
Non-fatal Police shooting on motorway north of Auckland justified

Summary of the Incident

1. Shortly after midday on Friday 19 October 2018, two officers fired shots at a man in the front passenger seat of a car fleeing Police on the Northern Motorway, as part of an Armed Offenders Squad (AOS) operation. The man Police shot at suffered only minor injuries; no one else was harmed.
 2. Police had warrants to arrest the driver of the fleeing car, Mr Z, and the passenger, Mr Y. Mr Y was a remand prisoner who had escaped from the Waitakere District Court two days earlier. When Police found them in Blockhouse Bay on 19 October 2018, Mr Y fired a shotgun at officers as he and Mr Z tried to escape in an Audi.
 3. Police called out the AOS and Police helicopter (Eagle), and followed the Audi as it travelled through Auckland. AOS Officers A, B and C were in an unmarked Land Cruiser that took the lead position behind the Audi as part of the operation to arrest Mr Y and Mr Z. AOS Officers A and B were armed with rifles.
 4. Mr Y fired several shots at the AOS officers, and later pointed his shotgun at them but did not fire. As the AOS officers were driving up the Northern Motorway towards Silverdale, they fired at Mr Y in the fleeing Audi:
 - First AOS Officer B fired a single shot through the front windscreen of the Land Cruiser.
 - Secondly, AOS Officer A fired three shots through the open left-rear window of the Land Cruiser.
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5. These shots hit the Audi, and the last one shattered the rear windscreen. The officers in the Land Cruiser then lost sight of the car when it sped off. Police continued following the Audi as it travelled west towards the Kaipara Coast Highway.
6. About 15 minutes later, Police arrested Mr Z when he stopped and got out of the Audi. Mr Y drove off in the Audi and was apprehended soon afterwards when it ran out of petrol on the Kaipara Coast Highway. Police found he had minor injuries to his back. The pursuit had lasted for more than an hour, over a distance of about 120 kilometres.
7. Police reviewed the incident and found the officers were justified in shooting at Mr Y. Police also notified the Authority of this incident, which we independently investigated.

The Authority's Investigation

8. The Authority's investigation is not for the purpose of determining whether the officers are criminally liable for their actions. Our task under section 27(1) of the Independent Police Conduct Authority Act 1988 is to:

“form an opinion on whether or not any decision, recommendation, act, omission, conduct, policy, practice, or procedure which was the subject matter of the investigation was contrary to law, unreasonable, unjustified, unfair, or undesirable”.

9. In forming our opinion, we adopt a standard of proof that is lower than the criminal standard. That is because our task relates to oversight of Police conduct, not the application of the criminal law. In matters alleging serious misconduct by officers, we are always mindful that the strength of the evidence upon which we base that opinion must be high. That said, we use the same standard of proof applied in the civil courts in New Zealand – the balance of probabilities (which means more likely than not).
10. As the law currently stands, the Authority's opinion is not binding, nor can the Authority take any action in respect of its findings other than to make recommendations to the Commissioner of Police.

Issues Examined by the Authority

- Issue 1:** Were AOS Officers A and B justified in firing shots at Mr Y?
- Issue 2:** Did Police exercise appropriate command and control of the incident?
- Issue 3:** Did Police failures contribute to Mr Y's escape from custody?

The Authority's Findings

11. The Authority found that:

- 1) AOS Officers A and B were justified in firing shots at Mr Y while attempting to prevent his escape.
- 2) The AOS officers should have been provided with more background information on Mr Y and Mr Z.
- 3) The NorthComms shift commander should not have passed the overall incident control to the AOS Commander. The AOS Commander should have passed incident control back to NorthComms before he became actively involved in trying to effect the arrest.
- 4) Radio difficulties did not significantly affect the Police response to this incident.
- 5) Staff in the custody area at the Waitakere District Court were not properly trained or supervised. Consequently, Police failed to alert the court security and the Court that Mr Y was known to be an escape risk.

Analysis of the Issues

ISSUE 1: WERE AOS OFFICERS A AND B JUSTIFIED IN FIRING SHOTS AT MR Y?

Mr Y's and Mr Z's actions leading up to the shooting

12. Mr Y was a remand prisoner who escaped from the Waitakere District Court on 17 October 2018. He had multiple active charges, including 'aggravated robbery with a firearm', 'wounds with intent to injure' and 'assaults Police'.
13. Police also had a warrant to arrest Mr Y's associate, Mr Z, for burglary and wilful damage. They issued intelligence reports to officers warning that Mr Y and Mr Z were likely to be together and might be carrying firearms.
14. On Friday 19 October 2018, detectives looking for Mr Y at an address in Blockhouse Bay saw him in the passenger seat of an Audi that arrived in the street. Mr Z was driving the Audi.
15. At about 11.42am, as the detectives followed the Audi, Mr Y fired a shotgun at their unmarked patrol car. The Police Northern Communications Centre (NorthComms) shift commander instructed officers on the ground to keep a safe distance and "*do not engage in a pursuit*".
16. However, some Police vehicles got close to the Audi as it travelled through Auckland and Mr Y fired several more shots out of the car. A motorist who crossed the Audi's path also called 111 to report that someone (Mr Y) had fired shots at him.

What was the situation when the AOS officers fired their shots?

17. Shortly after 12pm, AOS Officers A, B and C were driving to catch up to the Audi in an unmarked Land Cruiser with its siren and red and blue flashing lights activated. AOS Officer C was the driver, AOS Officer B was the front passenger and AOS Officer A was in the back seat.

18. AOS Officer A said they did not know Mr Y's and Mr Z's identities, but knew "the offender" (Mr Y) had fired shots at Police patrol cars in various locations around Auckland. The AOS Commander also told them Mr Y had fired at members of the public.
19. While this was an AOS operation, AOS Officers A, B and C were all members of the Special Tactics Group (STG), trained to handle extremely high-risk situations including armed offender incidents beyond the capability of the AOS. They were equipped with ballistic body armour, Lewis Machine & Tool Company (LMT) rifles and Glock pistols. In accordance with policy, AOS Officer B had reminded the officers that Police 'fire orders' applied.¹ The AOS also carried a Taser and sponge rounds.
20. They drove over the Auckland Harbour Bridge, travelling north in search of the Audi and passing marked and unmarked Police cars. Two other AOS vehicles (carrying the AOS Commander and three other AOS officers) and a Police dog van were behind them.
21. AOS Officer B confirmed over the radio that Mr Y was in the front passenger seat of the Audi, and Eagle advised them when they were directly behind it. AOS Officer A said when they caught up to the Audi, it was:

"driving fast and attempting to pass other vehicles where it could, weaving in and out of traffic.... We were able to catch up to the Audi as other vehicles would let us through due to our emergency lights and siren but the Audi would get caught up behind cars in front of it."
22. This incident happened on the Friday before a long weekend (Labour Day), and footage from the motorway cameras confirms that traffic on the motorway was quite heavy. Unfortunately, camera footage from Eagle was not available for this incident, as it failed to record.
23. The AOS officers planned to carry out a 'non-compliant vehicle stop', using two of their vehicles to bring the Audi to a halt.² Near the point where the Northern Motorway crosses over Rosedale Road, AOS Officer C drove up close behind the Audi in preparation for the stop. The Audi was right behind another vehicle. Mr Y then leaned out of the Audi's front passenger window and fired multiple shots from a pump-action shotgun towards the AOS officers. Shotgun pellets from at least one of these shots hit the windscreen of one of the AOS vehicles.
24. AOS Officer B later said Mr Y had pointed the shotgun directly at him (in the front passenger seat of the Land Cruiser), and fired at least three times before disappearing back into the Audi. AOS Officer C recalled Mr Y firing four to five shots. AOS Officer A said Mr Y fired at least one shot, but he could not "clearly remember the number of times that [Mr Y] shot at us or presented and aimed his weapon at us".

