

*Independence*

*trustworthiness*

*accountability*

*vigilance*

*integrity*

Fatal Police Shooting of Lachan  
Kelly-Tumarae

October 2013



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October 2013

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# Contents

INDEPENDENT POLICE CONDUCT AUTHORITY

Introduction .....	3
Executive Summary .....	7
Background.....	11
The Authority’s Investigation .....	23
The Authority’s Findings.....	25
Issue 1: Did the Police comply with the law and relevant policies in commencing and continuing their pursuit of Mr Kelly-Tumarae? .....	25
Issue 2: Did the Police comply with all relevant policies and best practice in their tactical response and incident control up to the time they arrived at Taihape Road? .....	28
Issue 3: Were the Police justified in arming themselves in response to this incident, and did they comply with all procedures for arming? .....	35
Issue 4: Did the Police comply with policy and good practice when they stopped behind Mr Kelly-Tumarae outside the cemetery? .....	37
Issue 5: Was Officer F justified in shooting at Mr Kelly-Tumarae? If so, was the number of shots fired justified? .....	41
Issue 6: Were other tactical options available and considered before Officer F used his firearm? .....	55
Issue 7: Was all reasonable assistance given to Mr Kelly-Tumarae after he was shot? .....	57
Issue 8: Following the shooting, was the scene kept secure in order to preserve evidence for subsequent investigations? .....	58

Issue 9: Was the Police criminal investigation conducted in a thorough and professional manner?	59
Issue 10: Was the Police’s liaison with Mr Kelly-Tumarae’s family adequate during and after the criminal investigation?	60
Issue 11: Were the Eastern District’s policies and procedures for firearms security and auditing adequate and complied with?	62
Issue 12: Were the firearms and related equipment used in this incident in good working order?	63
Issue 13: Did Police take all available opportunities to address pursuit management and incident control issues arising from this incident?	64
Conclusions	65
Recommendations	69
Appendix 1: Applicable Law and Policies	71
Appendix 2: Diagrams	79



# Introduction

INDEPENDENT POLICE CONDUCT AUTHORITY

1. At 1.56am on Sunday 28 March 2011 in the small settlement of Omahu, west of Hastings, a Police officer acting in the execution of his duty fatally shot 19-year-old Lachan Kelly-Tumarae.
2. The shooting occurred after a vehicle pursuit. At the time of the shooting Mr Kelly-Tumarae was carrying a firearm.
3. The Police notified the Independent Police Conduct Authority of the shooting, and the Authority conducted an independent investigation.
4. The Police carried out a separate homicide investigation, which determined that no criminal charges should be laid against the officer who fired the shots.
5. The Authority's investigation considered matters of Police conduct, and compliance with relevant laws and Police policies, practices and procedures. This report sets out the results of that investigation, and makes findings and recommendations.

## Glossary of terms

Abbreviation/term	Explanation
AOS	Armed Offenders Squad
CentComms	Police Central Communications Centre
Dispatcher	A communications centre staff member who receives information and assigns Police units under the supervision of a communications centre team leader and the shift commander
ESR	Institute of Environmental Science and Research
Field commander	A field officer formally designated as the incident controller in accordance with Police Radio Protocols
Incident controller	The officer responsible for managing the Police response to an incident, including forming and communicating the tactical response. Under Police radio protocols, the communications centre shift commander is the incident controller until that role is formally handed to a field commander.
Non-compliant vehicle stop	Using Police cars to force a vehicle to stop. This tactic can only be approved by Armed Offenders Squad (AOS) or Special Tactics Group (STG) commanders, and can only be carried out by AOS or STG staff who are trained in its use and are responding to a life-threatening incident.
PNT	Police Negotiation Team
Pursuit controller	The communications centre shift commander, who under the Police fleeing driver policy is responsible for overseeing Police pursuits.
Radio Protocols	The Police policy setting out communication requirements and incident control roles, responsibilities and procedures – see paragraphs 308-316 for detail.
Safe forward point	A gathering point where officers can meet, receive instructions and be allocated roles and equipment.
Shift commander	The senior officer at a Police communications centre, usually ranked Inspector.
STG	Special Tactics Group
TDD	Tyre Deflation Device; i.e. road spikes

## Index of officers

FIELD STAFF			
Officer	Vehicle	Rank/role	Nature of involvement
<b>Officer A</b>	Single crewed	Acting Sergeant	Napier shift supervisor. Heard that a shotgun had been pointed at Officer C at about 1.38am. Instructed Officers B, C, D and E to meet at a safe forward point and arm themselves. Subsequently joined the pursuit and gave instructions to other officers. Arrived at the cemetery unarmed, after Mr Kelly-Tumarae had been shot.
<b>Officer B</b>	Driver	Constable	At about 1.38am, reported that Mr Kelly-Tumarae had pointed a shotgun directly at Officer C. Subsequently led a pursuit until Officer F took over as the primary pursuit vehicle. Third Police vehicle to arrive at the cemetery, behind Officer F and Officers K and L. These officers were unarmed.
<b>Officer C</b>	Passenger	Constable	
<b>Officer D</b>	Driver	Constable	Joined the pursuit before stopping to arm themselves on Officer A's instructions. Subsequently rejoined the pursuit but were not among the lead Police vehicles and arrived at the cemetery after Mr Kelly-Tumarae had been shot.
<b>Officer E</b>	Passenger	Constable	
<b>Officer F</b>	Single crewed	Constable	Heard that a shotgun had been pointed at Officer C. Armed himself and joined the pursuit, becoming the primary pursuit vehicle. First Police vehicle to arrive at the cemetery. Parked behind Mr Kelly-Tumarae's car. Shot Mr Kelly-Tumarae.
<b>Officer G</b>	Driver	Sergeant	Officer G was the Hastings shift supervisor and discussed tactics with the CentComms shift commander. Joined the pursuit but was not among the lead Police vehicles and arrived at the scene after Mr Kelly-Tumarae had been shot.
<b>Officer H</b>	Passenger	Constable	
<b>Officer I</b>	Driver	Constable	These officers were instructed to lay road spikes to stop Mr Kelly-Tumarae on the Napier-Hastings Expressway. However before they could do that he turned off the highway and stopped at the cemetery.
<b>Officer J</b>	Passenger	Constable	
<b>Officer K</b>	Driver	Constable	Joined the pursuit after arming themselves. Became the secondary pursuit vehicle after Officer F took over as the primary vehicle. Arrived at the cemetery shortly after Officer F and parked beside Mr Kelly-Tumarae's car. Mr Kelly-Tumarae pointed his shotgun at Officer L before running towards the cemetery.
<b>Officer L</b>	Passenger	Constable	
OTHER STAFF			
Officer		Rank	Nature of involvement
<b>Shift commander</b> Central Communications Centre		Sergeant	As shift commander, it was his responsibility to act as the incident controller, taking command and communicating a plan of action to the officers in the field. The shift commander is normally an inspector but at the time of this incident a sergeant was acting in the role.

<b>Officer M</b> Officer in charge of Hawkes Bay AOS	Sergeant	Officer M was woken by a call from the Central Communications Centre at about 1.42am. He decided to activate the AOS but had not done so before Mr Kelly-Tumarae was shot.
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# Executive Summary

INDEPENDENT POLICE CONDUCT AUTHORITY

6. Sometime between 11.30pm on 27 March 2011 and 1.00am the following morning, Lachan Kelly-Tumarae, aged 19, left his maternal grandmother's Flaxmere home in her car, taking his deceased grandfather's shotgun and cartridges. Mr Kelly-Tumarae, who earlier in the evening had consumed alcohol and cannabis, visited a friend's house. Soon afterwards he was seen in Maraenui by two Police officers who were out driving on a routine patrol (Officers B and C). The officers saw Mr Kelly-Tumarae in a suburban street, crouching down beside a car. When they stopped to check what was happening, he pointed the shotgun directly at them.
7. The officers sped away and informed the Police Central Communications Centre. Shortly afterwards, Mr Kelly-Tumarae drove off in his grandmother's car, beginning a vehicle pursuit in which several Napier and Hastings Police patrols followed him. One of those officers was Officer F, who had stopped to arm himself before joining the pursuit.
8. After a lengthy pursuit, Mr Kelly-Tumarae stopped his car outside the Omaha marae *urupā* (cemetery). Officer F stopped about 14.5 metres behind him, intending to remain under the cover provided by his Police vehicle and to contain Mr Kelly-Tumarae until the Armed Offenders Squad arrived and could take over. Two other officers (Officers K and L) then arrived and stopped their car directly beside Mr Kelly-Tumarae's.
9. Mr Kelly-Tumarae got out of his car carrying the shotgun and wearing an ammunition belt of cartridges. He pointed his shotgun directly at Officers K and L in their car. He then turned and ran in Officer F's direction before turning again and running along the rear of his car towards the cemetery. Officer F, who was carrying a loaded Glock pistol, stepped out from behind the door of his Police vehicle and called "*Armed Police*".
10. According to Officer F, Mr Kelly-Tumarae then turned to face him and lifted and pointed the shotgun at him. Believing his life was in immediate danger, Officer F fired a volley of shots at Mr Kelly-Tumarae. When he saw that Mr Kelly-Tumarae was still standing and facing him, he fired another volley. He stopped firing when he saw Mr Kelly-Tumarae fall to the ground. An ambulance was called and Mr Kelly-Tumarae died later in hospital.

11. Although Officer F recalled Mr Kelly-Tumarae directly facing him with the shotgun raised throughout the shooting sequence, forensic evidence and the statements of other officers suggest that Mr Kelly-Tumarae was facing towards Officers K and L at the time he was shot. The Authority has considered this and other evidence in coming to its conclusions.
12. Officer F discharged 14 rounds in total from his Glock pistol. Four of the bullets wounded Mr Kelly-Tumarae and another bullet appears to have passed through his clothing without injuring him. The other nine bullets do not appear to have come into contact with Mr Kelly-Tumarae.

### **Authority conclusions**

13. Officer F was justified in firing at Mr Kelly-Tumarae, and in the number of shots fired. Throughout the firing sequence, Officer F genuinely believed that his life was under immediate threat and it was necessary to shoot in order to defend himself. Although the forensic evidence indicates that Mr Kelly-Tumarae was not directly facing Officer F at the time he was shot, in the Authority's view this can be explained by a range of factors, including: the speed with which events unfolded; the fact that both Officer F and Mr Kelly-Tumarae were moving as the shots were fired; the impact of stress on Officer F's perceptions; and the possibility that Mr Kelly-Tumarae was not immediately incapacitated by his wounds. The force Officer F used was not excessive.
14. Although Officer F was justified in firing, other aspects of the Police response to Mr Kelly-Tumarae did not comply with relevant policies or meet the required standards of good practice. The Armed Offenders Squad was not activated as quickly as it should have been. During the pursuit there was a lack of clarity about who was in charge, and about the tactics to be used. At times officers acted instinctively, in ways that were contrary to the disciplined and cautious approach advocated by Police policy, which seeks to cordon and contain armed offenders where possible rather than confronting them directly.
15. There were also breaches of policy on the management and carriage of firearms. An outdated policy meant that some of the Police patrol cars that responded should not have been carrying firearms. One of the officers who responded also should not have been carrying firearms. Officer F did not put on body armour even though the policy required him to. The Authority's investigation also found deficiencies in the Eastern District's management and auditing of firearms and ammunition prior to the shooting.
16. In drawing these conclusions, the Authority acknowledges that the principal responsibility for the way events unfolded on 28 March 2011 lay with Mr Kelly-Tumarae himself. He armed himself and deliberately engaged with and threatened Police before and after the pursuit. He initiated, and for the most part controlled, the sequence of events that were to end tragically with the loss of his life.

17. The Authority found that all reasonable and appropriate medical assistance was afforded to Mr Kelly-Tumarae by the Police after he was shot.
18. However there was room for improvement in respect of the Police's communication with Mr Kelly-Tumarae's family following the shooting and during the Police criminal investigation, particularly in respect of their failure to explain the numerous holes in Mr Kelly-Tumarae's clothing at the time it was returned to the family in December 2011.

### **Section 27 opinion**

19. Section 27(1) of the Independent Police Conduct Authority Act 1988 (the Act), requires the Authority to form an opinion as to whether or not any act, omission, conduct, policy, practice or procedure that was the subject-matter of an investigation was contrary to law, unreasonable, unjustified, unfair or undesirable.
20. The Authority has formed the opinion, pursuant to section 27(1) of the Act, that the following actions were undesirable:

#### *Pursuit and initial tactical response*

- i) The CentComms shift commander's failure to assert his role as incident controller, and to communicate a clear tactical plan.
- ii) The shift commander's decision to stop Mr Kelly-Tumarae using road spikes when there was no plan in place to safely contain him.
- iii) Officer M's delay in activating the Armed Offenders Squad.
- iv) Officer F's failure to put on ballistic body armour when arming himself.
- v) Officer L's decision to arm himself when he did not have the required certification.

#### *Tactical options at Taihape Road*

- vi) Officer F stepping out from the cover provided by his vehicle, instead of remaining under cover and appealing to Mr Kelly-Tumarae from a position of safety.

#### *Scene security*

- vii) Officer K moving his vehicle, and Officer F removing items from his vehicle, following the shooting.

#### *Family liaison*

- viii) The Police's failure to:
  - appoint an iwi liaison officer to liaise with Mr Kelly-Tumarae's family;

- comply with best practice regarding the return of Mr Kelly-Tumarae’s clothing to his family; and
- provide a full explanation about the causes of the holes in Mr Kelly-Tumarae’s clothing at the time the clothing was returned.

21. The Authority has also formed the opinion, pursuant to section 27(1) of the Act, that the following action was unreasonable and unjustified:

*Pursuit and initial tactical response*

- i) Officers K and L pulling up beside Mr Kelly-Tumarae’s car at Taihape Road.

**Section 27(2) recommendations**

22. Pursuant to Section 27(2) of the Act, the Authority recommends that Police:

- 1) Audit district policies in respect of patrols authorised to carry firearms, ammunition and associated equipment.
- 2) Standardise (either at district level or nationally) processes for auditing and documenting firearms, ammunition and associated protective equipment.
- 3) Amend policy to require non-certified officers who are instructed to carry firearms (e.g. when responding to an incident involving an armed offender) to advise the incident controller as soon as practicable that they are not certified.
- 4) Continue developing, as a matter of urgency, policy and procedures for compulsory drug and alcohol testing of officers involved in critical incidents.



# Background

INDEPENDENT POLICE CONDUCT AUTHORITY

## SUMMARY OF EVENTS

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### Events before Mr Kelly-Tumarae came into contact with Police

23. On the afternoon and evening of Saturday 27 March 2011 Lachan Kelly-Tumarae and a friend visited two addresses in Flaxmere. At one of these addresses they smoked cannabis. By the time Mr Kelly-Tumarae was dropped off at his grandmother's Flaxmere home at 11.30pm the two had between them drunk 24 cans of ready-to-drink alcohol.
24. Mr Kelly-Tumarae briefly spoke to his grandmother before disappearing towards his bedroom. His grandmother said that although she smelt alcohol on him, her grandson nevertheless appeared "*calm and peaceful*".
25. Within the next two hours, and unknown to anyone living at the house, Mr Kelly-Tumarae took his late grandfather's double-barrel shotgun, an ammunition belt and two boxes of shotgun ammunition from the garage. He put these in his grandmother's 1997 Nissan Primera station wagon and, without her permission, drove away.
26. At about 1.00am Mr Kelly-Tumarae drove to a nearby address and spoke to a man who lived there. Mr Kelly-Tumarae was looking for a female friend who also lived there, but was told she was asleep.
27. The man later said that Mr Kelly-Tumarae was on his own, was not drunk and "*seemed normal*". Mr Kelly-Tumarae left in the Primera.

### Police officers on duty

28. A total of 13 general duties Police officers were on duty in Napier and Hastings at the time of this incident. The table on page 5 lists those who were directly involved in the Police response to Mr Kelly-Tumarae.
29. All of the general duties officers involved in this incident had access to Glock pistols, M4 rifles, and ammunition locked in firearm safes in their vehicles. To arm themselves, the officers had to stop their patrol cars, open the safe (using a key on the car key ring) and

go through a prescribed arming process which includes putting on a ballistic armour vest. All of these officers also carried other equipment such as torches, batons, and handcuffs. Some of the patrols carried tasers.

### Initial report of a firearm and Police response

30. At about 1.38am on Sunday 28 March 2011, Officers B and C were driving on Wordsworth Crescent in the Maraenui area of Napier when Officer C noticed the silhouette of a person crouched down beside a dark-coloured station wagon on the grass verge. When the officers stopped to check, a man now known to be Mr Kelly-Tumarae rose up from beside the station wagon and walked towards the Police car carrying something in one hand.

31. Officer C, who was the passenger in the patrol car, then saw Mr Kelly-Tumarae approach his window and aim a shotgun at him. According to the officer's Police statement:

*"... the muzzle of the gun would have only been five centimetres from my passenger's window. And he's pointed the gun directly at my chest in a manner that he was actually aiming. He was looking down the gun and staring as if he was lining me up to take a shot."*

32. Officer B described hearing Officer C say: "he's got a gun, go, go go go". Officer B said she "put [her] foot to the floor", and as she did so looked around and saw Mr Kelly-Tumarae pointing a gun towards Officer C's chest.

33. As Officer B drove away at speed, Officer C radioed the Police Central Communications Centre (CentComms), reporting the incident and giving a description of the offender.

34. Officer A was on patrol nearby. On hearing this transmission he immediately directed two Napier patrol cars (Officers B and C, and Officers D and E) to meet him at a safe forward point about one kilometre away at the intersection of Geddis Avenue and Latham Street. Officer A also told the officers to arm themselves on arrival at the safe forward point, and said that General Instruction F061 – the Police policy on use of firearms – applied. In that same transmission Officer A asked CentComms to note his instructions.

35. Officer F, who was just over 20 kilometres way in Flaxmere with Officers G, H, K and L, immediately told CentComms that he was on his way to Napier in his single-crewed Police vehicle. Officer F also asked CentComms to ring the officer in charge of the Hawkes Bay Armed Offenders Squad (AOS), Officer M. Officer F has been with Police since 1995.

### The pursuit

36. While Officers B and C were driving north on Geddis Avenue towards the safe forward point, they noticed a car approaching them at speed from behind. They slowed down and the other car came up very close behind them. Based on the driver's clothing, they

suspected that he was the person who had pointed the shotgun at them, so they again drove off at speed and advised CentComms.

37. The car that was behind them (the Primera driven by Mr Kelly-Tumarae) turned left into Bledisloe Road. The officers continued driving towards the safe forward point, but soon afterwards they saw the Primera turn from Hillary Crescent into Geddis Avenue, in front of their car. Mr Kelly-Tumarae sped past the safe forward point where Officers A, D and E had just arrived and were in the process of unlocking the firearm safes in their cars.
38. Officers B and C started to follow the Primera, believing that the driver was the person they had encountered earlier. Officer A and Officers D and E also followed. None of these officers had had time to arm themselves. As it became clear that the driver of the Primera was the person Officers B and C had encountered, the patrols activated their red and blue warning lights. Officers B and C did this on Wyatt Avenue, a short distance after the safe forward point.
39. Though there was a lot of radio traffic and CentComms was not certain that a pursuit had commenced, the dispatcher broadcast the standard pursuit warning required by Police policy: *"If there's any unjustified risk to any person, you're to abandon this pursuit immediately, acknowledge that?"* Officer C acknowledged the warning, and provided information about the Primera, the road conditions and other risk factors – also as required by Police policy.
40. At about this time the three Hastings patrols (Officers F, G and H, and K and L) had armed themselves and started travelling towards the Maraenui area via different routes.
41. The pursuit continued through several suburban Napier streets (see the map of the pursuit route at the back of this report). Although Mr Kelly-Tumarae at times drove erratically and for a period had his headlamps off, he generally stayed within the 50 kph speed limit during this part of the pursuit. Officer C told CentComms that he and Officer B were *"keeping [their] distance due to ... the weapon"*.
42. When the Primera turned from Harold Holt Avenue into Ulyatt Road, a semi-rural area with a 100 kph limit, it slowly increased speed before suddenly slowing down. At about this time Mr Kelly-Tumarae started making hand gestures out the window, apparently encouraging Officers B and C to drive up alongside him. Officer C told CentComms they were now sure the driver was in fact the person who pointed the firearm at them earlier.
43. While Officers B and C continued to be the lead pursuit vehicle, Officers D and E, on the direction of Officer A, stopped on Ulyatt Road to arm themselves. Officer A's plan was that once they were armed Officers D and E would take over as lead pursuit vehicle.
44. By this time CentComms, on the shift commander's instruction, had made telephone contact with Officer M, the off-duty officer in charge of the Hawkes Bay AOS, asking for

the AOS to be activated. As the incident controller, the shift commander's intention was to have armed officers follow the Primera until the AOS could take over. CentComms subsequently informed the officers in the field that the AOS was at least 30 minutes away.

45. The pursuit continued from Tannery Road into Meeanee Road. By the time it reached the junction of Meeanee Road and the Napier Hastings Expressway (State Highway 50) the pursuit had gone on for eight minutes and travelled a distance of 6.5 kilometres with an average speed of 48 kph. At this location Officer F, after arming himself earlier, joined in the pursuit, initially as the third patrol car behind Officers B and C and Officer A. Also at this location, Officers B and C activated their siren for the first time.
46. As he travelled south along the Expressway, Mr Kelly-Tumarae increased his speed to 160 kph. He then turned right into Links Road. At about this time Officer F moved past Officer A and became the secondary unit behind Officers B and C, and Officers K and L joined the pursuit behind Officer A.
47. Soon afterwards Mr Kelly-Tumarae appeared to slow down deliberately until the patrol cars caught up; he then sped off again and turned left into Korokipo Road. At about this time Officer A directed Officers K and L to move forward and take over from Officers B and C as the lead pursuit vehicle. Officer A's reasoning was that Officers K and L were armed, whereas Officers B and C were not.
48. Officer A also asked Officer F to confirm that he was armed. Officer F said he was, then asked Officers B and C to pull over and *"let me pass ... put some firearms ahead of you"*. Officers B and C pulled over, leaving Officer F as the lead pursuit vehicle followed by Officers K and L. Officers B and C were then about 50 metres further back, followed by Officer A. Further back still were Officers G and H, followed by the last of the Napier patrol units, Officers D and E.
49. Mr Kelly-Tumarae continued along Korokipo Road, reaching speeds of up to 160 kph. Following discussion with officers in the field, the CentComms shift commander gave an instruction that, if possible, road spikes should be used to stop Mr Kelly-Tumarae's car. Officer G then instructed Officers I and J to lay spikes at Fernhill Bridge. Before that could happen, Mr Kelly-Tumarae braked and turned right into Taihape Road. He stopped on the left about 45 metres up that road, just outside the main entry into the Omahu marae *urupā* (cemetery).
50. The entire pursuit lasted approximately 13 minutes and 55 seconds, covering a total distance of 18 kilometres. Mr Kelly-Tumarae's average speed over the last five kilometres was 138 kph.



