

# Fatal shooting of Mr Witika in Auckland justified

1. On 29 November 2021, Police officers shot Mr Witika outside his burning house in Glen Eden after he fired several shots at officers. He suffered multiple gunshot wounds and died at the scene. Three officers were injured, having been shot by Mr Witika.
2. At about 8.21am, Police started receiving reports of a house fire where gunshots had been heard and reports of a man with a gun at the same address. Public Safety Team (PST) officers drove to the address and marshalled at the safe forward point (SFP).<sup>1</sup> The Police helicopter (Eagle) arrived overhead at about 8.29am. PST officers started communicating with the man, who was in a carport at the end of a driveway adjacent to the burning house. At times he went in and out of a gate adjacent to the rear of the carport, briefly bringing his dog out before putting it back behind the gate.
3. The Armed Offender Squad (AOS) arrived at about 8.49am. Less than three minutes later, the AOS team leader decided to use “less-than-lethal” tactics to arrest the man. On the team leader’s command, a 40-millimetre (less-than-lethal) sponge round<sup>2</sup> was fired and hit the man, a double stun grenade was then thrown, and an AOS dog handler released his dog. The man retreated through the pedestrian gate next to the rear of the garage and the Police dog pursued him. The AOS team then advanced down the driveway. As they approached the gate into the yard, they saw the man standing about five to ten metres away, pointing his shotgun at the Police dog. When the man saw Police, he aimed his shotgun at the officer at the front of the AOS group. That officer fired three rounds at the man, who then fired several rounds, hitting and injuring three officers before he was shot and killed.
4. Police notified us of the shooting as required by section 13 of the Independent Police Conduct Authority Act 1988.<sup>3</sup>

<sup>1</sup> A safe forward point is a location removed from the scene of an incident from where commanders coordinate the response and brief officers as they arrive at the scene.

<sup>2</sup> The 40mm Launcher is a single shot breech action rifle capable of shooting a sponge projectile at a target.

<sup>3</sup> Section 13 says: “Where a Police employee acting in the execution of his or her duty causes, or appears to have caused, death or serious bodily harm to any person, the Commissioner shall as soon as practicable give to the Authority a written notice setting out particulars of the incident in which the death or serious bodily harm was caused.”

## The Authority's Findings

**Issue 1: Was the command and control of this incident adequate?**

In the absence of radio protocols, the different command elements at the incident were unaware of who was undertaking specific roles at the incident, and the Incident Controller was unaware that the AOS team had arrived and that they intended to approach Mr Witika.

While the Incident Controller was theoretically responsible for overall management of the incident, his ability to undertake that role was adversely affected by factors including a delay in the Eagle footage download, a lack of knowledge of the physical environment at the scene, and a lack of critical communication from Officer F and the AOS team leader.

Without a commander coordinating the incident from the SFP, the incident lacked the benefit of a decision maker who was sufficiently removed from the immediate threat to be able to objectively consider the facts and provide sound guidance and direction as to what the circumstances reasonably required.

The pressure on Officer I to undertake both tactical and operational-level decision-making resulted in an inadequate briefing to the AOS team leader.

**Issue 2: Was it lawful and appropriate for the AOS to use the tactics they did in the circumstances?**

The AOS team was legally justified in deploying sponge rounds and a Police dog against Mr Witika.

It would have been preferable for Officer F to gather more information regarding the actual threat posed by Mr Witika and the fire before implementing the non-lethal tactics.

Officer F should have notified other command elements and officers on cordons that the AOS team was about to implement tactical options.

**Issue 3: Was Officer A justified in shooting at Mr Witika?**

Officer A was justified in shooting Mr Witika.

**Issue 4: Was Officer C justified in shooting Mr Witika?**

Officer C was justified in shooting Mr Witika and his dog.

**Issue 5: Was Officer D justified in shooting at Mr Witika?**

Officer D was justified in shooting at Mr Witika.

## Analysis of the Issues

### ISSUE 1: WAS THE COMMAND AND CONTROL OF THIS INCIDENT ADEQUATE?

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5. The Northern Communications Centre (NorthComms) received calls about the incident at about 8.21am and the shift commander assumed the role of Incident Controller by virtue of his position. The Police helicopter (Eagle) was called at this time.
6. Officer I was the Waitemata shift commander when the job came in. He says he asked for a Safe Forward Point (SFP) to be set up and for Eagle to be deployed.<sup>4</sup> He says that NorthComms asked him to be the forward commander at 8.27am and he confirmed he would assume the role when he arrived at the scene, in about 15 minutes. In the meantime, he tasked a sergeant (Officer L) who was arriving at the scene to take on the coordination role.
7. The Incident Controller contacted the District Command Centre (DCC) and asked for a Tactical Policing Team to be deployed to the scene.<sup>5</sup> However, the DCC was aware that the AOS was in the area conducting search warrants, so made the decision to ask them to attend instead. The Incident Controller, situated in NorthComms (not the DCC), did not know at this stage that AOS had been asked to attend. The AOS Commander was coming from a different location, so arrived after the AOS team had arrived and advanced down the driveway.
8. The Emergency Communication Centre called neighbours to warn them of the danger and asked them to remain inside their homes until Police could evacuate them.
9. At around 8.29am Eagle arrived overhead and started transmitting footage to NorthComms. Officer L says that once Eagle was overhead, he contacted Officer I and received permission to push forward from the SFP, which he did with three other PST officers. They had a partial view of Mr Witika, but they did not know his identity. Officer L said the house at the end of the driveway was fully ablaze and described the man as aggressive, agitated, yelling, and swearing. When Officer L called to him, saying “*armed Police, show me your hands!*”, Mr Witika held a long-barrelled firearm above his head. Officer L provided directions to other officers as they arrived, until Officer I arrived on scene. He says that Officer I took control of the incident and staff when he arrived at about 8.32am.
10. When Officer I arrived, he went through the SFP, where officers were trying to stop traffic getting through, and straight to the scene address, parking about 100 metres away. He explained his decision to go to the scene address to us, saying:

*“the incident controller probably needs to remain, or should remain at the SFP... but based on the dynamics of that particular incident I didn’t think it was appropriate for me to stay there, and the staff needed my assistance down at the main address itself.”*

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<sup>4</sup> An SFP is a safe location near an incident, from which the forward operations can be supported.