¹ 'Fire orders' are instructions which set out the circumstances under which Police may use firearms (see paragraph 153 for Police policy).

² An AOS or STG Commander may authorise a non-compliant vehicle stop during an AOS or STG operation, in situations involving a mobile armed offender "where there is no other timely practical method of containing the fleeing driver or neutralising the threat they present". Only AOS or STG officers trained in its use may perform such a vehicle stop.

25. AOS Officers B and C heard pellets hitting the front of the Land Cruiser, and AOS Officer B reported the shots over the radio. AOS Officer A said:

“... the initial reaction is to try and shoot him before he shoots you... but given the situation that wasn't possible due to safety.... I feared for my life and I feared for the lives of [AOS Officers B and C]... they were seated forward of me obviously in the front passenger and the driver's seat so they were more at risk than I was, but having said that given the angles I was kind of in the middle of the two seats.”

26. AOS Officer A recalled that the Land Cruiser was driving through a gap between two vehicles when *“the Audi drove erratically and a car swerved. This caused our vehicle to make contact with a large truck on our left side.”* The motorway footage shows this happened just after Mr Y had fired shots at them.

27. AOS Officer B said he asked AOS Officer C to *“offset the vehicle slightly so that we're not in direct line of sight of that shotgun”*. He brought his weapon up to aim at Mr Y in the front passenger seat of the Audi. The motorway traffic was moderate to heavy, and they were travelling through commercial and residential areas. AOS Officer B said he decided not to fire his rifle because he was not satisfied he had a clear line of sight behind the Audi, and other motorists were in *“close proximity”*.

28. Mr Z continued driving north on the Northern Motorway, weaving through traffic at high speed. The AOS vehicles were still trying to get into position to conduct a vehicle stop, but the traffic density and the speed of the Audi made it difficult for them to do so. At times, when the traffic was lighter, the Audi was able to put quite a lot of distance between them. AOS Officer A recalled:

“I would estimate that other traffic was travelling around 100 kilometres an hour and the driver of the Audi was trying to go as fast as he could when the road was clear ahead of him.”

29. The AOS officers said Mr Y leaned out of the front passenger window again and presented the shotgun at Police. He did not fire and went back inside the Audi out of sight. AOS Officer B said: *“at that point I've made the decision to bring my rifle up... and when an opportunity presents itself to fire a shot at the front passenger's seat.”*

AOS Officer B's single shot

30. AOS Officer B said he checked *“in and around and behind”* the Audi to ensure there were no other vehicles *“nearby or within line of sight”*. He could not recall what lane the Land Cruiser was in, but said they were directly behind and *“no more than two car lengths”* from the Audi.

31. AOS Officer C thought they were in the fast lane at the time, and recalled *“there was other traffic around”*.

32. AOS Officer B could not actually see Mr Y, but knew he was sitting in the front passenger seat. Therefore, he aimed at the centre of that seat and fired a single shot from his rifle through the

front windscreen of the Land Cruiser. AOS Officer C told us he was surprised as he did not know AOS Officer B was going to fire the shot.

33. This bullet missed its target and struck the upper left corner of the Audi's rear windscreen frame. The Land Cruiser's front windscreen was laminated, so it remained intact apart from the bullet hole. The Audi carried on driving, and AOS Officer B did not fire any more shots.
34. AOS Officer B could not recall exactly where they were when he fired his shot but said it *"would've been in the vicinity of just south of Oteha Valley Road"*. The motorway footage does not cover the entire stretch of this area and does not clearly show the shot. Some of the footage shows the Audi accelerating quite far ahead of the Land Cruiser.

AOS Officer A's three shots

35. The Audi continued past the Oteha valley off-ramp and into a semi-rural area of the motorway system, still heading north on State Highway 1 towards Silverdale.
36. AOS Officer A said he had earlier aimed his rifle at Mr Y, but the motorway was very busy with civilian traffic and he felt he *"could not safely fire at the subject without risking the safety of members of the public"*. He later had the opportunity to fire at Mr Y when the Audi was driving on the left-hand verge of the motorway,³ and the Land Cruiser was at a 45 degree angle behind it in the left northbound lane. AOS Officer A said:

"he'd come over to the left verge if you like um and not sure if because it's gravel and whatnot that that meant that he had the effect... of slowing him down so we were able to catch up... we couldn't get alongside it cause there was a car in front of us that would have been I guess right beside him."

37. AOS Officer A pointed his rifle through the open left-rear window of the Land Cruiser at where he estimated Mr Y to be in the front passenger seat of the Audi. He recalled he was only 5-10 metres away but: *"I couldn't see [Mr Y]. I don't know if that was because of tinted windows or just because of the angle."*
38. AOS Officer A fired three aimed shots in quick succession and saw them all hit the centre of the Audi's rear windscreen at different points, moving left to right. The windscreen shattered after the last shot. Although the shots were generally on track, they did not directly hit Mr Y. Police later found that Mr Y had minor injuries to his back, which doctors determined were caused by minute metallic fragments.
39. AOS Officer A said he would have continued to fire if the Audi had remained in position, but it suddenly accelerated away. The Audi swerved right across the road, using the grass median to pass other vehicles. The AOS officers were unable to keep up and lost sight of the Audi after it drove around a left-hand bend. They did not fire any other shots.

³ AOS Officers B and C recalled that the Audi was in the left lane and they were in the right lane.

40. AOS Officer A said he had fired his shots near the BP petrol station south of the Wilks Road overbridge. The available motorway footage of this area did not help us to determine exactly when and where AOS Officer A fired the shots.

Assessment of the officers' justification for shooting

The officers' view of the circumstances

41. The AOS officers' statements indicate they did not know Mr Y's and Mr Z's identities at the time they fired their shots. The AOS officers were, therefore, unaware of Mr Y's and Mr Z's criminal histories and the fact that Mr Y had escaped from court two days earlier with active charges including 'aggravated robbery with a firearm', 'wounds with intent to injure' and 'assaults Police'. AOS Officer A said he had unsuccessfully tried to get information about the offenders' descriptions and identities over the radio, and by phoning the AOS Commander. But he only discovered Mr Y's identity after the arrest, despite NorthComms knowing Mr Y was involved from the start of the incident.
42. We believe the AOS officers should have received this background information about Mr Y and Mr Z, because it put their actions in context and was highly relevant to their assessment of the situation. Without it, the AOS officers were unable to make a fully informed judgement as to whether it was appropriate to use lethal force in the circumstances.
43. Nonetheless, we must consider whether the officers' actions were justified in light of the information they did know.
44. AOS Officer A said he believed this was an *"active shooter situation at the extreme upper end of the tactical options framework"*, and he had *"no doubt that [Mr Y] was trying to kill us or seriously injure us"*. He also noted: *"the physical environment was public roads so [Mr Y] was also posing a risk to members of the public."*
45. According to AOS Officer B, Mr Y was: *"a direct threat to me... as well as the other members of the public in and around their vehicle and potentially other police that were pre-positioned ahead."* He decided to fire his shot at Mr Y because he believed he needed to *"incapacitate"* him.
46. AOS Officer A said he and AOS Officers B and C discussed the possibility Mr Y had run out of bullets after he presented his shotgun at them without firing. However, they thought his shotgun may have temporarily jammed or he could be saving his shots for later. He noted that Police policy directs officers to: *"Treat all armed offenders, or offenders believed to be armed, as dangerous and hostile unless there is definite evidence to the contrary."*
47. AOS Officer A also said it was not a *"viable option"* to back off or stop pursuing the Audi because:
- "[Mr Y had] shown a complete disregard for people's safety. I don't think it's beyond the realms of possibility that he would've kidnapped someone or shot someone to get their vehicle or committed some sort of burglary or robbery to get a vehicle, or hide somewhere or whatever, to facilitate his escape."*

