

# Police not justified in shooting at armed fleeing offender at an Ellerslie intersection

1. On 30 September 2021, Police fired at Mr X, who was armed, a total of 13 times in three separate events during a pursuit across Auckland. Mr X sustained life-threatening injuries but survived. Police notified the Authority of this incident as required by section 13 of the Independent Police Conduct Authority Act 1988.<sup>1</sup>
2. At about 8.30am (during Level 3 Covid-19 lockdown), Police in Ōtāhuhu started to pursue Mr X, who had breached his electronically monitored bail conditions while on firearms charges. The Eagle helicopter observed Mr X had firearms with him in his car. The Armed Offenders Squad were activated. In the meantime, two dog handlers, Officers A and D, followed Mr X to be ready to intervene if Mr X threatened the public.
3. At 8.50am, Mr X abandoned his car on the side of the Southern Motorway and got into the front passenger seat of a Honda driven by Mr Y. Mr X pointed a firearm at Officer D's dog van, and at members of the public.
4. At 8.54am, Mr X and Officer D engaged in the first of three armed confrontations. Mr Y conducted a hand brake turn at the intersection of Great South and Rockfield Roads in Ellerslie. Mr X pointed a firearm out the open passenger window towards Officer D. Officer D fired four or five rounds at Mr X but did not hit him. Mr Y sped away.
5. At 9am, the Honda ran out of petrol outside a house in Hillsborough. Mr Y and Mr X attempted to run away. Officer D ran after Mr X, who raised the firearm at Officer D while fleeing towards the house. Officer D fired four rounds at Mr X, hitting him once in the back.
6. Officer D followed Mr X around the corner of the house onto a covered deck. Officer D fired four shots at Mr X. Officer D says Mr X was facing him with a raised firearm. Mr X disputes this.

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<sup>1</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."

7. Just after 9am, Officers D, A, and two others, arrested and attempted to restrain Mr X, who was injured but resisting. Eventually, Police obtained control of the situation. A Police dog found Mr Y hiding in nearby bush and bit him during the restraint.
8. Mr X later complained that officers punched him and hit him in the head with a firearm while arresting him.
9. Our investigators interviewed Mr X, Mr Y and twenty Police officers involved. We also reviewed CCTV and Eagle footage of the pursuits and of the confrontations between Police, Mr X and Mr Y.
10. This was a lengthy incident that included several tactical decisions and uses of force in addition to the use of firearms. This report records our analysis and findings regarding the shots fired by Officer D.

## The Authority's Findings

11. We found:

- a) Officer D was not justified in shooting at Mr X at the intersection of Rockfield and Great South Roads because the risk to Mr Y and members of the public was too high.
- b) Officer D was justified in shooting at Mr X on two separate occasions at the Hillsborough house.

With regards to other matters, we concluded that:

- c) An officer who set road spikes during the first pursuit should have considered the risk to all motorists when doing so.
- d) Officers D and A should not have attempted to force the fleeing Honda to slow down on the motorway, as it involved an unauthorised and dangerous manoeuvre.
- e) Officer D should have worn armoured plates in his Ballistic Armour System, as required by policy.
- f) Officer D should not have aimed his firearm out of the car window at Mr X (in response to Mr X doing the same) while driving on the motorway.
- g) After Officer D shot Mr X, but before he was properly restrained:
  - i) Officer D was justified in using his boot on the back of Mr X's head and striking Mr X on the face to protect himself;
  - ii) Officer A was justified in using the Police dog to help restrain Mr X; and
  - iii) Police did not hit Mr X with a firearm.

- h) Officer A was justified in using the Police dog to restrain Mr Y, who was potentially armed and hiding in a bush covered area.
- i) Police provided appropriate first aid to Mr X once he had been secured, but officers did not use available ambulance staff to ensure Mr Y had appropriate medical care. Mr Y had serious injuries that were not detected until more than three hours after his arrest.
- j) Police did not adequately secure the scene at the intersection of Great South and Rockfield Roads, and did not ensure that Officer D's firearm was secured as soon as practicable.

