

Independence

trustworthiness

accountability

Police shooting of Halatau Ki'anamanu
Naitoko

vigilance
integrity

April 2012



IPCA

Independent Police Conduct Authority
Whaia te pono, kia puawai ko te tika



April 2012

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Contents

INDEPENDENT POLICE CONDUCT AUTHORITY

Introduction	3
Background.....	5
Applicable Laws and Policies	51
The Authority’s Investigation	61
The Authority’s Findings.....	63
Conclusions	93
Recommendations	97
Appendix	99



Introduction

INDEPENDENT POLICE CONDUCT AUTHORITY

1. At 2.03pm on Friday 23 January 2009, in Auckland, a member of the New Zealand Police Armed Offenders Squad (AOS) shot and killed 17 year old Halatau Ki'anamanu Naitoko; and also shot at and wounded Stephen Hohepa McDonald and wounded Richard Stephen Neville.
2. The shootings occurred at the conclusion of a three-phase police pursuit of Stephen McDonald, who was armed and posing an extreme risk to police officers and members of the public. During phase 1 of the pursuit McDonald was a passenger in the fleeing vehicle, and during phases 2 and 3 he was the driver of vehicles he had stolen.
3. Following the death of Mr Naitoko, police carried out a homicide investigation and after taking legal advice concluded that no murder or manslaughter charges should be laid against either the police officer involved or Stephen McDonald. Police further determined that no criminal charges would be laid against any police officer in respect the wounding of Mr Neville and Stephen McDonald, again after taking legal advice.
4. In response to the requirements of section 13 of the Independent Police Conduct Authority Act (the Act), the Commissioner of Police notified the Independent Police Conduct Authority (the Authority) of the pursuit of Stephen McDonald, and of the death of Mr Naitoko and the serious bodily harm to Mr Neville and Stephen McDonald resulting from the shootings. The Authority then conducted an independent investigation during which it considered all aspects of police conduct during events up to and including the shootings; as well as all issues of compliance with relevant law and operative police policies at the time.
5. This report sets out the results of the Authority's investigation, its consequential findings and seven recommendations.

Index to officers involved in events

Officers	Roles	Comment
Officer A	DNA Squad	Driver of first pursuit vehicle. First sighted firearm. Had firearm presented by McDonald.
Officer B	DNA Squad	Passenger in first pursuit vehicle. Had firearm presented by McDonald.
Officer C	General duties NCO ¹	Most senior officer to attend in Glendale Road. Had firearm presented by McDonald.
Officer D	General duties	Tried to access firearms from Officer C. Saw McDonald with firearm. Had firearm presented by McDonald.
Officer E	General duties	Arrested Ms Mann. Saw McDonald with firearm. Had firearm presented by McDonald. Saw and heard McDonald fire at Eagle. Identified McDonald and advised NorthComms.
Officer F	General duties trainee dog handler	Armed with a Glock pistol. Involved in second pursuit as passenger. Had firearm presented by McDonald in Parker Ave. Had firearm presented by McDonald in Thom St. Confronted McDonald with firearm and had firearm presented by McDonald in Pine St.
Officer G	General duties dog handler	Involved in second pursuit as driver. Had firearm presented by McDonald in Parker Ave. Had firearm presented by McDonald in Thom St. Had firearm presented by McDonald in Pine St.
Officer 55	AOS ² dog handler	Lead pursuit vehicle, third phase. On scene at time of shootings.
Officer 80	AOS	AOS Team Leader AOS Team 1.1
Officer 81	AOS	AOS Team 1.2 Fired one shot at McDonald.
Officer 84	AOS	AOS Team 1.2 Fired three shots; one killed Mr Naitoko, one wounded Mr Neville and one wounded McDonald.
Officer 77	AOS	AOS Team 1.1
Officer 87	AOS	AOS Team 1.1
Officer W1	General duties	Fired Glock pistol at McDonald. First to notice Mr Naitoko after he was shot.
Eagle observer	Air Support Unit	Tactical observer in police Eagle helicopter – provided commentary and direction.

¹ Non Commissioned Officer – i.e. of the rank of sergeant or senior sergeant.

² Armed Offenders Squad.



Background

INDEPENDENT POLICE CONDUCT AUTHORITY

Summary of Background

6. What follows on pages 6 – 49 is a detailed account of the events leading up to and including the fatal shooting of Mr Naitoko and the wounding of Mr Neville and Stephen McDonald. This **Background** section of the Report includes: sections on the AOS and its response and deployment on the day; details of communications made and *Fire Orders* given; actions taken immediately after the shootings and subsequently; statements made by the officers involved in the shootings; the police investigation that followed and decisions taken regarding criminal liability; the sentencing of Stephen McDonald; and the findings of the Coroner’s Inquest.