48. AOS Officer B told us:

“rather than disengaging at that point and letting the vehicle go, my concern is that that threat, the risks associated with that far outweigh the need to disengage... he still posed an immediate threat to other members of the public....”

49. Both AOS Officers A and B believed they were the best option to stop Mr Y, being highly trained, experienced, and equipped to do so. AOS Officer B said: *“... it’s my job and our group, our unit’s job to deal with those situations and not leave it up to general Police to deal with.”*

50. Before firing his shot, AOS Officer B assessed the risk to members of the public beyond his target:

“I’m continuously assessing the situation and looking for the most suitable time to take that shot where there’s no risk to the other members of the public ‘cause you know, we’ve got a moving vehicle and we’ve got other motorists in and around that vehicle, so I’m acutely aware of that and just waiting for an opportunity where I can mitigate those risks.”

51. AOS Officer A also assessed the risk to other people when firing his shots, noting:

“To the left of the Audi, so effectively beyond and behind it from my position, was farmland and at that point there was a rise that formed a natural backdrop. This presented a clear opportunity for me to fire at the subject and not pose any risk to any members of the public if I missed or if a round is deflected after hitting the offender or the vehicle.”

52. We accept both officers genuinely believed:

- a) Mr Y was an immediate and ongoing deadly threat to them, other Police officers, and the public in general;
- b) they needed to stop him as soon as possible; and
- c) the risks involved in shooting at him, at the moments they each chose to fire, were acceptable.

Possible justifications for the use of force

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

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

54. The officers could argue that Mr Y was using a firearm to resist the Police's efforts to arrest him, so they were justified in using force under section 39 to overcome this resistance. However, we believe section 39 would usually apply to situations where Police are more directly involved in the act of physically arresting a person. In this case, they had not yet reached the point of arresting Mr Y and Mr Z as they were still trying to catch them.
55. We therefore consider that the use of force by AOS Officers A and B best fits within section 40, as Mr Y and Mr Z were clearly fleeing in order to avoid arrest.

Were the officers legally justified in shooting at Mr Y to prevent his escape under section 40?

56. The proportionality and reasonableness of an officer's use of force against a person under section 40 should be assessed against two factors:
- a) the seriousness of the offence for which the person is to be apprehended (and the consequent public interest in detaining them in order to bring them to justice); and
 - b) the likelihood and degree of risk the person poses if escape is not prevented.⁴

The seriousness of Mr Y's offences

57. AOS Officers A and B did not know Mr Y's identity and criminal history, but they did know Mr Y had already fired shots at other Police officers, as well as firing shots at them. They were also told Mr Y had fired at members of the public.
58. Accordingly, there was a high level of public interest in apprehending Mr Y.

The likelihood and degree of risk Mr Y posed if his escape was not prevented

59. The AOS officers' view of the risk Mr Y posed is set out above at paragraphs 41-52.
60. We consider that, if AOS Officers A and B had only perceived that Mr Y posed a threat to themselves, they would not have been justified in shooting at him to prevent his escape under section 40. That is because they could have easily avoided the threat by ending the pursuit, or at least increasing their following distance. However, the AOS officers thought Mr Y had already fired shots at a civilian motorist. It is clear they believed he posed an ongoing serious risk to the public, as well as any Police officers he encountered.
61. While Mr Y is fully responsible for his illegal and highly dangerous actions during this incident, we note that the Police's decision to pursue him across Auckland and along busy motorways did further expose the public to the threat he posed. If Police cars had not been chasing him, Mr Y most likely would not have been firing his shotgun on public roads.
62. It could also be argued that Mr Y did not pose an immediate threat at the times AOS Officer B and AOS Officer A fired their shots, because he was sitting in the front passenger seat of the Audi and not pointing his shotgun at anyone. A short time had passed since Mr Y had fired shots

⁴ See paragraphs 132-141 below for an explanation of the Authority's interpretation of section 40 of the Crimes Act 1961.

at the officers, and he had since presented the shotgun without firing it. No one had been injured, and Mr Y's shots were clearly part of an effort to successfully escape Police rather than an indiscriminate shooting spree.

63. Nonetheless, we accept that when they shot at Mr Y, AOS Officers A and B had reasonable grounds to fear that he could kill or seriously injure a member of the public at any time. Mr Y had demonstrated his willingness to use the shotgun against them and others, and the officers did not know when he may use it again. It was reasonable for them to think Mr Y would continue to use the shotgun, and that he would put other people at risk in the immediate future if they failed to stop him.
64. Mr Y and Mr Z were behaving extremely recklessly, putting other road users and people on the streets in danger through their use of the shotgun and the Audi. The AOS officers reasonably anticipated that, if Police allowed Mr Y and Mr Z the space to do so, they might try to hijack another vehicle and seriously harm someone in the process.
65. Given what Mr Y had already done, these potential dangers were not merely speculative. And if any of the risks materialised, the consequences could be grave: death or serious injury. Overall, we are satisfied it was reasonable for AOS Officers A and B to believe that Mr Y posed a genuine deadly threat, and they needed to incapacitate him as quickly as possible.

Was the officers' use of force proportionate and reasonable in the circumstances?

66. Section 40 requires Police to use the minimum force needed to achieve their objective. Force will not be justified if the escape could have been prevented *"by reasonable means in a less violent manner"*.
67. We accept there were no reasonable and less violent methods than the use of firearms available to immediately stop Mr Y and remove the risk he posed. Other tactical options such as batons, pepper spray, Tasers and sponge rounds were all clearly unsuited to the task. The AOS officers had attempted to get into position to carry out a non-compliant vehicle stop to prevent Mr Y from escaping, but they were unsuccessful. The speed of the Audi and the proximity of other motorists made it too difficult to carry out the manoeuvre safely. Nor was it possible at that stage to use road spikes to stop the Audi on the busy motorway.
68. The lack of alternative ways of stopping Mr Y does not necessarily mean AOS Officers A and B were justified in shooting at him. Rather than shooting, the officers could have kept following the Audi at a safe distance while Eagle continued reporting on its movements. If Mr Y actively threatened anyone with his shotgun or tried to hijack another vehicle, as the officers feared he might, they would have been close by to respond to that threat. Police were also establishing roadblocks and planning to lay road spikes ahead. If successful, these tactics may have directed the Audi into a less-populated area and/or slowed it down enough to enable the AOS officers to conduct a non-compliant vehicle stop, reducing the risk to the public.
69. However, the AOS officers in the Land Cruiser were having trouble keeping up with the Audi (as demonstrated by the fact they lost sight of it after AOS Officer A had fired his shots). The officers

felt they had to act while they could, as they did not want to risk Mr Y and Mr Z escaping them on the motorway and potentially threatening more lives. Although Eagle was following the Audi, there was a risk it would need to leave to refuel and that Police would lose track of Mr Y and Mr Z.