<sup>5</sup> The Tactical Policing Team is a relatively new unit, designed to fall between PST and AOS, to attend incidents such as this while a decision is made whether AOS is required.

11. He began tasking officers to put cordons in place around the property. Once he was told that had been done, he directed the evacuation of houses immediately adjacent to Mr Witika's house. His reasoning for this was to protect them from both the fire and the risk posed by Mr Witika. He says he received a phone call from the DCC to say AOS were available so asked for them to be deployed as soon as possible. He says he was also asked whether firefighters could attend to the fire that had spread to a boundary fence, but he refused due to the danger posed by Mr Witika.
12. At 8.42am a PST sergeant, Officer K, advised over the radio that Police had cleared the surrounding houses.
13. When the AOS team arrived, Officer I gave them a briefing and tasked them to take over from the officers who were already at the scene, with the exception of the officer who had been communicating with Mr Witika. In the absence of the AOS Commander, Officer I spoke directly with Officer F (the AOS team leader). He says he was aware AOS were discussing the use of the 40-millimetre sponge round, but he remained at the top of the driveway and could not see when AOS pushed down towards the carport.
14. At about 8.51am the Incident Controller heard and saw that a Police dog had been deployed, saw the AOS officers advancing down the driveway, heard reports of shots being fired, and saw the offender falling. At 8.52am he heard that an officer had been shot and that a second ambulance was required. He then coordinated phone calls to different agencies and dispatched an officer to take over the role of incident controller at the scene. He then heard that another two officers had been shot.
15. At about 9.16am the officer tasked with taking over the incident controller role arrived at the scene.

### **Who had control of the incident?**

#### *Incident Controller*

16. Police policy states that the NorthComms shift commander assumes the role of Incident Controller until they hand it over to someone at the scene.
17. The Incident Controller describes his role as having overall coordination across other agencies (fire and ambulance) and tasking a forward commander within an element such as the AOS. In his statement, the Incident Controller stated that after Officer I was designated the Forward Commander, his own role changed to providing support for Officer I, although he clarified to us that he still had incident control.
18. The Incident Controller told us that generally the forward commander (Officer I) reports to the incident controller. However, the Incident Controller did not announce his role over the radio and said that he did not need to have any direct conversations with Officer I because Eagle was overhead and he had access to its footage, and because he believed others had already spoken with Officer I. He expected that Officer I would have been operating from the SFP to set up inner cordons around the incident.

19. The Incident Controller says that the delay between real time and the Eagle footage he was watching in NorthComms was unlikely to be more than eight to ten seconds, although it takes up to a minute for the downlink to come on initially. From the Eagle footage he could see a male with a long-barrelled gun in a carport, next to the house which was well ablaze. He instructed staff to start calling neighbouring properties to tell residents to stay inside and away from windows. As he watched, he saw a large and unrestrained dog contained behind a gate on the property, and saw that the man had placed the shotgun against a wall of the carport. At about 8.39am he instructed the dispatcher to call an ambulance to go to the SFP. He did not know when the AOS team arrived, but saw via the Eagle feed the AOS dog being deployed and the AOS team advancing down the driveway.
20. According to the Incident Controller, if a scene is contained and the incident likely to be protracted, incident control can pass to the forward commander, and the AOS commander can in turn take over from the forward commander's previous role. In this case, he said, Officer I was still the forward commander and not the incident controller. This was in part because the Incident Controller was not aware that the AOS were on their way. Although there was no incident controller at the scene, the Incident Controller said that given Officer I's rank and extensive experience, he was comfortable exercising his role from NorthComms, with Officer I as forward commander at the scene.
21. We asked the Incident Controller whether his attention was dedicated solely to this incident. His response was that for the most part it was, and that there were other managers within NorthComms who took responsibility for other jobs at the time.
22. After the shootings, Officer I gave authority for firefighters to start putting out the fire. The AOS Commander arrived at 9.12am and the on-site incident controller arrived at 9.16am.

#### *Forward Commander (Officer I)*

23. Officer I explained that the incident controller oversees the whole incident, but in the absence of an on-scene incident controller, this function delegates to a forward commander. Officer I said: "*ideally, there should've been an incident controller, but when I hit the ground, I could see that this was not a situation where I should remain at a safe forward point where the incident controller would normally remain*". He assessed that this was what the circumstances required, as the situation was dangerous and fast evolving. Officer I thought of himself as the forward commander and did not think that he was an incident controller.
24. Officer I's understanding of the role of forward commander is based on his extensive experience in the AOS. In the AOS, the AOS Commander generally remains at the SFP, while an appointed forward commander coordinates tactics at the scene. Officer I said that on this day, the AOS team leader (Officer F) was under his authority as he had overall command of the forward scene. Confusingly, the AOS team leader is also designated the "forward commander". Officer I was aware there was an incident controller at NorthComms.
25. Officer I told us that before he arrived, he wanted officers to go to the SFP first rather than straight to the scene because at that stage they did not have real time intelligence and did not know where exactly Mr Witika was. Once Eagle arrived overhead, he was satisfied they could

“push forward” to the scene, as Eagle could provide overwatch. He directed this be done under the coordination of a sergeant (Officer L) who was already on the ground.

