

# Officer used unjustified and excessive force at Rotorua

1. On 13 September 2021, Police arrested Mr Z in a Rotorua carpark. A friend of Mr Z witnessed the incident and complained to the Authority that officers had assaulted Mr Z. Sometime later, Mr Z's mother also complained to the Authority.
2. During that afternoon of 13 September 2021, Officers A and B had observed a Subaru motor car being driven erratically and, endeavouring to stop it, followed the car into a nearby motel carpark.
3. When the officers arrived in the carpark, the Subaru was parked and empty and a check on the Police database showed the car recorded as stolen. Mr Z approached the officers and said the car was his and denied that it was stolen. When asked by the officers for the car keys, Mr Z refused to hand them over.
4. Officer A arrested Mr Z for obstruction. Mr Z tried to run from the officers and a scuffle developed during his arrest which involved both officers. Mr Z was also charged with resisting Police. A month later, Police withdrew both charges against Mr Z.
5. Under the oversight of the Authority, Police later undertook an investigation into the actions of the officers involved. The Authority disagreed with the Police analysis and both the criminal and employment outcomes of the investigation. On that basis, we decided to conduct an independent investigation.

## The Authority's Findings

Issue 1: Was Officer A legally justified in arresting Mr Z?

- Mr Z was not obstructing Police and his arrest was unlawful.

Issue 2: Was the force used by Police against Mr Z justified?

- Because the arrest was unlawful, the subsequent force used by Police to arrest Mr Z and to prevent him from escaping to avoid arrest was unjustified under sections 39 and 40 of the Crimes Act 1961.

- Police could also not justify their use of force under sections 32 or 48 of the Crimes Act 1961.
- Even if the arrest had been lawful, the level of force used by Officer A was disproportionate and unreasonable.

## Analysis of the Issues

### ISSUE 1: WAS OFFICER A LEGALLY JUSTIFIED IN ARRESTING MR Z?

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#### What events led up to Mr Z's arrest?

6. At about 2.45pm on Monday 13 September 2021, Officers A and B were patrolling in central Rotorua when they observed a Subaru car being driven in an erratic manner. The officers decided to stop the car.
7. From a distance, the officers saw the Subaru turn into a motel car park on Malfroy Road and followed it. By the time the officers arrived, the Subaru was parked and empty.
8. The motel's CCTV footage shows the Subaru arrive at the carpark and then park out of sight of the camera. The footage does not capture who is in the vehicle. Fifteen seconds later, Police arrived and parked behind the Subaru, within view of the CCTV camera.
9. Shortly after the officers arrived at the carpark, Mr Z walked up to the officers and, when asked, gave his name and said the Subaru was his car (it was registered to him). Mr Z then locked the car and walked away. Officer A checked the Subaru on the Police database and saw that it was recorded as stolen.
10. Mr Z returned about 20 seconds later and had a discussion with the officers regarding the status of the Subaru. Mr Z told Police it was not stolen. Officer B also checked Mr Z's name against the Police database and noted that his licence was to be suspended because of demerit points and issued Mr Z with documentation relating to this. Mr Z took this paperwork in a plastic sleeve.
11. CCTV footage from the motel shows Mr Z talking openly with the officers and holding onto paperwork in one hand. Other people came out of the motel units and appeared calmly to engage with Mr Z and the officers. After about 7 minutes, Mr Z walked away. He returned a minute later and Officer A spoke with him again.
12. Officer A says he then asked Mr Z to hand over the keys to the Subaru. Mr Z reiterated that the car was not stolen and refused to give the keys to Officer A. Mr Z later told us that he did not have the car keys on him at the time Officer A requested them. This was confirmed when he was later processed at the Police station.
13. Officer A warned Mr Z that if he continued to refuse to provide the car keys, he would be arrested for obstruction. Mr Z continued to refuse, and Officer A moved to arrest him.