70. By the time AOS Officers A and B fired their shots, Police had been following Mr Y and Mr Z for about 40 minutes and they showed no sign of surrendering. AOS Officer A noted it was *“impractical”* to call on Mr Y to surrender in the circumstances, and Mr Y’s behaviour suggested this would have no effect anyway because he was determined to escape. We therefore accept that the officers reasonably felt they could not delay taking action and that it was necessary to incapacitate Mr Y as soon as the opportunity arose.
71. Nonetheless, shooting at Mr Y would not be a reasonable use of force if it posed greater risks to the public than Mr Y did.
72. Shooting at a person in a vehicle is an inherently dangerous action to take. In this case, both the AOS officers and their target, Mr Y, were in moving vehicles travelling at high speeds. The dynamic nature of this incident and the varying factors involved in firing the shots meant there was a real chance the AOS officers would miss their target, or the bullets would be deflected, and potentially place the lives of other motorists in danger.
73. All the shots had to pass through the Audi’s rear windscreen and front passenger seat to hit Mr Y. AOS Officer B’s shot also had to pass through the Land Cruiser’s front windscreen. These physical obstructions could have caused their bullets to fragment and/or deflect from their intended path.
74. As well as endangering other people on and near the motorway, poorly aimed or deflected shots could have killed or seriously injured the driver, Mr Z. Although AOS Officer A told us he considered Mr Z to be a *“party to all the offending”* and said: *“I thought we were probably justified in shooting him as well... but that opportunity didn’t present itself to me”*, we do not agree that the AOS officers would have been justified in shooting at Mr Z. Mr Z had not been firing the shotgun and his manner of driving was not, in itself, enough to justify using lethal force against him. If the AOS officers had hit Mr Z, intentionally or otherwise, he could have lost control of the Audi at high speed and crashed into other traffic on the busy motorway.
75. The AOS officers had also been fired upon and were under a lot of stress. In situations like this, a person’s attention is usually focused on the source of the immediate threat and their ability to notice and perceive risk to other people or vehicles nearby may be impaired.⁵ In this case, we note that, although AOS Officer B said there were no other vehicles nearby when he fired his shot from about 10 metres behind the Audi, the motorway footage we have seen indicates that the AOS officers only ever got that close to the Audi when traffic was directly in front of it and slowing it down. This suggests that there may in fact have been another car directly in front of

⁵ This issue of situational awareness was raised in the Authority’s report on the death of courier driver Halatau Naitoko in Auckland after AOS officers fired shots at an offender on the Northwestern Motorway. See IPCA report *“Police shooting of Halatau Ki’anamanu Naitoko”* (3 April 2012) paragraphs 419-430.

the Audi when AOS Officer B fired his shot. But the timing and location of his shot is not clear, so we cannot be certain of that.

76. For the reasons we have just outlined, we would not ordinarily consider shooting at Mr Y to be a reasonable use of force in this case. The likelihood of the shots successfully incapacitating Mr Y as intended was low, and the potential negative outcomes to others were severe.
77. However, AOS Officers A and B are highly-trained and experienced members of the Special Tactics Group (STG). The STG is a national unit which specialises in providing a tactical response to the most serious incidents and is staffed with full time officers. Accordingly, STG officers receive a much higher level of weapons training than general duties and AOS officers, and they are better prepared to deal with intensely stressful situations.
78. As STG officers, AOS Officers A and B have trained in shooting from unstable platforms (including vehicles, helicopters, and vessels) at stationary targets, and in firing at moving targets from within a vehicle. They have also trained in shooting from stationary vehicles, through windscreens, at stationary targets. We do note that they did not have prior experience in shooting from a moving vehicle at a target in another moving vehicle. Police told us there is no formal firearms training for this situation, as it is not possible to train for all potential armed interventions.
79. Both AOS Officers A and B said they assessed the risk before firing their shots, and only fired when the area beyond their target was clear. They were also using “bonded fusion” rounds, which are designed to better maintain their integrity and trajectory when fired through materials like glass or wood than standard Police ammunition. AOS Officer A commented that the angle at which he was firing and the bonded ammunition he was using meant he “*was not unduly putting the driver [or anyone other than Mr Y] in danger of being hit*”.
80. In relation to AOS Officer B’s shot, Police have acknowledged that firing shots through glass poses challenges. AOS Officer B explained that, prior to firing his shot at Mr Y, he pushed the muzzle of his rifle hard up against the Land Cruiser’s laminated glass windscreen. He believed from his own experiences and training that this, together with the bonded ammunition, would minimise any deflection.⁶ AOS Officer B acknowledged that his shot would have been slowed by having to travel through three mediums (two windscreens and the car seat), but said he believed it would still have enough “*punch*” to reach Mr Y as intended.
81. Overall, we are satisfied that neither AOS Officer A nor AOS Officer B were reckless with their shots. They conducted thorough risk assessments and waited until they thought the danger to the public was minimal before firing. All their shots succeeded in hitting the Audi, which supports the officers’ belief they were skilled enough to fire their shots without undue risk of missing their target completely. AOS Officer B told us:

“I do acknowledge that there is an element of risk in what was going on that day and that was always at the forefront of my mind prior to taking a shot. The risks

⁶ See Rayburn, MT (1998) ‘Overcoming the windshield glass barrier’ *Law and Order* 46, 45-48.

around that for me primarily are the collateral damage. So motorists and my round not going into its intended target and the risk of other motorists in and around that vehicle and beyond that vehicle.... I was fully satisfied that when I did make that shot that I had gone through that assessment and that decision-making and decided that there was no, going to be no risk to any motorists."

82. There are substantial dangers involved in Police firing shots on a busy motorway in the middle of the day. In the vast majority of cases, we would not consider such a use of force to be justified, even by AOS officers. However, we are satisfied that AOS Officers A and B shooting at Mr Y was a proportionate and necessary response in this case. We have only reached this finding because:
- a) AOS Officers A and B were full time STG officers;
 - b) they had exceptionally high levels of training and experience;
 - c) they had specialist equipment;
 - d) they demonstrated a thorough understanding of the risks involved; and
 - e) they waited until they believed there was minimal risk to members of the public before firing.

FINDING ON ISSUE 1

The AOS officers should have been provided with more background information on Mr Y and Mr Z. AOS Officers A and B were justified in firing shots at Mr Y while attempting to prevent his escape.

ISSUE 2: DID POLICE EXERCISE APPROPRIATE COMMAND AND CONTROL OF THE INCIDENT?

Was the initial Police response appropriate?