7. These matters are dealt with under the following headings:
 - The three phases of pursuit;
 - The AOS deployment;
 - Events leading up to the shooting;
 - The four shots fired by Officers 84 and 81 at Stephen McDonald;
 - Events and incidents after the shooting;
 - The persons involved;
 - The environment;
 - The police investigation and reviews;
 - The sentencing of Stephen McDonald; and
 - The Coroner’s inquest.

THE THREE PHASES OF PURSUIT

First phase of vehicle pursuit – Seabrook Avenue, New Lynn to Glendale Road, Glen Eden

8. At approximately 1.05pm on 23 January 2009, two plain clothes police officers (Officers A and B) went to an address in Seabrook Avenue, New Lynn, Auckland to serve a DNA compulsion order on the occupier. They were in an unmarked police car. While the officers were at the property, a dark blue Toyota sedan came down the driveway and then immediately turned and drove back out again. One of the officers recognised the driver, whose identity was later confirmed as Margaret Mann. The front-seat passenger was later identified as Stephen Hohepa McDonald.
9. The officers followed the Toyota with the intention of stopping it, being suspicious that the vehicle was stolen. They activated their vehicle's warning lights and siren and they followed the Toyota along Seabrook Avenue, West Lynn Road, Titirangi Road and then on to Pleasant Road. At about 1.08pm, they contacted the Police Northern Communications Centre (NorthComms), and reported they were commencing a pursuit. The NorthComms dispatcher in turn advised: *"Roger if there is any unjustified risk you are to abandon pursuit immediately. Copy?"* This warning was acknowledged by the officers.
10. At the time of the warning the officers were approximately 200 metres behind the Toyota and travelling at 80 kph in a 50kph zone. They advised NorthComms of the Toyota's speed and location, and of their driver and vehicle classifications, and gave an assessment of the driving of the Toyota at the time as *"good"*. They did not provide a reason for the pursuit, and the NorthComms dispatcher did not ask for one. One of the officers later recalled that the driving of the Toyota was *"a bit dangerous"* at the time and the other said he saw the Toyota cut in front of another car and regarded that as dangerous.
11. The pursuit continued along Bowers Road before the Toyota slowed in Glendale Road and then stopped.

Summary of first phase of vehicle pursuit

12. This phase of the pursuit had lasted just under two minutes, and had covered a distance of 3.57 kilometres. During this time the Toyota's speed was estimated to be in the region of 80-90 kph, all on streets with a 50 kph speed limit.

Significant times

1:08pm	Officers A & B advise NorthComms of pursuit – shift commander advised.
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Events between first and second phases of the pursuit - firearm sighted

13. As the officers were preparing to get out of their car, Officer A saw that Stephen McDonald was holding a short-barrelled gun, which he pointed at the two officers through the window of the Toyota and appeared to be aiming at them along the sight. Officer A yelled out to Officer B: *"He's got a gun."*
14. Officer B immediately informed NorthComms that there was a firearm in the suspect vehicle. The time of this advice was approximately 1.09pm. NorthComms asked how Officer B knew this and he responded: *"They've just pointed it through the window... pointing it at us."* NorthComms asked for confirmation that a gun had been pointed at the officers, and Officer B stated: *"Affirm... just a little handgun."*
15. The firearm was later identified as a .22 calibre semi-automatic Ruger rifle, with the butt and barrel cut down to make it pistol size. The magazine was capable of holding ten rounds (see paragraph 236).
16. The officers immediately took evasive action and drove to a safe location, where they were directed by NorthComms to keep the Toyota under observation until other police units arrived. At 1.15pm the dispatcher again asked the officers to confirm that the occupants had presented a firearm, and Officer B confirmed this.
17. NorthComms meanwhile arranged for other units to attend,³ as well as the police helicopter (Eagle). In addition to the pilot, Eagle was carrying a police observer and an unauthorised civilian 'ride-along' passenger. Eagle arrived overhead at the scene at 1.16pm.
18. As other police started to arrive, including Officer C (an acting senior sergeant), Mann and McDonald ran from the car along Glendale Road towards Harold Moody Park.

Initial response by NorthComms

19. Although the pursuit was taking place in the Auckland West area, Officer B had used the Auckland North radio channel to notify NorthComms. The NorthComms shift commander was alerted when the pursuit began and arrived at the dispatcher's desk at about the time Officer B reported the firearm.

³ Calls to NorthComms are answered by communicators, who gather initial information and determine whether a police response is required. If a response is required, a dispatcher determines the nature of the response and directs police units until an officer at the scene can take control. The dispatcher gathers and passes on any further relevant information to the field units and is overseen by a team leader and a section manager. For serious incidents, the shift commander (a commissioned officer or senior sergeant acting in that role) directly manages the section managers, team leaders, dispatchers and call takers to ensure a coordinated approach. The shift commander's call sign is *"Comms Alpha"*.

