

siren.² The driver, Mr W, failed to stop and accelerated along St Lukes Rd, so Officers A and B pursued him. The Police helicopter, Eagle, located the Nissan and continued to provide commentary.

7. Police set up road spikes on Khyber Pass Rd which the Nissan drove over, successfully deflating the tyres. Mr W turned left onto Nugent Street and pulled into a carpark driveway next to a building and stopped.
8. Officers A and B arrived at the scene with other units (Officers C, D, E, and F) close behind. Officer A approached Mr W and told him to get out of the car and on to the ground. Officer B arrested the front right passenger, Mr X, while Officer C arrested the rear right passenger, Mr Y. Mr W, Mr X and Mr Y all complied with Police requests.

Mr Z's arrest

9. Mr Z told the Authority that he had been asleep in the back of the car and awoke as the Nissan was spiked. He recalled an officer, later identified as a Police dog handler (Officer E), instruct him to get out of the car and onto the ground.
10. Mr Z said that he exited the Nissan and knelt down but:

"I just felt [Police] like slamming me on the ground ... holding me down, pinning me down ... on my back, one on the back of my head ...they were just treating me really like a dog..."
11. Mr Z advised the Authority that an officer told him to *"stop fucking resisting you little c**t"*. Mr Z however reported that he was compliant and lying face first on the ground with his hands behind his back.
12. Officer D said that she arrived to find Officer E crouched over Mr Z with a knee on his shoulders, and that he was presenting pepper spray at Mr Z's head (although there was no indication he sprayed it). She heard Officer E tell Mr Z that he should not have been resisting when he was removed from the car. Officer D then assisted Officer E to restrain Mr X.
13. A motorcycle officer, Officer F, arrived and observed Officers D and E struggling to restrain Mr Z as he was *"thrashing"* around. Officer F assisted by *"containing"* Mr Z's head to prevent him causing harm to himself.
14. Mr Z advised the Authority that, while handcuffed on the ground, he told the officers he was struggling to breathe but was told to *"shut up"*. He also said he turned his head to see if Mr X was okay, at which point he felt a kick to the forehead.
15. Mr Z said Officer E instructed him to get up while he aimed a pepper spray canister at his head but he was unable to do so as he was handcuffed behind his back and face down on the ground.

² Officer A was a Gold class driver authorised to engage in urgent duty driving and pursuits. Officer B was responsible for providing radio communications.

16. Subsequently, Officers D and E assisted Mr Z to stand. As Officer D escorted Mr Z to the Police car, she advised him that he was under arrest for unlawfully being in a motor vehicle. She said Officer E followed them and verbally provoked Mr Z.
17. Once in the Police car, Officer D could see that Mr Z had grazes on his forehead. She said he was *“very intoxicated and quite emotional, very upset about what was going on.”* As Officer D was advising Mr Z of his rights under the New Zealand Bill of Rights Act, she said Officer E interrupted her and continued *“verbally baiting”* Mr Z.
18. Mr Z informed the Authority that Officer E told him to *“fuck off back to whatever island you came from”*. He said he told Officer E he had thought about joining the Police until this incident, to which he believed Officer E responded, *“We don’t want you c**t”*.
19. Officer E said in his Police statement that Mr Z verbally threatened him and that Mr X claimed he had been kicked in the head. Officer E said he was lying on top of Mr Z and denied kicking him.