14. The officers later reported that Mr Z was uncooperative, abusive and aggressive and they considered he may have been under the influence of an illegal substance. Mr Z told us he was sober and generally compliant. The CCTV footage from the motel appears to support Mr Z's version of events, although, when Mr Z was received into custody later that afternoon, Police recorded in the database that Mr Z, *"says no to any substances, but seems to be on something."*

#### Was Mr Z obstructing Officer A from his duty?

15. Obstruction is an offence under section 23(a) of the Summary Offences Act 1981.<sup>1</sup> To obstruct Police, Mr Z needed to intentionally hinder Officer A from executing his duty. Officer A outlined to us that the duty he was carrying out was enquiring into a vehicle recorded as stolen.
16. Officer A also told us that he considered he was correct to charge Mr Z with obstruction, saying: *"To me that was the right charge, that was my justification for arrest."*
17. Mr Z acknowledged to us that he refused to cooperate with Officer A's request. However, we do not believe that Mr Z's behaviour, specifically his refusal to hand over the car keys, was obstructive or intentionally hindering Officer A from carrying out his duty, which was to investigate whether the car was stolen.
18. Obtaining the keys from Mr Z would not have assisted Officer A in carrying out this duty. Having the keys may have enabled Officer A to more easily seize or impound the Subaru while he undertook an investigation, but he could have done this by other means, such as having the car secured or towed away, without requiring Mr Z to provide the keys.
19. In any event, our view is that Officer A could not lawfully require Mr Z to hand over the keys to the Subaru. Police can only take possession of car keys from a driver under certain circumstances specified in sections 121 and 121A of the Land Transport Act 1998.<sup>2</sup> These sections relate to circumstances where officers reasonably believe a person in charge of a motor vehicle is incapable of having proper control of the vehicle or has not satisfactorily completed an impairment test. None of these circumstances applied in this situation.
20. Officers later made enquiries regarding the status of the Subaru, but then took no further action. No person was charged with theft or unlawful taking of the car.
21. At Mr Z's second Court appearance, a Police prosecutor withdrew the charges against Mr Z and noted on the Police file that:
  - *"There is no evidence on the file to support the conclusion that [Mr Z] had keys to the vehicle in the first instance.*
  - *There is no lawful requirement for [Mr Z] to surrender the keys even if he did have them.*
  - *The obstruction charge is not made out and the arrest was unlawful.*

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<sup>1</sup> See paragraph 60.

<sup>2</sup> See paragraph 61.

- *As this initial arrest is defective, then it taints the resulting actions, namely the resisting arrest charge. Therefore, both charges were withdrawn.”*

22. Given that Officer A had no lawful power to require Mr Z to hand over the keys, no offence was committed by Mr Z when he refused to comply.<sup>3</sup> Further, Officer A had other means of securing or impounding the Subaru, and Mr Z’s refusal was not an obstruction of the officer’s ability to carry out his enquiries. For these reasons we consider that Officer A’s arrest of Mr Z for obstruction was unlawful.

## FINDING ON ISSUE 1

Mr Z was not obstructing Police and his arrest was unlawful.

## ISSUE 2: WAS THE FORCE USED BY POLICE AGAINST MR Z JUSTIFIED?

### What occurred when Mr Z was told he was under arrest?

23. When Officer A confronted Mr Z and requested the car keys, the CCTV footage shows Mr Z attempt to move away from Officer A. Officer A then steps between Mr Z and the Police car, blocking Mr Z’s ability to leave.
24. Officer A informed Mr Z he was under arrest and as he went to restrain him. Mr Z quickly stepped to his right and tried to get away.
25. The following events are captured on CCTV footage:
- Officer A tries to grab Mr Z’s arms, but Mr Z pulls away. Officer B also tries unsuccessfully to grab Mr Z’s arm.
  - Officer A pushes Mr Z backwards against a concrete wall which is about 4 metres away. Mr Z is not pushing or fighting back. His arms are by his side, with one hand still holding the paperwork.
  - Officer B holds onto Mr Z’s left arm, holding him against the wall while Officer A throws an elbow strike which glances off Mr Z’s head.
  - Mr Z moves to his left and partially gets away, but Officer B retains hold of Mr Z and throws him back against the wall.
  - Officer A punches Mr Z’s body and head four times.
  - Mr Z continues to attempt to get away but is then taken to the ground by the officers.
  - While struggling on the ground, Officer B holds Mr Z in a headlock and Officer A manages to get one handcuff on Mr Z. He then delivers a knee strike to Mr Z’s body or thigh.
  - At this point Mr Z stops resisting, and the officers manage to handcuff him.

<sup>3</sup> *Police v Amos* [1977] 2 NZLR 564 (SC), at 571-573.

- Mr Z is then lifted to his feet and placed into the back of the Police car.
26. The struggle between the officers and Mr Z took just over two minutes. In viewing the CCTV footage, we do not see any attempt by Mr Z to assault or use force against the officers.
  27. Once taken to the Police station, officers recorded that Mr Z was having breathing difficulties. He also reported having a head injury and showed signs of being in pain. An ambulance was called, and Mr Z examined. No medical concerns were noted, and as Mr Z became calm, he was released on bail.