26. Officer I said he did not have the luxury of coordinating from the SFP because he had heard reports that Mr Witika had been armed out on the street, and he did not know the physical layout of the property. When he arrived at 8.32am he moved forward from the SFP to the scene and found the PST staff at the top of the driveway next to the road. While Officer I had access to Eagle footage, he said he did not have time to watch it in between phone calls, radio communication, and managing staff on the ground. He described it as “*a pretty full-on job for me*”.
27. As more officers arrived, Officer I tasked a sergeant (Officer K) to form an emergency action team that could be ready to move forward at his command. This team was positioned in a line on the right side of the end of the driveway, about 20 metres from Mr Witika. He asked Officer K to develop some options in case Mr Witika came up the driveway or became compliant and could be arrested. Officer I was clear that until AOS arrived, he did not have any tactical ability to deal with the situation beyond containment unless Mr Witika surrendered.
28. When the AOS team arrived, they bypassed the SFP and came straight to Officer I at the top of the driveway of Mr Witika’s house. Officer I said he could not remember the details of what he told AOS, but that the situation was fairly obvious to them – a burning house, and a man in the carport with a firearm within reach. He said it was an AOS decision to approach Mr Witika, and that AOS did not speak to him about it. Less than three minutes elapsed between AOS arriving and moving forward towards Mr Witika.

#### *AOS team leader (Officer F)*

29. The on-duty AOS commander (AOS Commander) was notified of the incident by the District Command Centre at about 8.23am. She sent a message at 8.32am instructing the on-duty AOS team to attend. The AOS Commander arrived at the scene at 9.12am (after Mr Witika had been shot) and in the meantime received detailed updates over the radio. The AOS Commander nominated Officer F as the forward commander. While this is the same title that Officer I was using, Officer F’s responsibility was limited to his AOS team – the AOS Commander described his role as “*the person who owns the area of operation where the incident is happening and is making decisions around tactics and feeding that back for approval through to the AOS Commander [at the SFP]*”. In this case, the AOS Commander instructed Officer F to take direction directly from the incident controller as the AOS Commander was not yet at the scene. The AOS Commander’s understanding was that the role of incident controller was being performed by Officer I. She was not aware that the incident controller was the NorthComms shift commander.
30. The AOS Commander told us that once Officer F was on the ground, he did not check back with her as his decision around the incident was time critical.

## *Summary*

31. While Officer I knew the NorthComms shift commander had been designated Incident Controller, everyone else at the scene believed that Officer I had control of the incident. The Incident Controller did not announce his role over the radio. He was making some decisions from his position in NorthComms, such as calling an ambulance, liaising with fire services, and instructing firefighters to start extinguishing the fire (paragraphs 20 and 22). However, other command decisions such as authorising officers to advance past the SFP, evacuate neighbouring houses, and establishing cordons were all made by Officer I.

## **Did Police effectively communicate critical information?**

32. The Incident Controller said he did not know if any people were inside the burning house, and that there were concerns about neighbouring houses catching fire. However, after liaison with the fire service's shift manager, he decided there was minimal risk of major structures around the house catching fire, and there was no chance of anyone inside the house being alive. He therefore concluded that there was no urgency for firefighters to attend, given the potential risk to them. He did not transmit this view over the radio.
33. Calls from members of the public at 8.22am and 8.27am indicated that neighbours believed the man lived there by himself. At 8.45am, a brother of Mr Witika was identified as possibly living at the address. At 8.51am, a NorthComms incident report identified Tex Witika as a possible link, but that information was not broadcast, nor followed up. It was only after the incident, when Police were talking with Mr Witika's family, that it was established that the deceased man was in fact Tex Witika.
34. As the AOS team were driving to the scene, two critical pieces of information were relayed over the radio. The first was from Eagle at 8.37am responding to a query from Officer I and reporting that the fire did not appear to be at risk of spreading to other houses, and the second was at 8.44am from an officer who had spoken to neighbours and reported that a single male lived at the property. Immediately after this transmission, Officer I asked a follow-up question, indicating that he had heard the information. Most AOS officers did not hear this information because the only time they were listening to that radio channel was when they were in the car with sirens on and talking to each other to plan their operation. The AOS dog handler, Officer B, says that he did hear a reference to the man living alone.
35. Officer I did not pass these two pieces of information onto Officer F when the AOS team arrived. Both Officer I and Officer F appeared to believe that the situation did not allow the luxury of a detailed briefing. This perception of urgency may have been heightened because the briefing took place at the scene, rather than the SFP. Cell phone footage taken by a neighbour suggests the briefing lasted about 16 seconds.
36. Therefore, the following critical pieces of information which were within the knowledge of the Incident Controller and/or Officer I were not known to Officer F, who conducted a risk assessment and decided to commence non-lethal tactics less than three minutes after arriving at the scene:

- a) the risk of fire spreading to neighbouring houses was low;
- b) there was no chance of anyone remaining in the house still being alive;
- c) Mr Witika lived alone in the house;
- d) a cordon had been established, and officers had been appealing to Mr Witika for about 17 minutes before the AOS arrived.

37. In our assessment, the communication failure can be attributed to the following key factors:

- a) The Incident Controller had not announced his role over the radio, nor did he pass on all information he received from fire services – the radio update on the fire came from Eagle. The Incident Controller had the advantage of observing the event from a distance and could make a more measured assessment than is possible when positioned at the scene, but the lack of radio communication meant this advantage was not realised;
- b) No one within the AOS team was focused on what was being relayed over the radio; and
- c) Officer I was overloaded, executing the roles of both an incident controller and a tactical forward commander. This likely contributed to his rushed briefing to the AOS team leader (Officer F), which did not contain critical pieces of information which could have informed Officer F's threat assessment and formulation of tactical options.

#### *Summary*

38. The Incident Controller, while performing some command-and-control duties at NorthComms, was not a visible operational-level incident controller – he relied on Officer I to perform the bulk of tasks that would ordinarily be done by the incident controller. Officer I's decision to move forward to the scene, rather than remain at the SFP, was reasonable in the circumstances but meant that not only was he trying to fulfil the tasks of an incident controller, but also playing a tactical, hands-on role until the arrival of the AOS team. This left him overstretched and likely contributed to the failure to provide a comprehensive briefing to Officer F.