After the arrests

20. Acting sergeant, Officer H, and Officer A, determined that the Nissan was not stolen as it belonged to Mr X’s father. Officer A advised the officers dealing with the three passengers, that Mr X, Mr Y, and Mr Z were free to go.
21. Officer D, who was still with Mr Z in the Police car, informed Mr Z that he was no longer under arrest and removed the handcuffs. Outside the Police car Mr Z remained in the area asking attending officers for their badge numbers but said Police were *“standing there laughing at me”*.
22. Mr Z asked to speak to the attending supervisor. He told the sergeant, Officer G, that he had been kicked in the head by an officer. Officer G said he observed a *“scuff”* on Mr Z’s forehead. He also said Mr Z shouted racist remarks towards Police but he did not hear any officer say anything in response.
23. Officer D escorted Mr Z down the driveway towards the main road and Officer E followed them, continuing to *“bait”* Mr Z. Officer D said Mr Z and Officer E began *“squaring up”* to each other as if they were about to fight so she stood between them and pushed them apart. She told Mr Z to leave and watched him cross the road with the other passengers from the Nissan.
24. As they walked away Officer H approached Mr X, Mr Y, and Mr Z. Mr Z told the Authority that Officer H acknowledged his colleagues had not managed the incident appropriately. He said Officer H apologised to Mr Z for the way he had been treated and offered to drive them home. Officer H took photos of Mr Z’s face, explained the process to make a complaint, and provided him with his badge number.
25. Mr W was arrested for failing to stop for Police. He was also charged with dangerous driving and driving with excess blood alcohol. Mr X, Mr Y, and Mr Z were not charged with any offence. The Nissan was impounded.

Police investigation

26. Police commenced an investigation into Mr Z's complaint but did not pursue it after Officer E resigned from New Zealand Police.

THE AUTHORITY'S INVESTIGATION AND FINDINGS

27. As part of its investigation the Authority monitored the Police investigation and reviewed all the documentation. The Authority also interviewed Officers A, B, C, D, F, G, and H. Despite attempts to contact Officer E for the purpose of interview, he did not respond to the Authority. On this occasion the Authority chose not to summons him to provide evidence in light of his resignation from Police. Eagle footage and other witnesses provided sufficient information to enable the Authority to reach its conclusions.
28. The pursuit was not included as part of the investigation as it did not form part of the complaint.
29. The Authority identified and considered the following issues:
- 1) Was the use of force during Mr Z's arrest appropriate?
 - 2) Were derogatory comments directed at Mr Z during this incident?

Issue 1: Was the use of force during Mr Z's arrest appropriate?

30. Mr Z told the Authority that he intended to get out of the car voluntarily but as soon as he opened the door Officer E "*threw me out on the ground*". He said that once he was on the ground, he was restrained by two to three officers, one knelt on his back and another knelt on his head as he was handcuffed. While lying face down on the ground he felt what he thought was a kick to his forehead by a Police officer's boot. Mr Z said Officer E subsequently aimed pepper spray at his head and told him to get off the ground but he was unable to do so as he was handcuffed behind his back.

Exiting the vehicle

31. Eagle footage shows that Mr Z did not immediately exit the Nissan when Officer E opened the door. There appears to be a period of about 15 seconds from when Officer E opened the door to when Mr Z is seen on the ground being restrained.
32. Officer E said that Mr Z attempted to hold the door closed, refused to get out and held on tightly to the front passenger seat headrest, preventing Officer E from extracting him. He therefore believed Mr Z was 'actively resistant' and resisting arrest.³

³ Active resistance includes physical actions such as pulling, pushing or running away; that is, "more than verbal defiance."

33. Mr X (the front passenger) told the Authority that he believed there was a struggle and Mr Z was pulled out of the car. Officer B (who arrested Mr X) said Mr Z was not given the opportunity to exit the car of his own volition and that he was removed by two officers who were “rough” with him.
34. Mr Z denies resisting Police and told the Authority he was compliant. However, he also admitted that he was heavily intoxicated and, having been asleep until moments before, he was not fully aware of the incident unfolding around him.
35. Having viewed the Eagle footage, the Authority accepts that Officer E alone extracted Mr X from the Nissan and that there was a brief struggle as he did so. The fact there was a struggle corroborates Officer E’s position that Mr Z was resisting him and the Authority accepts he was.

