

Complaint of excessive use of force and unlawful entry to property in New Plymouth

INTRODUCTION

1. On the evening of 31 October 2014, Police received a report of a domestic assault in New Plymouth. Police attended the scene and spoke to two teenage girls who told them that the suspect had run into Mr Z's property.
2. Police cordoned off the area around Mr Z's flat. During the events that followed, Mr Z's flat was searched and Police used OC spray on Mr Z's dog.
3. On 2 November 2014, Mr Z complained to the Police about the search of his flat and use of force on his dog. Police referred Mr Z's complaint to the Authority and the Authority conducted an independent investigation. This report sets out the results of that investigation and the Authority's findings.

BACKGROUND

Summary of events

4. At around 5.45pm on 31 October 2014 a teenage girl called 111 to report that her mother had been assaulted by her partner, Mr Y, and that Mr Y had threatened to kill her mother. The girl's friend also witnessed the threats.
5. Officer A (a sergeant and the shift supervisor), Officer B (a sergeant and dog handler) and Officers C, D and E (all constables) were deployed to the mother's address.
6. Mr Y is well known to Police and has an extensive criminal history involving violence. Due to the allegations of assault and Mr Y's history, Officer A considered Mr Y dangerous and armed himself with a Taser before attending the address.

7. When Police arrived at the address, Mr Y had left. They established that Mr Y had grabbed his partner by the throat, had attempted to choke her and had made a number of threats to kill her.
8. The two teenage girls had followed Mr Y and told Police that they believed they had seen him in a flat a few streets away, looking out from behind orange curtains. The flat, which was the right hand side of a duplex unit, was the home of Mr Z. Police were not aware of who lived in the flat or of any connection the occupants may have had to Mr Y.
9. Officer A formulated a plan, with Officer B's assistance, to surround the flat to prevent Mr Y from leaving, and then to do a door knock and entry under section 8 of the Search and Surveillance Act and arrest Mr Y.
10. Officer A remained at the front of the house. Officer B's task was to go, with his dog, to the rear of the flat and Officers C, D and E were directed to various spots around the side and rear of the flat.
11. The rear of the flat consisted of a small grassed area which led to a deck. A sliding door connected the deck to Mr Z's lounge. Officer B had his Police dog on a standard Police choker chain and a short lead. He told the Authority that he knew Mr Y and was aware that he had convictions for serious violence and assault on Police.
12. Both Mr Z and Police have different versions of what occurred next.

Mr Z's version of events

13. Mr Z said that he was sitting on the couch in his lounge, with his Shar-Pei dog nearby, when all of a sudden the ranch-slider door slid open and he saw a Police officer (Officer B) and his dog. Mr Z told the Authority, "*there was no announcement, just the door being slid open quickly and an officer saying '[Mr Y], where's [Mr Y]? We know he's here'*". Mr Z said that, the officer put his head inside the door and "*the Police dog just started barking its head off, carrying on*".
14. Mr Z told Officer B that the person they were looking for was not inside his flat but that he had seen someone running down the side of his property and jumping the back fence a short time ago. Mr Z said that Officer B said he did not believe him and wanted to search his flat.
15. Mr Z said that as he was talking to Officer B, his Shar-Pei ran outside and sniffed the Police dog. In response, Officer B swore at him saying, "*get that fucking dog out of here*", and kicked his Shar-Pei in the stomach.
16. Whilst Mr Z was not specific about the exact sequence of events when interviewed, he did make reference to his Shar-Pei running outside a second time.
17. Mr Z told the Authority that his Shar-Pei bolted past him and ran after the Police dog. He said that as his Shar-Pei went for the Police dog, he put his arms out. He had his Shar-Pei by the chin and he was about to pick him up when an officer (Officer C) sprayed the dog from behind with pepper spray. He said that the spray hit him and his Shar-Pei in the face and, when he turned around, he saw another officer (Officer A) holding a Taser.