#### FINDINGS ON ISSUE 1

In the absence of radio protocols, the different command elements at the incident were unaware of who was undertaking specific roles at the incident, and the Incident Controller was unaware that the AOS team had arrived and that they intended to approach Mr Witika.

While the Incident Controller was theoretically responsible for overall management of the incident, his ability to undertake that role was adversely affected by several factors including a delay in the Eagle footage download, a lack of knowledge of the physical environment at the scene, and a lack of critical communication from Officer F and the AOS team leader.

Without a commander coordinating the incident from the SFP, the incident lacked the benefit of a decision maker who was sufficiently removed from the immediate threat to be able to objectively consider the facts and provide sound guidance and direction as to what the circumstances reasonably required.

The pressure on Officer I to undertake both tactical and operational-level decision-making resulted in an inadequate briefing to the AOS team leader.

## ISSUE 2: WAS IT LAWFUL AND APPROPRIATE FOR THE AOS TO USE NON-LETHAL TACTICS IN APPROACHING MR WITIKA?

39. When the AOS team leader (Officer F) said over the radio that AOS were five minutes away, Officer I told them to come straight to the scene rather than stop at the SFP. Officer F told us this made him think "*things are slightly starting to unfold a little bit and we just need to get there*". According to Officer F, when they arrived at about 8.48am, Officer I gave him a "very, very quick brief", as outlined in paragraph 35.
40. Officer F says the only information that Officer I (who he believed to be the Incident Controller) gave him when they arrived, was that Mr Witika was up the driveway, had a firearm leaning against the garage, and the AOS team should take over from the PST team who were negotiating with Mr Witika. Officer F says he did not know the identity of the person, or whether he lived at the burning house. He says he did not ask Officer I any further questions after the short brief, because his team had already taken position and started verbally engaging with Mr Witika. As raised in paragraph 35, Officer I's duties spanning both tactical and operational decision making, as well as his presence at the scene rather than the SFP, may have contributed to the incomplete nature of the briefing.
41. The AOS team formed a stack, or line, on the left at the end of the driveway. Shortly afterwards the AOS dog handler (Officer B) and his dog arrived, along with the officer providing cover for Officer B.
42. At 8.51am, about two minutes and 46 seconds after the AOS arrived, Officer F directed the use of less-than-lethal tactics to facilitate the arrest of Mr Witika. Officer F directed Officer E to shoot Mr Witika with a 40-millimetre sponge round. Officer E, who was standing about 22 metres from Mr Witika, aimed the shot and fired. The sponge round struck Mr Witika and he bent forward. Meanwhile, on Officer F's direction, Officer G threw a double stun grenade, or distraction device, down the driveway, and Officer B released his dog. Officer F's intention was that the sponge round and stun grenade would shock and disorientate Mr Witika, while the AOS dog would engage him, allowing the officers to make the arrest.

*What did Officer F observe in the time between arriving and implementing non-lethal tactics?*

43. Officer F described being able to see an open carport extending out from the garage. He could see a shotgun leaning against the wall of the garage and Mr Witika standing there, "*quite aggressive, he had his hands out he was almost challenging Police to come and get him*". The AOS officers at the front of the "stack", or column, started appealing to him to calm him down. Officer F says he then saw Mr Witika disappear to the left-hand side of the garage where they could not see him. This caused him to move the AOS team across to the right-hand-side of the driveway, where they could see him, and where there was also a tree which provided more concealment.

44. Officer F described the situation as follows:

*"...the offender made threats of violence. He had a firearm, he'd fired shots into the burning house, he presented that firearm at attending Police officers...He refused to comply with our instructions to give himself up, he was agitated, he was aggressive, he was an angry man."*

45. Officer F perceived there was a high risk of the fire spreading to surrounding houses. He also highlighted that as he did not know the identity of the man and what his mental state or propensity for violence was; whether the man was linked to the house that was on fire; whether there were any casualties inside the house; and whether the man had access to a car or other firearms. Officer F described the risk of injury, death, or grievous bodily harm to his team, and to members of the public, as extreme.
46. Officer F says he saw Mr Witika come through the pedestrian gate (which connected the backyard of the burning house with the carport) holding a dog, as well as his shotgun. He described the dog as a "*pit bull terrier, sort of dog*", which we understand to mean that it looked aggressive. Officer F says Mr Witika put the shotgun back against the wall and then held his dog in a way that suggested he was threatening to release it on the officers. Officer F says the officers continued to appeal to him, before Mr Witika grabbed the shotgun and went back through the pedestrian gate with the dog and firearm. Officer F estimates the time from the team moving to the other side of the driveway to the time Mr Witika came out holding his dog was about 30 seconds.
47. Officer F set out the plan, and explained to his team when it should be implemented – he said that if Mr Witika came out, put his shotgun against the wall again and walked past the end of the carport towards them, then officers should deploy the sponge round, dog, and distraction device round.
48. Officer F says Mr Witika did come out of the gate - though without the dog - and did put his shotgun back against the wall before turning to face the officers, all while they continued to appeal to him to give himself up. Officer F described the AOS team formation and was concerned that they were only protected by a single shield. He says Mr Witika continued to walk towards them, and when he reached the end of the carport Officer F gave the command: "*hit him!*". Officer E fired the sponge round, which hit Mr Witika in the lower part of his stomach; Officer G then threw a distraction device halfway down the driveway, which exploded twice; and Officer B released his dog, which pursued Mr Witika.
49. There were elements of Officer F's recollection that are inconsistent with Eagle footage; specifically, Officer F's description of Mr Witika holding the firearm as described in paragraph 46 (Mr Witika did not pick up his firearm once between the time of the AOS team arriving) and his description of Mr Witika advancing beyond the end of the carport towards the AOS position (Eagle footage shows this did not happen). Such faulty recollection is a common occurrence following traumatic incidents such as this, where three members of Officer F's team were subsequently shot. They do not form part of the circumstances we consider below.