83. The officers who found Mr Y and Mr Z in Blockhouse Bay radioed NorthComms on the Auckland City channel to report that Mr Y had pulled out a shotgun and fired at them. The dispatcher alerted the NorthComms shift commander, who assumed control of the incident in accordance with Police policy. The shift commander notified the AOS Commander and asked Eagle to track the Audi. His plan was to observe the Audi from a distance and:
- a) If the Audi stopped, Police would cordon and contain the area and appeal to Mr Y and Mr Z to surrender.
 - b) If the Audi did not stop, he would hand command over to the AOS to effect the arrest.
84. The dispatcher instructed all officers to *"just follow [the Audi], we want no engagement with this vehicle. No spiking either."* About a minute later, the closest Police vehicle following the Audi advised: *"we are in pursuit Comms, we are staying back at 200, 300 metres"*. The dispatcher replied: *"negative from NorthComms Alpha [the shift commander], do not engage in a pursuit."* In response the officer said they would maintain a safe distance and keep observing the Audi.

85. The dispatcher then advised that officers had *“permission for urgent duties driving but do not pursue”*. ‘Urgent duty driving’ is when officers are permitted to exceed the posted speed limit with their red and blue warning lights or siren (or both) activated. The dispatcher then said: *“all units, AOS will be on the channel shortly. Do not engage in a pursuit just follow.”*
86. As happened in this case, Police sometimes distinguish ‘following’ a vehicle from ‘pursuing’ it. Presumably, the intention behind this is that officers ‘following’ a vehicle at a greater distance (or via Eagle) will not put as much pressure on fleeing drivers as would officers driving directly behind them with flashing lights and sirens. However, the distinction is somewhat artificial and can cause confusion, especially in cases like this one where the fleeing offenders were clearly aware that Police were following them and continued to drive erratically and at speed. The statements of officers interviewed following this incident reveal that many regarded this event as a ‘pursuit’ despite the NorthComms shift commander’s instructions not to pursue.
87. Regardless of whether Police formally classify such incidents as ‘pursuits’, we consider that the responding officers should still comply with the Police ‘Fleeing drivers’ policy by:
- a) Eagle (or the Police vehicle closest to the fleeing driver) providing an ongoing commentary of the fleeing driver’s actions and any apparent risks;
 - b) constantly assessing the risks involved in continuing to follow the fleeing vehicle (including the impact of the officers’ own actions as well as the fleeing driver’s); and
 - c) stopping if the risks of following the fleeing driver outweigh the need to immediately apprehend them.
88. We are satisfied that Police generally complied with these requirements up until the point where the AOS took over. Eagle, in particular, provided a good commentary once they were overhead. Police reasonably considered the need to apprehend Mr Y and Mr Z to be very high, as Mr Y had repeatedly fired shots from the Audi and they posed an ongoing danger to Police and the public. Therefore, although Mr Z was driving quite recklessly at times, the risks of continuing to follow Mr Y and Mr Z at a distance did not outweigh the Police’s need to stop and arrest them as soon as possible.
89. The Police ‘Fleeing drivers’ policy also requires that the ‘pursuit controller’ (a role usually taken by the shift commander) *“limit the number of Police vehicles following to no more than two, unless tactically appropriate”*. Many Police vehicles drove towards this incident, as they tend to do with any pursuit. Eagle reported that seven Police cars were following the Audi at a distance as it travelled through Otahuhu and *“there’s a backlog here so I don’t know whether we need that many.”* In response, the NorthComms shift commander instructed that only the AOS team were to be *“anywhere near”* the Audi and the other Police cars should drop out. Despite this instruction, about ten Police vehicles were still following behind the AOS vehicles north of the Auckland Harbour Bridge.
90. A Police review also found that four general duties officers got too close to the Audi during this incident, *“thereby endangering themselves and other motorists”* as Mr Y fired shots at them.

91. While noting these issues in respect of some officers' compliance with the shift commander's orders, we agree with his approach to managing this challenging incident. Calling in Eagle and the AOS and instructing officers on the ground to keep their distance from the Audi demonstrated good judgement.
92. After the Audi started travelling north on the motorway, Police attempted to moderate the traffic behind and steer it away from the ongoing incident, to reduce the danger to the public. This was justified in the circumstances.

Was it appropriate for the NorthComms shift commander to pass incident control to the AOS Commander?

93. NorthComms notified the AOS Commander of this incident at about 11.50am. Most of the AOS and some STG officers were away on training exercises, but some had been kept back in case they were needed. The AOS Commander quickly briefed the available officers and, after equipping themselves, they drove towards the Audi.
94. The AOS officers used three unmarked SUVs during the incident, because they were the most readily available. They did not want to delay their response by going through the process of booking out marked Police cars from the Auckland Central Police Station. However, one of the vehicles they used had been *"all but decommissioned"* according to the AOS Commander, and had no general Police radio. This limited the two officers using this vehicle to communicating through the AOS radio or via mobile phones.
95. The AOS Commander said he tasked another officer with driving his vehicle so he could focus on commanding the Police efforts to arrest Mr Y and Mr Z. He intended to *"shadow"* the other AOS vehicles to coordinate the Police response, rather than engaging in the arrest himself. He brought a Glock pistol *"due to the quick evolving nature of such incidents"*, but did not take all his AOS equipment.
96. The Police 'Radio and Communication Centre Protocols' allow Communications Centres to pass incident control to *"a suitable field supervisor"*. At about 12.06pm, NorthComms asked the AOS Commander to become the pursuit controller *"if a pursuit takes place"*.
97. The AOS Commander replied that he was not yet close enough to assume control. At the Auckland Harbour Bridge, the AOS overtook the large group of Police vehicles following about 500 metres behind the Audi. When they had almost caught up to the Audi, the AOS Commander advised he would *"assume pursuit controller authority"* and NorthComms confirmed this, saying *"You have command"*. The AOS Commander later said he was *"acutely aware of the responsibilities of this role and the need to continually assess the high risk presented by the offenders to public and police."*
98. While they used the term *"pursuit controller"*, the AOS Commander effectively became the Incident Controller and NorthComms took a supporting role. However, we think the NorthComms shift commander should have remained the Incident Controller, because they were in a better position to oversee and manage the wider incident (such as arranging cordons

and roadblocks). This would have freed up the AOS Commander to focus solely on the task of safely arresting Mr Y and Mr Z.

99. The role of an AOS Commander better fits that of a 'Forward Commander' under Police policy, rather than an Incident Controller. A Forward Commander is:

"a person in charge of a specific task group and includes: ... An officer in charge of an element, such as AOS, cordons, arrest team, etc.

A Forward Commander differs from an Incident Controller in that they are task specific and may not necessarily have an overall incident awareness, nor control any other elements deployed."