18. When Mr Z made his complaint to the Police he acknowledged that the Taser was not turned on, there was no red dot on him or his dog and the officer was simply holding it in his hand.
19. Mr Z said that the officers then told him again that they wanted to search his flat and he said, *"it's all right to have a look inside. I'm not hiding anything"*.
20. He told the Authority that he did not really feel he could say 'no' to the search and he said, *"what got me is the way they did it, acting like bloody Stormtroopers just coming in here. No regard for the law of identifying themselves or anything."*
21. Following the search of his flat, Mr Z became worried about the effects of OC spray on his dog and wanted to take his dog to the vet. Mr Z said in his statement to Police, *"I simply want an apology from those attending officers and I need to take my dog to the vet and I would like his vet bills taken care of by the Police"*.

Officers' version of events

22. Officer B said that, given the information received from Mr Y's partner and the teenage girls, he had 'good cause to suspect' that Mr Y was inside Mr Z's flat. He believed he was therefore entitled, under the Search and Surveillance Act, to enter Mr Z's flat to search for Mr Y (see paragraphs 59-60 for Search and Surveillance Act details).
23. Officer B decided to approach Mr Z's back door with his dog. He ensured that his dog was on a short lead and under control.
24. Officer B could see that the curtains behind the sliding door were closed and the lights were on. He tried the door and found that it was unlocked so *"slid the door open a short way and yelled out into the address, 'Police with a dog, come out' and almost immediately the curtain was pulled back and Mr Z was standing looking at him through the door"*.
25. Officer B told the Authority that he did not knock on the door. He said, *"I didn't want to announce myself to the fact that, especially if the offender was standing there with a weapon, I wanted to take the initiative"*.
26. Officer B told the Authority that Mr Z was *"obviously a little bit agitated at the start"*. However, his conversation with Mr Z was *"very amicable"* as he explained why he needed to search Mr Z's flat. Officer A, who had by that time come to the rear of the flat, said that he also told Mr Z that Police needed to search his house to ensure the offender was not inside.
27. Officer B told the Authority that, as he explained to Mr Z why Police were at his house, Mr Z's Shar-Pei ran through his legs and *"attacked"* the Police dog by biting it. Officer B said that he responded by pulling his dog off the deck and down onto the grass.

28. Officer B said that while he and his dog were down on the grass, Mr Z managed to get his Shar-Pei to come back to him and put him inside. As Mr Z was telling Officer B that he had seen someone running down the side of his address and jump over the back fence, his Shar-Pei ran back outside, for the second time, and attacked the Police dog, biting it on the hind leg. The two dogs then began fighting.
29. Officer B said that, at that stage, he realised that Mr Z was not the man Police were looking for. However, he was mindful that Mr Y could still be inside and could come out and confront him while he was distracted by a dog fight.
30. Officer B told the Authority that his main concern at that point was to quickly stop the dog fight and also to prevent any harm to his dog. He backed off, with his dog, and told Mr Z that he needed to get his Shar-Pei under control. Officer B also told the Authority that he *“definitely did not kick [Mr Z’s] dog”* and he did not see anybody else kick the Shar-Pei. He said that he *“was more than reasonable with [Mr Z’s] dog”* and *“didn’t swear or anything”*.
31. Officer B told the Authority that the Shar-Pei attacked the Police dog three times.
32. When the Shar-Pei continued to circle the backyard ignoring Mr Z’s commands, and attempts to control it, Officer C decided to use OC spray to try to get it under control. The spray had immediate effect and Mr Z was able to secure his dog. Officer C said that Mr Z was *“nowhere near the spray and wouldn’t have got sprayed as a result of the incident”*.
33. Officer C told the Authority that he explained the after-care procedure to Mr Z, which was to wash his dog’s face with cold water. He said that Mr Z was cooperative and acknowledged understanding the advice. Officer C said that he told Mr Z that there was no need to take his dog to the vet, and said that he did not witness anything that would indicate that the Shar-Pei was suffering from the spray.
34. Officer A said that, before Officer C used his spray, he drew his Taser, thinking that he may have to use it to control the Shar-Pei. Officer A said that the Taser was not turned on or pointed at Mr Z or his dog; he just held it in his hand ready to use. Mr Z acknowledged this to Police when he made his complaint.
35. Once the Shar-Pei was under control, Officer B again told Mr Z that Police needed to search his flat under the Search and Surveillance Act. Officer A then appointed Officer D in charge of the search. Officer D said that, he also advised Mr Z that the Police needed to search his house under the Search and Surveillance Act as they were looking for Mr Y, an offender who had allegedly assaulted his partner. Officer D said that Mr Z consented to the Police searching his address saying, *“that’s fine”*, and agreed to hold his Shar-Pei while the Police looked around. Mr Y was not found inside Mr Z’s house.