### The shooting

51. Officer F followed Mr Kelly-Tumarae into Taihape Road and stopped his Police vehicle about 14.5 metres behind the Primera on the left-hand side of the road (see the scene diagram at Appendix 2.3).
52. Once stopped, Mr Kelly-Tumarae grabbed the double barrel shotgun and before he got out of the car he discharged the shotgun once, inside the Primera. This shot, which appears to have been accidental, went through the front passenger floor. Officer F did not see or hear this shot.
53. Officer K drove past Officer F's stationary vehicle and stopped his patrol car almost parallel to the Primera, with the front of the patrol car about a metre away from and in line with the Primera's driver's door. His reasons for parking in this position are addressed in paragraphs 153-161.
54. Mr Kelly-Tumarae stepped out of the Primera's driver's door. He was carrying the shotgun and wearing the ammunition belt which was later found to contain 19 live shotgun rounds. At this stage Officer F was getting out of his vehicle, and the patrol car carrying Officers B and C was coming to a stop behind Officer F's wagon.
55. As Mr Kelly-Tumarae got out of the Primera he turned towards Officer K and L's patrol car and pointed the shotgun directly at Officer L in the front passenger seat, but did not fire. He then turned and started running towards the back of the Primera. According to the statements from officers at the scene, at this time he was carrying the shotgun horizontally at about waist level, with both hands, pointing it in front of him in Officer F's direction.
56. Officer F said he began to draw his Glock pistol and stepped out to the right of his opened driver's door. As he did so, Mr Kelly-Tumarae turned and ran along the rear of the Primera towards the cemetery. Officer F called out to him, "Armed Police". At this point, according to Officer F, Mr Kelly-Tumarae had reached the area by the left rear lights of the Primera, and was facing the cemetery. Mr Kelly-Tumarae then turned and faced Officer F, bringing the shotgun up from waist to lower chest level and pointing it at the officer. Officer F, in his statement to Police, said he believed that Mr Kelly-Tumarae was going to shoot him. He immediately discharged a volley of shots from his Glock pistol.
57. Mr Kelly-Tumarae remained standing, facing Officer F with the shotgun in the same position. Officer F said he believed Mr Kelly-Tumarae had not been hit and was still a threat. The officer looked at his pistol and realised he was aiming low. He raised the pistol and fired another volley of shots. Mr Kelly-Tumarae then moved towards the cemetery, dropped the shotgun, and stumbled three to four metres before falling onto the grass.

58. Officer F later said that the time from Mr Kelly-Tumarae getting out of the car to him falling onto the grass would have been 10 seconds at most, and the gap between the two volleys of shots was no more than a split second. The officer's statements are considered in more detail in paragraphs 172-197, where the Authority considers the justification for him shooting Mr Kelly-Tumarae.
59. Officer F was the only officer to use his firearm in this incident. While he later recalled firing three to four shots in the first volley and four to five in the second, in fact he discharged 14 rounds in total from his Glock pistol.
60. At the time the shots were fired Officer L was still in the front passenger seat of his patrol car. The driver, Officer K, had his feet on the ground but was also still in the car. By the time both of these officers were out of the car, Mr Kelly-Tumarae was on the ground. They drew their firearms and approached him.
61. Officers B and C also got out of their car. Both of these officers later recalled having seen Mr Kelly-Tumarae pointing his shotgun towards Officers K and L at the time he was shot. Their statements are considered in paragraphs 199-211. Forensic evidence also indicates that at the time he was shot Mr Kelly-Tumarae was not directly facing Officer F; this is discussed further in paragraphs 82-85 and 214-216.
62. Officer A was the next person to arrive on the scene. He drove past the first two patrol cars and stopped between the Primera and Officer F's Police vehicle. He saw Mr Kelly-Tumarae on the ground and told Officers F, K and L that he was moving forward to arrest Mr Kelly-Tumarae. As he was doing this, he noticed that Mr Kelly-Tumarae was bleeding heavily. He called for an ambulance and administered first aid in an attempt to control the bleeding.
63. The ambulance then arrived and transported Mr Kelly-Tumarae to Hawke's Bay Hospital, where he died at 3.05am.

#### LACHAN KELLY-TUMARAE

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64. At the time of his death Mr Kelly-Tumarae was 19 years old and living with his maternal grandmother and other family members. Mr Kelly-Tumarae had lived with his maternal grandparents for most of his life, and had been very upset when his grandfather passed away some 16 months earlier.
65. Mr Kelly-Tumarae had finished school at the age of 14 years and had begun associating with the local street gangs. For a period he was a Mongrel Mob prospect, but at the time of his death his family believed he had severed all links with gang life.

66. In 2010 he completed a Defence Service limited service volunteer course and decided he wanted to either join the army or become a truck driver. He moved to Christchurch that year, partly to resist the temptation of gang life. He got a job there and continued with his studies and training, but on 13 March 2011 he returned to Flaxmere after media speculation that Christchurch was about to be hit by another substantial earthquake.
67. Neither the Police nor the Authority knows why Mr Kelly-Tumarae stopped outside the *urupā*. He was culturally and historically linked to it; members of his extended and immediate families, including his sister and grandfather, were buried there. His grandmother said that her husband was a father figure to their grandson and had great influence over him. She also said that Mr Kelly-Tumarae appeared “*quite sad*” while the family was discussing plans for unveiling his grandfather’s headstone, and that he had been texting his cousin about the unveiling and “*getting angry about the way [she] was asking about things.*”

#### POLICE CRIMINAL INVESTIGATION

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68. After the shooting, Police began a homicide investigation managed by a Detective Inspector from outside the Eastern District, with oversight by a Detective Superintendent also from outside the district. Investigators from outside the district were also seconded to assist local staff during the investigation.
69. The investigation included interviews with all officers involved, as well as a small number of independent witnesses. It also included scene examinations, and reports on ballistics, pathology, and toxicology.

#### Independent witnesses

70. Five members of the public reported that they heard shots fired, but none of them saw the shooting. The witness statements were consistent with a single shotgun blast followed very soon afterwards by several shots from the Glock.

#### Firearms

71. The shotgun carried by Mr Kelly-Tumarae and the Glock pistol used by Officer F were examined by a Police armourer.
72. The armourer found that the Glock was functioning correctly except that the Trijicon HD™ foresight (a small vial containing a chemical compound which glows in the dark, assisting with shooting in low light conditions) was not functioning, because the chemical compound was defective.
73. At the time Mr Kelly-Tumarae was shot, the shotgun had one live round in the top barrel and one spent round in the bottom barrel. Although it appears that the round fired in Mr

Kelly-Tumarae's car was accidental, the armourer did not find any defects which might have caused the gun to go off unintentionally.

### Scene examination

74. A total of 14 spent Glock cartridges were recovered from the general area to the front and slightly to the right of Officer F's vehicle (see the scene diagram at Appendix 2.4). Five of the cartridges were found near the front right side of Officer F's patrol car, two more were found slightly further away from the patrol car, and another seven were found in the general area half-way between the patrol car and the Primera. The closest cartridge was 3.3 metres from the driver's door and the farthest was 12.7 metres away, some 4.1 metres from the back of the Primera. Some of these cartridges may have been disturbed by the arrival of Police vehicles at the scene after Mr Kelly-Tumarae was shot (see the scene diagram at Appendix 2.5).
75. Mr Kelly-Tumarae's shotgun and ammunition belt were recovered from the scene, along with other items such as his hat and glasses.

### Vehicle examinations

76. When the Primera was searched, it was found to contain two boxes of shotgun ammunition with 25 rounds in each, as well as two live rounds on the driver's seat and two spent rounds on the passenger's seat. There was a hole in the front passenger floor well, later found to be caused by a close-range discharge of the shotgun.

### Post-mortem examination

77. The post-mortem examination of Mr Kelly-Tumarae was undertaken at Palmerston North Hospital by a qualified and registered medical practitioner and pathologist. The pathologist recorded four gunshot wounds:
- one on the side of the **right lower chest wall** – this shot did not exit (referred to below as wound 1);
  - one to the **front and side of the right thigh** (referred to below as wound 2);
  - one to the **right lower leg** (referred to below as wound 3); and
  - laceration wounds on Mr Kelly-Tumarae's **left second and third toes** (referred to below as wound 4).
78. The pathologist recorded the cause of death as *“gunshot wounds to the abdomen and right leg”*.

## Toxicology

79. The levels of alcohol detected in Mr Kelly-Tumarae's ante-mortem and post-mortem samples taken at the hospital were 205 milligrams and 169 milligrams per 100 millilitres of blood, respectively. At the time of the shooting, the legal blood alcohol limit for a driver under the age of 20 years was 30 milligrams of alcohol per 100 millilitres of blood. Tetrahydrocannabinol (4 micrograms per litre) was found in Mr Kelly-Tumarae's post-mortem sample, indicating recent use of cannabis.
80. No blood sample was taken from Officer F. However, there is no evidence to suggest that he was under the influence of alcohol or drugs at the time of this incident. Officer F told the Authority that he would have been happy to provide a blood sample but was not asked to do so.

## Institute of Environmental Science & Research Report

81. An Institute of Environmental Science and Research (ESR) forensic scientist attended the post mortem examination, and examined a variety of items including Officer F's Glock pistol, Mr Kelly-Tumarae's shotgun and clothing, and pellets and projectiles recovered from the scene.

## Wounds

82. In the ESR forensic scientist's opinion Mr Kelly-Tumarae was struck by four shots. Although the wounds are numbered 1-4, it is not possible to determine the order in which they were fired or struck Mr Kelly-Tumarae:
- **Wound 1** struck the right side of Mr Kelly-Tumarae's chest, between the armpit and waist: *"As viewed with Mr Kelly-Tumarae standing upright, this shot went slightly forwards and downwards across his torso, to the left side of his abdomen ...."*
  - **Wound 2** *"entered the outer aspect of the front of right leg. This shot travelled across his leg in a slightly upwards and rearwards direction. This shot exited the inner aspect of his right leg."*
  - **Wound 3** *"entered the inner aspect of his right leg, below the knee, travelling up and across his leg, exiting the outer aspect of right leg, above the knee."*
  - **Wound 4** entered the outside of Mr Kelly-Tumarae's left foot. Based on the size of the entry wound, the ESR forensic scientist concluded that the shot had struck something else before a fragment entered Mr Kelly-Tumarae's toe.
83. The Authority subsequently sought further information from the ESR forensic scientist about the angle at which each of these shots entered Mr Kelly-Tumarae's body and the

direction he was facing towards when each shot was fired. The ESR forensic scientist's responses are explained in paragraphs 214-216.

### Clothing

84. The ESR forensic scientist examined Mr Kelly-Tumarae's t-shirt, singlet, track pants, and shoes. He identified nine holes as being caused by bullets or fragments thereof. These included: one hole in the chest area of the t-shirt and one in the singlet (consistent with **wound 1**); two holes just below the right pocket of the tracksuit pants (consistent with entry and exit points from **wound 2**); two holes – above and below the knee – in the right leg of the pants (consistent with entry and exit points from **wound 3**); a hole through the left shoe (**wound 4**); and two holes on the lower right leg of the tracksuit pants, which were possibly from a fragment of the bullet that caused **wound 4**.
85. In addition, the ESR forensic scientist found four holes in a horizontal line across the back left side of the t-shirt. He concluded: *"These may be from a bullet passing through folds in the t-shirt. There are no corresponding holes in the singlet or body. If a bullet hole, the bullet has passed across his back entering only the t-shirt which would be loose at the back."*
86. Altogether nine holes in the clothing were caused by four bullets, and another four holes may have been caused by one bullet. It is likely that the remaining nine bullets that were fired by Officer F did not come into contact with Mr Kelly-Tumarae.

### **Consideration of criminal liability**

87. After an internal legal opinion was considered, the Police determined that Officer F was justified in shooting Mr Kelly-Tumarae. The basis of the decision was that Officer F was protected by sections 39 and 48 of the Crimes Act, which provide justifications for using force to carry out an arrest or in self-defence. In the Police view, the officer's use of the firearm was proportionate to the threat and the only means available to defend himself; the danger was immediate; and he had no other tactical option available to deal with the threat.
88. On 7 May 2012 the Police met Mr Kelly-Tumarae's family and advised them that no criminal charges would be laid against Officer F.
89. After the Authority had sought further information from the ESR forensic scientist about the angle at which the shots entered Mr Kelly-Tumarae's body, it provided that information to Police, giving Police the opportunity to re-evaluate their decision about prosecution. The Police advised that their original decision remained.

#### CORONER'S INQUIRY

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90. The Authority has been in regular contact with the Coroner. The Coroner has advised that he will hold a hearing at the conclusion of the Authority's investigation and after the release of its public report.







# The Authority's Investigation

INDEPENDENT POLICE CONDUCT AUTHORITY

## THE AUTHORITY'S ROLE

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91. Under the Independent Police Conduct Authority Act 1988, the Authority's functions are to:
- receive complaints alleging misconduct or neglect of duty by any Police employee, or concerning any practice, policy or procedure of the Police affecting the person or body of persons making the complaint; and to
  - investigate, where it is satisfied there are reasonable grounds for doing so in the public interest, incidents in which a Police employee acting in the execution of his or her duty causes, or appears to have caused, death or serious bodily harm.
92. Under section 27 of the Act, the Authority's role on completion of an investigation is to determine whether Police actions were contrary to law, unreasonable, unjustified, unfair, or undesirable.

## THE AUTHORITY'S INVESTIGATION

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93. As required under section 13 of the Independent Police Conduct Authority Act 1988, the Police notified the Authority of the shooting of Mr Kelly-Tumarae on the morning of 28 March 2010. The Authority immediately started an independent investigation.
94. Two investigators visited the scene and liaised with Police the day after the shooting. They also spoke with Mr Kelly-Tumarae's family. Two weeks later the Authority Chair and senior staff visited the District. They were briefed by Police investigators, viewed the scene, and again met with members of Mr Kelly-Tumarae's family.
95. Since these initial visits, the Authority's designated investigator and legal advisor have interviewed a number of officers as well as members of Mr Kelly-Tumarae's family and friends. They also visited the scene.

ISSUES CONSIDERED

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96. The Authority's investigation considered the following issues:

- 1) Did the Police comply with the law and relevant policies in commencing and continuing their pursuit of Mr Kelly-Tumarae?
- 2) Did the Police comply with all relevant policies and best practice in their tactical response and incident control up to the time they arrived at Taihape Road?
- 3) Were the Police justified in arming themselves in response to this incident, and did they comply with all procedures for arming?
- 4) Did the Police comply with policy and good practice when they stopped behind Mr Kelly-Tumarae outside the cemetery?
- 5) Was Officer F justified in shooting at Mr Kelly-Tumarae? If so, was the number of shots fired justified?
- 6) Were other tactical options available and considered before Officer F used his firearm?
- 7) Was all reasonable assistance given to Mr Kelly-Tumarae after he was shot?
- 8) Following the shooting, was the scene kept secure in order to preserve evidence for subsequent investigations?
- 9) Was the Police criminal investigation conducted in a thorough and professional manner?
- 10) Was the Police's liaison with Mr Kelly-Tumarae's family adequate during and after the criminal investigation?
- 11) Were the Eastern District's policies and procedures for firearms security and auditing adequate and complied with?
- 12) Were the firearms and related equipment used in this incident in good working order?
- 13) Did Police take all available opportunities to address pursuit management and incident control issues arising from this incident?



# The Authority's Findings

INDEPENDENT POLICE CONDUCT AUTHORITY

## CONDUCT OF THE PURSUIT

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### **Issue 1: Did the Police comply with the law and relevant policies in commencing and continuing their pursuit of Mr Kelly-Tumarae?**

97. Law and policy relating to Police vehicle pursuits is set out in Appendix 1 (see paragraphs 302-307). The 'Fleeing Driver Policy' section of the Police Manual sets out the circumstances in which pursuits can commence and continue, the communication requirements, and the roles and responsibilities of pursuing officers and Police communication centres. The policy requires ongoing consideration of risks. If the risks outweigh the immediate need to apprehend the offender, the pursuit must not be commenced, or if it has already commenced it must be abandoned.

#### *Justification for commencing the pursuit*

98. Mr Kelly-Tumarae was carrying a firearm and had pointed it at a Police officer. Police were clearly justified in believing that he was a threat to public safety. When he was seen driving past the safe forward point, they were justified in initially following him at a safe distance.

99. Soon after the safe forward point, Officers B and C activated their patrol car's warning lights. When Mr Kelly-Tumarae did not then stop, Police were legally justified in commencing a pursuit. It is clear from the recorded CentComms transmissions that Officers B and C conducted the required risk assessment and believed that the immediate need to follow and safely apprehend Mr Kelly-Tumarae outweighed any potential risks from pursuing his car. It is also clear that the CentComms shift commander considered the risks and agreed with the officers' risk assessment.

100. Under the circumstances, the officers were justified in commencing a pursuit. Indeed, they would have been neglecting their duty if they had not taken appropriate steps to follow and safely apprehend Mr Kelly-Tumarae.

### Ongoing risk assessment and justification for continuing the pursuit

101. The officers' statements and the recorded CentComms transmissions show that throughout this pursuit the officers involved were constantly balancing the need to immediately arrest Mr Kelly-Tumarae against other safety considerations, as required under the fleeing driver policy.
102. Initially, although Mr Kelly-Tumarae's manner of driving was at times erratic, he remained within the speed limit. As the pursuit reached semi-rural areas, his speed increased, sometimes reaching 160 kph. That speed would likely be considered excessive in many pursuit situations; however in this situation Police were pursuing an armed offender, the driving conditions were good, the roads were clear, and there was no indication of Mr Kelly-Tumarae endangering other road users.<sup>1</sup> Under the circumstances, the officers were justified in continuing the pursuit until Mr Kelly-Tumarae stopped his car.

### Tactical options

103. The fleeing driver policy requires the Police communication centre's shift commander to consider tactical options for bringing the pursuit to a safe conclusion. The Authority has found that the CentComms shift commander and other officers actively considered and discussed tactical options, in particular (i) the activation of the AOS to complete a non-compliant vehicle stop (explained in paragraph 307); and (ii) the use of road spikes to stop the Primera. The other tactical option specified in the policy, aerial surveillance, was not available.
104. The tactical options specified in the fleeing driver policy are specific to vehicle pursuits, most of which are initiated in response to traffic offending. In this case, the pursuit was in response to armed offending, and the appropriate tactical options need to be considered in that context. The tactical options considered, and the manner in which they were communicated, will therefore be addressed separately in paragraphs 112-140.

### Communication

105. The fleeing driver policy's communication requirements are intended to ensure that the Police communications centre has adequate information to oversee the pursuit and make decisions about risks and tactics. Police policy also requires that, during pursuits and major incidents, officers are disciplined in their use of Police radio; those who are not directly involved in the pursuit must cease all non-essential radio communication. This is

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<sup>1</sup> In the updates provided by the two lead pursuit vehicles there is no mention of any other vehicles encountered during the pursuit. When all officers were interviewed, only one (Officer B) could recall seeing another car, and that had pulled over to the side of the road.

intended to support clear communication and tactical decision-making by the communications centre.

106. At the beginning of this incident there was a large amount of radio traffic and it was not immediately clear that Officers B and C had commenced a pursuit. Nevertheless, Officer C was advising CentComms of risk factors such as Mr Kelly-Tumarae's manner of driving. The CentComms shift commander formed the view that a pursuit had commenced and instructed the dispatcher to issue the required warning, which Officer C immediately acknowledged.
107. While they were the lead pursuit vehicle, Officers B and C provided clear and concise information to CentComms in compliance with the fleeing driver policy. During this period other officers at times provided commentary about the pursuit and asked questions about tactical options.
108. Throughout the pursuit, the CentComms shift commander – through the dispatcher – prompted for relevant information as required by the policy; however, he did not provide clear guidance about the intended tactical response (this is addressed in paragraphs 122-133). Once Officer F took over as lead vehicle, he updated CentComms on Mr Kelly-Tumarae's speed and the fact that he was turning into Taihape Road.

#### Officer F taking over as lead vehicle

109. As described in paragraphs 45-47, at about the time the pursuit reached the Napier Hastings Expressway, Officer A instructed Officers K and L to take over from Officers B and C as the lead pursuit vehicle, and Officer C acknowledged that request. Officer A's reasoning was that Officers K and L were armed and Officers B and C were not. It was appropriate for armed officers to take over the primary pursuit role; however under the fleeing driver policy the decision to replace the lead pursuit vehicle must be made by the pursuit controller (in this case, the CentComms shift commander).
110. Following the instruction from Officer A, Officer F – after confirming that he was armed – asked Officers B and C to pull over and let him through, which they did. This left Officer F leading the pursuit. Officers K and L also passed Officers B and C and became the secondary pursuit vehicle. At this time Mr Kelly-Tumarae was driving at around 160 kph on an open road. Officer L later recalled that he and Officer K "*were meant to go in front*" and intended to take over the lead from Officer F as soon as possible. Officer L noted that, as a two-person patrol, they could drive and provide the required situation reports to CentComms more effectively than Officer F could.
111. Officer F did not directly inform CentComms that he was taking over as the lead pursuit vehicle. However, CentComms would have been aware from Officer F's and other communications that he had assumed this role. The policy requires the dispatcher to

issue the safety warning referred to in paragraph 39 to the new lead vehicle, but this did not happen.

#### FINDINGS

Officers B and C were justified under relevant law and policy in commencing a pursuit. The officers involved considered all relevant risk factors as the pursuit began and continued. They were justified in continuing the pursuit until it ended at Taihape Road.

Throughout the pursuit, the officers involved substantially complied with the fleeing driver policy in respect of communication, and speed and manner of driving.

The decision to have armed officers take over leadership of the pursuit was reasonable under the circumstances, even though it took place without the pursuit controller's authorisation and without the required pursuit warning being given.

### **Issue 2: Did the Police comply with all relevant policies and best practice in their tactical response and incident control up to the time they arrived at Taihape Road?**

112. Relevant policies are set out in Appendix 1. The 'Radio Protocols' chapter of the Police Manual sets out Police communication requirements and incident control responsibilities (see paragraphs 305-313). That policy makes clear that the communications centre shift commander is responsible for leading the overall Police response until such time as incident control is formally handed over to a suitable officer in the field. The policy also emphasises that officers must be disciplined in their use of Police radio, in order to support clear communication and effective tactical decision-making.
113. Police policies on responding to armed offenders emphasise caution unless it is necessary to take immediate action to prevent casualties. The 'Firing at offenders' section of the Police Manual advocates that where possible officers should establish a cordon to restrict movement into or out of the area in order to contain the offender and protect the public; they should then adopt a 'wait and appeal' approach unless it is necessary to take immediate action to prevent casualties (see paragraph 322).
114. The 'Traffic Patrol Techniques' chapter of the Manual says that officers should not stop or approach vehicles with armed occupants, but rather should follow at a safe distance (see paragraphs 323-327).