100. The AOS Commander was also one of the relatively few AOS officers available to carry out the arrests of Mr Y and Mr Z. Incident Controllers should not generally become so directly involved in arresting the offenders, as it hinders their ability to sit back and think of the wider picture. It was appropriate for the AOS Commander to take forward command of the arrest and the planned non-compliant vehicle stop, but overall control of the pursuit should have remained with the NorthComms shift commander.
101. Shortly after assuming control, the AOS Commander asked NorthComms to have officers block the motorway offramps ahead, and to continue moderating traffic behind the pursuit. He also asked them to prepare to block off the tunnel south of Puhoi, as he was concerned that the highway beyond that point had no median barrier and a high volume of oncoming traffic. He considered there was a significant risk that the Audi would collide head-on with another vehicle if the pursuit reached that location, given Mr Z's manner of driving so far.
102. As the AOS vehicles got close to the Audi with lights and sirens activated, Police were clearly signalling Mr Z to stop. Therefore, the incident unquestionably became a 'pursuit' under Police policy. However, NorthComms did not issue a pursuit warning,⁷ and Police did not follow the usual communications procedures for a pursuit.
103. Eagle attempted to hand over the task of providing the commentary to the lead AOS vehicle, but they did not respond. They were occupied with responding to Mr Y firing shots at them (as described above in Issue 1). The AOS Commander did not know AOS Officers A and B had fired shots at Mr Y about this time, as their attempts to report this fact over the radio were unsuccessful. Nor were they able to report that their Land Cruiser had made contact with a truck belonging to a member of the public (see paragraph 26). Ideally, they should have been able to pass on this information as soon as possible, as it related to the risks involved in the pursuit. If they had, the AOS Commander (as the Incident Controller) would have been able to consider this information as part of his assessment as to whether the pursuit should continue.
104. After the Audi sped away out of sight of the officers on the ground, NorthComms switched from using the Counties radio channel to using the Waitemata channel for better coverage. The two

⁷ Police policy required the Police Communications Centre to transmit a 'pursuit warning' to all vehicles involved: "... if there is any unjustified risk to any person you must abandon pursuit immediately. Acknowledge".

leading AOS vehicles (including AOS Officers A, B and C) were not aware of this channel switch and did not hear Eagle informing them that the Audi had turned off the highway at the Millwater offramp. These AOS vehicles continued driving north on State Highway 1, but the AOS Commander and a dog handler turned off the highway to follow the Audi west on Wainui Road, becoming the lead vehicles in the pursuit. They could not see the Audi ahead of them, but relied on Eagle's directions.

105. As the other two AOS vehicles were no longer in position to immediately respond to Mr Y and Mr Z, the AOS Commander tasked the dog handler and another armed general duties unit to assist him if the Audi stopped or they had an opportunity to safely stop it.
106. Once they had left the motorway, fewer members of the public were at risk from Mr Y and Mr Z. The AOS Commander considered abandoning the pursuit and leaving it to Eagle to keep observing the Audi. However, he felt they needed Police vehicles to remain close behind in case Mr Y and Mr Z attempted to hijack another vehicle and/or take hostages in their attempt to avoid arrest.
107. The AOS Commander and NorthComms planned to stop the Audi with road spikes ahead. An officer advised that he had set the spikes up near Kaukapakapa, but Mr Z stopped the Audi before reaching that location. He got out, knelt down, and put his hands up in surrender. The dog handler and AOS Commander stopped near the Audi, and the AOS Commander approached the car with his pistol drawn. He saw a man (Mr Y) sitting in the driver's seat with both hands on the steering wheel. Mr Y then drove off at speed towards the bridge where the road spikes were to be deployed. The AOS Commander said he decided not to shoot because he could see the man was not holding a firearm and did not pose an immediate threat. He was also unsure at that point whether he was the same person who had been shooting earlier.
108. The AOS Commander acknowledged to us that it is not usually a commander's role to become involved in "*forward operations*", but said he and the AOS officer driving him were the "*most tactically experienced*" officers available to deal with Mr Y and Mr Z, as the other AOS officers had fallen behind in the pursuit. At the time he also thought he should retain incident control as they had experienced difficulties with the radio (discussed further below), and NorthComms would not have the "*situational awareness*" he had.
109. However, we believe the AOS Commander should have handed incident control back to the NorthComms shift commander when he became one of the lead vehicles in the pursuit and was likely to become actively involved in carrying out the arrest (as he eventually did). The difficulties the AOS Commander had with getting on the radio were another point in favour of transferring control back to NorthComms, because they had the ability to transmit their messages over others but he did not.
110. While other officers arrested Mr Z, the AOS Commander, dog handler and another unit followed Mr Y, who was still being tracked by Eagle. The road spikes were not deployed effectively, so Mr Y continued driving north on the Kaipara Coast Highway (State Highway 16).
111. The AOS Commander said he continued the pursuit, despite Mr Y driving at 160 kph at times, because the traffic was light and Mr Y still posed an ongoing threat as the shooter. One of the

other AOS vehicles caught up and took the lead, with authority to conduct a non-compliant vehicle stop if they had the chance. However, the Audi's speed was still too high to carry this out.

112. Mr Y then threw his shotgun out of the Audi, which began to slow down (Police later discovered the car had run out of petrol). The AOS unit attempted to do a non-compliant vehicle stop, but Mr Y braked and stopped his vehicle. He then got out and surrendered to the AOS officers.
113. Mr Y complained that he had been shot in the back, and the officers found he had two small wounds between his shoulder blades.⁸ Police arranged for an ambulance to attend to these injuries and transport Mr Y to hospital.
114. AOS Officers A and B arrived at the scene and told the AOS Commander they had fired shots at Mr Y. The AOS Commander instructed the officers to return to the Auckland Central Police Station to hand over their firearms as evidence. He also coordinated with NorthComms to control traffic and preserve the arrest scene.

Was the Police response hampered by radio difficulties?

115. Some officers noted that it was difficult to transmit and hear messages on the radio at times, due to the nature of the incident and the large number of officers responding. AOS Officer A commented that, due to the radio traffic and the ongoing commentary, he had difficulty trying to transmit a request for information on the offenders, their vehicle, and their location.
116. The AOS Commander explained:

“the three districts under Tāmaki Makaurau operate the digital trunk radio system and that enables for greater reach in terms of the Comms being able to be received. The downfall of that is that it’s – I use the term “clunky” in that if someone else is transmitting when you go to transmit it comes up with a... blocked tone, and that goes on for about two seconds, you can’t transmit and equally you can’t hear what is being said during that moment. During this incident I would’ve attempted that, and I estimated around 30 times trying to transmit and then not being able to because other people were on.

... getting the message out was compounded by this on so many occasions and I don’t mind but it’d be very frustrating, but also losing that situational awareness by trying to transmit and then not hearing what was actually being said by that other person.”

117. However, he thought officers were quite disciplined about their use of the radio during this incident compared to other pursuits he had heard.
118. NorthComms used three different radio channels (Auckland City, Counties Manukau and Waitemata) as the Audi travelled from Blockhouse Bay, through Counties Manukau, north on State Highway 1 and then west towards State Highway 16. The AOS were also using their own

⁸ A later medical examination found that minute metallic fragments caused the wounds.

secure channel at times, but the AOS Commander said he knew Police had previously been criticised for solely using the AOS channel (during the incident that led to the fatal shooting of Halatau Naitoko in 2009),⁹ so he primarily communicated through the main radio channel “to ensure overall awareness for all staff responding”. However, one of the AOS vehicles did not have a general Police radio so had to communicate through phone calls, text messages and the AOS channel.

119. The transfer between the three main radio channels sometimes caused problems. Two of the three AOS vehicles did not hear that the Audi had turned off State Highway 1, and subsequently had to travel back to attempt to rejoin the pursuit. The AOS Commander also believed that an ambulance was continuously monitoring the incident (to be in the best position to provide medical assistance if necessary), but subsequently discovered they did not have access to all three Police radio channels and so could not keep up. Nonetheless, transferring between these radio channels was necessary to maintain good coverage for this wide-ranging incident.
120. These radio difficulties are not unusual for this type of incident. Overall, we find the problems did not significantly impact the Police response. Police conducted a debrief afterwards and resolved to remind officers of the need to keep radio transmissions to a minimum during these types of critical incidents.