Mr Y

36. Police located Mr Y a short time later at his mother's address. He was charged with threatening to kill and male assaults female. He was convicted and sentenced to five months imprisonment.

Mr Z's Complaint

37. The next day, on 1 November, Officer A found a note in his in-tray from a constable asking him to visit Mr Z about a complaint. Officer A said that he spoke to Mr Z about the incident and told him that he could not take his complaint as he had attended Mr Z's address on the night. He arranged for another officer to take his statement.
38. On 2 November 2014, Mr Z complained to Police that:
 - 38.1 the Police dog handler pulled open the rear door of his property without announcement;
 - 38.2 the dog handler swore at and kicked his Shar-Pei;
 - 38.3 Police searched his house even though he told them that the alleged offender was not inside;
 - 38.4 there was no need for Police to pepper spray his Shar-Pei in the face;
 - 38.5 Police should have paid for his vet's bill; and
 - 38.6 Police should have apologised for their actions during the search.

Post incident

39. Police immediately acknowledged that Mr Z was an innocent party caught up in a Police operation. Therefore they made numerous attempts to resolve Mr Z's complaint before it was referred to the Authority.
40. Between November 2014 and January 2015, three senior Police officers spoke to Mr Z and apologised to him for the inconvenience of being caught up in a Police operation.
41. Mr Z has not accepted the apologies as he believes that, while Police have apologised for the inconvenience, they have not accepted that officers used excessive force or did anything wrong during the search.
42. In addition, Mr Z wanted the Police to pay for his Shar-Pei's vet bill. However as the dog was not taken to the vet, and there is no vet bill, the Authority has not needed to take this issue further.

THE AUTHORITY'S INVESTIGATION

43. Based on Mr Z's complaint, the Authority's investigation has considered the following issues:
- 1) Was it appropriate for Officer B and his dog to make the first approach to and enter Mr Z's flat?
 - 2) Was Officer B's demeanour and attitude unprofessional and aggressive?
 - 3) Did Police have legal justification to enter Mr Z's flat in search of Mr Y?
 - 4) Was the use of OC spray by Officer C on Mr Z's dog justified in the circumstances?

THE AUTHORITY'S FINDINGS

Issue 1: Was it appropriate for Officer B and his dog to make the first approach to Mr Z's flat?

44. The Police plan was to surround the address and then do a door knock and entry under the Search and Surveillance Act. Officer B went to the rear of the address to make sure that Mr Y did not escape out the back, while Officer A and other officers got into position at the front, side and rear of the house.
45. While Officers A and B agreed to deploy Officer B and his dog to the rear of the address, it was Officer B's decision to take his dog to the back door and open it unannounced. He did not communicate his decision to open the door without knocking to the other officers present.
46. Mr Z told the Authority that there was no knock and the Police officer did not identify himself. Mr Z said that the Police dog immediately started barking which led to his Shar-Pei approaching the Police dog.
47. There is no Police policy which states when a dog handler can take their dog with them to a job. The decision to do so is based on the dog handler's decision making and their perceived level of threat and risk to themselves and the public (see paragraph 72).
48. The Authority is satisfied that Officer B's decision to take his dog from the van to the address was reasonable and justified given Officer B's knowledge of Mr Y's history of violence and the possibility that, if Mr Y was inside, he could run from the flat.
49. However, Officer B knew the address was not Mr Y's and, in the Authority's view, should have considered that there could be innocent people and possibly unsecured animals inside. Given that there were four other officers present, the Authority considers that another officer should have made the initial approach to the door, with Officer B and his dog acting as backup a little further away.
50. The Authority finds that Officer B's unilateral decision to enter Mr Z's property with his dog, without first knocking, in a 'cordon and contain' situation was not good practice and potentially placed other officers in a position of risk.

FINDINGS

Officer B's decision to take his dog with him was reasonable and justified.