20. The Auckland North dispatcher handed control of the incident over to the Auckland West dispatcher at 1.13pm.⁴
21. At about 1.15pm, the shift commander had Officer C contacted, asking him to make contact with Officers A and B. The dispatcher told Officer C: *"You will be incident controller."* Officer C received but did not acknowledge this message (see paragraphs 275-281). The shift commander subsequently told the Authority's investigators that he was not in fact appointing Officer C as incident controller at that time, but rather wanted to *"sow the seed"* in Officer C's mind that he would become incident controller and should start preparing.
22. In contrast Officer C said that, in his view, he did become incident controller at that point, and continued to be incident controller until Eagle took over the role, which, again in his opinion, occurred when NorthComms asked the helicopter observer to set up cordons at 1.24pm (see paragraph 31). The Eagle observer believed that, as in other pursuits, he had assumed the role of incident controller at the point he was asked to set up cordons, unless otherwise advised.

Glendale Road – confrontations between police and Stephen McDonald

23. After Stephen McDonald and Margaret Mann ran from the Toyota car in Glendale Road they went to the Glen Ora Rugby League Club. Both were carrying bags and were challenged by people at the Club, who suspected the bags were stolen. McDonald and Mann made to run off but as people from the club gave chase Stephen McDonald stopped, took the firearm from his bag and waved it in front of them. One of the men challenged him, asserting that the firearm was not real and McDonald responded by asking whether he wished to try it.
24. This incident was reported to the police and, at 1.17pm, NorthComms transmitted *"Robbery, bag snatch, two minutes at 50 Alpha Glendale Road, bag snatch and handgun presented."*
25. At 1.18pm, Officer D, who was in a vehicle with another constable, contacted Officer C asking for his location, so they could get firearms and other safety equipment from Officer C's vehicle; however Officer C's vehicle was equipped with only one Glock pistol.⁵
26. Soon afterwards, Officer C saw Mann and McDonald running out of a property near the intersection of Glendale and Levy Roads. McDonald walked in front of Officer C's car,

⁴ At 1.16pm Officer B was instructed to switch over to the Auckland West radio channel.

⁵ As senior NCO for the shift there was an expectation that Officer C would be driving a vehicle containing arms and other emergency equipment, however that vehicle was not in use.

holding out his firearm in the officer's direction. Officer C drove off and reported the encounter to NorthComms.

27. Over the next few minutes, McDonald was seen in the area by several officers and at times he presented his firearm at them. At 1.22pm Officer D told NorthComms: "He's got a gun" and: "He has just pointed it at us. We're getting out of there."
28. Moments later, another officer saw McDonald aim at Eagle and fire a shot. He told NorthComms: "He's just shot at the helicopter." Eagle transmitted: "Confirm he's just pointed the gun at us, I don't know whether he's pulled the trigger or not." A later inspection of Eagle established that it had not been struck by a bullet.
29. Meanwhile Officer E, a constable who was alone and unarmed, had seen Ms Mann walking along Glendale Road and arrested her, placing her in his police vehicle. The officer then saw McDonald, about 20 to 30 metres away, running towards him, and also saw McDonald appear to fire at Eagle. The officer said:

"He looked really agitated and angry and was still running with his right arm up under his shirt. I strongly believed that he was running at me with something concealed under his T shirt. I quickly got into the car, found my keys, started the car and took off. As I was taking off I observed the male holding a silver coloured handgun and pointing it in my direction. He was actually pointing the gun at me. At this point he would have been between 5-10 metres away from the rear of the car. He then changed and pointed the weapon up to his left towards the Eagle Police helicopter, which was above us and fired once. I heard the shot and also saw the muzzle flash from the weapon. At least one other unit said on the police radio that this male had fired a firearm at the helicopter, so I did not get on the air myself."

Co-ordination of the response

30. At about this time, NorthComms asked Officer C if he had any other armed staff in the vicinity. Officer C checked and was advised by his patrol base that two 'I cars' (uniform incident patrols) had just left base and were armed.
31. At 1.23pm, at the request of attending units, NorthComms started to set up cordons with the aim of containing Stephen McDonald in the area. Several cordon positions were set up and, at 1.24pm, Eagle was instructed to set up cordons "where you see fit". The Eagle observer immediately began to do this; however he found it difficult because he was the single police crew member (the other passenger being the unauthorised ride-along). This situation was not known to NorthComms. The Eagle observer said:

“As soon as I got there or within five minutes of arriving at the scene I was given the task of setting cordons. Now not only have I got again to look at the offender and describe what he’s doing, look at the computer to work out where the hell I am on earth but I’ve now got to set cordons for incoming staff with or without firearms.”

32. It was at this point that Officer C believed incident control had been transferred to Eagle.
33. At 1.25pm Eagle directed police units at the corner of Glengarry and Glendale Roads to leave the scene and head south. As the Eagle observer later explained, this was because McDonald, who was on foot, was heading directly towards the cordon. Of this the Eagle observer said:

“So in my subconscious I’d made a decision that he’s not really a threat to members of the public but he’s shooting at me and he’s shot at other staff earlier on Glendale Road and pointed the weapon at others and not pulled the trigger. With that view in mind I was pretty adamant that had he come across that cordon of unarmed staff on Glendale Road there could have been or would have been some sort of standoff or fire fight.”