#### The tactical response

115. Officers B and C, when confronted by Mr Kelly-Tumarae, initially retreated and informed CentComms. The officers were unarmed and unable on their own to effectively respond to the threat indicated by Mr Kelly-Tumarae's actions. Their response was prudent and in accordance with Police policy.

116. Once CentComms had been informed, the shift commander became the incident controller with overall responsibility for managing the Police response; his role and responsibilities are addressed in greater detail in paragraphs 119-133 below.<sup>2</sup>
117. From the time CentComms was informed that Mr Kelly-Tumarae had pointed a shotgun at Officer C, the Police tactical responses can be summarised as follows:
- 1) **Establishment of a safe forward point** – Officer A immediately established a safe forward point and instructed other available officers to meet him there and arm themselves. His intention was to establish a cordon using available staff to contain Mr Kelly-Tumarae in the area until the AOS arrived – bearing in mind that the initial information was that Mr Kelly-Tumarae was on foot. From previous experience, Officer A expected it would take about 20-30 minutes for the AOS to arrive.
  - 2) **Commencement of pursuit** – When Mr Kelly-Tumarae drove past the Safe Forward Point, Officer A’s plan changed from one of containing an armed offender on foot to following him at a safe distance until the AOS could take over. Officer A gave clear instructions that Officers B and C should follow the Primera at a safe distance, and that other patrol units should arm themselves in preparation to take over the pursuit until the AOS could get there. Once the pursuit had got under way, Officer A sought support by liaising with CentComms and Officers G and F. The CentComms shift commander agreed with Officer A’s approach; he later said that his intention was for armed patrol units to take over the pursuit until the AOS could take over. Officers B and C clearly understood that they were to remain at a safe distance until armed patrol units could take over the pursuit.
  - 3) **Call to AOS** – As the pursuit was getting under way, a CentComms operator (on the shift commander’s instruction) contacted the Officer in charge of the Hawkes Bay AOS, Officer M, to ask him to activate the AOS. Officer M, who had been asleep and was woken up by the call at 1.42am, initially asked for more information and was told that the offender was now mobile and that unarmed officers were in pursuit. Officer M responded: *“Can I just ... wait a second and see what happens.”* Officer M confirmed that he could hear the radio traffic in which officers were describing the pursuit. Officer M later said that he was confused about how this incident had arisen, and that he had been woken from a deep sleep and did not immediately comprehend what he was being told.

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<sup>2</sup> After the shooting, the CentComms shift commander delegated incident control to Officer A. Post-shooting actions are addressed in paragraphs 254-263.

As there appeared to be uncertainty about whether he was activating the AOS, the CentComms operator said: “... *the Sergeant is asking can you please deploy your squad, he said none of [the officers] are armed at this stage.*” Officer M responded that it would take about half an hour to get there. Although this exchange occurred early in the call, Officer M remained on the line, listening to radio transmissions and asking questions while he got dressed and got into his car. Officer M later said that during the phone call he was considering where the pursuit was possibly heading (rural or urban), the deployment of a helicopter, and the possibility of the pursuit ending prior to AOS arrival. He was still on the line and had not activated the AOS at 1.56am when CentComms was notified that Mr Kelly-Tumarae had been shot.

Officer M later said that he was about to end the call and activate the AOS when the pursuit ended. However, in the transcript of his conversation with the CentComms operator he did not at any stage clearly state that he was activating the squad, nor did he request that CentComms activate the squad for him. The CentComms shift commander later said that, from the time he asked for the AOS to be activated, he had believed it was being activated.

- 4) **Officer F asks for guidance from the AOS** – As noted in paragraph 35, as soon as Officer F heard about the shotgun being pointed at Officer C he notified CentComms that he was on his way, and asked CentComms to contact Officer M. Specifically, Officer F said: “*I’m not telling you to suck eggs but can you ring [Officer M] and see if he wants to make this an AOS job ....*”

The CentComms shift commander responded that he had already instructed a CentComms operator to call Officer M. Nonetheless, CentComms acknowledged Officer F’s request, and when the operator called Officer M she told him she was doing so because “[Officer F]’s asked me to call you”.

Officer F later told Police that his initial intention was to help other officers establish an armed cordon to contain Mr Kelly-Tumarae.

- 5) **Advice to field staff about AOS** – After Officer M had told the CentComms operator the AOS would be at least 30 minutes away, this was relayed to the field staff. Officer A immediately responded: “... *I was expecting that, we’ll just ah play it by ear, see how we get on*”.
- 6) **Subsequent tactics, including the decision to use road spikes** – Soon afterwards, Officer F asked: “... *with AOS 30 minutes away, what’s our plan of attack, spike, or just follow him until such time [as] AOS get on the air*”? In the absence of any response from CentComms, Officer A advised that his intention was to follow the Primera until the AOS could take over.



The CentComms shift commander subsequently asked Officer G if he had road spikes in his car, but received no response. For a period the communication focused on armed officers taking over from Officers B and C as the lead pursuit vehicle. The shift commander then asked Officer A if he or any other pursuit vehicle had spikes. When Officer A responded that he had spikes, the shift commander said: “... if we get an opportunity, where we can lay spikes out we’ll endeavour to do that ... in an area where he’s slowing down ...” Officer G then instructed Officers I and J to lay spikes at Fernhill Bridge, which is about 200 metres south of the entrance to Taihape Road on State Highway 50. Before this could happen, Mr Kelly-Tumarae turned into Taihape Road.

118. The actions described above raise several questions about Police incident control and tactics in response to Mr Kelly-Tumarae’s actions. These are addressed below.

#### Who was in charge?

119. On the night of this incident, a sergeant was relieving as the shift commander at CentComms in Wellington, a position normally held by an Inspector. The shift commander became aware of this incident when Officer C reported that Mr Kelly-Tumarae had pointed a shotgun at him. From that point the shift commander, as the incident controller, was responsible for managing the Police response and formulating tactics. He retained that responsibility until he formally designated Officer A as the incident controller at the Taihape Road scene, about seven minutes after Mr Kelly-Tumarae was shot.
120. Although Police policy is clear about the shift commander’s responsibilities, and about the process for handing over command to the field supervisor (see paragraphs 308-314), the officers involved had differing views about who was in charge of the Police response during this incident:
- Officer A’s view was that he was in charge throughout, although Officer F and others were “asking ... useful questions and asking for assistance”. An example was when Officer F asked CentComms to contact the AOS; “there was no need for me to interfere because that was being followed up”.
  - Officer F also believed that Officer A was in charge. In an interview with the Authority he said: “I don’t think Comms had butted in and said ‘hey we are taking over’ or I don’t think Comms had said [Officer A] you’re the incident commander, none of that had happened I don’t think at that stage.”
  - Officer L believed that Officers A and G (the two sergeants in the field) were in control. He said the CentComms shift commander “probably has overall control but on the ground it would have been the Sergeants”.

121. Police policy clearly states the importance of clarity about roles and responsibilities when responding to critical incidents. It also explains the rationale for the Police communications centre having initial responsibility for incident control, and the process for handing responsibility over to officers in the field. It is concerning that the officers in the field did not appear to understand these important and well established aspects of Police procedure.

*Did the CentComms shift commander provide effective leadership of the Police response?*

122. Regardless of who the officers believed was in charge, the CentComms shift commander knew he was the incident controller and the onus was on him to take command, assess options, and provide a plan for dealing with a mobile armed offender.

123. As has been noted, the shift commander gave instructions for the AOS to be activated. He also prompted officers for information about the pursuit. But he did not at any stage clearly assert his authority as the incident controller, or convey a plan of action to the pursuing officers.

124. As a result, throughout this incident those officers were making decisions or suggestions about tactics that were properly within the shift commander's area of responsibility. Officer A gave instructions to the pursuing patrol units, while Officer F made repeated suggestions or asked questions about tactics (including asking whether road spikes were to be used).

125. The only clear tactical instruction the shift commander gave was his direction to use road spikes, after Officer F had suggested it; this instruction was given just before 1.55am (more than 15 minutes after Officer C initially notified CentComms about the shotgun, and 11 and a half minutes after the pursuit had begun). At no stage did the shift commander provide officers with a plan should Mr Kelly-Tumarae unexpectedly stop, or explain how to contain Mr Kelly-Tumarae if the plan to use road spikes succeeded in stopping the Primera.

126. The shift commander later told the Authority that his initial plan had been for the pursuing officers to follow Mr Kelly-Tumarae at a safe distance; he did not want them to lose sight of Mr Kelly-Tumarae, because he was armed, but nor did he want to put unarmed officers in danger. It was, he said, a question of containing and observing Mr Kelly-Tumarae until firstly armed officers could take over, and subsequently the AOS could arrive and carry out a non-compliant vehicle stop.

127. The shift commander said he did not convey this plan to the officers in the field as *"the decisions that were being made by [Officer A] were in line with my own feeling and my own thoughts and I didn't feel there was a need to interject on the radio and use up... what I believed was important air time"*. Asked if, in hindsight, he should have asserted himself as incident controller, he repeated that he was happy with the decisions being

made, and *“if I wasn’t happy I’m confident that I would have said “no we’re not doing that”.*

128. The shift commander also explained that the decision to use spikes was intended to *“bring the situation to some sort of conclusion because it clearly was going to continue if we hadn’t – if we didn’t do something”.* He was comfortable with Officer F taking over as the lead pursuit vehicle, as it was *“the best tactical option”* to have an armed officer leading the pursuit.
129. Officer F told the Authority’s investigator that in hindsight he would have liked to have seen the shift commander take control of the Police response. That would have clarified what was expected of the officers involved because:

*“It’s someone remote from the incident. They haven’t got the tunnel vision, they haven’t got the adrenaline. It’s someone sitting away from it. Sure, we can monitor the pursuit but we still need the input from someone independent in relation to just keeping our minds clear, keeping us thinking and things like that. And with all the radio traffic and all that type of stuff you know we just need someone to take control.”*

130. In the Authority’s view, the shift commander did not provide effective control of the Police response to this incident. Rather than taking command himself, he left officers in the field to give instructions and make suggestions about tactics, and largely acquiesced to those instructions.
131. This may have been reasonable during the opening stages. During that period the tactics adopted by Officer A (i.e. containing Mr Kelly-Tumarae when he was believed to be on foot, and then following his car at a safe distance until armed officers could take over) were exactly as they should have been under the circumstances, and Officer A was giving clear instructions.
132. But as the pursuit unfolded there was a lack of clarity about the tactics to be followed. This was apparent when Officer F initially sought input from the AOS; when Officer A (on hearing that the AOS was 30 minutes away) said *“we’ll play it by ear”*; when Officer F asked whether the plan was to follow or use road spikes; and when Officer F took over the role of lead pursuit vehicle contrary to Officer A’s instructions. Each of these events should have been a signal to the shift commander that there was a need to assert his role and clarify the tactics to be used. The lack of clarity about roles and tactics was particularly evident in the responses to Officer F’s question about the tactical plan: Officer A said the plan was to follow; and the shift commander almost immediately afterwards gave the instruction to use spikes.
133. Furthermore, when the shift commander was considering whether to use spikes the onus was on him to determine whether that was a safe and appropriate tactical option under

the circumstances, and – if so – to then form and communicate a plan for safely containing Mr Kelly-Tumarae should Police succeed in stopping him. It was also the shift commander's role to consider what tactics to use should Mr Kelly-Tumarae stop of his own accord.

134. The traffic control techniques policy explicitly instructs Police not to stop vehicles containing armed offenders unless there is an urgent need to do so. The decision to use spikes was clearly contrary to this policy. From the CentComms transcripts and the shift commander's subsequent explanation of his reasoning, the decision to use spikes does not appear to have been a considered one; rather, the shift commander simply went along with Officer F's suggestion. Further, in the recorded exchanges between CentComms and the pursuing officers there is no discussion about what tactics the officers should adopt to contain Mr Kelly-Tumarae either if his car was stopped using road spikes or if he stopped of his own accord.
135. The lack of clarity over tactics was to contribute to the events that later unfolded when Officers K and L arrived at Taihape Road, as explained in paragraphs 153-161.

*Did other officers fulfil their roles and responsibilities as part of the Police tactical response?*

136. Officer M's response to this incident has been described above, in paragraph 117(3). Eastern District policies provide for the AOS to be activated by any of the Police communications centre, the officer in charge of the AOS, or the Hastings or Napier police stations; however the general practice is that the officer in charge of AOS does the actual activation after discussions with the Police communications centre.
137. In this case there was a clear request from the CentComms shift commander that Officer M activate the squad. While it is understandable that, having been woken, Officer M needed a few moments to assess the situation, he should have taken steps to activate the AOS sooner than he did (either by paging the squad himself or asking CentComms to do it) rather than staying on the phone for a further 12 minutes. It should be noted, however, that a more urgent response from Officer M would not have resulted in the AOS reaching the scene before Mr Kelly-Tumarae stopped his car.
138. Officer A's initial plan around the Wordsworth Crescent scene, and his tactical appreciation and guidance of other officers during the pursuit, were exactly what would be expected of a field supervisor under the circumstances. In the absence of clear direction from the CentComms shift commander, Officer A's actions cannot be faulted.
139. As noted above, as soon as CentComms was informed about the shotgun being pointed at Officer C, Officer F said he was on the way. From there, he suggested tactics (e.g. calling the AOS, using road spikes) and provided commentary about Mr Kelly-Tumarae's appearance and manner of driving.

140. The Authority has found that when Police are responding to mobile incidents like this one, and the shift commander at the communications centre is the incident controller, there is friction between (i) the desire of officers on the ground to provide information or advice (which increases radio traffic), and (ii) the need to maintain radio discipline and for there to be clear command and control. The Authority intends to engage with Police to address this and other issues arising from this incident (see paragraph 300).

#### FINDINGS

Officer A acted professionally and complied with policy and best practice when he was advised of the incident, and in his conduct throughout the pursuit.

The CentComms shift commander, as the incident controller, did not take command and exercise control according to policy. Field staff did not know who was in command, and once the pursuit got under way there was no clear tactical plan for safely containing Mr Kelly-Tumarae.

Officer M should have responded more clearly and quickly when he was asked to activate the Armed Offenders Squad.

#### CARRIAGE AND USE OF FIREARMS

### **Issue 3: Were the Police justified in arming themselves in response to this incident, and did they comply with all procedures for arming?**

#### Authorisation to carry firearms in vehicles

141. Before 2001, firearms were secured at Police stations and, when circumstances required, officers returned to the station and obtained firearms from there. In 2001, Police adopted policy allowing district commanders to authorise the carriage of firearms in vehicles, provided they are kept in a locked cabinet and the keys are kept secure.
142. The district policy that applied at the time of this incident specified which vehicles could carry firearms. Due to an oversight, four of the vehicles involved were not listed in the policy and so were not authorised to carry firearms. Those were the vehicles carrying: Officers B and C; Officers D and E; Officers I and J; and Officers K and L. There is no reason to believe that the officers in these vehicles would have known of this oversight. The three vehicles carrying Officers A, F, and G and H were authorised under the policy to carry firearms. Eastern District Police advised the Authority in June 2012 that a new policy had been put in place to address this issue.
143. This issue was administrative in nature and had no bearing on the Police response to Mr Kelly-Tumarae.

The justification for and process of arming

144. The 'Carriage and Use of Firearms' chapter of the Police Manual sets out the circumstances in which officers may arm themselves (see paragraph 321-322). In essence, there must be "*clear and specific evidence*" that the officers may encounter a situation that requires them to use firearms in self-defence or defence of another, or to effect an arrest or prevent an escape, in accordance with the relevant provisions of the Crimes Act 1961. Officers who hold the rank of sergeant or above, or are authorised by a supervisor, may arm themselves; other officers may also use their discretion to arm if it is not practical to obtain prior approval. The policy requires officers to notify the communications centre and to put on ballistic body armour when they arm (see paragraph 323). Officers must be familiar with the law and policy setting out the circumstances in which firearms can be used and, if time and circumstances permit, supervisors must draw their attention to 'Fire Orders' which set out the circumstances in which Police officers may use firearms. These are printed on the inside cover of the Police issue notebooks, and are also stored in vehicle firearm security cabinets.
145. From the time Mr Kelly-Tumarae pointed his shotgun at Officer C there was "*clear and specific evidence*" that he presented a threat of death or grievous bodily harm involving a firearm, and that firearms may therefore be required either for purposes of self-defence or to carry out his arrest. At the time the pursuit began there may have been an element of doubt as to whether the driver of the Primera was the person who had pointed the shotgun earlier; however once the pursuit had started that doubt evaporated based on the driver's description and actions (such as driving up close behind Officers B and C, and signalling the officers with his hands).
146. Based on this information:
- i) **Officers D and E** armed themselves (Officer D with a Glock, Officer E with an M4 rifle) on instruction from Officer A. Both officers were current in their firearm certification. Officer A asked CentComms to note his instruction to those officers. Officer A also told those officers that General Instruction F061 applied, and both officers understood that this referred to the policy on use of firearms. Once armed, Officers D and E put on ballistic body armour. In all respects, this was in accordance with policy.
  - ii) **Officer F**, once he became aware of the shotgun being pointed at a Police officer, decided to arm himself with a Glock pistol. Officer F's firearm certification was current. While there was no explicit instruction for him to arm, his decision was appropriate under the circumstances. He told Officer A that he was "*tooling up*", and CentComms would have been aware of this; however, he did not explicitly inform CentComms that he had armed himself as required by Police policy, and Officer A later had to check that he was in fact armed. After arming himself Officer

F read over General Instruction F061 to remind himself of the law and policy on use of firearms. Contrary to policy, he did not put on his ballistic body armour. He later told Police that there was a need to get to Napier as quickly as possible and he intended to make a decision about armour once it was clear what his role was. He told the Authority's investigator that the armour was "cumbersome" and made it difficult for him to get out of his vehicle quickly.

- iii) **Officer G** (a sergeant) decided based on the circumstances to arm himself and his staff (**Officers H, K and L**). Officers G and K armed themselves with Glock pistols and Officers H and L took M4 rifles. All of these officers were current with their firearm certification except Officer L, whose certification had expired almost six weeks earlier on 18 February 2011 and who was scheduled for recertification. When he was directed to arm, Officer L did not tell his supervisor that he was not certified; as his supervisor, Officer G should have known this. When Officer G told the other officers to arm themselves, he told them that General Instruction F061 applied, and they were aware of what this meant. Once armed, Officers G, H, K and L put on ballistic body armour.

#### FINDING

Officer A was justified in arming himself and in directing Officers D and E to arm. Officer F was justified in arming himself. Officer G was justified in arming himself and in directing Officers H, K and L to arm.

However Officer L breached policy by arming when he was not certified to carry and use a Police firearm. He should have told Officer G that he was not certified, and Officer G as his supervisor should have known that.

Officer F did not clearly inform CentComms that he was armed, and he breached policy by not putting on his ballistic body armour.

#### THE OFFICERS' ARRIVAL AT THE SCENE

#### **Issue 4: Did the Police comply with policy and good practice when they stopped behind Mr Kelly-Tumarae outside the cemetery?**

147. As noted earlier, Police policies on responding to armed offenders emphasise caution unless it is necessary to take immediate action to prevent casualties. Specifically, the Police Manual advocates that where possible officers should establish a cordon to restrict movement into or out of the area in order to contain the offender and protect the public; they should then adopt a "wait and appeal" approach unless it is necessary to take immediate action to prevent casualties (see paragraph 325).

148. The 'Traffic Patrol Techniques' chapter of the Manual says that officers should not approach vehicles with armed occupants (see paragraphs 323-327). Where a vehicle with armed occupants stops, the policy provides specific instructions on where Police vehicles should stop and how officers should respond. To summarise, officers are instructed to stop 12-15 metres away from the offender, within effective range of their weapons. Officers are then instructed to get out of their vehicles and crouch under cover in the 'V' between the door and the vehicle.

#### Officer F

149. Officer F said he was about 30 to 40 metres behind as Mr Kelly-Tumarae turned in Taihape Road. When Mr Kelly-Tumarae stopped his car, Officer F stopped his Police vehicle about 14.5 metres behind him on the left-hand side of the road (see the scene diagram at Appendix 2.3).
150. Officer F later said that he stopped there *"to prepare myself for an armed vehicle stop, that was my intention and that is how I thought the incident was going to unfold."* In response to questions from the Authority, he explained that in his understanding an *"armed vehicle stop"* was the Police response to a mobile armed offender who has stopped voluntarily. He said Mr Kelly-Tumarae's decision to stop *"came out of the blue"*.
151. The officer's intention was for other Police vehicles to park alongside him, allowing them to use their vehicles for protection as they appealed to Mr Kelly-Tumarae. The officers would then have been in a position to *"see what happens, you know, if he decides to sit there for half an hour in his car, great, no one's going to argue with that"*.
152. In this initial response, Officer F's actions were exactly what were expected under the traffic patrol techniques policy.