## **Were the AOS team legally justified in entering Mr Witika's property and using non-lethal force?**

### *Police reliance on section 39 of the Crimes Act*

50. Officer F relied in part on section 39 of the Crimes Act 1961. Section 39 empowers Police to use "*such force as may be necessary*" to overcome any force used in resisting an arrest. However, section 39 gives no power to enter property. It only allows use of force to effect an arrest in a place which Police can lawfully enter.

### *Section 14 of the Search and Surveillance Act 2012*

51. The relevant power to enter in an emergency can be found in section 14 of the Search and Surveillance Act. That section allows an officer to enter a property without a warrant and "*take any action that he or she has reasonable grounds to believe is necessary*" to prevent offending from continuing or to avert the emergency in one or both of the following circumstances:
- a) The officer has reasonable grounds to suspect an offence is being committed, or is about to be committed, that would be likely to cause injury to any person, or serious damage to, or serious loss of, any property;
  - b) The officer has reasonable grounds to suspect there is risk to the life or safety of any person that requires an emergency response.
52. This is an objective test – the person must have reasonable grounds to suspect one or both of the stated circumstances, and the actions must be necessary when weighed against that reasonable suspicion.
53. We therefore need to consider whether either or both of the above circumstances applied at the time Officer F deployed non-lethal tactics, and if so, whether the actions Officer F took were necessary in those circumstances.

*Did Officer F have reasonable grounds to suspect an offence was being committed, or that there was a risk to the life or safety of a person requiring an emergency response?*

54. Paragraphs 43 to 48 describe what Officer F recalls seeing at the time.

55. Officer F explained:

*"... my thought process is that this needs to be resolved very quickly and that this is going to get so out of hand soon. It's going to be unsafe for this to carry on, you know if you look at where the house was, even when we came down the hill, you're looking where the house was, there's a house right next to, and another one here, another one behind, another one in front of it. And that fire was obviously a significant concern for me in relation to that address."*

56. He says he assumed, but didn't know, that neighbours had been evacuated and that a cordon had been established around the property. The latter was significant as Officer F did not say over the radio that the AOS team were about to execute non-lethal tactics. This meant that the officers on cordon in neighbouring properties did not have notice, nor the opportunity to take cover, when the situation escalated.
57. There was further information available but not known to Officer F, as it did not form part of the short brief provided by Officer I (see paragraphs 36 and 40). The Incident Controller had information from fire services that the fire was not at risk of spreading to neighbouring properties. Eagle had also been providing updates over the radio on the state of the fire (paragraph 34). Additionally, the Incident Controller, by this stage, had information from neighbours that Mr Witika lived alone in the house – as set out in paragraph 34, this had been transmitted over the radio at 8.44am.
58. If Officer F had paused to seek further information he may have learnt of the above, as well as understood that Officer J had been negotiating with Mr Witika for around 17 minutes and felt he was making some progress in de-escalating the situation. While, with the benefit of hindsight this information may have altered Officer F's tactics, on any view, the presence of a man with a firearm standing in front of a burning house constituted circumstances requiring an urgent response.
59. Officer F had reasonable grounds to suspect that the offence of arson had already caused serious damage to Mr Witika's house, and that his possession of a firearm was likely to cause injury if he chose to discharge it at an officer or member of the public. This satisfies the first limb of the test in section 14 subsection (2)(a) as set out in paragraph 51.
60. Further, Officer F had reasonable grounds to suspect the house fire posed a risk to the safety of at least Mr Witika. As set out at paragraph 45, Officer F also said he could not rule out the presence of other casualties inside the burning house and believed there was a risk of the fire spreading to neighbouring properties. This risk required an emergency response, so both limbs of the test set out in paragraph 51 were met.

*Were the AOS actions that Officer F directed necessary in the circumstances?*

61. We accept that Officer F was acting to prevent any ongoing offending by Mr Witika, whether through use of his firearm or otherwise. We also accept he was acting to facilitate entry of fire services onto the property so that they could extinguish the blaze before further property was destroyed.
62. In these circumstances, our conclusion is that Officer F was justified under section 14 of the Search and Surveillance Act 2012 in ordering the deployment of non-lethal force in the form of a sponge round and Police dog.

63. We note that Officer E's firing of a sponge round at Mr Witika, as well as Officer B's release of his dog, constitute a use of force by those officers. The use of force was directed by Officer F. As a general proposition, the law requires that each individual officer takes responsibility for his or her own use of force. However, this must be balanced against the need, in situations of emergency or large-scale operations, for a substantial degree of coordinated command and control, as we have discussed in Issue 1. There is an inherent tension between these two propositions. In our view, while the actions of Officers B and E do need to be assessed individually, due allowance needs to be made for the circumstances under which they were operating and the directions that they received. In this case, given the apparent urgency of the situation (they were not given information to suggest otherwise) and the limitations of what they knew, it is not reasonable for us to expect them to have challenged Officer F's orders. Those orders were, in any event, lawful.

## FINDINGS ON ISSUE 2

The AOS team was legally justified in deploying sponge rounds and a Police dog against Mr Witika.

It would have been preferable for Officer F to gather more information regarding the actual threat posed by Mr Witika and the fire before implementing the non-lethal tactics.

Officer F should have notified other command elements and officers on cordons that the AOS team was about to implement tactical options.