Force used during the arrest

36. Mr Z said that once he was on the ground, he felt a knee on his back. Officer D confirmed that when she approached she could see Officer E had a knee on his back.
37. Mr Z also told the Authority that he turned his head to look at Mr X and as he did so he was kicked in the forehead by one of the officers. He said the kick itself did not cause visible injury but it caused his forehead to be pushed into the ground, causing grazing to his cheek and forehead.
38. Officer D recalled Mr Z saying he had been kicked but she did not see anyone do so. Officer E also recalled Mr Z complain about being kicked in the head. He said that he ended up lying on top of Mr Z while he was on the ground so he was “less of a danger” and that he therefore could not have kicked Mr Z in the head.
39. Mr X said he saw an officer holding Mr Z’s hair down against the concrete. Officer F told the Authority that he held Mr Z’s head to stop him banging it on the ground as he was struggling and resisting Police.
40. Mr Z said he did not see who kicked him but recalled seeing an officer’s boot and regular Police uniform trousers rather than the dog handler’s overalls. Officer D was the only officer in the immediate vicinity wearing standard issue Police uniform as Officer F was wearing motorcycle trousers and Officer E was in overalls. However, the Authority is satisfied that Officer D did not kick Mr Z as she was handcuffing him behind his back at the time of this incident.
41. The grazes on Mr Z’s forehead are consistent with his face connecting with the ground and the Authority is satisfied they were received while he was being restrained. The Authority also accepts that Mr X may have received a blow to the forehead while being restrained but is unable to determine whether the blow was deliberate or accidental or who it was administered by.

Presentation of pepper spray

42. Mr Z said that Officer E threatened to pepper spray him if he did not get up off the ground and actually presented a spray canister to his head. Officer D also heard the threat and observed the presentation of the canister.
43. Police policy states that before resorting to pepper spray, officers should consider communication and other less serious tactical options such as empty hand restraints. Pepper spray should not be used on a person secured in handcuffs.⁴
44. Mr Z was handcuffed behind his back and lying face down on the ground. Due to the position he was lying in, he was unable to stand of his own accord. He was restrained by three officers with little opportunity to cause harm to himself or others. The Authority is of the view that while Officer E did not use pepper spray on Mr Z, it was both unnecessary and inappropriate to threaten him with it and present it at him.

FINDINGS

The grazes Mr Z received were as a result of being restrained during the arrest. The Authority also accepts that Mr X may have received a blow to the forehead while being restrained but is unable to determine whether the blow was deliberate or accidental or who it was administered by.

Officer E's presentation of pepper spray was both unnecessary and inappropriate in the circumstances.

Issue 2: Were derogatory comments directed at Mr Z during this incident?

45. Mr Z told the Authority that Officer E used offensive and derogatory language towards him during this incident. He said he was told to *"fuck off back to whatever island you came from"* and called a *"c**t"*.
46. Officer D sat in the rear seat of the Police car with Mr Z to advise him of his rights. She recalled Officer E open the car door and lean into the vehicle in an *"intimidating"* way, continuing to *"bait"* Mr Z while she was explaining his rights.
47. Officer D said that Officer E told Mr Z that he could never be a Police officer as he was *"useless"*. Although she could not recall the exact wording, she described Officer E's comments towards Mr Z as:

"racist ... derogatory ... it wasn't professional and it was very unnecessary as the male wasn't aggressive ... just distraught ... he actually began crying like kind of hysterical crying..."

⁴ See paragraphs 68-69 for relevant Police policy.

48. Officer B (who arrested the front passenger) said that she saw Officers E and F “swearing and laughing” about the incident that had just occurred and it appeared they “didn’t give a toss for what had just happened and that [Mr Z] deserved what he got.”
49. Officer E did not make himself available for interview with the Authority. However, based on the accounts provided by Mr Z and Officers B and D, the Authority accepts that Officer E used offensive, derogatory language and acted unprofessionally towards Mr Z during this incident.

FINDINGS

Officer E used offensive, derogatory language and acted unprofessionally towards Mr Z during this incident.

CONCLUSIONS

50. Officer E acted unprofessionally towards Mr Z during the course of his arrest. He inappropriately threatened Mr Z with the use of pepper spray and used offensive, derogatory language towards him. Officer E failed to act in a manner that would be reasonably expected of an experienced, well-trained Police officer.