### What record did Officer A make following the arrest of Mr Z?

28. Because Officers A and B used force when arresting Mr Z, both officers were required to submit Tactical Options Reports (TOR).<sup>4</sup>
29. Each of the officers' TORs outlined that their Perceived Cumulative Assessment (PCA)<sup>5</sup> regarding Mr Z was that he was 'actively resisting' arrest. 'Active resistance' includes physical actions such as pulling, pushing or running away. Officer A recorded that to avoid Mr Z grabbing his arm, he punched him *"a couple of times in the abdomen."* No other detail of force is noted in his TOR.
30. Officer A also completed a file for Mr Z's prosecution where he did not present an accurate account of the amount of force that he applied to Mr Z, recording in a statement within that prosecution process that he punched Mr Z *"2 (or) 3 times to the abdomen to distract him"* and *"using a closed fist I attempted to strike him to his head, but this missed."*
31. As outlined in paragraph 21, the charges against Mr Z were withdrawn on 13 October 2021.

### What action did Police take after a complaint was received?

32. Police undertook an investigation after the Authority advised them that a complaint had been received from a witness at the motel. This investigation commenced six months after the charges against Mr Z were withdrawn by a Police prosecutor, who had recorded on the Police file that the arrest of Mr Z for obstruction had been unlawful (as per paragraph 21).
33. A Senior Sergeant, Officer C, spoke to the witness at the motel, Mr Z and Officer B. Then, on 19 April 2022, Officer C interviewed Officer A, who was shown the CCTV footage from the motel before being questioned.
34. At this Police interview, Officer A amended his earlier assessment that Mr Z was actively resistant, stating that Mr Z had actually been 'assaultive' – meaning he was displaying intent to cause harm through his body language or physical actions – and because of that, Officer A had needed to use a level of force in return, including an elbow strike and then punches to Mr Z.

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<sup>4</sup> By Policy, a Tactical Options Report (TOR) is a report that an officer is required to complete when he or she has used force on a member of the public. The report includes each tactical option and a description of the force used and the reasons.

<sup>5</sup> PCA is a tool used by officers to gauge the level of risk being presented by an individual, ranging from cooperative, passive resistance, active resistance, assaultive, GBH or death.

35. In this Police interview, Officer A could not explain why he:
- had not previously recorded his use of an elbow strike, despite having earlier opportunities to do so; and
  - had previously stated that Mr Z was actively resisting, but had now changed his assessment of Mr Z to assaultive.
36. Police later decided that there was insufficient evidence for a criminal charge against Officer A as they believed the force used could be justified under section 39, Crimes Act 1961.<sup>6</sup>
37. The Authority was concerned with the approach taken by Police and the outcomes of their investigation. We have addressed those matters separately with Police.

### What did the Authority's investigation reveal?

38. As part of the Authority's independent investigation, we spoke to Mr Z about the incident, and he outlined some of the force used, saying:

*"... then [Officer A]'s pinned me up, thrown a massive elbow at me. That like dazed me a bit..."*

39. Mr Z also told us:

*"... [Officer B]'s held me in place while [Officer A], he's gone ahead and lined me up. Full cocked punches and elbows and they've both pretty much got on, got onto me. ... I was scared to death at the time."*

40. We then spoke to Officer B who said:

*"... I've grabbed [Mr Z] and pushed him up against a wall, concrete – a brick wall that was there and tried to just get control of him because he was, he'd been placed under arrest."*

41. When we asked Officer B if he saw Officer A strike Mr Z, Officer B denied seeing that, saying:

*"I was focused on [Mr Z] at the time. I wasn't watching anything that [Officer A] was doing."*

42. We then spoke to Officer A who acknowledged using an elbow strike and punches against Mr Z, telling us:

*"... I've thrown three or four punches to his abdomen 'cos I don't want those, immediately to be to his face.... Then I've thrown a couple of elbow strikes to him. I can't remember whether any of them connected."*

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<sup>6</sup> See paragraph 65.

43. As noted above in paragraph 34, when interviewed by Police during their criminal investigation, Officer A said that he considered Mr Z to be assaultive and because of this, he needed to use force to effect Mr Z's arrest.