## ISSUE 3: WAS OFFICER A JUSTIFIED IN SHOOTING MR WITIKA?

64. The sponge round fired by Officer E struck Mr Witika and he bent over, before turning around and moving towards the gate through to the backyard of the property where his dog was. As he was doing so, Officer G threw a distraction device which landed about five metres from Mr Witika and exploded twice in quick succession. As Officer B released his dog, Mr Witika opened the gate and leaned back to take the shotgun in his right hand. He used the shotgun to fend off the Police dog while retreating into the yard of the property. The Police dog followed Mr Witika into the yard, where Mr Witika's dog started attacking the Police dog. This distracted the Police dog, which appeared to snap at Mr Witika's dog to keep it at bay, while following Mr Witika to try and engage him. Mr Witika and the dogs moved to the right corner of the house, which was behind the shed and out of the view of the AOS officers still at the end of the driveway. These events are visible on Eagle footage.
65. Officer F says he saw the Police dog attacking Mr Witika but was not sure whether it had managed to latch on. He also says he was concerned for Mr Witika's safety, having just been hit by a sponge round, and possibly with the Police dog latched on, as well as for the Police dog and officers on cordons. Officer A expressed similar concerns when he was speaking to Police investigators. Officer F assessed that Mr Witika would be preoccupied with the Police dog, so he could safely move his team under the carport area to the corner where the garage would provide cover.

66. For these reasons, Officer F instructed his team to advance down the driveway. He says his plan was for the team to take up a position under the carport, at the corner of the shed, where the shed could still provide some cover. He did not articulate this plan to the team. Officer A told Police that moving forward behind the cover of a shield to effect an arrest was a standard procedure that the AOS practised on a regular basis.
67. About halfway down the driveway, Officer C, whose role it was to hold the ballistic shield the team was stacked behind, decided to drop the shield so he could hold his M4 rifle instead. He provided his reasoning for this decision and after speaking with other officers, we accept he was justified in doing so.
68. As the AOS team reached the carport, Officer A veered to the left, towards the alleyway and gate through to the backyard. Officer B followed closely behind. Officer B was not carrying a firearm and says he did not see Mr Witika grabbing his shotgun. He knew Officer A was armed and was relying on him for cover. Officer A approached the pedestrian gate with his M4 rifle raised in the direction of Mr Witika. Officer B was immediately behind him, and Officer C was positioned to Officer A's right, standing at the corner of the shed, at the rear of the carport. Officer F was under the carport and behind Officer C. The area in which Officers A, B, and C were standing was only about one metre wide, with the wall of the shed on one side, a wooden fence on the other, and the gate to the backyard in front of them. This created a "*funnel*", with limited ability to take cover from the threat posed by Mr Witika. Officer A says that because of the limited space, the officers had to be in single file.
69. When Officer A reached the gate, he saw Mr Witika standing about 10 metres ahead of him, at the right-hand corner of the house. He saw Mr Witika wrestling with the Police dog, holding his shotgun at hip-level in his left hand. He says it appeared as if the Police dog had latched onto Mr Witika's right arm, and he thought Mr Witika was ready to shoot the dog with his left hand. Officer A says Mr Witika saw him, started turning towards him, and raised his shotgun, moving it in a sweeping motion from right to left. By the time it was at shoulder height, Officer A says the barrel was pointing at him. There is no Eagle footage of these developments as its view of Mr Witika was blocked by the house he was standing behind. An officer yelled a warning to Mr Witika to drop his weapon. Officer A does not recall doing this, but it appears from evidence of other AOS officers that he did.
70. Officer A says he fired three shots in quick succession as Mr Witika fired on him. He did not know if any of the shots hit Mr Witika, as he was immediately knocked backwards off his feet by the blast from Mr Witika's shotgun. A ballistic examination of the bullets found in Mr Witika's body could not forensically link them to Officer A's rifle.

#### **Was Officer A legally justified in shooting Mr Witika?**

71. Officer A says he was justified in shooting Mr Witika in self-defence, because he could see that Mr Witika was aiming his shotgun at him. Section 48 of the Crimes Act provides that any person, including a Police officer, is legally justified in using reasonable force in defence of themselves or another.

72. Under section 48, we must assess Officer A's actions on both:

- a subjective basis (that is, what Officer A genuinely believed); and
- an objective basis (what a “reasonable” person would have done).

73. This assessment involves three questions:

- a) What were the circumstances as the officer believed them to be? (a subjective test)
- b) Was the officer's use of force against Mr Witika for the purpose of defending himself or another? (a subjective test)
- c) Was the officer's use of force against Mr Witika reasonable in the circumstances as the officer believed them to be? (an objective test)

*What were the circumstances as Officer A believed them to be?*

74. Paragraph 69 sets out what Officer A says he saw when he reached the gate through to the backyard. He says that as he rounded the corner of the shed, Mr Witika turned the shotgun towards him *“and then pulled the trigger as [Officer A] was coming up into the aim [position]”*. According to Officer A:

*“...so as he’s brought that muzzle around from right to left, sweeping it towards me, I too have formed a decision to shoot this male as I believe he was going to shoot and kill me in that moment.”*

75. He says the reason he believed Mr Witika was about to shoot him was that he had already discharged the weapon, had been non-compliant, was exhibiting threatening behaviour, and had picked up the shotgun and was pointing the muzzle at him. He also believed that he saw Mr Witika squeezing the trigger before his own shots.

76. The audio from cell phone footage shows that Officer A was the first to fire. His three rounds were followed closely by Mr Witika's shotgun blast, with a second shotgun blast three seconds later. Despite the discrepancy in Officer A's recollection that Mr Witika fired first, we accept his description of how he perceived the situation. While Eagle footage did not capture the movements of the AOS team just prior to the shooting, examination of still images taken from Eagle footage shows the barrel of Mr Witika's shotgun raised, coming into view from the corner of the house, followed by Mr Witika, who holds it with the stock braced against his shoulder just before firing.