#### Officers K and L

153. Immediately after Officer F had stopped, Officer K drove past and came to a halt almost parallel to the Primera, with the front of his patrol car about a metre away from and in line with the Primera's driver's door. Officer L, the passenger, was the senior officer in the car.
154. In his statement to Police, Officer K described pulling into Taihape Road, driving around Officer F's vehicle, and then driving directly at the Primera. He said:

*"... there was a lot of thoughts going through my head when this happened... I thought perhaps that [I] might have time to just drive straight ahead and perhaps ram the driver's door to keep him closed or keep him in the car..."*



155. However as the patrol car got closer, the door of the Primera was “*flung open*” and Mr Kelly-Tumarae got out. Officer K braked and stopped the patrol car just short of the Primera driver’s door.
156. When questioned by the Authority, Officer K said he was not speeding and was in control of his car when he turned into Taihape Road. He also said he had not been trained in how to act when an armed offender who is being pursued suddenly stops. As he approached the scene he expected Mr Kelly-Tumarae to drive away:
- “...it was just something that happened so quickly... by the time I realised what he was doing we were basically heading straight towards his driver’s door and I guess I made just a very quick snap decision that we’d carry on and try to pin the driver’s door closed so he couldn’t get out.”*
157. Officer L, in his statement to Police, said that as Officer F pulled over to the side of the road Officer K said to him: “*Shall we get down in front [of Mr Kelly-Tumarae], cut him off so he can’t drive off again?*” In the same statement Officer L said: “*...we should have stopped twenty metres away from his vehicle, not next to it ... it’s probably the worst decision I made that night. It not only put my life in danger, someone else’s as well.*”
158. Officers K and L later told the Authority they could not remember saying anything to each other about what they should do when Mr Kelly-Tumarae suddenly stopped his car. Officer K explained that he only had a matter of seconds to react and the officers did not have an opportunity to discuss or plan where they were going to stop and what actions they would take.
159. Officers B and F, in their statements to Police, both described the patrol car carrying Officers K and L stopping near the Primera. Officer B recalled thinking: “*you’re too close, you’re too close*”. Officer F recalled thinking: “*... what the fuck are those guys doing*” because the actions of Officers K and L were contrary to Police training. He also said: “*I am sorry I have to say it, it was wrong.*”
160. The actions of Officer K (as the driver) and Officer L (as the senior officer in the car) were clearly contrary to Police policy. The principle of cordon and containment of armed offenders is well established and was clearly the appropriate response, in accordance with both the Police firearms and traffic patrol techniques policies.
161. The option of ramming Mr Kelly-Tumarae’s car was risky and ill-considered, because of the immediate danger to life and because it limited Police tactical options for safely containing Mr Kelly-Tumarae. Officer K was a relatively inexperienced officer and clearly did not know how to respond when Mr Kelly-Tumarae stopped. The absence of a clear tactical plan may have contributed to this confusion. Officer L, as the senior officer in the car, should have provided guidance. But Officer K should also have been aware of the requirement to take a cautious approach, and the principles of cordon and containment.

### Officers B and C

162. Officers B and C were about 50 metres behind Officers K and L, and arrived at the corner of Taihape Road in time to see the Primera and the first two patrol cars stopping. Officers B and C stopped behind Officer F's car. Officer C said they made a conscious decision not to drive any closer, as they were still unarmed. The actions of these officers were appropriate and in compliance with the relevant policies.

### Officer A

163. Officer A was behind the first three patrol cars as the pursuit approached Taihape Road. When he arrived at the scene he was not yet aware that shots had been fired. He saw Officer F standing on the grass verge, pointing his Glock pistol at Mr Kelly-Tumarae, who was then lying on the grass. He also saw one other officer (most likely Officer K) pointing a Glock at the prone Mr Kelly-Tumarae.

164. Officer A stopped his car on a slight angle to the road, immediately behind the Primera and in front of Officer F's Police vehicle. Officer A then approached Mr Kelly-Tumarae and called out to the officers with firearms that he was moving forward to handcuff him.

165. Officer A's actions were appropriate and in compliance with the relevant policies.

### Officer G

166. When Officer G arrived at the Taihape Road scene, he saw the parked Police cars and the officers out on the road. From this he assumed that it was safe to approach and assess what had happened. He stopped and parked his car next to Officer A's, behind the Primera. He had not heard any gunshots. Officer G's actions were appropriate and complied with the relevant policies.

#### FINDINGS

Officer F complied with policy in the manner he stopped his Police vehicle behind the Primera.

Officer K (as the driver) and Officer L (as the senior officer in the car) breached policy and good practice in the manner in which they stopped next to the Primera. This action was risky and ill-considered, and limited subsequent Police tactical options for responding to Mr Kelly-Tumarae.

Officers A, B, and G complied with policy in the manner they stopped their cars at the scene.

THE SHOOTING OF MR KELLY-TUMARAE

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**Issue 5: Was Officer F justified in shooting at Mr Kelly-Tumarae? If so, was the number of shots fired justified?**

167. The Authority has considered whether the force used by Officer F was justified under relevant provisions of the Crimes Act 1961.
168. Section 48 of the Crimes Act 1961 provides a justification for any person acting in self-defence or defence of another to use *“such force as, in the circumstances as he believes them to be, it is reasonable to use”* (see paragraph 319). The Act also authorises Police officers to use necessary force to carry out an arrest or prevent an escape, provided the rest cannot be carried out or the escape prevented *“by reasonable means in a less violent manner”* (see paragraphs 314-315).
169. The Authority has also considered whether Officer F complied with relevant Police policies, both when he stepped out from the cover provided by his Police vehicle and when he fired.
170. As already explained, Police policy advocates that officers remain under cover and take a cautious approach based on safe containment unless it is necessary to act immediately to prevent casualties. The traffic control techniques policy states that when a vehicle containing an armed occupant stops, the driver of any following Police vehicle should stop a safe distance away, get out of the vehicle and crouch in the ‘V’ made by the open door (see paragraphs 323-327). The officer should then use the vehicle’s public address system to tell the offender that he or she is armed, and give instructions to the offender. Officers should not approach the offender’s vehicle, but should observe, report to the communications centre, and wait for backup.
171. General Instruction F061 (Use of Firearms), explained in paragraphs 331-332, sets out the circumstances in which officers can fire on an offender. In essence, it mirrors the Crimes Act provisions while also providing additional guidance. The instruction reminds officers that they must use the minimum force necessary to effect their purpose. It says that an officer may not fire until: the offender has been asked to surrender (unless that is impractical or unsafe); it is clear the offender cannot be disarmed or arrested without being shot; and further delay in apprehending the offender would be dangerous or impractical.

Officer F’s account

172. Officer F gave a statement to Police on 30 March 2011, and was subsequently interviewed by the Authority’s investigator on 29 September 2011.

173. In his statement to Police, Officer F described hearing Officer C over the Police radio reporting that a firearm had been pointed at him. Officer F said: *"I have never heard Police officers so scared before in my life."* He decided to drive towards Napier with the intention of helping out in an armed cordon. He subsequently heard that the offender was in a car and was being pursued. As described earlier in this report, he armed himself, joined the pursuit, and took over as the lead pursuit vehicle. He arrived first at the scene, intending to contain Mr Kelly-Tumarae, and then saw Officers K and L drive past him and pull up immediately beside the Primera.
174. Officer F said he was still in his Police vehicle when he saw Mr Kelly-Tumarae get out of the Primera and approach the front seat passenger's window of Officer K and L's patrol car. He noticed Mr Kelly-Tumarae's clothing, and the ammunition belt across his chest with red cartridges in it. Mr Kelly-Tumarae *"was standing, the butt [of the shotgun] was in his shoulder and the barrel was pointing down into the window of the patrol car"* (see diagram 1 at Appendix 2.1). Officer F at that point believed that Mr Kelly-Tumarae was going to shoot Officer L.
175. Officer F said that as he witnessed this he was starting to get out of his Police vehicle and take his Glock pistol from its holster. Mr Kelly-Tumarae suddenly turned and moved towards him, running between the Primera and Officer K and L's patrol car. At this stage Mr Kelly-Tumarae was carrying his shotgun in a low-slung position, and Officer F had not fully drawn his Glock.
176. Mr Kelly-Tumarae then reached the back of his Primera and turned right, running towards the cemetery. His shotgun at that time was pointed towards the cemetery, not towards any of the Police officers. Officer F, aiming his Glock at Mr Kelly-Tumarae, shouted *"Armed Police"*. Officer F said that:

*"[Mr Kelly-Tumarae] stopped at the back left passenger side corner of the vehicle near the boot where the tail lights are, he then turned around and swung the shotgun in my direction aiming it towards me.*

*This all happened in a matter of split second, I thought to myself "I'm gonna fucken get it here" and I immediately fired."*

177. Officer F said he remembered firing four or five rounds in quick succession, and:

*"After I fired those four or five rounds, I still remember him standing front on to me and I thought to myself I haven't hit him and I remember looking at my weapon and it was aiming around towards the ground. I said to myself, "sight picture, foresight".*

*He was still front on to me, he was still standing, he was still a threat to me, I again fired my weapon ... and at that stage he had moved onto the grass and*

*I followed him and he dropped his weapon and then moved backwards and slumped to the ground.”*

178. Officer F then realised Mr Kelly-Tumarae had been hit. He moved forward, with his Glock still aimed at Mr Kelly-Tumarae. Other officers then arrived and handcuffed Mr Kelly-Tumarae.

179. Officer F told Police that the entire incident, from the time Mr Kelly-Tumarae got out of his car to the time he was shot, took 10 seconds “*at the most*”. There was time for “*a split second reassessment*” between the two volleys of shots.

180. Within this very short timeframe, it is evident from Officer F’s account that he was required to make split-second assessments of the level and immediacy of the threat to himself or others at different stages, including when:

- Mr Kelly-Tumarae got out of his car and pointed his shotgun at the car containing Officers K and L;
- Mr Kelly-Tumarae ran in Officer F’s direction;
- Mr Kelly-Tumarae turned and began running towards the cemetery;
- Officer F shouted “*Armed Police*”, and Mr Kelly-Tumarae turned and (as Officer F perceived it) pointed his shotgun at Officer F; and
- Mr Kelly-Tumarae remained standing after the first volley of shots.

181. During their interviews with Officer F, Police and the Authority both asked him to clarify or elaborate on aspects of his account.

*(i) Mr Kelly-Tumarae pointing his shotgun at Officer L*

182. In his Police statement, Officer F said that when Mr Kelly-Tumarae aimed his shotgun at the car carrying Officers K and L, his stance was “*aggressive*”. By this he meant that Mr Kelly-Tumarae had deliberately brought the shotgun up into a firing position:

*“... to me it looked like that he had handled a weapon before and he had fired either a rifle or shotgun ... it looked like it he meant business ... it looked like he wanted to kill whoever was in that vehicle.”*

183. Officer F said Mr Kelly-Tumarae was not moving his shotgun, but rather taking a “*steady calculated aim*” down the barrel, which lasted for “*a second or two*”. Officer F thought to himself “*I’ve got to react*”, so he opened the driver’s door and started to get out of his vehicle and put his hand on his holster to draw his Glock.

*(ii) Mr Kelly-Tumarae running towards Officer F*

184. Officer F told Police that Mr Kelly-Tumarae suddenly turned and started to run towards him, carrying the shotgun in a *“low down horizontal position”* (see diagram 2 at Appendix 2.1).
185. Initially, Officer F was behind the open door of his Police vehicle and could see Mr Kelly-Tumarae through the window and the ‘V’ gap between the door and the vehicle. As Officer F stood up and started to draw his Glock, he *“moved around the door”*. Mr Kelly-Tumarae was *“moving fast in [his] direction”*, with one hand on the butt of the shotgun and another hand on the wooden part of the barrel. Officer F went on to say that:

*“... the barrel was pointed in my direction and from where I was standing he could have easily pulled the trigger and the spread of the, I guess the shot, would have been in my direction. I have started to draw my weapon as he has moved towards me, I haven’t presented it because of the obstruction of the door to my [vehicle].”*

186. Officer F also said:

*“In respect to him running towards me, the way the weapon was being held, I thought now it’s my turn, I thought he was going to shoot, he wasn’t carrying the weapon in one arm and running, the weapon was in horizontal position, the barrel was pointed at my direction, I thought I was going to wear it. I can’t describe it any more than that.”*

187. However when interviewed by the Authority’s investigator, Officer F said Kelly-Tumarae was not a threat to him while he remained in the car or behind the door:

*“...as he’s turned and run [towards Officer F] that’s when I’ve thought I better get out of the car... by the time I’ve cleared the door because it was open is when he’s got to the end of his car and then turned right towards the cemetery... so I had all the protection of my car, my windshield, the doors and things like that...”*

*(iii) Mr Kelly-Tumarae running towards the cemetery*

188. In his Police statement, Officer F said:

*“As I have stepped out of the driver’s door to present my firearm, he has... turned right... and headed down the back side of his vehicle heading towards the grass verge. As he’s rounded the corner of the car, that’s when I have managed to bring my weapon up, I have shouted ‘Armed Police’, but I have not fired because he was moving from my right to my left [i.e. away from Officer F] and the firearm was facing towards the cemetery, there wasn’t a threat from him on me at that stage.”*

*(iv) Mr Kelly-Tumarae pointing the shotgun at Officer F – the first volley of shots*

189. Officer F then said:

*“So I have stepped out from cover of my driver’s door, why I did that I have no idea. When he’s got to the back passenger side of his vehicle, he’s then stopped, turned and faced me, with the firearm in a low horizontal position, barrel towards me [see diagram 3 at Appendix 2.1], I thought to myself he’s going to shoot, I immediately opened fire with my Glock and I remember I fired four or five rounds, but I recall him still standing and I thought to myself he’s still facing me he’s still a threat I haven’t hit him...”*

*(v) The second volley of shots*

190. Officer F checked his Glock and saw that it was facing towards the ground:

*“... I then brought the weapon up and fired three or four successive rounds, he turned to his right and moved over towards the grass... I still thought I hadn’t hit him because he hadn’t stumbled or reacted to rounds hitting him, I saw him drop the shotgun... then he has stumbled back three or four metres and fallen back and into a foetal position facing West [i.e. towards the front of the Primera, away from Officer A]. While I was firing on him on both instances I was advancing because I want to dominate, I didn’t want him to get the upper hand, I wanted to go home that night, I wanted to be aggressive, I wanted to go home.”*

191. Officer F said the gap between the first and second volley of shots was a split second, rather than five or 10 seconds.

192. When asked by the Authority whether the fear for his life had diminished after the first volley of shots, Officer F said:

*“...I remember thinking to myself he’s still standing, he’s still looking at me... there was nothing at that stage to indicate that I’d hit him... that’s when I opened with the next lot of volleys and then he provided me with some sort of reaction that I’d hit him... he’d stumbled over to the grass and dropped the weapon, that’s when I knew I had hit him, that’s when I knew the threats stopped, that’s when I stopped firing.”*

*(vi) Stepping out from cover*

193. The Authority’s investigator asked why Officer F had stepped out from behind the cover of his driver’s door. Officer F responded that Police officers are taught to take cover, *“... but he was a moving target and I think I’ve just done it just out of instinct”*. This was partly because, in his view, Glock pistols are not very accurate at distances greater than five metres and so it was necessary to reduce the distance. Officer F also explained that:

*"... the other thing too is he's pointed a firearm at me it was about domination... for someone who's not there it's hard but I had to win – for [want of] a better word... I mean, I had to assert my control, I had to dominate him, I had to be aggressive to make him compliant and that's probably why I did it... I think if I'd stayed behind the door and fired from the door, I don't think I... would have been able to stop him as effectively."*

*(vii) Reasons for firing*

194. Officer F also told both the Police and the Authority that he did not believe he had any other option but to fire on Mr Kelly-Tumarae at the time he did. He said he would have been happy for Mr Kelly-Tumarae to run off into the cemetery, but that had not been possible because Mr Kelly-Tumarae had brought the firearm up and pointed it at him.

195. To Police, Officer F said that he had intended to just "eat up time" until the AOS arrived, but he was forced to act quickly:

*"...I believed that if I did not act quickly, Police would be dead, I am only saying Police because they were the only ones there, if there were members of the public there I would include them as well."*

196. He also said:

*"I didn't want this to end like it did and like I say I was happy for him to either give himself up or run off, I am sorry to his Mum and to his father because they have lost their son and if there is any way I could turn the tables I would. I can't explain the sorry that I feel... but I want people to realise that I was put in this situation by him... I have to say that I stand by my actions, if I didn't act in the way I did, either myself or other members of Police may have been fatally wounded."*

197. To the Authority, Officer F said that throughout the incident Mr Kelly-Tumarae had dictated the chain of events. Although he would have been happy for Mr Kelly-Tumarae to run off, he was also aware that if Mr Kelly-Tumarae ran off he was carrying a shotgun, and:

*"...if he'd met someone down the street or if we'd put cordons in and then he snuck up on a cordon and taken out a police officer... I wouldn't be able to live with myself... I had to protect myself and I had to stop him there and then that's all I can say about it... I thought he was just too much of a threat."*

*(viii) Warning shot*

198. General Instruction F061 advocates against warning shots (see paragraph 335). Officer F told Police he did not consider firing a warning shot. He said Mr Kelly-Tumarae was



pointing the shotgun at him and to fire a warning shot would have meant taking his aim off Mr Kelly-Tumarae; he was not prepared to do that.

Accounts of other Police officers

199. Officers B and C were the only other people to see Officer F discharge his firearm.

(i) *Officer B*

200. Officer B, in a statement to Police on 29 March 2011, said she was still in the patrol car when she heard a shotgun firing. *“Immediately after that shot”* she heard Officer F firing his Glock.

*“[I] saw the offender, who was... side-on to [Officer F], but I saw the gun in his hand... and then I didn’t see where the gun went... it was really fast, the shots were really fast and I got, I thought there was only like five but I don’t know, they were just super fast.”*

201. She said that *“the last shot, [when] that was fired, the offender just collapsed”*.

202. Later in the same interview, Officer B said that at the time he was shot Mr Kelly-Tumarae was standing towards the front of the Primera on its left-hand side. Asked to describe how Mr Kelly-Tumarae was holding the shotgun, Officer B said he was holding the gun at his waist or side, and was pointing it towards Officers K and L. She was not certain how many shots were fired from the Glock, but recalled counting three to five.

(ii) *Officer C*

203. Officer C said he was opening his car door and *“watching continuously”* as events unfolded. He and Officer B were about 10 metres away. Although it was dark there was street lighting.

204. He described seeing Mr Kelly-Tumarae out of his vehicle, holding his shotgun in a *“level”* position, pointing it towards Officers K and L. He was walking backwards, *“making his way around the other side of his car”*, while still facing the officers. *“This all happened extremely quick.”*

205. Officer C said he saw Officer K beside his patrol car pointing his rifle towards Mr Kelly-Tumarae (but Officer K was actually still inside the patrol car at this time – see paragraph 212 below); at the same time Officer F was moving in front of his Police vehicle while pointing his Glock pistol at the offender. Officer C then heard a *“crack”* sound, which he believed was the sound of the shotgun being fired, followed immediately by five or six sounds from the Glock. As noted above, the shotgun was actually fired (apparently accidentally) when Mr Kelly-Tumarae was still in the Primera.

206. Officer C said Mr Kelly-Tumarae was still standing when the shots were fired, *“and it wasn’t until... the shots stopped that he dropped to the ground.”*
207. Later in the same interview, Officer C said Mr Kelly-Tumarae appeared *“highly charged”* and was *“jumping around”*. The shotgun was held level at about chest height. The officer could see Mr Kelly-Tumarae’s mouth moving but could not hear what was said.
- “He ... was obviously aggressive; he was pointing his gun at the police officers ... making a challenge ... [he] obviously wanted [a] stand-off ... his behaviour obviously appeared to be erratic and threatening.”*
208. Officer C said Officer F moved *“very quickly”* towards Mr Kelly-Tumarae. Due to the lighting, Officer C could only see Mr Kelly-Tumarae as a *“silhouette”*. Officer C said Mr Kelly-Tumarae was facing Officers K and L, and he had his shotgun raised pointing directly at them and their car. Mr Kelly-Tumarae would have been able to see Officer F moving towards him, but *“I couldn’t see whether he turned to challenge [Officer F] or not.”*
209. Asked for further clarification, Officer C said he was side on to Mr Kelly-Tumarae and so could not be sure whether or not Mr Kelly-Tumarae pointed his rifle towards Officer F. It was *“a matter of... five degrees deviation”* from Officers K and L to Officer F: *“I’m not gonna be able to tell that from where I was... positioned at the time.”*
210. Officer C said that, before any shots were fired, he heard Police officers telling Mr Kelly-Tumarae to put his gun down.
211. He said he did not see Mr Kelly-Tumarae fire his shotgun but did hear the distinct *“crack”*, followed by the shots from the Glock. Mr Kelly-Tumarae appeared to hold on to his shotgun *“until he finally fell to the ground”*.

*(iii) Officers K and L*

212. At the time the shots were fired Officer L was still in the patrol car. Officer K had his feet on the ground but was also still in the car when he heard Officer F’s challenge followed by shots being fired. By the time both of these officers were out of their car, Mr Kelly-Tumarae was on the ground.
213. Officer K said he heard a loud bang immediately before he heard the shots from the Glock. As explained earlier, the reconstruction and scene examination established that the shotgun was discharged once (most likely accidentally) while Mr Kelly-Tumarae was still inside his car.

Forensic evidence

214. At the Authority’s request, the ESR forensic scientist carried out a trajectory reconstruction to determine what direction Mr Kelly-Tumarae was facing at the time he received his wounds (see diagrams at Appendix 2.2). As noted earlier, although the

wounds are numbered 1 to 4 the actual order of the shots cannot be determined. In the ESR forensic scientist's view:

- **Wound 1 – to the right side of Mr Kelly-Tumarae's chest** – was received when Mr Kelly-Tumarae was facing in a north-westerly direction and the shooter was to Mr Kelly-Tumarae's right and slightly to his rear.
- **Wound 2 – to the outside of the right leg** – was received when Mr Kelly-Tumarae was facing in a north to north-westerly direction and the shooter was to Mr Kelly-Tumarae's right and slightly forward of him.
- **Wound 3 – to the inside of the right leg** – was *either* received when Mr Kelly-Tumarae was upright and facing in a south-westerly direction with the shooter behind him; *or* when Mr Kelly-Tumarae was on his back, facing in a north-easterly direction, with his right leg off the ground, and the shooter in front and to the left of him.
- **Wound 4 – to the outside of the right foot** – was received while Mr Kelly-Tumarae was facing in a southerly direction, "*assuming that the fragment was travelling in the same direction as the shots*". Note that, as explained in paragraph 82, this shot is likely to have struck something else before a fragment struck Mr Kelly-Tumarae.

215. Officers K and L had stopped their car due north of where Mr Kelly-Tumarae was standing at the time he was shot.

216. As noted in paragraph 84, there were four holes in a line across the left back of Mr Kelly-Tumarae's t-shirt, which may or may not have been caused by a bullet passing through folds in the shirt. If the holes were from a bullet, at the time the shot was fired Mr Kelly-Tumarae would have been facing in the same general direction as when he received wounds 1 and 2.

217. As noted in paragraphs 189-190, Officer F recalled firing four to five shots in the first volley and three to four in the second, but in fact he discharged 14 rounds in total. When he was told that 14 empty cartridges had been found at the scene, Officer F said he could not explain why that number of shots had been fired.

*The Authority's view – application of section 48*

218. As explained earlier, section 48 of the Crimes Act 1961 provides that any person acting in self-defence or defence of another is justified in using "*such force as, in the circumstances as he believes them to be, it is reasonable to use*". Officer F has said that he was acting in self-defence when he fired on Mr Kelly-Tumarae.

219. In determining whether section 48 applies, the starting point is to assess what Officer F believed the circumstances to be from his subjective point of view. The second point is to

consider whether he believed he was acting in self-defence or defence of another, again from his subjective point of view. The third point is to consider whether, given Officer F's beliefs, the force he used was reasonable; in other words, whether it was proportionate to the level of threat as Officer F perceived it.