44. However, when we spoke to Officer A 12 months after that criminal investigation, he conceded that his actions were not justified, saying:

*"There was no legal justification, I said I put him at active resistant. To justify those actions my PCA would have to have placed him at assaultive being fully aware of the Tactical Options framework. To answer your question no, there was no justification for those strikes."*

45. When questioned about the difference between his accounts, Officer A said:

*"At the time of the [Police] interview I can only say that I believed, based on all the circumstances, that [Mr Z] was assaultive and as time has gone on and leading up to this, I've had a lot more time of reflection ..."*

46. In our assessment, Mr Z's account of events is credible. It is supported by the CCTV footage. We agree with Officer A's statement that the force used was unjustified and, based on the inconsistencies in his evidence, and his failure to accurately report the incident, we do not believe that Officer A reasonably believed Mr Z was assaultive at the time.

### **Was Officer A legally justified in using force against Mr Z?**

47. The following provisions of the Crimes Act 1961 provide legal justification for using force in certain circumstances:

- a) Section 39 empowers Police to use *"such force as may be necessary"* to overcome any force used in resisting an arrest or the execution of any sentence, warrant, or process.
- b) Section 40 empowers Police to use *"such force as may be necessary"* to prevent the escape of someone who takes to flight to avoid arrest.
- c) Section 48 provides that any person is justified in using *"reasonable"* force in defence of themselves or another.

48. Having already concluded that Mr Z's arrest was unlawful because Officer A had no lawful power to require Mr Z to hand over the car keys, and therefore that Mr Z's refusal to do so was not an obstruction of the officer's ability to carry out his enquiries, it follows that Officer A's use of force to effect Mr Z's arrest and to prevent him from escaping to avoid being arrested under sections 39 and 40 of the Crimes Act 1961 was also unlawful.

49. Officer A may have been justified in using force against Mr Z under section 48 of the Crimes Act 1961 if the force was needed in order to defend himself. However, at no time does Officer A claim that he used force to protect himself or others. Additionally, although Mr Z admits he was trying to get away and avoid being arrested, the CCTV does not show Mr Z using force against the officers as part of that avoidance. We therefore cannot accept that Officer A genuinely felt

a threat from Mr Z and cannot find that Officer A's use of force was justified under section 48 of the Crimes Act 1961.

50. It is beyond doubt that Officer A had no legal basis for demanding that Mr Z hand over the keys to the vehicle. It follows that Officer A's arrest of Mr Z for obstruction was unlawful – as noted above in paragraph 22, no offence is committed by a person who refuses to comply with an unlawful instruction.<sup>7</sup>
51. Police contend that, although Officer A's arrest of Mr Z was unlawful, section 32 of the Crimes Act 1961 applies. Section 32 provides that, when an officer has power to arrest a person for an offence without a warrant, the officer is justified in arresting the person if he has 'reasonable and probable' grounds for believing that he or she has committed the offence, 'whether or not the offence has in fact been committed, and whether or not the arrested person committed it.'<sup>8</sup> Thus Police say that because Officer A believed that he was entitled to demand that Mr Z hand over the keys, he 'reasonably and probably' believed that Mr Z was committing the offence of obstruction in refusing to do so. They say that this conclusion is supported by the Court of Appeal's judgment in *Summers v R*.<sup>9</sup>
52. We disagree.
53. Whether there are reasonable and probable grounds is an objective question of fact, to be "judged by the standard of a reasonable person assumed to know the law and possessed of the information in fact possessed by the constable".<sup>10</sup> It should also be noted that a police officer's subjective belief that there are reasonable grounds is not sufficient.<sup>11</sup> In our assessment, Officer A, as a reasonable person presumed to know the law, cannot have reasonably believed that his instruction to Mr Z was lawful.
54. In such circumstances, we do not accept that Officer A is in a position to contend that he 'reasonably and probably' believed that Mr Z's refusal to comply with his (unlawful) instruction constituted obstruction.
55. What Officer A is doing is setting up his own ignorance of the law as a foundation for what is said to be a 'reasonable and probable' apprehension that Mr Z was committing an offence.
56. That, in our view, is profoundly illogical.
57. In the particular circumstances of this matter, Officer A cannot legally justify his use of force under sections 32, 39, 40 or 48 of the Crimes Act 1961.
58. We also record that, even if the arrest had been lawful, we would have concluded that the level of force used was unreasonable based on the CCTV evidence.

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<sup>7</sup> *Police v Amos* [1977] 2 NZLR 564 (SC), at 571-573.

<sup>8</sup> See paragraph 64

<sup>9</sup> *Summers v R*, CA356/04, 8 December 2004.

<sup>10</sup> *Craig v Attorney-General* [1986] 2 CRNZ 551 (HC).

<sup>11</sup> *Police v Anderson* [1972] NZLR 233 (CA); *Duffy v Attorney-General* [1985] 1 CRNZ 599 (HC).