34. At 1.26pm, NorthComms advised patrols that the Armed Offenders Squad (AOS) was being paged.
35. While cordons were being put into place, other police units that had heard the radio transmissions began to respond. Some of these units had been at police stations as events unfolded and had armed themselves with either Glock pistols or Bushmaster rifles. It is clear that a number of the units did not, or could not (because of heavy radio traffic), advise NorthComms that they were armed and responding. NorthComms did not know which responding units were armed.
36. The heavy radio traffic during this period was not being controlled by NorthComms, and officers were talking over each other. Eagle experienced difficulty getting a priority call through to NorthComms, and some units heading to the scene were not acknowledged, including one unit which had advised it was armed.
37. At 1.32pm only three officers in the forward (Glendale Road) area were armed: Officer C (Glock pistol); a constable at the corner of Kaurilands and Withers Roads (Bushmaster rifle); and a dog handler - Officer F (Glock pistol).

Summary of events between first and second phases of pursuit

38. Over a 23 minute period, while Stephen McDonald was on foot, he presented a firearm at people who he and Ms Mann confronted at the Glen Ora Rugby League Club (see

paragraph 23), and at a number of police officers (see paragraphs 13 and 26-27); and he also fired at the Eagle helicopter (see paragraphs 28 and 29). Attempts were made to set up various cordons during this time and there was a degree of confusion over incident control (as between Eagle and Officer C). Communications were proving difficult and it was not known how many armed units were responding.

Significant times

1:09pm	Officer B advises NorthComms of the firearm.
1:15pm	Officer C advised “ <i>You will be incident controller</i> ”, intended as a pre warning – Officer C assumes the role – Officer B confirms firearm presented at police.
1:17pm	Bag snatch reported and handgun presented at Glen Ora Club.
1:18pm	Officer D contacts officer C for firearms – firearm presented at Officer C.
1:22pm	Firearm presented at Officer D – McDonald fires at Eagle – Officer E apprehends Ms Mann – firearm presented at Officer E.
1:23pm	NorthComms commences setting up cordon points.
1:24pm	Eagle asked to set up cordons – Eagle observer assumes he is incident controller – Officer C considers the Eagle observer to be incident controller.
1:25pm	Eagle sees McDonald approaching cordon point and tells officers to leave.
1:26pm	NorthComms telephones O/C AOS and then advises patrols that AOS is being paged (see paragraph 91).
1:29pm	AOS members receive page message.
1:31pm	Officer C instructed by NorthComms to set up a Safe Forward Point (SFP) at Konini school.
1:32pm	Only three officers known to be armed.

Second phase of vehicle pursuit – Glendale Road to Nikau Street, New Lynn

39. After Stephen McDonald confronted Officer E in Glendale Road (see paragraph 29), he went to several addresses along the road and confronted the occupants of those addresses, unsuccessfully demanding keys to vehicles. At 1.30pm he confronted the occupants of an address on Glengarry Road, and demanded and was given the keys to a green four-wheel-drive Hyundai Terracan.
40. He drove this vehicle into Glendale Road and headed north towards a police cordon near Harold Moody Park. The three police vehicles there were all unmarked and the officers were unarmed. They moved off and allowed McDonald to pass through at an estimated speed of 100 kph.
41. This was observed by Eagle and McDonald was then pursued by police vehicles with their sirens and red and blue lights activated. McDonald cut through the service station on the corner of Oates Road and continued along West Coast Road and through other New Lynn streets. The lead police vehicle was initially an unmarked car travelling about

- 500 metres behind. At 1.35pm this car was replaced by a dog unit carrying Officers F and G. Officer F was armed with a pistol.
42. At 1.36pm, McDonald stopped the Hyundai abruptly in Parker Avenue, near the junction with Hutchison Avenue. The several police vehicles pursuing him also stopped – the closest being about 30 metres away. Stephen McDonald got out and faced the police holding his firearm. This was reported to NorthComms by Eagle. Some officers said he pointed the weapon at them, while others said he was waving the firearm about in front of them. The police units retreated and McDonald returned to the Hyundai and drove off.
43. The pursuit then continued through other New Lynn streets and, at 1.37pm, Stephen McDonald drove into Thom Street (a cul-de-sac), did a u-turn at the end and drove back out, passing the pursuing police vehicles as they were entering the cul-de-sac. As he passed the dog unit he pointed the firearm at it and swerved the Hyundai, almost losing control. Several officers noted the Hyundai on two wheels at that point. The Eagle observer reported that McDonald was *“weaving all over, almost rolled his vehicle”* and that he had *“almost clobbered”* the police vehicles. At 1.38pm, the dog unit relayed to NorthComms: *“This guy has just pointed the gun at us again. Looks to be real at this stage.”*
44. Shortly afterwards, an officer asked NorthComms about putting out road spikes but was told by the Eagle observer *“Negative that unit.”* A different patrol unit did set up spikes on the corner of Seabrook and Margan Avenues but McDonald did not take that route. Another unit was preparing to place spikes in Tane Street when he drove past. These attempts at laying road spikes were neither known to, nor approved by, NorthComms.
45. At 1.39pm Eagle reported that Stephen McDonald had driven around a corner on the wrong side of the road, that the oncoming traffic was minimal, and that the police vehicles were 400 metres behind. NorthComms advised that all police vehicles should stay back.
46. At 1.40pm the dog unit asked NorthComms if there were any cars with road spikes and was told by the dispatcher: *“We do not want to spike an armed offender at this point.”*
47. Eagle then gave the advice that McDonald’s driving appeared safe at that time, that traffic was building and McDonald was weaving in and out of the traffic, and that as long as police vehicles stayed back McDonald was not posing a risk to other vehicles.
48. At 1.41pm McDonald drove into a driveway in Nikau Street, New Lynn. He abandoned the Hyundai and jumped a fence into the rear of a property in Pine Street, a cul-de-sac that runs parallel to Nikau Street, off Great North Road.