Given the plan to cordon and contain the address then knock on the door, Officer B should not have made the unilateral decision to enter the back door of Mr Z's flat with his dog unannounced.

Issue 2: Was Officer B's demeanour and attitude unprofessional and aggressive?

51. Mr Z complained that Officer B swore at him saying, "get that fucking dog out of here" and then kicked his Shar-Pei in the stomach.
52. Officer B told the Authority that he asked Mr Z to get his dog under control but he said he did not swear or kick Mr Z's dog in the stomach.
53. At that time, no other officer was in a position where they could have witnessed Officer B swear or kick the dog.

FINDING

Due to the conflict in evidence, the Authority is unable to make a finding as to whether Officer B used inappropriate language or kicked Mr Z's dog.

Issue 3: Did Police have legal justification to enter Mr Z's flat in search of Mr Y?

54. Mr Z complained that the Police wanted to search his flat even though he told them that the man they were likely looking for had jumped the fence to his neighbour's address.
55. Officers told the Authority that the search was justified on two grounds: firstly, that it was undertaken with Mr Z's consent; and secondly, that it was authorised by section 8 of the Search and Surveillance Act. We will discuss each of these grounds in turn.

Consent search

56. Section 92 of the Search and Surveillance Act states that a Police officer may ask a person to consent to undergo a search of a place to investigate whether an offence has been committed.
57. Section 93 of the Act provides that before conducting a search by consent, the Police officer who proposes to conduct it must advise the person from whom consent is sought of the reason for the proposed search and advise the person that he or she may either consent to the search or refuse to consent to the search.
58. Following the dog fight, both Officer B and Officer D advised Mr Z that Police would search his flat under the Search and Surveillance Act. Officers A, B and D said that, after discussion, Mr Z consented to the Police searching his address.
59. The Authority accepts that Mr Z was told the reason for the search, and may have spoken in a way that led officers to reasonably believe he was consenting. However, there is no evidence that officers told him that he could refuse consent. Indeed, their secondary reliance on section 8 (see paragraph 63) clearly suggests that he in fact would not have been given the right to refuse.

60. The requirements of section 93 of the Search and Surveillance Act were therefore not complied with and any consent search of the house was consequently unlawful.

Section 8

61. Officer B said that as soon as Mr Z came to the door, he told Mr Z that he was a Police officer and that he was looking for a male in connection with a serious assault. He told Mr Z that he was relying on section 8 of the Search and Surveillance Act 2012 to search his flat, however, because of the dog fight, no search was commenced at that point.
62. After the dog fight, both Officer B and Officer D told Mr Z they would be searching his flat under the Search and Surveillance Act.
63. Under section 8 of the Search and Surveillance Act, Police can enter an address without a warrant to search for and arrest a person. To do this Police must have reasonable grounds to suspect that the person has committed an offence punishable by imprisonment for which they may be arrested without warrant, to believe that the person is in the place, and to believe that if entry is not effected immediately the person will leave the place to avoid arrest. All three of these circumstances must be established in order for the search to be lawful.
64. The Authority is satisfied that there was enough information for the Police to arrest Mr Y for assault and threatening to kill; and that the officers reasonably believed Mr Y might be inside Mr Z's flat, and might try to flee. The Authority has therefore concluded that a search under section 8 of the Act was justified.
65. However, section 131 of the Search and Surveillance Act states that a person exercising a search power must announce their intention to enter and search the place and identify themselves by name or unique identifier. If the power is exercised without warrant, they must, before entering, also provide the occupier with the name of the enactment under which the search is taking place and the reason for the search unless it is impracticable to do so.
66. The officers were in uniform and clearly told Mr Z that Police would be searching under the Search and Surveillance Act. But Officer B, who was the first officer to talk to Mr Z about the search, did not identify himself by name, as required by section 131.
67. Officer B accepts that he did not identify himself by name or number as required by the Act. He told the Authority that he intended to and this was simply an unintentional oversight by him due to events unfolding too quickly.
68. The Authority has concluded that as Officer B did not fully meet the requirements of the Search and Surveillance Act, prior to searching the house for Mr Y, the search was unlawful.
69. The Search and Surveillance Act gives Police the power to intrude into people's private spaces when circumstances permit. However, as a balance to this power, the law requires these people to be informed of their rights when such an intrusion occurs.

