issues as and when they arose.

It was bad for the majority of the protesters who had thought that this form of protest would not have any negative personal consequences but found that themselves inhaling Captor or, for some, having captor sprayed directly on them.

There were even bad consequences for Officers, most who in their years of service in the BPS had never had been ordered to go into a large crowd to regain control. This in circumstances where the crowd was surprised by their appearance in their Bubble formation; the crowd became galvanized and hostile by reason of that. The crowd, comprising some well-known local leaders, became hostile to the Officers even to the extent of some who often socially inter-acted with Officers refusing to engage in discussion with the Officers. Some members of the crowd even made death threats to Officers and physically assaulted some of the Officers.

Regarding individual Officers, the PCA is unanimous in concluding that no misconduct can be attributed to Officers at the Parliamentary grounds and thus the complaints received cannot be upheld.

However, there is no question that mistakes were made in the BPS at senior levels. The NPoCC Report highlighted what it set out as the deficiencies in the BPS. There was reliance on Operational Manuals but

it is the view of the PCA that there is no such thing as textbook roles in a crisis.

We are somewhat encouraged by the frank acceptance of BPS that mistakes were made and in discussions which we have had with the most senior commanders of the BPS we were informed that training programs and future operations will result in more trained and focused leadership. We understand from the Commissioner of Police's press release immediately after the NPoCC Report that the BPS welcomed the Report and the Commissioner of Police has also informed us that BPS have put into place many of the recommendations of the NPoCC report and have put into action some of the suggestions, e.g. ensuring that there are 'no surprises' as to the policing tactics to be utilized when anyone seeking to exercise their constitutional and lawful right to peacefully protest wishes to do so. They adopted a "no surprises" approach on the 3rd and 10th February and shared their plans in advance with the public for policing the House of Assembly sessions. The results from those occasions stand in stark contrast to what occurred on the 2nd December 2016. It is unfortunate but those events of 2nd December have left a scar on Bermuda's history and the relationship between the public and the police. However, in so far as it has been alleged that the Officers performing their duties in and around the grounds of the HOA were guilty of misconduct, the PCA is of the view that no blame can attach to those individual Officers.

POLICE COMPLAINTS AUTHORITY – Jeffrey Elkinson, Chairman, Michelle Simmons, William Francis, Barrett Dill, Andrew Bermingham, Winston Esdaille