FINDINGS ON ISSUE 2

The NorthComms shift commander should not have passed the overall incident control to the AOS Commander. The AOS Commander should have passed incident control back to NorthComms before he became actively involved in trying to effect the arrest.

Radio difficulties did not significantly affect the Police response to his incident.

ISSUE 3: DID ANY POLICE FAILURES CONTRIBUTE TO MR Y’S ESCAPE FROM CUSTODY?

121. As well as examining the Police response to Mr Y’s and Mr Z’s actions on 19 October 2018, we also looked at whether any Police failures contributed to Mr Y’s escape from the Waitakere District Court on 17 October 2018.
122. We found there were several problems that day:
- a) The acting sergeant assigned to cover the supervisory role at the Court’s custody unit took leave at short notice, which left Police scrambling to fill that position. Two constables (one each from the early and late shifts) were sent to oversee the custody unit: the first was returning to frontline duties for the first time in 14 months, and the second had only five weeks’ experience as a Police officer. The constables did not receive an induction or handover of duties, and there was no desk file with instructions.
 - b) Prisoners arrived at the custody unit with documents identifying them and detailing any known risks they may pose. However, the custody officer operating the control desk that

⁹ See IPCA report “Police shooting of Halatau Ki’anamanu Naitoko” (3 April 2012).

day did not know they were supposed to review these documents, check the Police database, and alert the supervisor and court security officers to any risks.¹⁰ The officer had been working at the Waitakere District Court Police cells since April 2018, but could not recall having any formal induction. The officer said they had learned the processes through ‘on the job’ experience observing what others were doing and:

“I was still very much in a learning phase for the Controllers Desk. I hadn’t worked on it very often, perhaps half a dozen times, and I wasn’t entirely sure of the processes.”

Consequently, the custody officer did not alert anyone to the fact Mr Y had been identified as an escape risk.

- c) Mr Y’s appearance in the Alcohol and Other Drug Treatment Court happened towards the end of the day (4.45pm). Only one custody officer was present, and there was no security on the door. Mr Y was only appearing in that court because he was being removed from the therapeutic programme he had been undertaking, having been arrested and charged with committing an aggravated robbery with a firearm while on bail for a ‘wounding with intent to injure’ charge. A Police debrief found that the custody officers and the court security officers did not know Mr Y was going to be withdrawn from the programme and remanded.

123. Towards the end of Mr Y’s appearance, he jumped over the dock. Accomplices helped him to run out of the courtroom and through the front doors of the District Court to escape in a waiting vehicle.

124. If Police had alerted the court security officers that Mr Y was known to be an escape risk, the Court may have had more security in place for his appearance and his escape may have been prevented. We find that the lack of adequate training and supervision of staff in the custody unit likely contributed to Mr Y’s escape.

FINDINGS ON ISSUE 3

Staff in the custody area at the Waitakere District Court were not properly trained or supervised.

Consequently, Police failed to alert the court security and the Court that Mr Y was known to be an escape risk.

Subsequent Police Action

125. Police advised us that since this incident they have developed a desk file and a red/amber/green risk alert system for the Waitakere District Court custody unit. The custody officer on the control desk also told us they now understand they must carry out a risk assessment for each prisoner.

¹⁰ Custody officers (or ‘authorised officers’) are non-sworn Police employees who have responsibility for managing the health, safety and secure custody of detainees.

126. Regarding the officers who failed to comply with the Incident Controller's instructions to keep their distance from the Audi and drop out of the pursuit (see paragraph 90), Police appropriately addressed this as a performance matter.

127. Therefore, we will not make any recommendations on these issues.

A handwritten signature in black ink, appearing to read 'Colin Doherty', with a horizontal line underneath.

Judge Colin Doherty

Chair

Independent Police Conduct Authority

4 May 2021

IPCA: 18-0784

APPENDIX – Laws and policies

USE OF FORCE

Law

128. 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.”*
129. Section 40 of the Act also states that Police may use *“... such force as may be necessary to prevent the escape of [someone who] takes to flight in order to avoid arrest”*.
130. 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.”*
131. Under section 62 of the Act, anyone who is authorised by law to use force is criminally responsible for any excessive use of force.

The Authority’s interpretation of section 40 of the Crimes Act 1961

132. While section 40 allows the use of force, including lethal force, to prevent an escape, it is silent as to the circumstances in which that will be justified. Nonetheless, it is clear the section will only justify force that is proportionate to the nature and degree of the risk the person poses if they succeed in escaping.
133. In the Authority’s view, the primary purpose of an officer using force under section 40 is to take the fleeing or escaping offender into custody, and the proportionality of his or her force should be assessed against two factors:
- a) the seriousness of the offence for which the person is to be apprehended (and the consequent public interest in detaining them in order to bring them to justice); and
 - b) the likelihood and degree of risk the offender poses if escape is not prevented.
134. How are these two factors to be assessed? Are they to be determined by the actual belief of the officers concerned (a subjective test), or the reasonableness of that belief (an objective test)? There is no direct legal authority on section 40 that we are aware of. However, the courts have considered this issue in related contexts.
135. In the context of section 55 of the Crimes Act (which justifies the use of necessary force to prevent breaking and entering of a residence), the Court of Appeal in *R v Haddon* held that the necessity to use force was to be assessed by reference to the officers’ actual belief (the

subjective test).¹¹ In contrast, in the context of section 41 of the Crimes Act (which justifies the use of necessary force to prevent the commission of suicide or an offence that would be likely to cause the immediate and serious injury to a person or property), the Court of Appeal in *Russo v R* held that the necessity to use force was to be assessed by reference to the reasonableness of the belief (the objective test).¹²

136. The Authority believes that the test in *Russo* is more applicable to section 40 than the test in *Haddon*. That is because, like section 41, section 40 justifies the use of force for preventive rather than defensive reasons (although there is obviously some overlap between the two). Moreover, while section 41 is concerned with the prevention of an offence that would be likely to cause immediate and serious injury, section 40 has no such immediacy requirement. If section 41 requires that an officer's perception of the circumstances be reasonable, it would be strange indeed if section 40 did not do so.
137. We also note that section 40 is an adjunct to the power of arrest. Since the legality of an arrest will generally depend upon a reasonable belief (that an offence has been committed), it would be surprising if the situation where "necessary" force is being used to facilitate a lawful arrest or achieve a similar outcome were to be assessed on a different, less stringent standard based upon actual belief.
138. Our view is supported by Adams on Criminal Law (ref [CA39.02 and [CA40.02]), which cites the High Court decision in *Hill v Police* ((1994) 12 CRNZ 89 (HC) at 93):

"It is plain from [sections] 36, 39 and 40 that the person making the arrest must have reasonable and probable grounds for believing that the person or persons arrested were committing an offence... and that he can only use such force as may be necessary to arrest or prevent escape. The evaluation of the arresting person's conduct and belief will be an objective one taking all the circumstances into account."