Summary of second phase of vehicle pursuit

49. This phase of the pursuit to Nikau Street had lasted approximately 11 minutes, covering a distance of 9.75 kilometres on streets with 50 kph speed limits. Stephen McDonald's speed during this phase was estimated to be in the region of 80 kph, reaching 120 kph at one point. Data from the police Automatic Vehicle Locator (AVL) system showed that one of the pursuing police vehicles reached a speed of 105 kph during this phase.
50. Throughout this second phase of the pursuit, numerous units communicated with NorthComms, Eagle and other units without identifying themselves (see paragraph 276).

Significant times

1:30pm	McDonald takes Hyundai at gun point – permitted to drive through a cordon point of unarmed officers in unmarked patrol cars – pursuit begins.
1:34pm	NorthComms updates AOS commander (see paragraph 93).
1:35pm	Officers F & G take lead in pursuit.
1:36pm	McDonald points firearm at police officers in Parker Ave.
1:37pm	McDonald presents firearm at Officers F & G in Thom Street.
1:38pm	Officer G reports that McDonald presented firearm and it looked real.
1:39pm	Due to driving described by Eagle observer, NorthComms advises all police vehicles to stay back.
1:40pm	Officer G asks NorthComms about deploying spikes but NorthComms advises: <i>"We do not want to spike an armed offender at this point."</i>
1:41pm	McDonald abandons Hyundai in Nikau Street.

Events between the second and third phases of the pursuit – Pine Street

51. After Stephen McDonald abandoned the Hyundai in Nikau Street and jumped a fence into the rear of a property in Pine Street (at 1.41pm), the following sequence of events occurred.
52. At 1.42pm, Eagle reported to NorthComms and all units: *"The offender still has a weapon; he has taken shots at the staff on Great North Road."* This event had neither been seen nor reported by officers on the ground.
53. At the same time NorthComms began to set up armed cordons, with the aim of containing McDonald, so that dogs could be used. However, as no field incident controller had been appointed by NorthComms, no officer assumed formal command at the scene.

54. By this time, however, there were at least nineteen armed officers available, including one senior sergeant and Officer C. Also available were two unarmed senior sergeants, three dog units, and three vehicles carrying spikes.
55. After Stephen McDonald had been seen entering Nikau Street, Officer C had set up a cordon point at Arawa and Titirangi Roads and had stopped traffic going into that area. He had also sent another unit to Margan Road and Titirangi Road to divert traffic away from the area. He was aware that other units were coming into the area.
56. Although Officer C considered Eagle to be still in control, he nevertheless deployed unarmed officers to outer cordons and, without advising NorthComms, sent armed units to inner cordon points.
57. In Pine Street, Stephen McDonald entered a house and confronted the occupants, demanding the keys to a Nissan Skyline that was parked in the driveway. He was given the keys and left the house.
58. Two dog handlers, Officers F and G, were directed to the Pine Street address by Eagle. Officer F was armed with a Glock pistol and Officer G had his dog on a lead.
59. Officer G saw McDonald across a driveway alongside a fence. Officer F, who was behind Officer G, challenged McDonald by calling out *"Armed police"*, but got no reaction.
60. When later interviewed, Officer G said that he could not see Stephen McDonald's firearm at that point. He said he did not let his dog go because it was quite young and not AOS qualified,⁶ and he *"could not guarantee that [the dog] would 'take' the offender"*. As Officer G crossed the driveway, Stephen McDonald held his firearm in both hands and aimed it directly at him. The officer, who was not armed, retreated.
61. Officer F then levelled his pistol at Stephen McDonald and ordered him to put down his firearm. The two men had their guns pointed at each other for a brief period before McDonald disappeared behind the fence. To the Eagle observer, it appeared that McDonald and Officer F had fired at each other. At around 1.47pm Eagle advised: *"There appears to be shots fired both ways at this stage on the driveway."*
62. Stephen McDonald then presented his firearm at several other officers who had converged, before getting into the Nissan Skyline. Officer F later stated that about 20 seconds passed from the time McDonald disappeared behind the fence to the time he heard the Nissan start to *"rev loudly"*.