## FINDINGS ON ISSUE 2

Because the arrest was unlawful, the subsequent force used by Police to arrest Mr Z and to prevent him from escaping to avoid arrest was unjustified under sections 39 and 40 of the Crimes Act 1961.

Police also could not legally justify their use of force under sections 32 or 48 of the Crimes Act 1961.

Even if the arrest had been lawful, the level of force used by Officer A was disproportionate and unreasonable.

## Recommendation

59. The Authority recommends that Police alter information held on their database regarding this incident to reflect that the arrest and charge were unlawful.



**Judge Kenneth Johnston KC**

Chair

Independent Police Conduct Authority

5 December 2023

**IPCA: 23-16606**

## Appendix – Laws and Policies

### LAW

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#### Summary Offences Act 1981, Section 23: Resisting Police, prison, or traffic order.

60. Resisting Police, prison, or traffic officer: Every person is liable to imprisonment for a term not exceeding 3 months or a fine not exceeding \$2,000 who resists or intentionally obstructs, or incites or encourages any other person to resist or obstruct,—
- (a) any constable or any authorised officer, or any prison officer, or any traffic officer, acting in the execution of his duty; or (b) any other person acting in aid of any such constable, authorised officer, prison officer, or traffic officer; or (c) any Police dog working under the control of a Police dog handler.

#### Land Transport Act 1998, Sections 121 and 121A

61. An enforcement officer may exercise all or any of the powers outlined below [paragraph 62] if they believe on reasonable grounds that a person who is in charge of a motor vehicle:
- Due to the person’s physical or mental condition (however arising), is incapable of having proper control of the vehicle; or
  - The person has not completed (failed or refused) a compulsory impairment test in a manner satisfactory to an enforcement officer.
62. Therefore, the enforcement officer may:
- Forbid that person to drive a motor vehicle for a specific period.
  - Direct the person to drive the vehicle to a specified place where the driver may obtain rest, or where the load on the vehicle or other conditions make it appropriate the driver should drive to that place.
  - Take possession of all ignition or other keys of the vehicle, and for that purpose require that person to immediately deliver up all such keys.
  - Take such steps as may be necessary to render the vehicle immobile or to remove it to a place where it does not constitute a traffic hazard.
63. An enforcement officer may arrest without warrant a person who fails to comply.

#### Crimes Act 1961: Use of Force

64. Section 32 of the Crimes Act 1961 states: “ Where under any enactment any constable has power to arrest without warrant any person who has committed an offence, the constable is justified in arresting without warrant any person whom he or she believes, on reasonable and probable grounds, to have committed that offence, whether or not the offence has in fact been committed, and whether or not the arrested person committed it”.

65. 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”*.
66. Section 40 of the Crimes Act 1961 provides for Police officers to use reasonable force to *“prevent the escape of that other person if he takes flight in order to avoid arrest”* unless the escape can be prevented *“by reasonable means in a less violent manner”*.
67. Section 48 of the Crimes Act 1961 states: *“Everyone is justified in using, in the defence of himself or herself or another, such force as, in the circumstances as he believes them to be, it is reasonable to use”*.
68. Section 62 of the Crimes Act 1961 says anyone who is authorised by law to use force is criminally responsible for any excessive use of force.

## POLICY

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### Arrest and Detention

69. Force used during an arrest must be reasonable and be used only when it is not reasonable to make the arrest in a less violent manner.

### Use of Force

#### *Police policy on the use of force*

70. 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.
71. Police policy provides a framework for officers to assess, reassess, manage, and respond to use of force situations, and ensure 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.
72. 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:
  - 1) the incident type, location, and time;
  - 2) the officer and subject’s abilities;

- 3) the subject's emotional state;
- 4) the influence of drugs and alcohol and the presence or proximity of weapons;
- 5) similar previous experiences with the subject; and
- 6) environmental conditions.

Police refer to this assessment as an officer's Perceived Cumulative Assessment (PCA).

73. A key part of an officer's decision about 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:

- 1) cooperative;
- 2) passively resisting (refuses verbally or with physical inactivity);
- 3) actively resisting (pulls, pushes or runs away);
- 4) assaultive (showing an intent to cause harm, expressed verbally or through body language or physical action);
- 5) 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.

74. 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.

# About the Authority

## WHO IS THE INDEPENDENT POLICE CONDUCT AUTHORITY?

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

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

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

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

## WHAT ARE THE AUTHORITY'S FUNCTIONS?

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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

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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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