*Was Officer A’s use of force against Mr Witika for the purpose of defending himself or others?*

77. We are satisfied that Officer A believed Mr Witika was about to shoot him. He also expressed concern (outlined in paragraph 65) about the potential for Mr Witika to shoot other officers on the cordons, and the Police dog.

*Was Officer A's use of force against Mr Witika reasonable in the circumstances as he believed them to be?*

78. The officers found themselves positioned in a narrow area, with or no opportunity to seek cover from the threat posed by Mr Witika. As raised in Issue 2, there were tactical options available at an earlier stage which may have prevented this scenario. However, Officer A was now facing a man who had been acting erratically, had previously fired shots into the burning house, and was now pointing a shotgun at him. The threat Mr Witika posed to Officer A and the other officers was imminent, and the risk of death or grievous bodily harm was high. We accept that Mr Witika had the shotgun aimed at Officer A. In these circumstances, it would have been impractical and unsafe (both in terms of the serious risk Officer A faced, his distance from Mr Witika, and the time available to him) to revert to a different, less-than-lethal tactical option. He also did not have the opportunity to take cover behind the shed when he saw Mr Witika about to fire, because of the lack of room to move. Officer A was justified in shooting at Mr Witika in self-defence.

### FINDING ON ISSUE 3

Officer A was justified in shooting Mr Witika.

## ISSUE 4: WAS OFFICER C JUSTIFIED IN SHOOTING MR WITIKA AND HIS DOG?

79. Officer A, who had taken the worst of the blast from Mr Witika's shotgun, was lying on the ground having struck his head against the concrete. He used his feet to push himself backwards to where two AOS teammates assisted him by taking him back down the driveway to the grass verge at the front of the house. Officer B was also hit by the blast. When he realised that he had been shot, he moved off the driveway and onto the grass verge.
80. Officer C was designated to hold the shield for the team. He decided to put his shield down when the team were halfway down the driveway because he saw that Mr Witika had picked up his firearm; consequently, he thought he should also be armed with his primary weapon. He justified this decision on the basis that a shield is only effective when someone is standing beside it to provide lethal cover, and that there was not enough room for this to happen in the space by the gate next to the shed. He says this is consistent with his training on shield use in narrow passages, and we accept that.
81. When the first shots were fired, Officer C, who was standing next to the shed and about a metre from the gate, retreated into the carport and positioned himself behind the corner of the shed. Officer E heard someone yell the instruction to step in front of an injured person to provide cover, so he stepped forward, over Officer A, and stood on Officer C's left. He was still only armed with the less lethal 40mm sponge round.
82. Officer C says he saw Mr Witika walking towards him with his shotgun in his hand, and with the barrel of the shotgun in a ready position, the stock braced against his shoulder, facing him. The AOS dog was still attached to him.

83. Officer C stood behind the corner of the shed with his M4 rifle raised at a 90-degree angle and aimed at Mr Witika. Officer C says he tried to move out of the shotgun's firing line by pushing closer in behind the shed, but Mr Witika moved in an arc around the corner of the shed, which brought the officers into the shotgun's line of fire. This is captured in Eagle footage.
84. Officer C was watching Mr Witika from above his rifle's scope. He says he believed Mr Witika was about to shoot him. As Mr Witika closed in, Officer C fired. He believes he fired five rounds, and as the last shot hit Mr Witika, he saw him fall and stopped firing. At some point during the exchange, about three seconds after Mr Witika fired his shotgun at Officer A, cell phone footage records a second shotgun blast from Mr Witika's firearm.
85. As Mr Witika fell to the ground the AOS dog bit his leg. Officer C noticed that Mr Witika's dog was latched onto the AOS dog's neck and was biting it. When Officer F instructed the team to enter the backyard so they could attend to Mr Witika, he saw Mr Witika's dog trying to rip at the Police dog's neck by swinging its head left and right. Officer C fired at the dog to incapacitate it.
86. Officer C fired five rounds in total. There is some uncertainty as to how many rounds were fired at Mr Witika and how many at the dog, but we do not regard this as material to the legality of Officer C's actions.
87. We have applied section 48 of the Crimes Act in deciding whether Officer C was justified in shooting Mr Witika. Officer C had just seen Mr Witika shoot Officer A and he was now moving towards the other AOS officers, with his shotgun pointing at them. It is clear from the Eagle footage that Mr Witika was moving quickly and purposefully towards the remaining officers with the shotgun braced against his shoulder. Officer C says he feared for his life and discharging his firearm was the only tactical option available to him. We accept his perception of the circumstances. The Eagle footage shows that Officer C waited until the last possible moment before he fired at Mr Witika.
88. Officer C was clearly acting in self-defence. Mr Witika had already fired at, and hit, Officer A, who was standing next to Officer C. Indeed, Officer C had also been seriously injured by that first blast, although he did not realise it until a colleague pointed out the injury immediately after the incident. The immediacy and seriousness of the threat, and the likelihood that it would eventuate, meant Officer C's decision to use lethal force against Mr Witika was justified.
89. We also considered whether Officer C was justified in shooting Mr Witika's dog, or whether officers could have tried to remove it from the AOS dog in another way. Officer B said that the AOS dog had bite marks on its neck collar, showing Mr Witika's dog had been latched onto the neck area of the AOS dog.
90. Section 57 of the Dog Control Act 1996 provides that a person may seize or destroy a dog if the person sees the dog attacking a domestic animal. In these circumstances, Officer C had just witnessed officers being shot, had himself been shot, and needed to aid Mr Witika, who he had just shot. Further, the need to act quickly to provide medical assistance to Mr Witika justified his decision to shoot Mr Witika's dog, not only to protect the AOS dog, but to also allow safe access to Mr Witika as quickly as possible.

## FINDING ON ISSUE 4

Officer C was justified in shooting Mr Witika and his dog.