## Analysis of the Issues

### ISSUE 1: WAS OFFICER D JUSTIFIED IN SHOOTING AT MR X AT THE INTERSECTION OF GREAT SOUTH AND ROCKFIELD ROADS?

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- 12. In this section, we consider whether Officer D was justified in firing four or five shots at Mr X in self-defence. If we find Officer D's actions unjustified, we may recommend Police:
  - a) consider charging the officer with an appropriate offence; and/or
  - b) consider initiating disciplinary proceedings against Officer D.<sup>2</sup>

#### What happened immediately prior to Officer D firing at Mr X?

- 13. Mr Y drove at speed, north-west bound, along Great South Road, followed by Officer D who was leading several other Police cars. Mr Y turned left into Rockfield Road. On the far (northern) side of this intersection is a raised carpark area surrounded by a low wall, and a group of shops (including a pharmacy). Eagle and CCTV footage captured ensuing events.
- 14. Mr Y misjudged the turn and attempted to correct by applying the handbrake. The tyres lost traction and he spun the Honda 180° anticlockwise, so the Honda was positioned across the south-bound lane of Rockfield Road, with the bonnet facing back down Great South Road, towards Officer D who had stopped at the traffic lights controlling the intersection.
- 15. The Honda remained stationary for approximately a second. The Honda's front passenger window was down, and footage shows Mr X aiming his firearm directly at Officer D from a distance of about 3-4 metres. Mr Y then continued turning left to complete a 360° turn.
- 16. A second later, Officer D began exiting his dog van and aimed his pistol at Mr X through the gap between his windscreen and the open van door. Footage shows that the Honda began to turn left before Officer D was outside his van. This meant the passenger side of the car, and the open front passenger window, were no longer facing Officer D's position.

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<sup>2</sup> Obviously, when considering the possibility of criminal charges we will need to assess evidential sufficiency by the criminal standard and public interest, and when considering the possibility of disciplinary proceedings we apply the civil standard.

17. Officer D says he fired “four or five” times at the Honda. He was aware of the low wall behind the Honda but did not see any people. As Mr Y completed the turn and fled down Great South Road, one bullet hit the window frame edge on the driver’s door. A subsequent scene examination found a second bullet had hit but not penetrated the window of the pharmacy approximately 60 metres behind the intersection. Police were unable to find the other bullets.

#### Was Officer D justified in firing at Mr X to defend himself?

18. Section 48 of the Crimes Act 1961 provides that any person, including a Police officer, is legally justified in using reasonable force in defence of themselves or another. An analysis under section 48 has subjective and objective aspects.
19. The assessment involves three questions:
- c) What were the circumstances as the officer believed them to be (a subjective test)?
  - d) Was the officer’s use of force against Mr X for the purpose of defending himself (a subjective test)?
  - e) Was the officer’s use of force against Mr X reasonable in the circumstances as the officer believed them to be (an objective test)?

#### What did Officer D believe the circumstances to be?

20. Officer D told us he fired at Mr X when the Honda was stationary and directly facing his dog van. Mr X was pointing the firearm at him and he feared for his life. He was unclear whether Mr Y was Mr X’s associate or hostage. He thought the former most likely, but that either way he was acting to protect Mr Y.
21. However, Officer D’s account is not consistent with the CCTV evidence, as described above. We are satisfied that Officer D was not outside his dog van when the Honda was stationary, and therefore he fired as the Honda was driving away, and Mr X no longer posed an immediate threat to him.
22. Officer D had difficulty reconciling what he could see in the footage with what he recalled. He says he would never have fired across the driver’s seat to incapacitate the threat posed by Mr X, given the risk to Mr Y. However, he accepted after viewing the footage that as the Honda turned across the front of the dog van, Mr Y was between himself and Mr X.
23. Our assessment is that Officer D provided us with an honest account of what he believed the circumstances to be. Although his account is inaccurate (insofar as footage establishes that it does not accurately reflect what happened), the disparity almost certainly reflects the officer’s distorted perception of events due to the intensity of the situation.
24. We accept Officer D’s genuine perception at the time he fired was that the Honda was stationary, Mr X was pointing a firearm at him, and his life was at risk.