*(i) The circumstances as Officer F believed them to be*

220. In his statements to the Authority and to the Police, Officer F provided clear, consistent and detailed accounts of the events as he saw them, including clear explanations of the level of threat he believed he faced. His version of events is set out in detail in paragraphs 172-198.
221. The events at Taihape Road took place over a very brief period of time, during which Officer F had to make a number of split-second assessments of the threat he or others faced, and the appropriate response, while he was under extreme pressure. It is clear from his statements that throughout the events at Taihape Road he was fearful for his life and the lives of others.
222. This fear was based on the events prior to his arrival, when Mr Kelly-Tumarae had pointed a shotgun at other Police officers. That fear then escalated as events unfolded at the scene. When Mr Kelly-Tumarae emerged from his car, wearing the ammunition belt and pointed his shotgun at Officers K and L, the officer formed a view that he had to act immediately to prevent fatalities.
223. Officer F then faced Mr Kelly-Tumarae running directly towards him, and some of the officer's statements indicate that he feared for his own life as that occurred. The threat diminished for a split second as Mr Kelly-Tumarae turned towards the cemetery, but the officer – believing he had to act – stepped out from cover and called "Armed Police".
224. According to Officer F, Mr Kelly-Tumarae then turned towards him, raising his shotgun. Officer F, believing his own life was under immediate threat, fired a volley of shots. Seeing Mr Kelly-Tumarae still standing and facing him, and believing his life was still under threat, he then fired another volley. He stopped firing when he saw that Mr Kelly-Tumarae had fallen and was no longer a threat.

*(ii) Self defence or defence of another*

225. For section 48 to apply, Officer F must have believed that he was using force in defence of himself or another. In this case, Officer F has clearly said that he was acting in self defence throughout the entire shooting sequence.
226. At times during his interviews with Police and the Authority, the officer also gave other reasons for his actions. He referred to a more general belief that, if he had not acted, other Police officers could have died. He also referred to a belief that he had a responsibility to protect members of the public from the threat posed by Mr Kelly-

Tumarae if he escaped. In the context of explaining his decision to step out from cover, he also referred to his desire to advance on and dominate Mr Kelly-Tumarae. For the purposes of section 48, it is not necessary to establish that self defence was Officer F's *sole* motivation. Rather, what must be established is that the officer believed he had to fire in order to defend himself or another, regardless of what other motives he may have had.

227. The Authority has also considered the relevance in this context of the forensic evidence and the accounts of Officers B and C. As already explained, Officers B and C both indicated that Mr Kelly-Tumarae appeared to be facing Officers K and L at the time he was shot (although Officer B was unsighted for a short period and Officer C could not be sure about whether or not Mr Kelly-Tumarae pointed his shotgun at Officer F). The forensic evidence also supports the view that Mr Kelly-Tumarae's body was facing in the general direction of Officers K and L when he was shot.
228. Although this evidence creates an appearance of inconsistency, ultimately it does not affect the application of section 48. It is not necessary to establish that Officer F's perceptions and subsequent recall (or those of any other officer) were objectively accurate in every detail. In particular, it is not necessary to objectively establish that Mr Kelly-Tumarae's shotgun was pointing directly at Officer F when the shots were fired. It is enough that, under the circumstances as he perceived them, Officer F genuinely believed that his life was under immediate threat.
229. The Authority has also considered Officer F's decision to step out from a position of relative safety behind the door of his vehicle. This apparently instinctive action left Officer F in a highly vulnerable position – especially as he was not wearing body armour – and removed all tactical options other than use of a firearm. Police policies suggest that the officer should have remained under cover and taken a cautious approach (the officer's non-compliance with these policies will be considered in paragraphs 241-244). However the issue here hinges on the circumstances as the officer believed them to be *at the time he fired* – not the officer's prior actions. Officer F did not fire because he had stepped out from cover, but rather because – once he had done so – he saw Mr Kelly-Tumarae with his shotgun in a firing position and believed that his life was in immediate danger.
230. In summary, the Authority is satisfied that when Officer F fired on Mr Kelly-Tumarae he genuinely believed that his life was under immediate threat.

*(iii) The reasonableness of the force used*

231. The final step in the application of section 48 is to consider whether the force used was reasonable under the circumstances as the officer believed them to be. That is, was the force used proportionate to the threat?

232. Although Officer F recalled firing a first volley of four to five shots and a second volley of three to four shots, the forensic evidence indicates that in fact he fired 14 shots in total. The inconsistency between Officer F's memory and the actual number of shots fired is neither surprising nor unusual. There is ample scientific evidence that highly stressful situations can impair a person's ability to perceive and process information. It is not unusual in shooting situations for officers and other witnesses to be unclear about exactly how many shots were fired. In this case, all of the other officers present believed Officer F had fired considerably fewer than 14 shots.
233. It is also important to be clear that the firing of 14 shots is not in itself excessive. What matters is not the number of shots fired but the threat the officer perceived, and whether his response was reasonable. Of the shots fired, only four struck Mr Kelly-Tumarae; the others missed, and so cannot have had any effect on the threat Officer F perceived.
234. One of those four shots appears to have struck Mr Kelly-Tumarae as he was either falling or had turned away from Officer F. However this can be explained by a range of factors, including: the speed with which events unfolded; the fact that both Officer F and Mr Kelly-Tumarae were moving as the shots were fired; the impact of stress on Officer F's perceptions; and the possibility that Mr Kelly-Tumarae was not immediately incapacitated by his wounds.
235. It must be remembered that this was a rapidly evolving event, in which both Officer F and the offender were moving. Officer F has said that the whole incident took no more than 10 seconds from the time he got out of his car to the time Mr Kelly-Tumarae fell, and this is supported by the accounts of other officers at the scene. The Glock is a semi-automatic pistol, which is capable of firing multiple rounds in a very short time, with very light pressure on the trigger. Based on testing carried out for the Authority, it is possible to fire 14 rounds from a Glock in less than four seconds.
236. When a person is shot, there are many factors that will influence how quickly they are incapacitated (that is, how quickly they cease to present a threat of death or serious bodily harm). Not all bullet wounds incapacitate. One of the relevant factors is the performance of the gun and ammunition used. Police regard the Glock as the best available short barrel firearm for their purposes, but all short barrel firearms have limited effectiveness. According to the NZ Police Firearms Instructors Training Manual, "*studies of actual shootings show the 9mm [Glock] to be 72% effective*" at incapacitating offenders. The manual also recognises that as a general rule handgun ammunition does not perform well in operational environments, and acknowledges that officers may have to fire further shots should immediate incapacitation not occur.
237. After the bullet is fired, other factors may come in to play. This includes the angle of the bullet, whether it strikes anything (including clothing) before entering the body, and the part of the body that is struck. If a bullet strikes a major organ or artery this may result in

rapid incapacitation; if a bullet strikes arms or legs the offender may be able to continue to act. Factors affecting the offender's mental state, such as alcohol or drugs, might also delay an offender's reaction when he or she receives a bullet wound.

238. Based on the factors described above, it is possible that Mr Kelly-Tumarae was wounded but was not immediately incapacitated, and so Officer F continued to fire for a brief period. It is also possible that Mr Kelly-Tumarae was incapacitated, but Officer F did not immediately perceive this. As noted above, highly stressful situations can impair a person's ability to perceive and process information. In this incident, Officer F was required to process a great deal of information in a very short time, during which both he and the offender were mobile and the level of threat was constantly changing. Under these circumstances, it is reasonably likely that Mr Kelly-Tumarae began to fall but Officer F took a moment to register this fact, and so continued firing for a split second.
239. Finally, there is the evidence of Officers B and C to consider. These officers are the only witnesses to the shooting. Both confirmed that the shooting took place over a very short timeframe, and both clearly stated that Officer F stopped firing as soon as Mr Kelly-Tumarae fell. In this respect their evidence is consistent with Officer F's version of events.
240. In summary, Officer F's use of force was not excessive. He did not intend to kill; he intended to incapacitate an armed offender and so remove a threat to his own life. Faced with that lethal threat, he used the only means of self defence available to him – his Glock pistol. Having decided to use the pistol, he fired until he perceived that the immediate threat to his life had passed.

*The Authority's view – compliance with Police policies*

*(i) Moving out from cover*

241. Police General Instruction F061 requires officers to balance caution against the immediate need to prevent casualties; it reminds them that caution is not cowardice, and instructs them to *"never go unnecessarily into danger"* and to contain the offender and take a *"wait and appeal"* approach where possible. The traffic patrol techniques policy also advises officers stopping vehicles containing armed offenders to remain under the cover of their own vehicle and appeal to the offender from there.
242. Instead of taking the cautious approach advocated by these policies, Officer F stepped out from a position of relative safety behind the door of his vehicle. Based on his own statements, it appears he did this as Mr Kelly-Tumarae was reaching the back of his Primera and was turning to run towards the cemetery, shortly after the offender had pointed his rifle at Officers K and L.
243. Officer F provided various explanations for this action (see paragraphs 184-193). He said he did not know why he stepped out. He also said that the action was instinctive; and that

(having decided he had to take immediate action to prevent casualties) he stepped out to get a clearer aim, to reduce the distance between himself and Mr Kelly-Tumarae due to the Glock's perceived inaccuracy, and to "dominate" the offender.

244. Applying the relevant policies, it is clear that Officer F should have remained behind the door of his Police vehicle and appealed to Mr Kelly-Tumarae from there. By stepping out from cover, Officer F put himself in a highly vulnerable position and removed all tactical options other than use of a firearm. However, as explained in paragraph 229, although the officer did not take the cautious approach required by policy, he was nonetheless acting in self defence when he fired.

(ii) *Compliance with the conditions of General instruction F061*

245. General instruction F061 sets out conditions which must be met before an officer fires on an offender (see paragraph 332). One of those conditions is that Police call on the offender to surrender, unless it is impractical and unsafe to do so. Officer F recalls shouting "Armed Police" at Mr Kelly-Tumarae. Officer C recalled an officer shouting at Mr Kelly-Tumarae to put down his gun. Other officers present could not clearly recall what was said. Under the circumstances, the Authority is satisfied that Police conveyed to Mr Kelly-Tumarae that they were in attendance and he should surrender.
246. The other conditions for firing were also met at the time Officer F fired. Specifically, at the time of firing it was clear that Mr Kelly-Tumarae could not be disarmed or arrested without first being shot; and it was clear that, in Officer F's view, further delay in apprehending Mr Kelly-Tumarae would be dangerous or impractical.

#### FINDINGS

Officer F breached Police policy by stepping out from the cover provided by his Police vehicle. Although his reaction appears to have been instinctive and to have been motivated by a desire to prevent casualties, the appropriate action under the circumstances was to remain under cover and appeal to Mr Kelly-Tumarae from there.

Having stepped out, and having seen Mr Kelly-Tumarae raise his shotgun, Officer F believed his life was under immediate threat and that it was necessary to shoot in order to defend himself. Under the circumstances as the officer believed them to be, his decision to use potentially lethal force by firing on Mr Kelly-Tumarae was justified.

The officer continued to fire only for as long as he believed that his life was in immediate danger, and stopped firing when he saw that Mr Kelly-Tumarae had fallen to the ground and the danger had passed. The force used was not excessive.



## OTHER TACTICAL OPTIONS

**Issue 6: Were other tactical options available and considered before Officer F used his firearm?**

247. As explained earlier, Police policy on the use of force is based on the principle of caution. It encourages officers to contain armed offenders and use voice appeal where possible, and to act in ways that minimise the risk of casualties. In light of those policies, the Authority has considered whether Officer F had tactical options available to him other than drawing his Glock and directly confronting Mr Kelly-Tumarae, in the very brief period before the officer stepped out from cover and used his firearm.
248. Although Officer F was carrying OC spray and a baton, neither of these would have provided safe or practical options under the circumstances. He was not carrying a taser, and even if he had this would also have been unsafe and impractical under the circumstances.
249. Other options that may have been open to Officer F included: cordon and containment (as described in paragraph 113); and retreat. Police and the Authority's investigators asked him about those options.

Officer F's account*(i) Cordon and containment*

250. As explained earlier, Officer F's initial intention when he arrived at Taihape Road was to cordon and contain Mr Kelly-Tumarae, but that plan changed once Officers K and L arrived and Mr Kelly-Tumarae pointed his shotgun at them. Officer F said he also would have been happy for Mr Kelly-Tumarae to run off down the road, or for him to run off into the cemetery and for Police to contain him there until the AOS arrived; but instead Mr Kelly-Tumarae pointed his shotgun at Officer F. Officer F emphasised that in his view Mr Kelly-Tumarae had dictated the course of events.

*(ii) Retreat*

251. When interviewed by Police, Officer F was asked if he considered retreating after he had stopped at Taihape Road. He said he did not:

*"... thinking back on it now, it didn't even come into my head, he stopped unexpectedly because I was expecting him to carry onto Flaxmere, but when he did stop I was prepared for an armed vehicle stop, if I had retreated I have no idea what else he could have done ... if I had retreated I believe I would not have carried out my duties as a Policeman."*

### The Authority's view

252. From the time Mr Kelly-Tumarae stopped, the option to cordon and contain until the AOS arrived was the most obvious, appropriate and viable tactical response. The immediate response at Taihape Road should have been the same as that mapped out by Officer A for the Wordsworth Crescent scene. There, notwithstanding that Mr Kelly-Tumarae had aimed his shotgun at Officers B and C, Officer A's immediate response was based on best practice and safety considerations for all. His plan to meet at the safe forward point and then cordon and contain, is the foundation of the initial Police response to such a scenario based on tried and tested principles of dealing with an armed offender. Officer F's plan when he initially arrived at Taihape Road also reflected this best practice approach.
253. Officer F has said that Mr Kelly-Tumarae dictated the way events unfolded, and that is largely true. However, Police actions also narrowed the tactical options available for safely containing the offender:
- First, as discussed in paragraphs 153-161, Officers K and L arrived at the scene and parked in a manner that put them in danger and made cordon and containment difficult. Their actions, as noted earlier, reflected the absence of a clearly articulated tactical plan for containing Mr Kelly-Tumarae.
  - Second, Officer F stepped out from cover. Had he remained behind the door of his Police vehicle he could have appealed to Mr Kelly-Tumarae from there. While it cannot be known how Mr Kelly-Tumarae would have responded, this approach would at least have given Officer F more protection and potentially provided more time for armed backup to arrive. If Mr Kelly-Tumarae did run off into the cemetery, the cordon and contain option would have remained viable.

#### FINDINGS

The appropriate tactical option as Police arrived at Taihape Road was to wait under cover and seek to safely contain Mr Kelly-Tumarae. This was Officer F's intention when he arrived at the scene.

Safe containment became much more difficult after Officers K and L arrived and stopped right next to Mr Kelly-Tumarae's vehicle.

Officer F limited his tactical options by leaving the cover provided by his vehicle and confronting Mr Kelly-Tumarae.

## MEDICAL CARE

**Issue 7: Was all reasonable assistance given to Mr Kelly-Tumarae after he was shot?**

254. Officer A was the first officer to make physical contact with Mr Kelly-Tumarae after the shooting. He said he was not aware as he got out of his car that shots had been fired. As he moved forward he saw Mr Kelly-Tumarae lying on his side. Officers F and K were standing nearby with their firearms pointing at the prone Mr Kelly-Tumarae.
255. Officer A said he told those officers he would handcuff Mr Kelly-Tumarae. He approached Mr Kelly-Tumarae and grabbed his left hand. Mr Kelly-Tumarae attempted to struggle as he placed a handcuff on his left wrist. The officer asked Mr Kelly-Tumarae to put his right hand behind his back. When Mr Kelly-Tumarae did not comply, the officer reached for his right hand. He then looked down towards Mr Kelly-Tumarae's legs and saw that he was bleeding heavily. Officer A immediately advised CentComms that the offender had been shot and an ambulance was required. He told Mr Kelly-Tumarae that an ambulance was on his way and then started searching for further injuries.
256. Officer A found what appeared to be a bullet injury to Mr Kelly-Tumarae's lower chest, but it was not bleeding heavily. The officer continued with the search until he found the source of the bleeding, inside Mr Kelly-Tumarae's upper leg. The handcuffs were immediately removed and he and another officer applied pressure on the wound using Mr Kelly-Tumarae's trousers, which had been removed during the search to identify the source of the bleeding. Bandages were then used to stem the blood flow.
257. While waiting for the ambulance, Officer A advised CentComms to inform the ambulance staff that Mr Kelly-Tumarae had been hit by a bullet and the heavy bleeding was probably from a severed artery.
258. Officer A remained with Mr Kelly-Tumarae and maintained the pressure on the wound. He and another officer again called CentComms and asked when the ambulance would arrive. When it arrived about 11 minutes later, Officer A briefed the paramedics on the bullet wounds and helped them, with another officer, to lift Mr Kelly-Tumarae onto a gurney.
259. The two paramedics confirmed that on their arrival there were pressure bandages on Mr Kelly-Tumarae's leg, with an officer holding and putting more pressure on it. They knew it was a serious injury and had Mr Kelly-Tumarae in the ambulance within two minutes of their arrival.
260. One civilian witness later said that Mr Kelly-Tumarae's head was not supported during his transfer into the ambulance. However, in the Authority's view, the nature of the bleeding and the urgency to quickly transport him to the hospital was the priority. While his head

may not have been supported, there was nothing improper about the actions of the medical staff and officers.

261. While Officer L assisted the two paramedics in the back of the ambulance, Officer K drove the ambulance to Hawke's Bay Hospital where Mr Kelly-Tumarae was immediately attended to by seven medical staff awaiting his arrival. Gradually, Mr Kelly-Tumarae's condition deteriorated and he was pronounced dead at 3.05am.

**FINDING**

All reasonable and appropriate medical assistance was afforded to Mr Kelly-Tumarae by the Police after he was shot.

**SCENE SECURITY**

**Issue 8: Following the shooting, was the scene kept secure in order to preserve evidence for subsequent investigations?**

262. While first aid was being administered to Mr Kelly-Tumarae, Officer K moved his car from its original position to the side of the road. He later said that he had believed he was to use it to escort the ambulance to the hospital. At the time, Officer A, who had been designated as the incident controller, was with Mr Kelly-Tumarae. He did not find out until later that the car had been moved.
263. Shortly before Officer F left the scene, he went back to his Police vehicle and took out his wallet and a bag containing personal items.<sup>3</sup> Based on his statement to Police, it does not appear that he asked Officer A or any other senior officer before taking these items. Officer A was not aware of Officer F taking these items from his Police vehicle.

**FINDING**

Once it was established that a person had been shot, the scene should have been 'frozen' and no vehicles or items should have been moved until a thorough scene examination had been carried out.

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<sup>3</sup> Including his meal.

## THE POLICE INVESTIGATION

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### **Issue 9: Was the Police criminal investigation conducted in a thorough and professional manner?**

#### Conduct of the investigation

264. In most respects the Police investigation was thorough and professional. The Authority supports the conclusion that the shooting of Mr Kelly-Tumarae was justified in accordance with section 48 of the Crimes Act 1962. However, in the Authority's view, for the sake of completeness and transparency it would have been preferable for:

- The ESR scientist to have been asked to attend the Taihape Road scene, as well as the post mortem examination.
- A scene reconstruction to be undertaken. Reconstructions are particularly useful for incidents involving firearms where there are questions of trajectory, lighting, line of sight and line of fire. In this case, a reconstruction may have provided additional clarity about the actions and positions of Officers K and L, the movements of Officer F, and the movements of other officers who arrived on the scene after the shooting.
- Gunshot residue tests to have been carried out on Officer F and other officers at the scene, and on the Police vehicles and the Primera.
- Gunshot residue tests that were taken from Mr Kelly-Tumarae to have been analysed.
- A more thorough search and area canvas of the scene where Mr Kelly-Tumarae was first seen by Officers B and C to have been undertaken, in order to ensure that any evidence relating to that interaction was uncovered.

#### Drug and alcohol testing

265. Under Police policy on firearms, officers who may be required to carry firearms must not consume alcohol while on standby for duty, or during duty, or before commencing duty if when their duty commences they may still be under the influence of alcohol or their work performance may be impaired as a result of their alcohol consumption.

266. Officer F was not tested for alcohol or drugs on the night of the incident. He was interviewed by the Police two days later on 30 March 2011. He told the Police that he was happy to be tested by the investigation team, but after waiting for three hours after the shooting he left his office and went home. Officer F said he had last drunk alcohol about two weeks before the shooting. He said he did not take illicit drugs. The day before the shooting he had taken two Nurofen pills for a headache.

267. The Authority has on numerous occasions recommended that Police develop a compulsory drug and alcohol testing policy for officers involved in critical incidents. In this case, there is no suggestion that Officer F or any other officer involved in this incident was under the influence of drugs or alcohol. Nonetheless, the case for compulsory testing remains valid. Police have informed the Authority that they are currently developing a policy and are close to implementing it.

#### FINDINGS

In most respects the Police criminal investigation was thorough and professional. Although there were some omissions, these did not affect the overall conclusion that Officer F was justified in shooting Mr Kelly-Tumarae.

#### **Issue 10: Was the Police's liaison with Mr Kelly-Tumarae's family adequate during and after the criminal investigation?**

268. In the aftermath of an incident such as this, the deceased person's family is asked not only to deal with their grief and with practicalities such as funeral arrangements, but also to engage with Police during the investigation and to understand the investigative process and its outcomes. This can be overwhelming and the uncertainty arising out of dealings with the Police can cause further distress in an already delicate situation. Cultural issues can also come into play.
269. In situations involving the sudden death of a Māori person, Police may appoint an iwi liaison officer to help them communicate with the family throughout the investigation. In this case all three Eastern District iwi liaison officers were unavailable. Instead a Māori Police Sergeant facilitated a visit by senior Police officers onto the Omahu marae, and a family liaison officer, who was not versed in tikanga Māori, was appointed to liaise with Mr Kelly-Tumarae's family.
270. The Authority considers that there are ways in which more effective support could have been provided to the Tumarae family, and ways in which family liaison policies and practices could be improved. Specifically:
- i) While the Authority understands that the appointed family liaison officer carried out her duties well, the Authority considers that Police should have sought an iwi liaison officer from outside the District to liaise with the family, instead of a family liaison officer who was not versed in tikanga Māori. Police looked outside the District for specialist staff to assist with the criminal investigation, and in the Authority's view they should have given the same level of consideration to appointing appropriate staff to liaise with the family. In this case there was a particular need for Police to ensure that they dealt with the family in a culturally sensitive manner, given the location and manner in which the death occurred.