⁶ That is, not trained and qualified to AOS standards for dealing with armed offenders.

63. At 1.47pm, Eagle advised that Stephen McDonald was in the Nissan driving along Pine Street towards Great North Road. NorthComms then directed all units to “*stay out of the vehicle’s way*”. Two police units were at a cordon at Pine Street and Great North Road, and McDonald drove between them at high speed.

Summary of events between the second and third phases of the pursuit

64. Stephen McDonald was in the Pine Street area for approximately 6 minutes, during which he confronted the occupants of an address and demanded and obtained the keys to a Nissan Skyline. He was challenged by Officer F as he prepared to leave the property and levelled his firearm at Officers F and G and other police who had converged on the scene. McDonald then got into the Nissan and left the area at speed.
65. A number of units were by now available, but no field incident controller was appointed. Although he thought Eagle was still in control, Officer C was busy setting up cordons and deploying officers to those.

Significant times

1:42pm	Eagle advises that McDonald still has the firearm and has taken shots at police staff – NorthComms and Officer C commence setting up cordon points – McDonald takes keys to Nissan Skyline at gunpoint – standoff between McDonald and Officer F.
1:47pm	Eagle observer reports that there appears to have been shots fired both ways on the driveway – McDonald drives away in Nissan – NorthComms advises all units to stay out of the vehicles way – McDonald drives through a cordon and onto great North Road.

Third phase of vehicle pursuit – Pine Street, New Lynn, to Auckland motorway

66. After leaving Pine Street, Stephen McDonald drove along Great North Road towards LynnMall.
67. At 1.48pm, the driver of the lead police vehicle following McDonald called NorthComms to advise that he was in pursuit and gave the registration number of the Nissan. The officers in this vehicle were not armed.
68. TV3 news footage taken at the corner of Rata Street and Great North Road recorded a lot of police public safety activity, with roads being blocked and traffic redirected. The camera operator captured the Nissan driving past at speed with the front bumper damaged and hanging down, scraping the road. The first uniform police vehicle was approximately two seconds behind, with a further three seconds gap before the next police vehicle. After a few more seconds, eight more police vehicles, both uniform and unmarked, followed.

69. In the period between 1.48pm and 1.53pm, the Eagle observer reported that McDonald almost collided with other vehicles three times as he travelled along Great North Road, Blockhouse Bay Road, New Windsor Road and Bollard Avenue. NorthComms requested radio silence, unless urgent, other than for Eagle providing the commentary. Eagle described McDonald's driving as dangerous and then as "*extremely dangerous*", and said he was "*fishtailing*" and "*losing control*" while travelling at about 80 kph in a 50 kph zone. Eagle next described McDonald's driving as "*crazy*" as he crossed on to the wrong side of the road at more than 100 kph. During this time McDonald was driving through red lights and compulsory stop signs, causing other vehicles to take evasive action.
70. Meanwhile NorthComms was directing police units to stay at least 500 metres behind McDonald in order to avoid pressuring him. AVL data indicates that the peak speeds of two of the pursuing police vehicles at this time were 97 kph and 119 kph.
71. Along Bollard Avenue, just before the junction with New North Road, an unidentified police unit attempted to deploy spikes as McDonald passed by them, but he swerved and avoided them. This deployment of spikes had not been authorised by NorthComms.
72. Stephen McDonald then turned right into New North Road, forcing other road users to brake hard to avoid collisions. He turned immediately into Hendon Avenue, where his speed was estimated to be about 100-140 kph. Police vehicles at this stage reached peak speeds of 116-119 kph.
73. At 1.54pm, Officer E broadcast to NorthComms: "*I have the driver's identity, Stephen Hohepa McDonald*". NorthComms then carried out a check on Stephen McDonald, but did not inform field units of his extensive criminal history or pass on information that he had a history of known drug use, of carrying and using firearms and other weapons, and of assaulting police (see paragraphs 288 and 320).
74. McDonald turned right onto Owairaka Avenue, then into Mt Albert and Sandringham Roads, at one stage cutting a corner with his vehicle on the wrong side of the road. At 1.55pm Eagle advised that he was: "*...intermittently driving recklessly at speed, undertaking buses, red lights, and pedestrian crossings*". Along Sandringham Road he narrowly missed colliding with a car.
75. NorthComms then repeated the direction that all police units in pursuit were to be at least 500 metres behind.
76. Two of the first three pursuing police vehicles were now armed dog units. Shortly after 1.55pm, Officer 55, an AOS qualified dog handler, took over as the lead vehicle. This officer had been off duty but, as the AOS dog handler on call, had responded directly from home to join the pursuit when the AOS was paged at 1.26pm.