*Was Officer D's use of force for the purpose of defending himself or another?*

25. We accept that Officer D was acting to defend himself and Mr Y.

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

26. Force is reasonable if it is proportionate to the threat, taking into account the consequences if the risk materialises, the imminence of that risk and the likelihood of it occurring.
27. We have accepted that Officer D believed he was at imminent risk of being shot and killed by Mr X, and that (believing he was outside his dog van at the time), he was exposed.
28. We accept that Officer D believed it was reasonably likely that Mr X would fire his weapon at him, based on Mr X's aggressive and volatile behaviour and his clear motivation to escape Police. Officer D was aware that Mr X had earlier rammed Police cars in his attempts to escape, and presented his firearm at Police and the public.
29. The overall assessment also calls for consideration of the likely harm resulting from Officer D's decision to fire towards the car that was occupied by both Mr X and Mr Y, and in a built-up area. From Officer D's perspective, Mr Y was likely an associate of Mr X, but this was not certain. The risk of the shots fired by Officer D accidentally hitting Mr Y was high, especially as Officer D was using a handgun which are notoriously difficult to fire accurately. Further, Officer D needed to fire through the Honda's windscreen to incapacitate Mr X, which increased the risk that the bullet would deflect. Although it was lockdown, some shops were open, and these were also in Officer D's line of fire. In short, it was a high-risk shot to take.
30. Although Officer D perceived that he was defending himself and others from a serious and imminent threat, his chosen course of action put Mr Y and others at an increased and unacceptable risk, in our view.
31. While the situation Officer D faced was indeed serious, it was distinguishable from other recent incidents where an armed offender was shooting at Police officers, placing officers and the public at imminent and extreme risk of death or serious injury. In such cases high-risk actions may be required to protect against the extreme and uncontained threat to life. The exigencies of such a scenario compared with the situation Officer D perceived he was facing are not the same.
32. For these reasons, our view is that Officer D's decision to fire several times at Mr X in the Honda was not proportionate or reasonable. It constituted excessive force.
33. However, we do not consider the evidence meets the standard required for charging Officer D with an offence. In plain terms, we do not think a jury could be sure beyond reasonable doubt that Officer D could not rely on self-defence to justify his decision to fire at Mr X.
34. Although that finding does not mean that Officer D's use of force was justified, nor do we recommend that Police commence disciplinary proceedings. This is primarily for natural justice reasons, having regard to the fact that these events occurred in September 2021.

## FINDINGS ON ISSUE 1

Officer D was not justified in shooting at Mr X at the intersection, as this put Mr Y and others at unacceptable risk.

We do not recommend charging Officer D with an offence, or that Police commence disciplinary proceedings.

## ISSUE 2: WAS OFFICER D JUSTIFIED IN SHOOTING AT MR X ON THE DRIVEWAY AT THE HOUSE IN HILLSBOROUGH?

35. A few seconds after the Honda stopped at the end of the driveway, Mr X got out of the Honda holding the firearm. Officer D says he stopped his dog van 25 metres behind the Honda. Eagle footage shows Mr X raised the firearm three separate times towards Officer D, then a fourth time as he ran around the Honda's bonnet before starting to run in front of the house.
36. Officer D got out of the dog van and fired four shots at Mr X to incapacitate him, in defence he says of himself and the occupants of the surrounding houses.
37. One of these shots passed laterally through Mr X's back. He fell, rolled and pointed his firearm at Officer D as he regained his footing and ran towards the corner of the house to a covered deck area.

### *What did Officer D believe the circumstances to be?*

38. Officer D says when he stopped on the driveway he did not think Mr X lived there, and was concerned he could enter the house and threaten any occupants. He also could not see if any other Police officers had arrived in support because his rear vision was obstructed by the dog capsule in his dog van.
39. He says he saw Mr X point the barrel of the firearm at him the entire time Mr X was crossing the driveway in front of him. We know from the CCTV footage this is incorrect; Mr X raised and lowered the firearm towards Officer D four times before Officer D fired at him. However, the footage indicates that Officer D started firing about one second after Mr X lowered his firearm for the fourth time. We accept Officer D's evidence that he decided to fire as Mr X was pointing the firearm at him, and fired without perceiving that Mr X had lowered it. This is plausible because the timeframe in which these events happened was so short.