- ii) In May 2012, Police met and advised Mr Kelly-Tumarae's family of the outcome of the criminal investigation. This was over four months after Officer F had been informed of the likely outcome. The Authority accepts that Officer F was only advised of the interim findings of the investigation, which were subject to the conclusions of the final ESR and pathological reports, and further legal consideration. However it would have been desirable for the family and Officer F to have received the same information about the outcome of the investigation at the same time.
- iii) Police met the family to inform them of the outcome of the criminal investigation, and then sent a letter to the family confirming that outcome. This approach provided a very limited opportunity for the family to understand the evidence and the conclusions of the investigation. In future incidents of this nature, it would be preferable for families to receive a comprehensive report about the incident at the time they are informed of the investigation outcome. This approach would be fairer and more transparent.
- iv) Police returned only some of the clothing Mr Kelly-Tumarae wore on the night he was shot, despite the family's request that all clothing (including blood-soiled clothing) be returned.<sup>4</sup> In the Authority's view, all clothing should have been returned at the same time. Police have advised the Authority that none of the clothing should have been returned until the final legal opinion had been received, and that the remaining items of clothing will be retained by Police until the Coroner's inquest is completed.
- v) While four shots struck Mr Kelly-Tumarae, there were many more holes in his clothing. Some of the holes were from bullets; some were not; and the cause of others could not be determined (see paragraphs 84-85). When the clothing was returned to the family in December 2011, Police did not clearly explain the causes of the holes in the clothing. As a result, the family formed a view that Mr Kelly-Tumarae may in fact have been shot more than four times. A clear explanation should have been provided by Police at the time the clothing was returned, but was not given until May 2012. Police have advised the Authority that they accept that the return of Mr Kelly-Tumarae's clothing was not as well handled as it should have been, and they have extended their sincere apologies to the family.

271. The families of people who are lawfully shot by Police face many of the same challenges as families of other homicide victims. In the Authority's view, Police policy and practice

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<sup>4</sup> Mr Kelly-Tumarae's hat, underwear, and glasses were not returned.

should reflect this, and should ensure that the families are (i) dealt with in a culturally sensitive manner; (ii) provided with regular and timely updates on the progress of the Police investigation; and (iii) given an opportunity to consider and ask questions about the outcome of the Police investigation.

#### FINDINGS

In some respects the Police's liaison with Mr Kelly-Tumarae's family was not adequate. Given the circumstances, an iwi liaison officer or an officer with an appropriate understanding of tikanga Māori should have been appointed to liaise with the family. Police should have communicated more effectively with the family about the clothing and the investigation outcome.

#### FIREARMS POLICY AND MANAGEMENT

272. During the course of its investigation, the Authority became aware of a number of issues relating to firearms policy and management in the Eastern District. These issues did not directly contribute to the outcome of this incident, but are nonetheless worthy of note and in some cases are significant policy breaches.

#### **Issue 11: Were the Eastern District's policies and procedures for firearms security and auditing adequate and complied with?**

273. The 'Police Firearms' section of the Police Manual requires that all ammunition is safely and securely stored in an approved safe or security cabinet. The manual also requires that all dummy rounds are stored separately from live ammunition and clearly marked.
274. When Officer F's Police vehicle was searched after the shooting, a 9mm live round and a 9mm dummy round were found in the glove box. The Police vehicle is used by Officer F and other officers.
275. During interviews with Police and the Authority, Officer F said the firearm is not checked daily by the officer using the vehicle. He said that, during a routine monthly firearms check a few days before the shooting, he had found a live round missing from the vehicle's gun safe and had replaced it. There was, however, no record of this in the documentation from his monthly check. Officer F also explained that within his group the Glock was sometimes used to fire dummy rounds for training purposes, which may explain the presence of the dummy round in the glove box.
276. Any mixing of live and dummy rounds creates a potentially significant safety risk to Police and others. The presence of these rounds in the glove box is a clear breach of the required standard of firearms security.



277. In addition, the firearms safe in the car used by Officers D and E was damaged and Eastern District audit processes failed to detect this damage. During the investigation it became clear that officers knew of the damage but had not taken any action to deal with it.
278. Police supplied the Authority with documentation regarding the auditing of firearms, ammunition and equipment in Napier and Hastings. This documentation showed that each office had different approaches to auditing.

#### FINDINGS

The Authority's investigation uncovered deficiencies and inconsistencies in Eastern District firearms audit practices. In some cases these deficiencies resulted in potential risks to Police and public safety.

#### **Issue 12: Were the firearms and related equipment used in this incident in good working order?**

279. When Officers K and L arrived at Taihape Road, they had difficulty getting out of their car while fully kitted with their body armour, holsters and firearms. In the Authority's view, this resulted from a combination of both human and equipment issues. While the human element can only be resolved by training and familiarity, there was also an issue with the way the holster sat against the officers' bodies when they were sitting down. Before this incident the Police had accepted there was a problem with the holster. The Police have since replaced these holsters nationwide.
280. When the Police armourer examined Officer F's Glock pistol, he discovered a fault with the pistol's Trijicon HD™ foresight. This foresight has a small vial containing a chemical compound which glows in the dark, assisting with shooting in low light conditions. As noted in paragraph 177, after firing the first volley of shots Officer F realised he was aiming low and checked his aim (*"I said to myself sight picture, foresight"*) before firing again. In the Authority's view, it is unlikely that the fault in the foresight was a factor in Officer F aiming low (and, in turn, in the number of shots he fired). The Taihape Road scene was well lit, whereas the Trijicon foresight is intended for a darkened environment. It is nonetheless of concern that the defect was not discovered until after this incident. In 2012 the Police undertook a nationwide programme to replace both the rear and foresight Trijicon components in all Glock pistols.

#### FINDINGS

Some equipment used during this incident was not in good working order. Police have since remedied these faults.

INVESTIGATION DEBRIEF

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**Issue 13: Did Police take all available opportunities to address pursuit management and incident control issues arising from this incident?**

281. On 21 June 2011, the Police held a debrief of its criminal investigation. CentComms and the District staff also had separate debriefs. However, there was no combined debrief involving members of all the sections that had roles in this incident (including General Duties, CentComms, Welfare and AOS).
282. In the Authority's view, it would have been preferable for Police to hold a combined debrief so that the different sections could critically review their actions and address any issues relating to how they cooperate during an incident of this nature. Specifically, a debrief would have been valuable as some of the issues arising out of this incident suggest that there is a need for better understanding and appreciation of the different sections' roles and responsibilities when dealing with critical incidents.
283. Police policy was amended in 2012 in relation to debriefs and a more detailed procedure has been introduced. This requires a formal or multi-agency debrief to be held no later than four weeks from the date of the incident, which must involve the key players that were involved in the response to the incident.

**FINDING**

It would have been valuable for Police to conduct a combined debrief involving members of each different section involved in this incident.



# Conclusions

284. It is not known why Lachan Kelly-Tumarae took his grandfather's shotgun and ammunition and went to Wordsworth Crescent. He may have been distressed over the unveiling of his grandfather's headstone. The circumstances of the preceding weeks, in which he had returned to the Hawke's Bay following the Canterbury earthquake, may have had an impact. Alcohol, drugs and other factors may also have been at play.

285. It is also not known why he pointed the shotgun at Officers B and C, or why he pulled his car up close behind the officers, gestured to them in a way that made it appear he wanted them to pull up alongside him, and finally led them to the *urupā*. It does appear from his actions that – having been seen by Officers B and C – he wanted to engage with Police. However all that can be known for certain is that the sequence of events he initiated, and for the most part controlled, was to end tragically with the loss of his life.

286. Responding to armed offenders is one of the unavoidable hazards of Police work. The officers who were called on to respond to Mr Kelly-Tumarae were willing to put their lives in danger in order to carry out their duty. The Police response was in many respects exactly as it should have been. On the occasions in which officers sought to contain Mr Kelly-Tumarae in a limited area where they could appeal to him without endangering themselves or others, and where they sought to follow him at a safe distance, they were acting exactly as they should under these difficult circumstances.

287. There were also times when the Police response fell short of what is required. The AOS should have been activated more quickly in accordance with the CentComms shift commander's request. For much of the pursuit there was a lack of clarity about who was in charge, and about the tactics to be used. This left officers in the field to form their own views. At times it appeared that officers were acting instinctively, in a manner that was inconsistent with the disciplined and cautious 'cordon and contain' approach required under the circumstances. This occurred in particular when the CentComms shift commander made the decision to use road spikes to stop Mr Kelly-Tumarae without developing a plan for safely containing him, when Officers K and L pulled in close beside Mr Kelly-Tumarae's car at Taihape Road, and when Officer F stepped out from under cover.

288. There were also several occasions in which officers failed to comply with policies on the carriage and use of firearms (such as Officer L arming himself when he did not have the required certification, and Officer F choosing not to wear body armour); and on responding to armed offenders (such as the actions of Officers K and L and the shift commander, referred to in the previous paragraph). Some of these failings limited the tactical options Police had available to them, and contributed to the circumstances that ultimately led to Officer F confronting an armed Mr Kelly-Tumarae.
289. Where they acted instinctively, the officers' actions were understandable human responses to very difficult, dangerous and rapidly evolving circumstances. But that is precisely why a clear chain of command, effective leadership, and compliance with policy are so important: along with training, they insulate against instinctive, fight-or-flight reactions, and guide officers towards more considered and cautious approaches that minimise risk to themselves and others.
290. Compliance with policy is particularly important in respect of firearms. In addition to the breaches referred to above, the Authority's investigation found instances of poor ammunition security, faulty equipment, inconsistent and deficient approaches to auditing firearms and ammunition, and outdated policy which meant that several of the Police vehicles responding to this incident were carrying firearms without authorisation. Some of the breaches of policy identified in this report were oversights, but others were wilful.
291. Before 2001, Police did not routinely have access to firearms; in order to arm, they had to return to the station or obtain firearms from a supervisor. Now, however, firearms are routinely carried in frontline vehicles. In this incident, all of the vehicles that responded were carrying firearms. This ready access to firearms reflects what is occurring in the community; it appears that Police are more often being called on to respond to firearms incidents, and in some cases they are compelled to use firearms themselves. This brings a heavy responsibility. In order for the public to have confidence in the Police when a firearm is used and causes death or serious injury, it is essential that policies governing the storage, carriage and use of firearms must be current, relevant, and complied with.
292. Lessons should also be learned about how to respond to the families of people who are killed by Police. It is essential that families are provided with a culturally appropriate Police response in a timely manner, and that they are given the information they need to understand the investigative process and its outcomes.
293. The central issue before the Authority was the shooting of Mr Kelly-Tumarae and whether or not it was justified. It was Mr Kelly-Tumarae who initiated this incident by pointing a firearm at Police officers. Police had no option but to follow him in the hope that he could be safely contained. Once he had reached Taihape Road, Mr Kelly-Tumarae again pointed his shotgun at Police officers in a manner that suggested he was about to shoot. Officer F

perceived a clear and immediate threat to his own life, and so was justified in firing to remove that threat. The force Officer F used was not excessive.

### Section 27 opinion

294. Section 27(1) of the Independent Police Conduct Authority Act 1988 (the Act), requires the Authority to form an opinion as to whether or not any act, omission, conduct, policy, practice or procedure that was the subject-matter of an investigation was contrary to law, unreasonable, unjustified, unfair or undesirable.

295. The Authority has formed the opinion, pursuant to section 27(1) of the Act, that the following actions were undesirable:

#### Pursuit and initial tactical response

- i) The CentComms shift commander's failure to assert his role as incident controller, and to communicate a clear tactical plan.
- ii) The shift commander's decision to stop Mr Kelly-Tumarae using road spikes when there was no plan in place to safely contain him.
- iii) Officer M's delay in activating the Armed Offenders Squad.
- iv) Officer F's failure to put on ballistic body armour when arming himself.
- v) Officer L's decision to arm himself when he did not have the required certification.

#### Tactical options at Taihape Road

- vi) Officer F stepping out from the cover provided by his vehicle, instead of remaining under cover and appealing to Mr Kelly-Tumarae from a position of safety.

#### Scene security

- vii) Officer K moving his vehicle, and Officer F removing items from his vehicle, following the shooting.

#### Family liaison

- viii) The Police's failure to:
  - appoint an iwi liaison officer to liaise with Mr Kelly-Tumarae's family;
  - comply with best practice regarding the return of Mr Kelly-Tumarae's clothing to his family; and
  - provide a full explanation about the causes of the holes in Mr Kelly-Tumarae's clothing at the time the clothing was returned.

296. The Authority has also formed the opinion, pursuant to section 27(1) of the Act, that the following action was unreasonable and unjustified:

*Pursuit and initial tactical response*

- i) Officers K and L pulling up beside Mr Kelly-Tumarae's car at Taihape Road.



# Recommendations

INDEPENDENT POLICE CONDUCT AUTHORITY

297. The most significant issues of Police policy and practice that arose in this investigation concerned incident control and compliance with policy.
298. It is essential that officers understand their respective roles and responsibilities when responding to critical incidents. In particular, it is essential that all field officers understand that it is the shift commander's role to formulate tactics and manage the Police response to any critical incident until that responsibility has been formally handed to a field commander.
299. It is also essential for officers who have access to firearms to clearly understand and comply with the relevant policies, including the basic principles for responding to an armed incident set out in the 'Firing at offenders' section of the Police Manual and policies concerning carriage and use of firearms.
300. There is no need for formal recommendations from the Authority in respect of these issues, as the existing policies are sound. The Authority would, however, encourage Police to take appropriate steps to ensure that all officers are familiar with these policies and understand the importance of complying. The Authority intends to engage with Police to address issues arising in this case (and other cases) relating to command and control and communication during fleeing driver/mobile armed offender incidents.
301. In respect of other issues, the Authority has identified some areas where it considers amendments to policy or practice are warranted. Pursuant to Section 27(2) of the Act, the Authority recommends that Police:
- 1) Audit district policies in respect of patrols authorised to carry firearms, ammunition and associated equipment.
  - 2) Standardise (either at district level or nationally) processes for auditing and documenting firearms, ammunition and associated protective equipment.

- 3) Amend policy to require non-certified officers who are instructed to carry firearms (e.g. when responding to an incident involving an armed offender) to advise the incident controller as soon as practicable that they are not certified.
- 4) Continue developing, as a matter of urgency, policy and procedures for compulsory drug and alcohol testing of officers involved in critical incidents.

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

SIR DAVID CARRUTHERS

CHAIR

INDEPENDENT POLICE CONDUCT AUTHORITY

24 OCTOBER 2013





# Appendix 1: Applicable Law and Policies

INDEPENDENT POLICE CONDUCT AUTHORITY

## FLEEING DRIVERS

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302. At the time of this incident, section 317A of the Crimes Act 1961 empowered Police to stop a vehicle for purposes of arrest where there were reasonable grounds to believe the vehicle contained a person who had committed an offence punishable by imprisonment.<sup>5</sup> Where such a vehicle failed to stop, the Police were authorised to begin a pursuit.
303. The 'Fleeing Driver Policy' chapter of the Police Manual states that a pursuit begins when a driver is signalled by Police to stop, the driver fails to stop and takes steps to avoid apprehension, and Police take action to apprehend the driver.
304. The policy requires officers to carry out a risk assessment before beginning a pursuit, and to continue to assess risks throughout the pursuit. If the risks arising from the pursuit outweigh the immediate need to apprehend the offender, the pursuit must not be commenced, or if it has already commenced it must be abandoned.
305. When a pursuit commences, the communications centre must be notified. The pursuing officer[s] must provide information about their location and direction of travel. The communications centre must prompt for information about the reason for the pursuit, vehicle description, driving speed and posted speed limit, road and traffic conditions, weather, the offender's manner of driving and identity, and the Police driver and vehicle classifications, as well as confirmation that warning devices are activated on the Police car. This information enables the pursuit controller (i.e. the shift commander at the Police communications centre) to make an independent assessment of the risks and to manage the pursuit, including deciding whether to direct that the pursuit be abandoned.

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<sup>5</sup> Section 317A was repealed in 2012. Section 9 of the Search and Surveillance Act 2012 now empowers Police to stop a vehicle if they have reasonable grounds to believe a person is in the vehicle and is unlawfully at large or has committed an offence punishable by imprisonment.

306. The policy sets out the responsibilities of those involved in pursuits:

- The **driver of the lead Police vehicle** has primary responsibility for the initiation, continuation and conduct of a pursuit. The driver must comply with relevant legislation, ensure lights and siren are activated, drive in a manner that prioritises public and Police safety, undertake risk assessments throughout the pursuit, maintain constant communication with the communications centre, comply with all directions from the pursuit controller, and comply with all directions from a Police passenger if the passenger is senior in rank or service.
- The **passenger in a pursuing vehicle** must assist the driver by operating the radio and advising of possible hazards. If senior in rank or service, the passenger may also direct the driver to abandon the pursuit.
- The **pursuit controller** (the shift commander at the nearest Police communications centre) is responsible for supervising the pursuit and coordinating the overall Police response. He or she is also responsible for selecting and implementing the appropriate tactical options. The pursuit controller must ensure that the pursuit warning referred to in paragraph 39 is given by the dispatcher and acknowledged by the pursuing officers. The pursuit controller appoints the lead pursuit vehicle, and can also appoint a secondary vehicle to follow the primary one at a safe distance.
- The **field supervisor** (the senior officer in the field) advises the pursuit controller of any relevant information, and may recommend to the pursuit controller that the pursuit be abandoned.
- The **dispatcher** at the communications centre must advise the shift commander (pursuit controller) that a pursuit has commenced, maintain radio communications with staff involved in the pursuit, give the pursuit warning, and communicate instructions from the pursuit controller. The dispatcher is also required to reissue the pursuit warning if a new vehicle takes over as the primary pursuit vehicle, or if the pursuit location changes to a new dispatch channel.

307. The policy sets out a range of circumstances in which a pursuit must be abandoned. Other than abandoning the pursuit, the fleeing driver policy also outlines three tactical options that may be used: aerial surveillance (where available); a tyre deflation device (i.e. road spikes); and a non-compliant vehicle stop (i.e. using Police cars to force the vehicle to stop). Non-compliant vehicle stops can only be approved by AOS or Special Tactics Group (STG) commanders, and can only be carried out by AOS or STG staff who are trained in its use and are responding to a life threatening incident.

## INCIDENT CONTROL & COMMUNICATION

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308. The 'Radio Protocols' chapter of the Police Manual sets out communication requirements and incident control responsibilities when Police are responding to incidents. The policy states that: *"An efficient and effective Police response to incidents requires that everyone involved in the process clearly understands their own role and responsibilities, and those of the other participants."*

### Incident control

309. Under the policy, the communications centre is responsible for the initial Police response to an incident. This responsibility to act as the 'incident controller' formally lies with the communications centre shift commander (although, in practice a team leader or dispatcher is often delegated to take this role).

310. For as long as the communications centre retains the responsibility for incident control, district staff must comply with the directives given by the shift commander (or by the communications centre team leader or dispatcher). The shift commander makes the final decision on operational matters.

311. The policy provides that the communications centre retains the responsibility for incident control until that role is formally passed to a suitable field supervisor – that is, an officer in the field, preferably ranked sergeant or above, who is willing to assume command. The policy sets out formal procedures for handing over this responsibility, and states that incident control will not be handed over to a field supervisor until he or she has arrived at a safe forward point, been fully briefed, and formed a tactical response plan.

312. Until incident control is formally handed over to a field supervisor, the communications centre shift commander has *"overall responsibility and accountability for managing critical incidents and fulfilling the role of incident controller"*:

*"Accordingly, the shift commander is expected to actively manage, direct and supervise those staff responding to the incident, including initial tactics to be utilised."*

313. Once incident control has passed to a field unit, the shift commander is still required to maintain active oversight of the Police response. This may include engagement with the incident controller over tactics and timing, peer support and mentoring, and advice about legislative powers.

314. Even after incident control is handed over, there may be situations where the field supervisor is no longer best placed to manage the Police response, and so the shift commander can take back incident control. One example of when this may occur is when the offender is mobile.

### Radio discipline

315. The radio protocols require that, during pursuits and major incidents, officers are disciplined in their use of Police radio. During the initial stages, only Police units involved should use the radio. Other units should listen but not make non-urgent requests for information or call to notify their location and availability. All units should immediately comply with directions from the communications centre.
316. This radio discipline is intended to support clear communication and effective tactical decision-making so the communications centre can fulfil its incident control role.

## CARRIAGE AND USE OF FIREARMS

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### Crimes Act 1961

317. Section 39 of the Crimes Act 1961 provides authority for Police carrying out an arrest to use *“such force as may be necessary”* to overcome any force used in resisting the arrest, unless the arrest can be made *“by reasonable means in a less violent manner”*.
318. Section 40 of the Crimes Act 1961 provides authority for Police to use *“such force as may be necessary”* to prevent a person from escaping in order to avoid arrest, unless the escape can be prevented *“by reasonable means in a less violent manner”*.
319. Section 48 of the Crimes Act states: *“Everyone is justified in using, in the defence of himself or another, such force as, in the circumstances as he believes them to be, it is reasonable to use.”*
320. Section 62 of the Crimes Act makes anyone who is authorised by law to use force criminally responsible for any excess use of force, according to the nature and quality of the act that constitutes the excess.

### Authorisation to carry firearms

321. The Police Manual authorises Police officers who hold the position of sergeant or above, or are authorised by a district or communications centre supervisor, to carry firearms when there is *“clear and specific evidence”* that they may encounter circumstances in which they may be required to use a firearm:
- to defend themselves or others, if they fear death or grievous bodily harm to themselves or others and cannot reasonably protect themselves or others in a less violent manner; or
  - to arrest an offender, if they believe on reasonable grounds that the offender poses a threat of death or grievous bodily harm in resisting their arrest, and the

arrest cannot be reasonably effected in a less violent manner, and the arrest cannot be delayed without danger to other people; or

- to prevent an escape, if they believe on reasonable grounds that the offender poses a threat of death or grievous bodily harm to any person (whether identifiable or a member of the public at large), and the offender is fleeing to avoid arrest or is escaping after arrest, and the flight or escape cannot reasonably be prevented in a less violent manner.

322. If it is not practical to obtain any required prior approval, officers may exercise their discretion to arm themselves, but must advise the nearest communications centre and must advise their supervisor at the first reasonable opportunity.

323. The Police Manual also sets out the following requirements when officers arm themselves:

- *Notification of Comms:* In any case where Police arm themselves to attend an incident, or are already at an incident and carry firearms, they must notify the communications centre that they are armed.
- *Body armour:* Authorised ballistic body armour must be worn while a firearm is carried or when Police attend or expect to attend an armed incident.
- *Fire Orders:* Any officer issued with a firearm is personally responsible for ensuring that he or she is thoroughly familiar with relevant law, particularly sections 39, 40, 41, 48 and 62 of the Crimes Act 1961 (see paragraphs 317-320); General Instruction F061 (see paragraphs 331-332); and all relevant instructions and guidelines in the Police Manual. When firearms are issued, if time and circumstances permit, supervisors must draw officers' attention to the 'Fire Orders', which set out the circumstances in which Police officers may use firearms. These are printed on the inside cover of Police notebooks and are also stored in vehicle firearm security cabinets.