77. Officer 55 considered various tactical options, including a non-compliant vehicle stop (turning into the Nissan's path to cut it off), a manoeuvre that is permissible only by AOS and Special Tactics Group (STG) members who have been specifically trained to perform it (see paragraph 291). However the officer did not know what armed support was available to back up this manoeuvre, and was reluctant to carry out a non-compliant vehicle stop because of the potential danger to the public.
78. Near the junction with St Luke's Road, McDonald suddenly braked hard and reversed into Officer 55's car, slightly damaging it. McDonald then accelerated away at speed, while Officer 55 dropped back. McDonald's speed along Sandringham Road was estimated to be between 80 kph and 120 kph.
79. At approximately 1.57pm, members of the Auckland AOS made contact with NorthComms advising that they were mobile (see paragraphs 89-102 for details of the AOS deployment).
80. Stephen McDonald continued on Sandringham Road towards New North Road, with the pursuing police vehicles reaching speeds ranging between 110 and 128 kph. An onlooker counted 19 police vehicles following the Nissan, three or four of those in close pursuit and with the remaining 15 or 16 well behind. Some cars had their sirens on and others did not.
81. At the intersection of Sandringham Road and New North Road, McDonald drove into the back of another car, causing extensive damage to both vehicles but no injuries. He then turned into New North Road and then into Bond Street. At 1.57pm, Eagle reported the collision and said: *"His car should be incapacitated very shortly."* A senior sergeant involved in the pursuit asked for a police unit to stop and check on the occupants of the car with which McDonald had collided. No firm instruction was given and no unit stopped to do that.
82. From Bond Street, McDonald turned into Great North Road and then Williamson Avenue, reaching speeds estimated to be between 80 kph and 150 kph and at times driving on the wrong side of the road.
83. At 1.59pm, NorthComms asked the AOS to advise when they were in position. This was acknowledged by the AOS commander.
84. McDonald turned onto Ponsonby Road, driving on the wrong side of the road. He then turned onto Hopetoun Street, maintaining a speed of approximately 80 kph and overtaking vehicles on the wrong side of the road, passing a stationary AOS unit which

did a u-turn and joined in the pursuit.⁷ The pursuit then continued into Beresford and Pitt Streets before McDonald turned onto the North Western Motorway

85. At 2.01pm NorthComms directed all the non-armed units to pull out of the pursuit and let the AOS units through.
86. The Eagle observer reported that the Nissan was travelling at about 80 kph as it went onto the motorway and that it was swerving from left to right and weaving in and out of traffic. The vehicle was also emitting steam and fluid and, over the next minute, slowed to about 15 kph before turning right onto the verge and stopping against the median barrier. A pursuing senior sergeant directed units to use a “*moving block*” to slow down traffic on the motorway and by this means police brought traffic to a halt about 200 metres behind the Nissan.

Summary of third phase of pursuit

87. The third phase of the pursuit had lasted approximately 15 minutes and covered 20.24 kilometres, ending at 2.02pm. At times during this phase McDonald's speed reached in excess of 100 kph and as high as 150 kph, all in 50 kph zones.
88. An AOS qualified dog handler took over as the lead vehicle in the pursuit at 1.55pm, and at 1.57pm AOS squad members advised they were mobile. All non-armed units were then directed by NorthComms to pull out of the pursuit. The Nissan had been severely damaged when McDonald rear-ended another vehicle during the pursuit and shortly after he turned onto the North Western Motorway it slowed and stopped against the median barrier.

Significant times

1:48pm	Third pursuit commences with McDonald's driving becoming extremely dangerous.
1:54pm	Officer E advises that the driver is McDonald.
1:55pm	Officer 55 takes over as lead pursuit vehicle – McDonald stops and reverses into Officer 55's vehicle.
1:57pm	AOS squad members advise NorthComms that they are mobile – McDonald drives into the back of another vehicle – Eagle observer advises that McDonald's car should be incapacitated very shortly.
1:59pm	NorthComms asks AOS to advise when they are in position.
2:01pm	NorthComms directs all non-armed units to pull out of the pursuit and let AOS units through.
2:02pm	McDonald stops on the motorway and abandons the Nissan.

⁷ This vehicle contained AOS team 1.2, comprising Officers 81 and 84: see paragraphs 98 and 100-102 below.