### *Was Officer D's use of force for the purpose of defending himself or another?*

40. We accept Officer D acted to defend himself from being shot by Mr X, and to protect any occupants of the surrounding houses.

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

41. We accept that Officer D perceived Mr X was pointing a firearm at him and that it was reasonably likely that Mr X would shoot him to make his escape. Mr X's behaviour indicated he was highly motivated to get away, and prepared to use extreme measures to do so.

42. The risk to Officer D was therefore imminent and potentially lethal. Officer D could not retreat and wait for back-up to arrive because Mr X might enter any one of the surrounding houses. Officer D also says he could not get his dog out, as this would involve turning his back on Mr X, and, regardless, Mr X would probably shoot the dog before it could incapacitate him.
43. On balance, we accept that Officer D was justified in shooting at Mr X given the level of threat he faced and the likelihood that threat would eventuate.

## FINDING ON ISSUE 2

Officer D was justified in shooting at Mr X on the driveway.

## ISSUE 3: WAS OFFICER D JUSTIFIED IN SHOOTING MR X ON THE DECK?

44. Officer D chased Mr X around the corner of the house to a covered deck area. From this point, they were no longer visible to Eagle's camera.
45. Officer D says he rounded the corner and saw Mr X was facing him from three metres away at the end of the deck, pointing a firearm at his head. He thought he was about to be shot and closed his eyes and shielded his face. When he did not hear Mr X's firearm discharge, Officer D raised his pistol and fired four times at Mr X in self-defence. He then holstered his pistol immediately, grabbed Mr X's shirt and pulled him down onto the deck to restrain him.
46. Mr X's evidence is that when he ran to the end of the deck, he thought he was trapped. He says he threw his gun down to avoid being shot and was turning around to surrender when Officer D shot him.
47. Medical evidence shows Mr X was shot four times while on the deck. These rounds struck Mr X's finger, chest, torso, and abdomen. There is no objective evidence against which we can assess these contrasting accounts.

### *What did Officer D believe the circumstances to be and did he use force to defend himself?*

48. With no other evidence to support or corroborate either account, we re-interviewed Officer D on his recollection and decision-making.
49. We found Officer D's responses consistent and considered. He presented as professional, trying to provide an accurate account of what he recalled and what he felt when confronting Mr X. We therefore find that he genuinely believed events occurred as he describes, and that he fired to protect himself from being shot by Mr X.

### *Was Officer D's use of force reasonable in the circumstances as he believed them to be?*

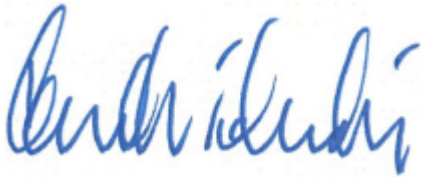
50. The threat Officer D believed he faced was extremely serious and imminent. If Mr X fired at Officer D from a few metres away, Officer D would probably be killed.
51. Officer D had no realistic alternative options. Officer D did not have time to retreat back around the corner or wait for back-up. He says he did not want to leave an armed offender free to gain

access to the house. He had no other reasonable tactical options than to fire, primarily to protect himself.

52. Having regard to the circumstances as we have concluded Officer D believed them to be, we accept that it was reasonable for him to think that Mr X would fire at him. Mr X had been trying to escape, but had now turned around and taken up an aggressive stance with his firearm pointed towards Officer D. This indicated that he might try to shoot his way out of the situation. Although Mr X had not immediately fired at Officer D as he expected, this did not mean he would not do so.
53. Officer D's decision to fire at Mr X from a range of three metres was very likely to result in serious injury or death. However, on balance we find his actions were reasonable and proportionate to the immediate threat he faced.

### FINDING ON ISSUE 3

Officer D was justified in shooting Mr X on the deck.



**Judge Kenneth Johnston KC**

Chair  
Independent Police Conduct Authority

31 October 2024

**IPCA: 21-9189**



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## About the Authority

### WHO IS THE INDEPENDENT POLICE CONDUCT AUTHORITY?

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

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

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

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

### WHAT ARE THE AUTHORITY'S FUNCTIONS?

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

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

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

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

### THIS REPORT

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

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