## **Responding to armed offenders**

### Armed Offenders Squad callout

324. The Police Manual outlines the role of AOS in an armed incident. Where time and the offender's actions permit, all forward operations against armed offenders, particularly any direct approaches to the offender, must be carried out by AOS members assisted by the Police negotiation team (PNT). If the circumstances do not allow this, the senior officer in charge at the incident must take immediate steps to deal with the situation.

### Principles for responding to armed offenders

325. The 'Firing at offenders' section of the Police Manual sets out the basic principles for Police responding to an armed incident:

*"When dealing with an armed offender or an offender believed to be armed, Police should observe these basic principles:*

- *It is better to take the matter too seriously than too lightly.*
- *Treat all armed offenders or offenders believed to be armed, as dangerous and hostile unless there is definite evidence to the contrary.*
- *Make every effort to prevent casualties.*
- *Caution is not cowardice. When the offender's actions permit, cordon the area, and adopt the wait and appeal role in order to negotiate surrender.*
- *Never go unnecessarily into danger. However, if the offender is acting in a way that makes casualties likely, Police must act immediately to prevent this."*

### Dealing with armed vehicle occupants

326. The 'Traffic Patrol Techniques' chapter of the Police Manual has a section on dealing with armed vehicle occupants. The policy emphasises that checking a vehicle with armed occupants is one of the most dangerous duties a Police officer can face.

327. The policy states: **"Do not approach the vehicle – whether you are armed or not, and whether you are in a two-person patrol or not."** Instead, officers are instructed to follow at a safe distance and observe, provide continuous situation reports to the Police communications centre, request information about the vehicle and person, and wait for backup.

328. The policy also says:

#### ***"Avoid stopping the vehicle***

*Do not stop the vehicle before back up arrives, except in extreme circumstances. For example, if the driver:*

- *has become agitated and is heading into a populated area, or*
- *is going somewhere to commit a serious offence and is nearly at their destination."*

329. The policy also sets out the appropriate actions if Police are required to stop or approach a vehicle with armed occupants. It states that a Police officer's decision about where to

stop in relation to an armed offender's vehicle *"is a trade-off between the safety of distance and the control achieved by proximity"*. It is important that the officer stops:

- i) within the effective range of his or her weapons;
- ii) where the offender's hands can be seen;
- iii) where the officer can react to an attempted ram (the recommended distance is 12-15 metres); and
- iv) in a position that maximises the cover provided by the Police vehicle, but is close enough for the officer to convey orders clearly to the offender.

330. The policy states that officers should leave their vehicle's engine running and warning lights on. The driver of the Police vehicle should get out of the vehicle and crouch in the 'V' made by the open door. The officer should then use the vehicle's public address system to tell the offender that he or she is armed, and give instructions to the offender. Officers should not approach the vehicle, but should observe, provide continuous reports to the Police communications centre and to officers providing backup, and wait for that backup to arrive.

#### Use of firearms

331. Police General Instruction F061 (Use of Firearms) provides that Police may only use firearms for the purposes of defending themselves or others, arresting an offender, or preventing escape, in the circumstances referred to in paragraph 321 and in accordance with the Crimes Act provisions referred to in paragraphs 317-320. The instruction reminds officers that *"An overriding requirement in law is that minimum force must be applied to effect the purpose."* It also says that: *"Where practical, Police should not use a firearm unless it can be done without endangering other persons."*

332. General Instruction F061 directs that an offender is not to be shot until **all** of the following conditions have been satisfied:

- *"they have first been asked to surrender (unless it is impractical and unsafe to ask them)*
- *it is clear they cannot be disarmed or arrested without first being shot*
- *further delay in apprehending the offender would be dangerous or impractical."*

#### Firing at offenders

333. The 'Police Firearms' section of the Police Manual contains a section on 'Firing at offenders'. That section also reminds officers of the Crimes Act provisions and the need to use the minimum force necessary to achieve the objective. It states that the

*“circumstances justifying Police firing at an offender can change very rapidly”, and any officer who fires a shot “must be personally satisfied there is justification for doing so”.*

334. The Police Manual reminds officers of the circumstances in which they are able to claim self-defence under section 48 of the Crimes Act, and states: *“There is no justification for firing at a suspect when they are no longer a threat to life. This applies regardless of the suspect's previous actions.”*
335. The manual states that, as a general rule, warning shots should not be fired. However, a warning shot may be appropriate if: extreme caution is taken to safeguard the safety of others; the suspect has been asked to surrender (if practical) and has not done so; and the shot can be clearly aimed as a warning shot.



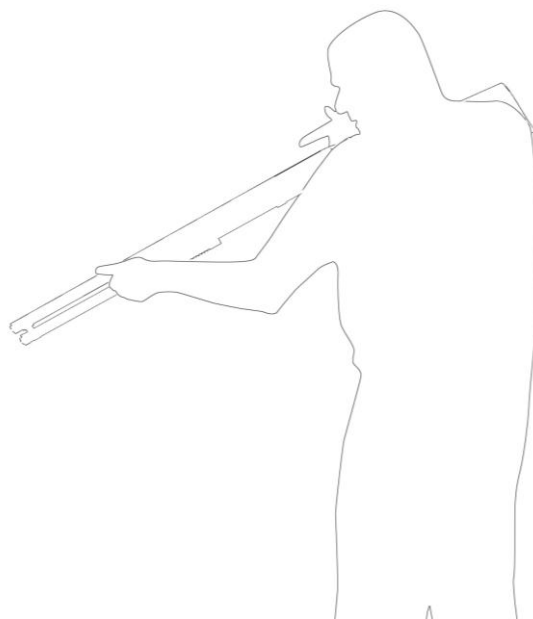
## Appendix 2: Diagrams

INDEPENDENT POLICE CONDUCT AUTHORITY

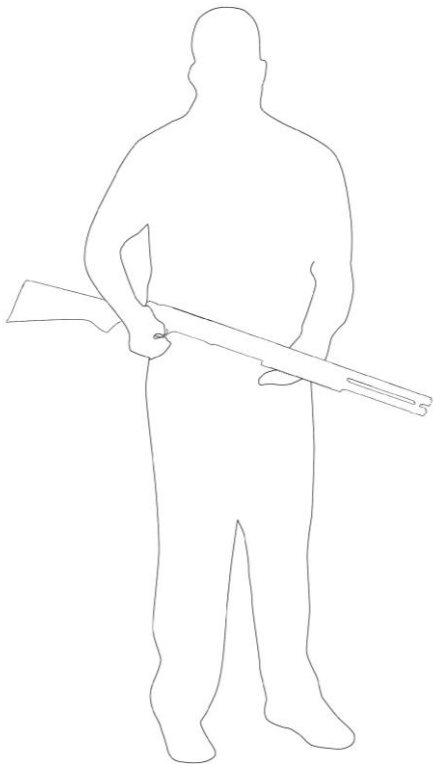
336. The diagrams in Appendix 2.1 illustrate Officer F's recollections of Mr Kelly-Tumarae's stance and the manner in which he was holding the shotgun at key moments just before he was shot.
337. The diagrams in Appendix 2.2-2.5 are based on scene diagrams created by Police and ESR during the Police investigation into this incident. They illustrate the trajectory of the bullets that struck Mr Kelly-Tumarae, the scene measurements, where the spent cartridges were located, and the positions of the vehicles at the scene after the shooting.

### APPENDIX 2.1: HOW MR KELLY-TUMARAE HELD THE SHOTGUN ACCORDING TO OFFICER F

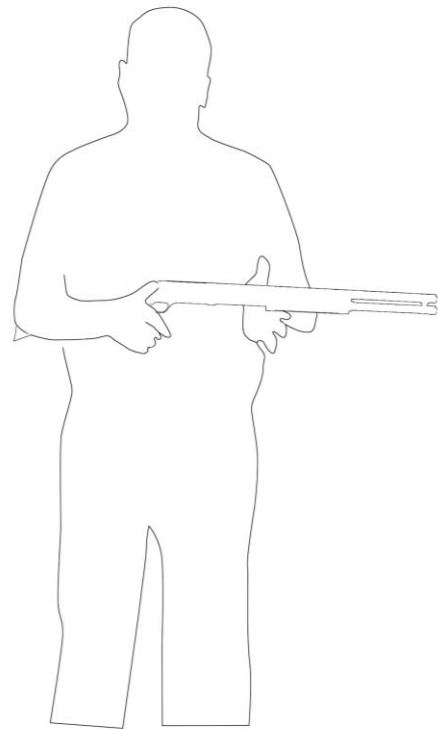
**1. Pointing the rifle at Officer L:** According to Officer F, this was Mr Kelly-Tumarae's stance as he pointed his shotgun at Officer L. Officers K and L had just arrived at the scene and Officer L was still sitting in his patrol car.



**2. Running towards Officer F:** According to Officer F, this was how Mr Kelly-Tumarae held his shotgun as he ran down the side of the Primera directly towards the officer.

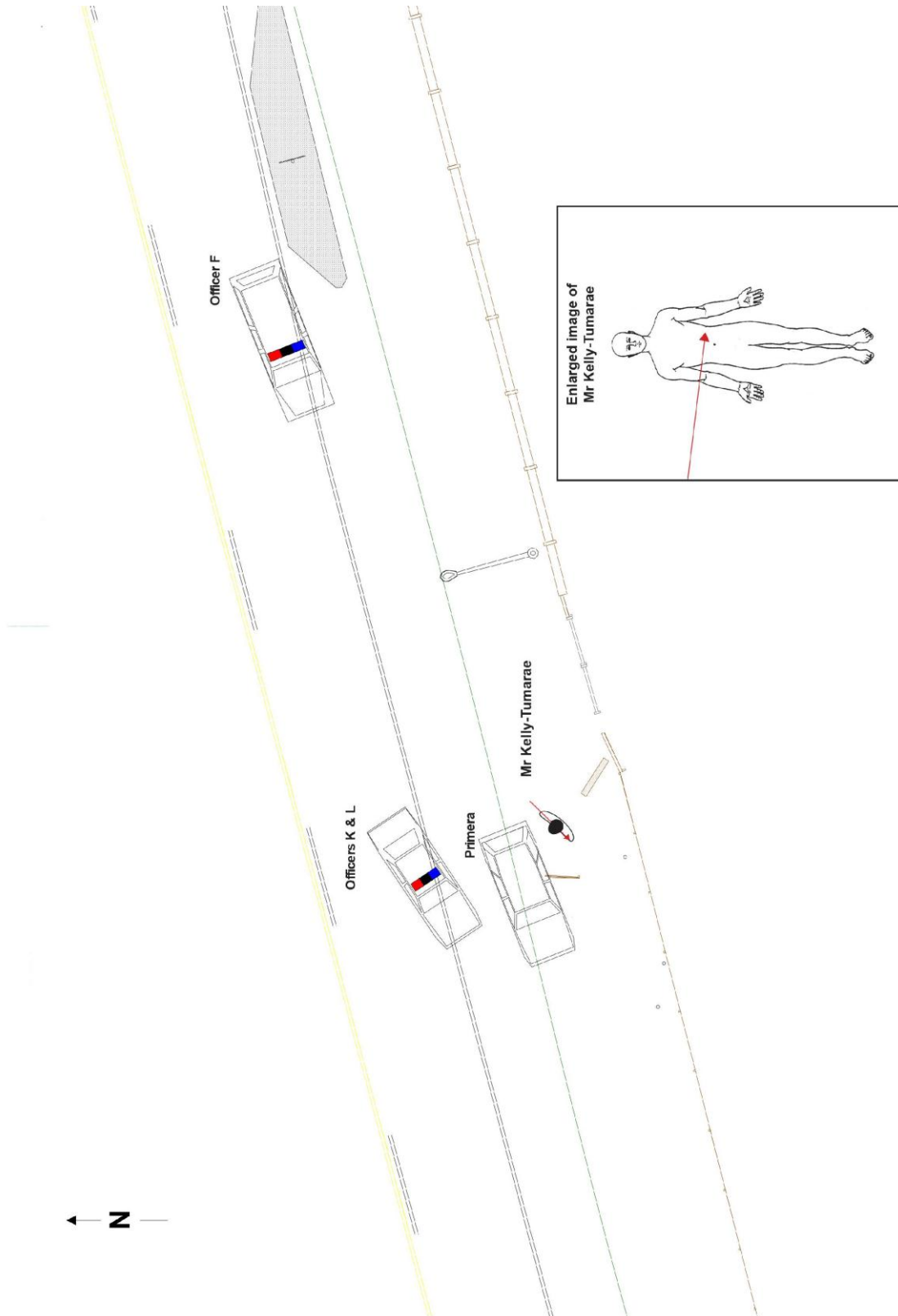


**3. Pointing the shotgun at Officer F:** According to Officer F, this was Mr Kelly-Tumarae's stance immediately before he was shot. He was at the rear left side of the Primera, holding his shotgun in a firing position and pointing it directly at Officer F.

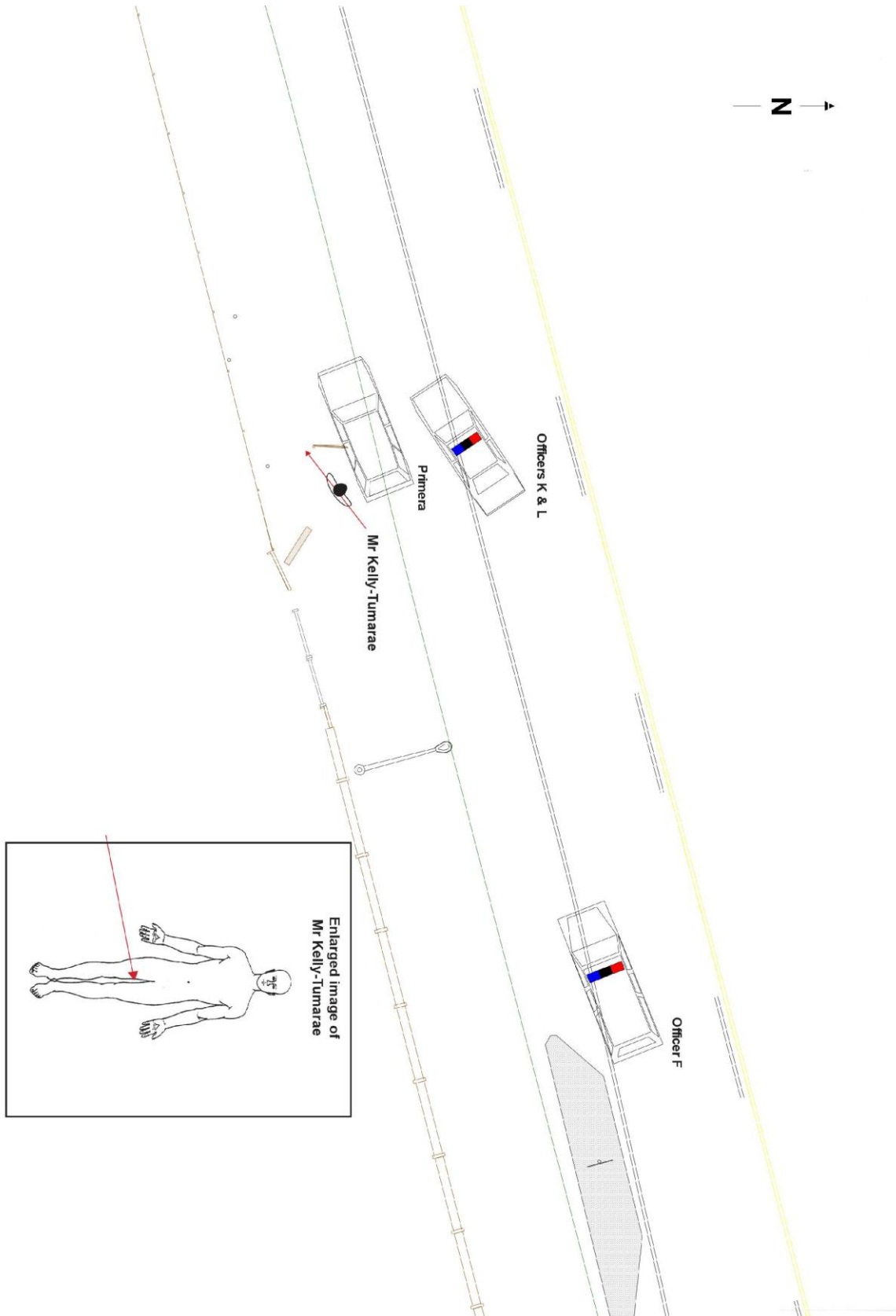


APPENDIX 2.2: BULLET WOUNDS RECEIVED BY MR KELLY-TUMARAE

**Wound 1:** This shot entered Mr Kelly-Tumarae's right side between his armpit and waist. It did not leave his body.

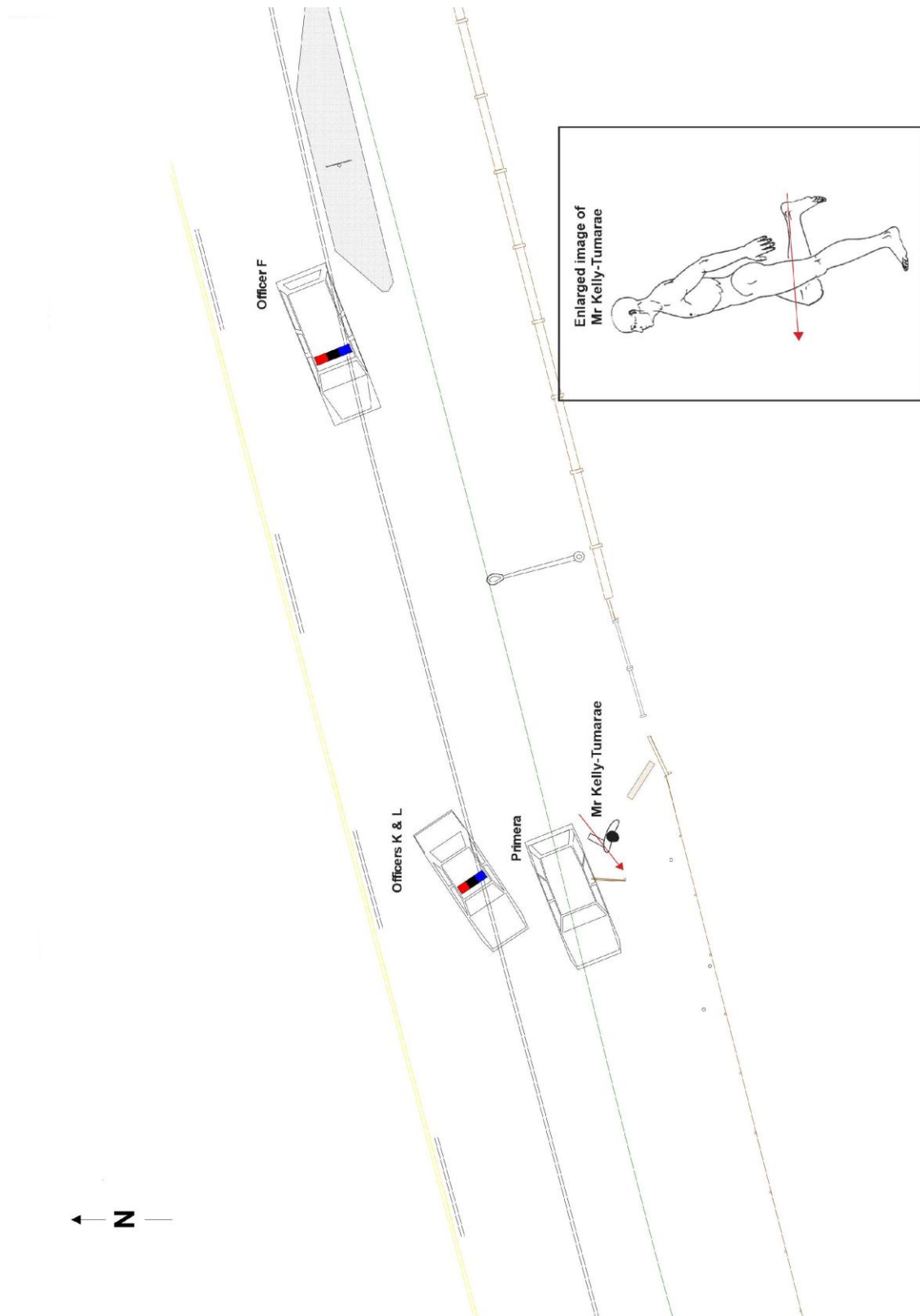


**Wound 2:** This shot entered the outside of Mr Kelly-Tumarae’s right leg, and exited at the inside of his right leg.

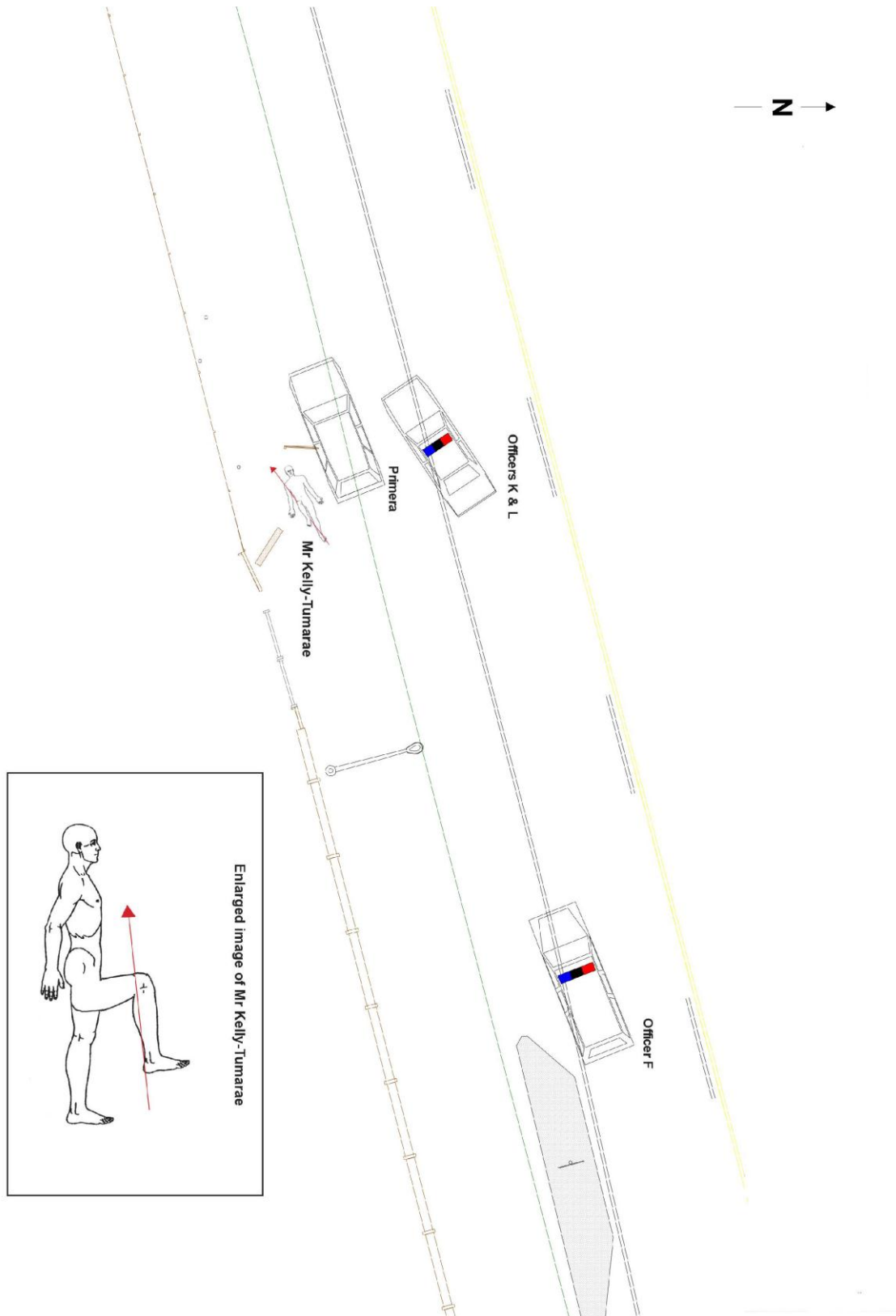


## APPENDIX 2.2: BULLET WOUNDS RECEIVED BY MR KELLY-TUMARAE (CONTINUED)

**Wound 3, Scenario A:** This shot entered the inside of Mr Kelly-Tumarae's right leg. At one extreme of many possibilities, the bullet may have entered Mr Kelly-Tumarae's leg as he was upright and facing in a south-west direction away from Officer F.