Judge Colin Doherty

Chair
Independent Police Conduct Authority

25 June 2019

IPCA: 17-1902

Law

51. Under section 114 of the Land Transport Act 1998 Police are empowered to stop vehicles for traffic enforcement purposes.
52. Section 39 of the Crimes Act 1961 provides for law enforcement officers to use reasonable force in the execution of their duties such as arrests and enforcement of warrants. 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.”*
53. Under section 62 of the Act, anyone who is authorised by law to use force is criminally responsible for any excessive use of force.

Fleeing driver policy

54. The overriding principle of the Police fleeing driver policy is that: *“Public and staff safety takes precedence over the immediate apprehension of the offender”*.
55. It is the responsibility of the lead vehicle driver, or Police passenger, to notify Police Communications as soon as practicable and when it is safe to do so, that a vehicle has failed to stop, the location, direction, fleeing vehicle description, and reason that it is being pursued (failure to stop is not a reason).
56. Under the Police ‘Fleeing driver’ policy, the pursuing officer[s] must carry out a TENR (Threat-Exposure-Necessity-Response) risk assessment when deciding to commence or continue a pursuit. The assessment required of officers includes consideration of the following:
 - a) The threat, by any individual or action which is likely to cause harm to Police in the course of their duties.
 - b) Exposure refers to the potential for harm (physical or otherwise) to people, places, or things. Exposure can be mitigated through assessment and planning.
 - c) Necessity is the assessment to determine if there is a need for the operation or intervention to proceed now, later, or at all.
 - d) Response must be a proportionate and timely execution of Police duties aided by the appropriate use of tactics and tactical options.
57. The TENR risk assessment must weigh up:

“... the ongoing exposure to harm that the fleeing driver incident poses, or is creating, with the current threat that the fleeing driver poses and the necessity to respond.”

58. During a pursuit, warning lights and siren must be simultaneously activated at all times. The Communications Centre must also be advised immediately if there is a fleeing driver and that a pursuit has been initiated.
59. The fleeing driver policy outlines that Police officers responsible for the fleeing driver communications should provide the Pursuit Controller with timely and uniform situation reports (when safe to do so). They must advise Police Communications of their location, direction of travel, description of the fleeing vehicle, and reason for pursuit.
60. Police Communications transmits pursuit warning to all vehicles involved: *"{Call sign} if there is any unjustified risk to any person you must abandon pursuit immediately. Acknowledge"*
61. Officers are required to carry out risk assessments before and during a pursuit in order to determine whether the need to immediately apprehend the fleeing offender is outweighed by the potential risks of a pursuit to the public, the occupants of the pursued vehicle, and/or the occupants of the Police vehicle.
62. Fleeing driver incidents must be managed in the safest possible manner. A pursuit will only be commenced and/or continued when the seriousness of the offence and the necessity of immediate apprehension outweigh the risk of pursuing. The fact that a driver is fleeing does not in itself justify engaging in a pursuit.

Use of force policy

63. 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.
64. 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.
65. Police 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)).
66. 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.

67. 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.

Pepper spray policy

68. Before using oleoresin capsicum (pepper) spray, officers must consider communication and other less serious tactical options (e.g. control and restraint techniques or empty hand tactics not needing equipment) for resolving and controlling an incident. Officers must be satisfied when using pepper spray that the person is resisting (by more than passive resistance) or attempting to prevent police from lawfully controlling or arresting them.
69. Unless there are exceptional circumstances, pepper spray must not be used on a person who is secured in handcuffs. Exceptional circumstances include situations when either:
 - 69.1 the person cannot be controlled by less forceful means;
 - 69.2 timely assistance is not available;
 - 69.3 there is a risk of injury to the person or another person;
 - 69.4 the prisoner is in possession of a weapon; or
 - 69.5 you need to take immediate action to resolve a situation or prevent a situation continuing.

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 Colin Doherty.

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.

This report

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



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