139. Notably, too, section 40 contains a specific proviso in relation to the use of force for the prevention of escape where the force "is intended or likely to cause death or grievous bodily harm". Such force can only be used by "a constable or a person called upon by a constable to assist him or her", and not other law enforcement officers who may be trying to effect an arrest. This is in contrast with force used in self-defence (section 48) which has no such restriction. Thus, section 40 sets apart those with the authority and training that police officers have. It is reasonable to assume that is so because of the recognition that police officers are equipped with the appropriate risk assessment skills to make these judgements. Accordingly, those judgements ought to be objectively assessed.
140. This interpretation is also consistent with the Police 'fire orders', which state Police may use a firearm to prevent an offender escaping if they "believe **on reasonable grounds** [emphasis

¹¹ *R v Haddon* [2007] NZAR 135 (CA).

¹² *Russo v R* [2011] NZCA 79, [2011] NZAR 123.

added] *that the offender poses a threat of death or grievous bodily harm to any person (whether an identifiable individual or members of the public at large)*".

141. In conclusion, in considering the justification for the officers' actions under section 40, the Authority must determine whether both their beliefs as to the circumstances and the degree of force they used were reasonable. That must be assessed by reference to:
- a) the seriousness of the offences for which Mr Y was liable to arrest;
 - b) the likelihood and degree of risk Mr Y actually posed if escape was not prevented; and
 - c) the proportionality of the force the officers used as a result.

Police policy

142. The Police 'Use of Force' policy provides guidance to Police officers about the use of force. The policy sets out the options available to Police officers when responding to a situation. Police officers have a range of tactical options available to them to help de-escalate a situation, restrain a person, effect an arrest or otherwise carry out lawful duties. These include communication, mechanical restraints, empty hand techniques (such as physical restraint holds and arm strikes), OC spray, batons, Police dogs, Tasers and firearms.
143. Police policy provides a framework for officers to assess, reassess, manage and respond to use of force situations, ensuring the response (use of force) is necessary and proportionate given the level of threat and risk to themselves and the public. Police refer to this as the TENR (Threat, Exposure, Necessity and Response) assessment.
144. The overriding principle when applying TENR is that of "*safety is success*". Public and employee safety are paramount, and every effort must be made to minimise harm and maximise safety.
145. The TENR risk assessment must balance the ongoing exposure to harm, with the current threat and the necessity to respond. This will determine the Police response.
146. Police officers must also constantly assess an incident based on information they know about the situation and the behaviour of the people involved; and the potential for de-escalation or escalation. The officer must choose the most reasonable option (use of force), given all the circumstances known to them at the time. This may include information on: the incident type, location and time; the officer and subject's abilities; emotional state, the influence of drugs and alcohol, and the presence or proximity of weapons; similar previous experiences; and environmental conditions. Police refer to this assessment as an officer's Perceived Cumulative Assessment (PCA)).
147. A key part of an officer's decision about when, how, and at what level to use force depends on the actions of, or potential actions of, the people involved, and depends on whether they are: cooperative; passively resisting (refuses verbally or with physical inactivity); actively resisting (pulls, pushes or runs away); assaultive (showing an intent to cause harm, expressed verbally or

through body language or physical action); or presenting a threat of grievous bodily harm or death to any person. Ultimately, the legal authority to use force is derived from the law and not from Police policy.

- 148. The policy states that any force must be considered, timely, proportionate and appropriate given the circumstances known at the time. Victim, public and Police safety always take precedence, and every effort must be taken to minimise harm and maximise safety.
- 149. Ultimately, the legal authority to use force is derived from the law and not from Police policy.

FIREARMS

Responsibilities when firearms are carried

- 150. Police policy on firearms requires that when an officer carries a firearm because they have assessed a situation as being within, or likely to escalate to be within, the death/grievous bodily harm range, they must advise their immediate supervisor and the Police Communications Centre of their decision to deploy with firearms as soon as practicable, and also deploy with a Taser where one is available.
- 151. When deploying to an incident where firearms are or may be present, officers must wear approved ballistic body armour.

Use of firearms

- 152. The 'Police firearms' chapter of the Police Manual instructs members of the Police to always be aware of their personal responsibilities in the use of firearms, reminds them of the relevant sections of the Crimes Act, and sets out the circumstances in which the use of lethal force is justified.
- 153. The Police 'fire orders' state:

“Responsibility for knowing when firearms may be used

Every Police employee issued with a firearm is personally responsible for ensuring they are thoroughly conversant with relevant law, particularly sections 39, 40, 41, 48, and 62 of the Crimes Act 1961, and all relevant instructions and guidelines contained in this chapter.

Conditions to be satisfied before use

The circumstances justifying police firing at an offender can change very rapidly. Any employee who fires a shot must be personally satisfied through their perceived cumulative assessment that there exists justification for doing so.

An offender must not be shot without first considering —

<i>Communication</i>	<i>they must have first been asked to surrender (unless it is impractical or unsafe to do so), and</i>
----------------------	--

<i>Less violent alternatives (Proportionality)</i>	<i>it must be clear they cannot be disarmed or arrested without first being shot, and</i>
<i>Delay (Necessity)</i>	<i>it must be clear that further delay in apprehending the offender would be dangerous or impractical</i>

Making decisions to use

Police must only use a firearm for these lawful purposes:

Lawful Purpose	Police may use a firearm...
<i>Defending themselves or others (s48 Crimes Act 1961)</i>	<p><i>to defend themselves or others if:</i></p> <ul style="list-style-type: none"> • <i>they fear death or grievous bodily harm to themselves or others, and</i> • <i>cannot reasonably protect themselves or others in a less violent manner.</i>
<i>Arresting an offender (s39 Crimes Act 1961)</i>	<p><i>to arrest an offender if they:</i></p> <ul style="list-style-type: none"> • <i>believe on reasonable grounds that the offender poses a threat of death or grievous bodily harm in resisting their arrest, and</i> • <i>the arrest cannot be reasonably effected in a less violent manner, and</i> • <i>the arrest cannot be delayed without danger to other people.</i>
<i>Preventing escape (s40 Crimes Act 1961)</i>	<p><i>to prevent an offender escaping if:</i></p> <ul style="list-style-type: none"> • <i>police believe on reasonable grounds that the offender poses a threat of death or grievous bodily harm to any person (whether an identifiable individual or members of the public at large), and</i> • <i>the offender flees to avoid arrest or escapes after arrest, and</i> • <i>the flight or escape cannot reasonably be prevented in a less violent manner.</i>
<i>Destroying animals</i>	<i>To destroy animals in circumstances set out in the Animals chapter of the Police Manual.”</i>

Principles applying when offenders are armed

154. Police policy states that, when dealing with an armed offender or an offender believed to be armed, Police should observe these basic principles:

- *“Conduct an ongoing TENR assessment during the course of an incident.*
- *It is better to take the matter too seriously than too lightly.*
- *Caution is not cowardice.*
- *When the offender's actions permit, focus on de-escalation, communication, and prevention, cordon the area, and adopt the wait and appeal role in order to negotiate a 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.*
- *Treat all armed offenders or offenders believed to be armed, as dangerous and hostile unless there is definite evidence to the contrary.*
- *Where practical, police should not use a firearm unless it can be done without endangering other persons.”*

About the Authority

WHO IS THE INDEPENDENT POLICE CONDUCT AUTHORITY?

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

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?

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

This report is the result of the work of a multi-disciplinary team of investigators, report writers and managers. 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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