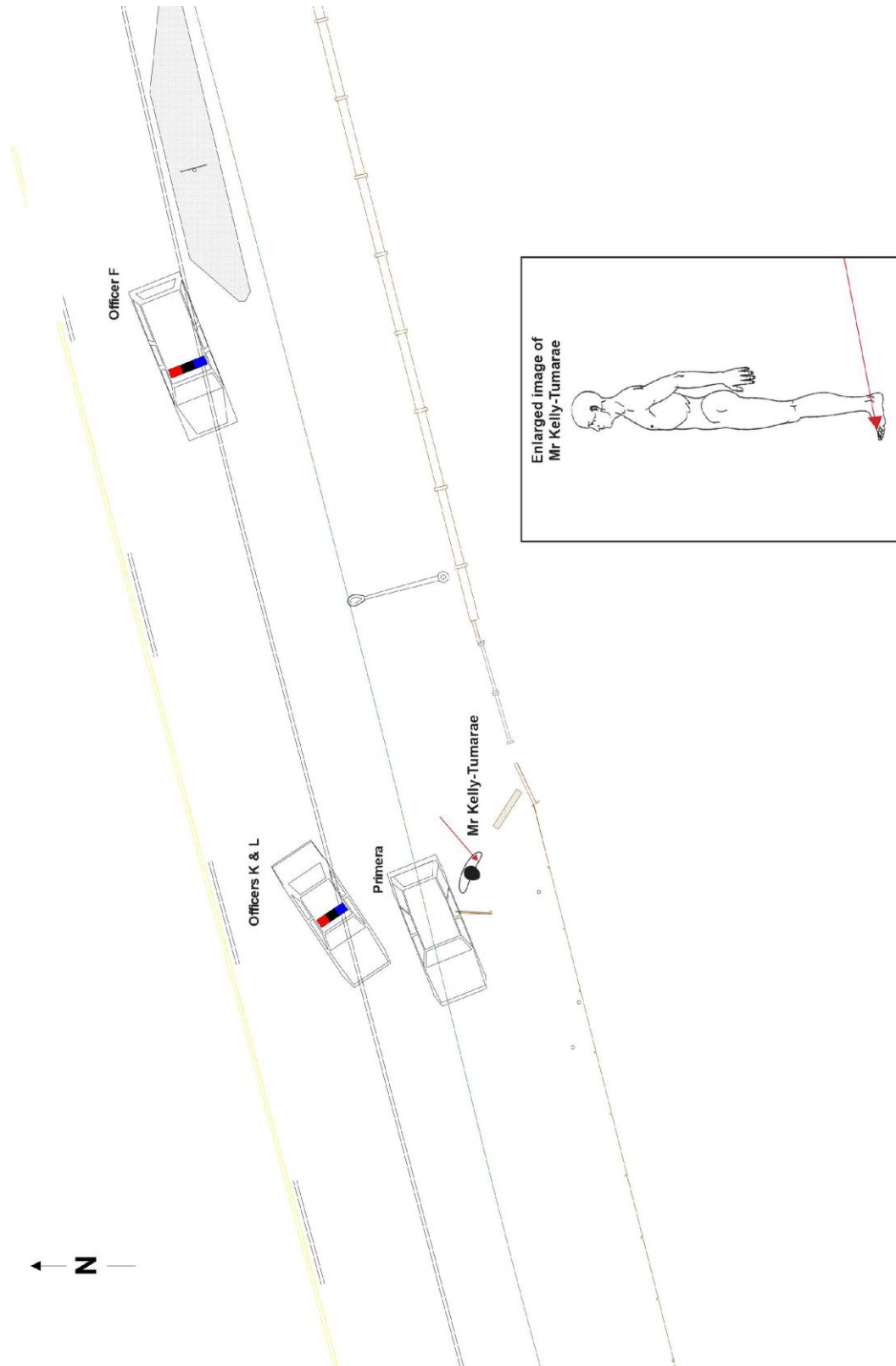


**Wound 3, Scenario B:** This shot entered the inside of Mr Kelly-Tumarae's right leg. At one extreme of many possibilities, the bullet may have entered Mr Kelly-Tumarae's leg as he was facing in a north-east direction towards Officer F, and had fallen on his back with his leg raised above the ground.

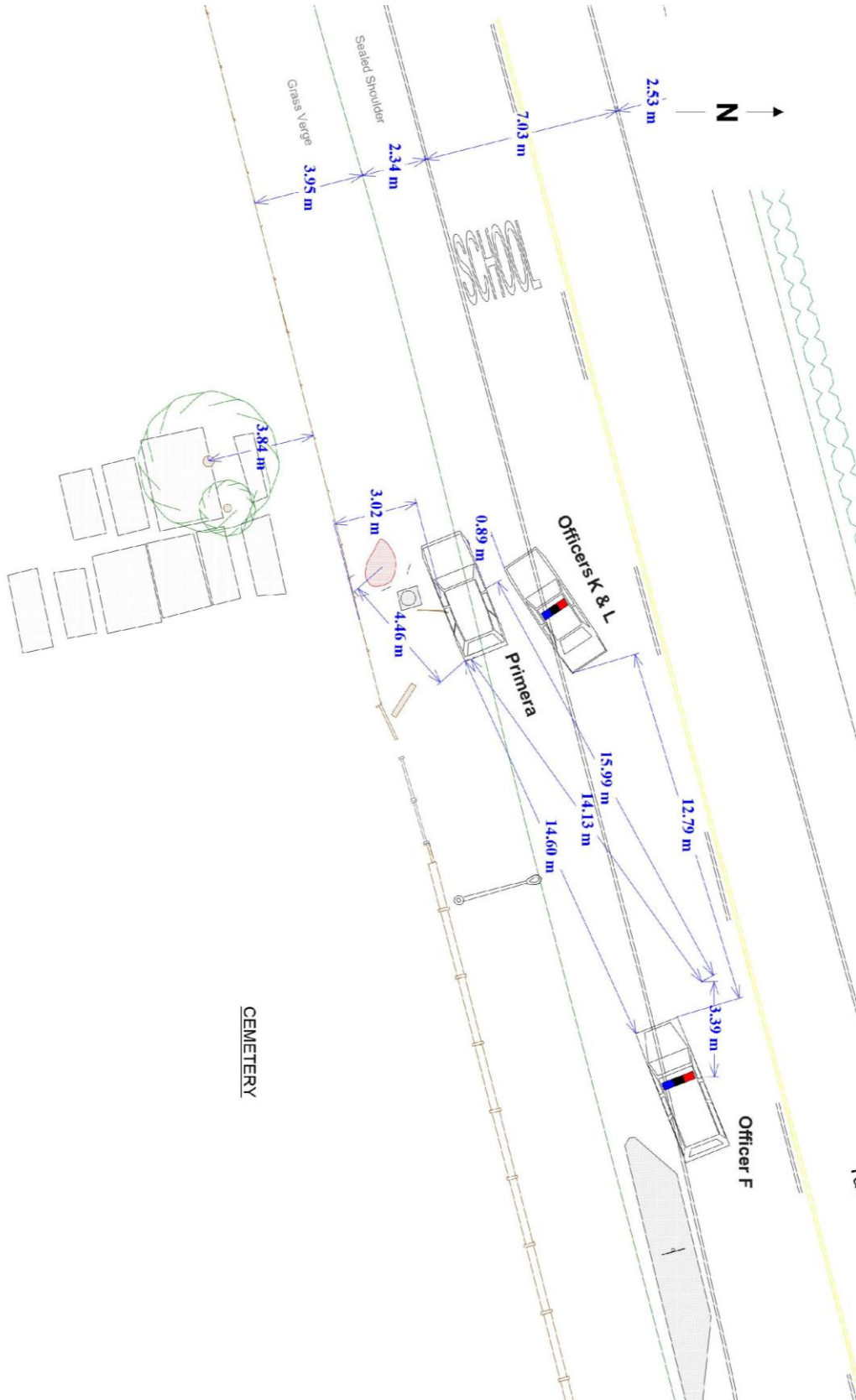


APPENDIX 2.2: BULLET WOUNDS RECEIVED BY MR KELLY-TUMARAE (CONTINUED)

**Wound 4:** This shot appears to have struck something else before entering Mr Kelly-Tumarae's left shoe and the side of his left foot. It exited by the big toe and the second and third toes of that foot.



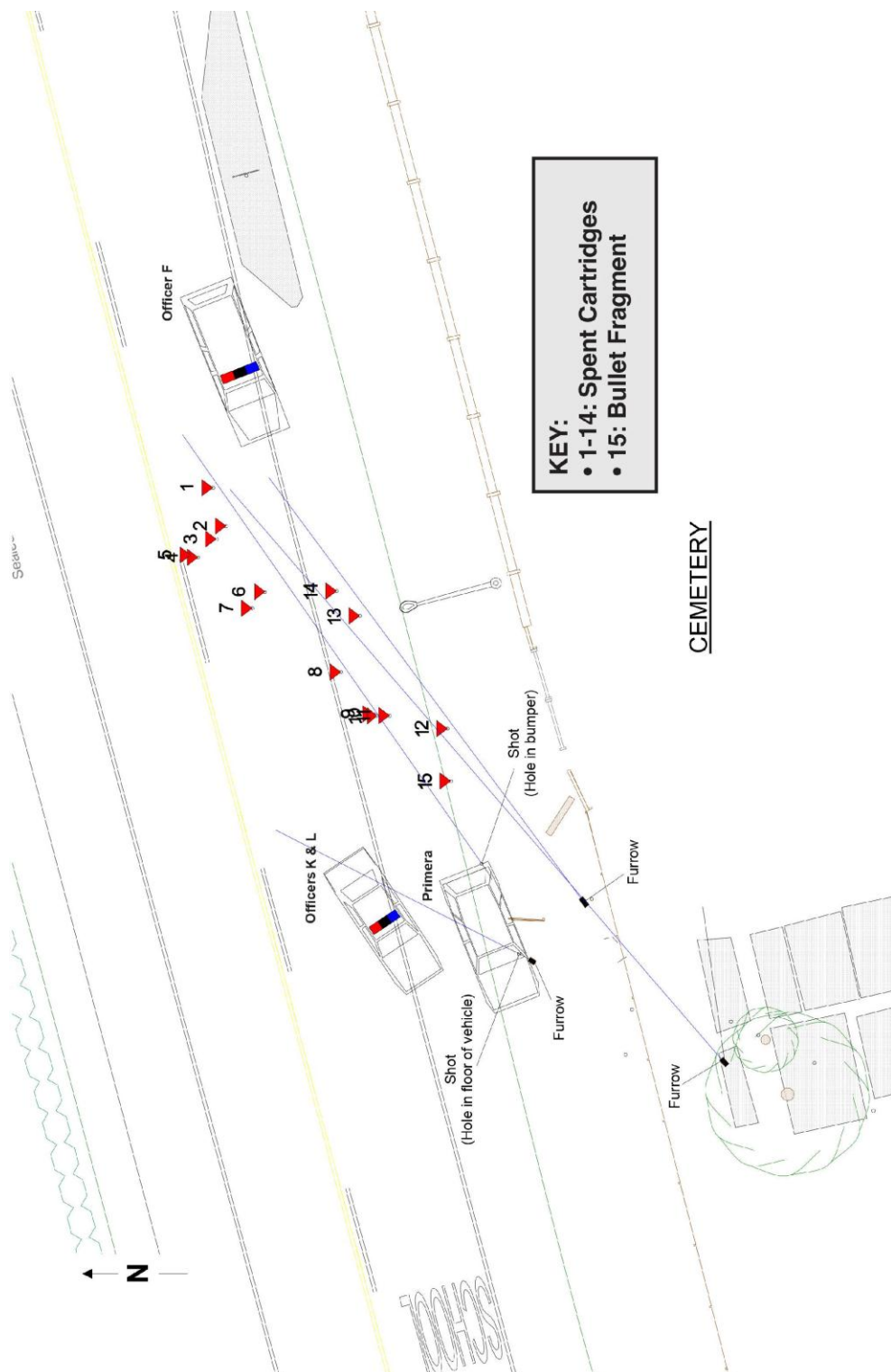
APPENDIX 2.3: SCENE MEASUREMENTS





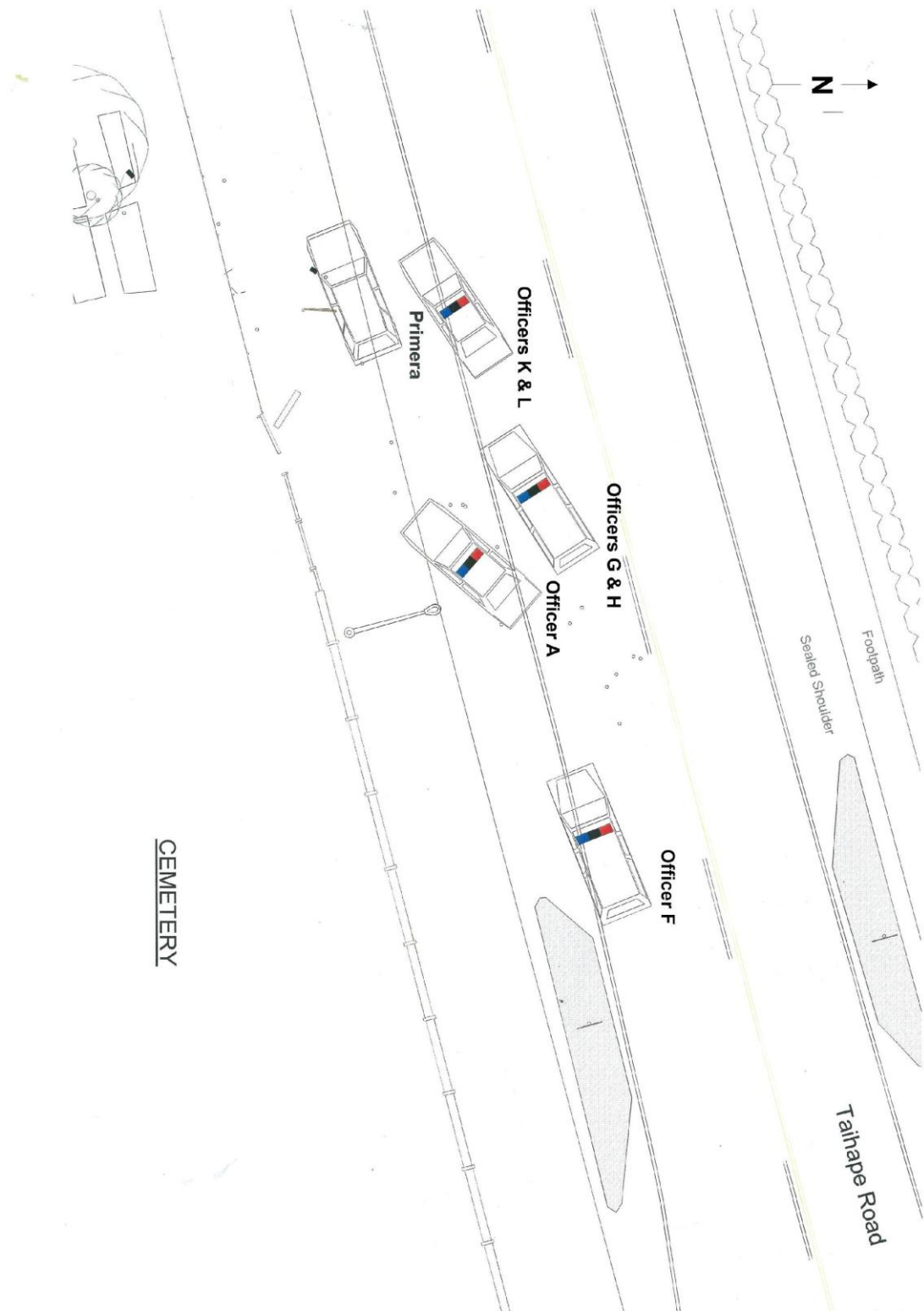
## APPENDIX 2.4: GENERAL TRAJECTORY ANALYSIS AND LOCATION OF SPENT CARTRIDGES

This diagram shows the approximate trajectory of the shots Officer F fired and the locations where the spent cartridges were found. It is possible that some cartridges were disturbed by the tyres of the patrol cars driven by Officer A and Officers G and H as they arrived at the scene. Nonetheless, the spread of cartridges appears to support the view that Officer F was advancing as he fired.



APPENDIX 2.5: POST-SHOOTING VEHICLE PLACEMENT

The vehicles carrying Officer A and Officers G and H arrived after Mr Kelly-Tumarae had been shot.



# 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.

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 has 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 complaints alleging misconduct or neglect of duty by Police, or complaints about Police practices, policies and procedures affecting the complainant;
- 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 can make findings and recommendations about Police conduct.



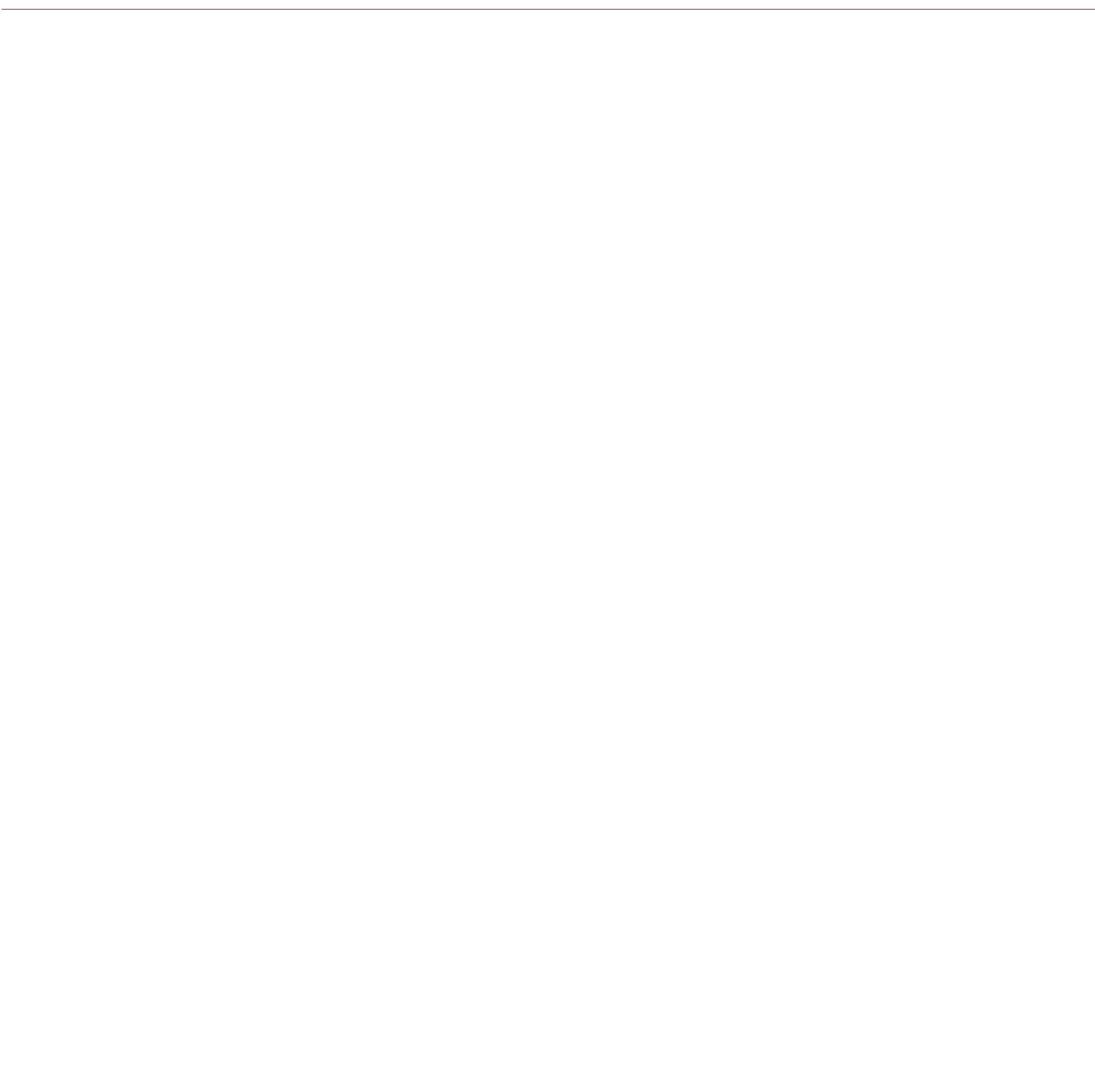
**IPCA**

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