## ISSUE 5: WAS OFFICER D JUSTIFIED IN SHOOTING AT MR WITIKA?

91. Officer D was positioned on a cordon on a street from where he had a clear view across a neighbour's yard into Mr Witika's backyard, about 15 metres away. He heard the shotgun blast and saw three AOS officers falling backwards. He says he assumed the officers were either dead or gravely injured. After about a second Mr Witika came back into view as he advanced, holding the shotgun with the barrel pointed directly at the gate, towards where the remaining AOS officers were. He describes Mr Witika as:

*"moving with intent, I guess you could call it, towards them. He was obviously trying to close the distance, the gun is pointed at them, so at this point all I'm thinking is, well like I said three of them already dead or greatly injured and now he's about to shoot the other three, so therefore I need to shoot him, there's no other option..."*

92. He says by the time Mr Witika had come into his view he was about two to three metres from the AOS officers by the gate. He could see some commotion among the AOS team, believing they were trying to get in a position to fire again. His description of what he could see unfolding was broadly consistent with other officers' accounts and the Eagle footage, although he was incorrect in saying Mr Witika fired first (see paragraph 76).
93. There were two fences between where Officer D was standing and Mr Witika. Officer D says he brought his firearm up and aimed through the palings of the first fence. He says he had Mr Witika, and no one else, clearly in his scope. He says he was confident that the gaps in the palings of the second fence were wide enough to allow a round to pass through. He was aware of the risk of the round ricocheting off the fence, but once he saw Mr Witika with his gun pointed at the AOS team, he felt there was more risk to those officers from him not taking the shot. He fired a single shot from his M4 rifle at Mr Witika, in between the fence palings. He saw Mr Witika falling and believed he had shot him. A subsequent scene examination determined that the shot he fired missed Mr Witika and struck the back right corner of the shed.
94. In determining whether Officer D was justified in shooting at Mr Witika in self-defence, the circumstances as he perceived them are set out in the above paragraphs. There is no doubt he was acting in defence of others. The remaining question is whether Officer D's use of force against Mr Witika was reasonable in the circumstances as the officer believed them to be.
95. Officer D was acting to prevent Mr Witika firing at the AOS team, a risk that was both imminent and likely to materialise given Mr Witika had already fired at Officer A. However, in shooting through fence palings, from about 15 metres, he was posing a risk not only to Mr Witika, but also to the AOS officers standing two to three metres away from Mr Witika, and potentially to officers on other cordons, the whereabouts of whom Officer D was not aware. Officer D's use of force to avert the risk posed by Mr Witika would likely result in death, or grievous bodily harm for Mr Witika. It would possibly result in death, or grievous bodily harm for other officers, if

Officer D's aim was not precise, and/or the bullet ricocheted off a fence paling. This was a risk that Officer D said he considered.

96. Officer D took a calculated risk. His perception of the risk to the AOS team was that Mr Witika was about to fire his shotgun at them from a range of two to three metres, and that no one in the AOS team would be able to shoot at Mr Witika before this happened. He was unaware that Officer C was preparing to shoot. He did turn his mind to the risk of his round ricochetting and endangering the AOS officers. He does not appear to have turned his mind to the same risk endangering the officers on other cordons. Any risk to them, however, would have been low due to their distance from Officer D. In these circumstances, having just seen AOS officers fall to the ground from a shotgun blast, and having been of the impression that the AOS team was not presently able to fire, the almost certain probability that Mr Witika would hit an officer from close range if he fired outweighed the risk to other officers if Officer D's round ricocheted off the fence or missed Mr Witika and passed through to an officer on cordon. His use of force was therefore reasonable in the circumstances as he believed them to be.

#### FINDING ON ISSUE 5

Officer D was justified in shooting at Mr Witika.

### Subsequent Police Action

97. Police investigated this incident and found the shootings were justified, as was the use of non-lethal force when the AOS team was at the end of the driveway.



Judge Kenneth Johnston KC

Chair  
Independent Police Conduct Authority

14 March 2024

**IPCA: 21-9915**

## Appendix – Laws and Policies

### LAW

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#### Use of force

98. Section 39 of the Crimes Act 1961 provides for law enforcement officers to use reasonable force in the execution of their duties, such as arrests and enforcement of warrants. Specifically, it provides that officers may use "*such force as may be necessary*" to overcome any force used in resisting the law enforcement process unless the process can be carried out "*by reasonable means in a less violent manner*".
99. Section 48 of the Act states: "*Everyone is justified in using, in the defence of himself or herself or another, such force as, in the circumstances as he or she believes them to be, it is reasonable to use.*"
100. Under section 62 of the Act, anyone who is authorised by law to use force is criminally responsible for any excessive use of force.

#### Destroying a dog

101. S 57 of the Dog Control Act 1996 provides that:

*"A person may, for the purpose of stopping an attack, seize, or destroy a dog, if the person witnesses the dog attacking any other person, or any stock, poultry, domestic animal, or protected wildlife."*

# About the Authority

## **WHO IS THE INDEPENDENT POLICE CONDUCT AUTHORITY?**

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

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

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

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

## **WHAT ARE THE AUTHORITY'S FUNCTIONS?**

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Under the Independent Police Conduct Authority Act 1988, the Authority receives and may choose to investigate:

- complaints alleging misconduct or neglect of duty by Police;
- complaints about Police practices, policies and procedures affecting the complainant in a personal capacity;
- notifications of incidents in which Police actions have caused or appear to have caused death or serious bodily harm; and
- referrals by Police under a Memorandum of Understanding between the Authority and Police, which covers instances of potential reputational risk to Police (including serious offending by a Police officer or Police actions that may have an element of corruption).

The Authority's investigation may include visiting the scene of the incident, interviewing the officers involved and any witnesses, and reviewing evidence from the Police's investigation.

On completion of an investigation, the Authority must form an opinion about the Police conduct, policy, practice or procedure which was the subject of the complaint. The Authority may make recommendations to the Commissioner.

## **THIS REPORT**

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



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