FINDINGS

As Police did not tell Mr Z that he could refuse to consent to the search, they did not comply with all the requirements of section 92 of the Search and Surveillance Act. Any consent search of Mr Z's house was therefore unlawful.

Police entry and search under section 8 of the Search and Surveillance Act was justified. However, as Officer B did not identify himself by name, the requirements of section 131 of the Act were not fully complied with and the search of Mr Z's house was unlawful.

Issue 4: Was the use of OC spray by Officer C on Mr Z's dog justified in the circumstances?

Law and Policy

70. Section 39 of the Crimes Act 1961 provides that Police can use reasonable force in the execution of their duties such as arrests, where the use of force is necessary to overcome any force used in resistance.
71. The Police *Use of Force* policy provides guidance to Police officers about the use of force. 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.
72. Police policy provides a framework for officers to assess, reassess, manage and respond to use of force situations, ensuring the force is timely, necessary and proportionate given the level of threat and risk to themselves and the public. 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.
73. A key part of an officer's decision to decide when, how, and at what level to use force depends on the actual or potential actions of the people involved, and depends on whether they are cooperative, passively resisting, actively resisting, assaultive or presenting a threat of grievous bodily harm or death to any person. Victim, public and Police safety always take precedence, and every effort must be made to minimise harm and maximise safety.
74. Police policy provides that OC spray can be used in cases of deterring attacking or aggressive animals.

Use of OC spray by Officer C

75. Mr Z told the Authority that he had his Shar-Pei by the chin and was about to pick him up when his dog was unnecessarily pepper-sprayed in the face. He said that he and his Shar-Pei were adversely affected by the OC spray.
76. Officer B told the Authority that the Shar-Pei bit the Police dog three times before Officer C used OC spray to try and control it. Several other Police officers also witnessed Mr Z's dog Shar-Pei attacking the Police dog.
77. Officer C said that he sprayed Mr Z's Shar-Pei in the face with OC spray as a result of its continual attacks on the Police dog. The officer said that he deployed a short burst of the spray into the Shar-Pei's eyes when it ran away from Mr Z and began heading towards Officer B and the Police dog. Officer C said the spray was accurate and had an immediate effect. Officer C said that Mr Z was *"nowhere near the spray and wouldn't have got sprayed as a result of the incident"*.
78. After considering all the evidence, the Authority accepts that the Shar-Pei attacked the Police dog several times. While this was probably a predictable result of the surprise intrusion onto its property, the Shar-Pei had to be brought under control so that the search for Mr Y could progress as soon as possible.
79. The Authority considers that Officer B gave Mr Z sufficient opportunity to get his dog under control before it was sprayed by Officer C. As Police were searching for a dangerous and violent man, it was important for Mr Z's dog to be under control so that a dog fight did not adversely distract them from the Police operation.

FINDING

Officer C's use of OC spray was appropriate and justified.

CONCLUSIONS

80. The Authority has concluded on the balance of probabilities that:
- 80.1 Officer B's decision to take his dog with him was reasonable and justified;
 - 80.2 Given the plan to cordon and contain the address then knock on the door, Officer B should not have made the unilateral decision to depart from the plan and enter the back door of Mr Z's flat with his dog unannounced;
 - 80.3 Due to the conflict in evidence, the Authority is unable to make a finding as to whether Officer B used inappropriate language or kicked Mr Z's dog;
 - 80.4 As Police did not tell Mr Z that he could refuse to consent to the search, they did not comply with all the requirements of section 92 of the Search and Surveillance Act. Any consent search of Mr Z's house was therefore unlawful;
 - 80.5 Police entry and search under section 8 of the Search and Surveillance Act was justified. However, as Officer B did not identify himself by name, the requirements of section 131 of the Act were not fully complied with and the search of Mr Z's house was unlawful; and
 - 80.6 Officer C's use of OC spray was appropriate and justified.



Judge Sir David Carruthers

Chair
Independent Police Conduct Authority

26 November 2015

IPCA: 14-1056

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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