THE AOS DEPLOYMENT

AOS response and deployment

89. Police policy requires the communications centre shift commander to notify the AOS as soon as there is an armed offender alert. The officer in charge of the AOS then decides whether to mobilise the squad.
90. NorthComms was first informed that Stephen McDonald was in possession of a firearm at 1.09pm (see paragraph 14). At 1.15pm, Officer B confirmed that a gun had been presented. Over the following nine minutes, Eagle and five other units reported possible or definite sightings of a firearm, including the witnessing of shots being fired by McDonald.
91. Though the NorthComms shift commander believed that he gave an instruction sometime between 1.15pm and 1.21pm for the AOS to be called out, it was 1.26pm when a NorthComms team leader phoned the AOS commander, briefing him on an offender who was involved in a pursuit and robbery and had shot at Eagle and presented a firearm at other officers. The team leader also advised that this offender was on foot and was being kept under observation by Eagle.
92. The Authority's investigators later asked the shift commander if it would not have been wise to have called the AOS earlier. Of this the shift commander said:

"No because I'm still at that point gathering my thoughts, getting onto the correct radio channel. Yes it's a consideration but I'm just sort of – and this is put against a number of incidents that we get where toy guns are waved around and things like and it turns out or doesn't turn out to be a gun – I'm just... running through my options in my head, listening maybe for a verification that it was a firearm.

Normally I would expect to see – and this is where it becomes a little bit difficult – in a normal reporting of an armed incident you're getting details from a Call Taker who is trained in the six step process, who would be putting in a description of the firearm, you know, what it looked like and what made people think it was a firearm. At this point you are relying on the Police unit to, when they say they've seen a firearm, you're relying on them to have some authority around that."

93. After being briefed by the NorthComms team leader, the AOS commander instructed that Auckland AOS members be paged. At approximately 1.29pm, members were paged to report to the squad room immediately. The AOS commander left his home in a police vehicle. It was his intention to follow the pursuit at a distance and to brief AOS

staff once they were ready to respond. At 1.34pm, NorthComms contacted him again to inform him of McDonald's location (then Glengarry Road).

94. At that time, the AOS commander had six staff rostered on call, none of whom were NCOs.⁸ Other staff were on annual leave, and the STG was out of Auckland and unavailable. All but one of the rostered AOS staff responded to the pager message.⁹ The AOS commander later said that a normal turnout would have been more than 15.
95. The first AOS member to arrive at the squad room at Auckland Central police station – six minutes after being paged – was Officer 80. As a senior constable who had been a member of the AOS since 2005, this officer was the most experienced member to respond, in terms of both police and AOS service. Officer 80 assumed the role of team leader, phoned NorthComms and received a briefing that Stephen McDonald had fired at Eagle and was being pursued in a stolen blue Nissan.
96. Of the four other AOS members who responded, two had been squad members since 2007 (Officers 77 and 87) and two since 2008 (Officers 81 and 84). Officer 81 qualified for the AOS in 2007, and within the first half of 2008 commenced training, duty and deployments with the Auckland squad. Officer 84 qualified for the AOS in the second half of 2008, and within the same period commenced training, duty and deployments with the squad.
97. All arrived in the squad room within about 21 minutes after they were paged. Officer 80 briefed them as they were donning their equipment and arming themselves. Under Officer 80's leadership, they discussed what was known, and determined that they would need to conduct a non-compliant vehicle stop on Stephen McDonald's vehicle. This decision was made without consulting the AOS commander – but he shortly afterwards (at 2.00pm) gave the same instruction (see paragraph 103(i)).¹⁰
98. Officer 80 divided the squad into two teams – 1.1 (Officers 80, 77 and 87) and 1.2 (Officers 81 and 84). Officer 80 regarded all the officers who responded as having roughly the same level of experience, and selected team 1.1 on the basis that its three officers, having arrived slightly before Officers 81 and 84, were ready to deploy. It was, in Officer 80's view, critical to get AOS on the way, and the pairing of the two members who had most recently joined the squad (Officers 81 and 84) was not an issue at the time.

⁸ See footnote 1 above for the definition of an NCO.

⁹ One member was unable to attend due to another commitment.

¹⁰ AOS may only perform a non-complaint vehicle stop when trained and authorised to do so by an AOS commander (see paragraph 291).

99. During the briefing, Officer 80 did not need to explain the teams' roles, as they had all been trained in non-compliant vehicle stop procedures. The officer later explained that the intention was for team 1.2 to be the 'crunch' car, cutting off Stephen McDonald's vehicle, while team 1.1 would pull up behind his vehicle, engaging him with voice appeals and making the arrest.
100. Two uniform police cars were made available to the squad. The teams then left the Auckland Central police station, with team 1.2 leaving a few minutes after team 1.1. Officer 80 advised NorthComms that the AOS was mobile at approximately 1.57pm – about 28 minutes after the members had been paged. Officer 80 sought details of McDonald's location, movements (at that point McDonald was on Sandringham Road), and vehicle, confirmed that Eagle had McDonald under observation, and gave team 1.1's location. NorthComms was not told (and did not ask) about the number of AOS members deployed, the number of vehicles, or the intended strategy.
101. Officer 77 was the driver of the team 1.1 vehicle, with Officer 80 as the front seat passenger and Officer 87 the rear seat passenger. Officer 84 was the driver of the team 1.2 vehicle with Officer 81 in the rear passenger seat.
102. Both teams drove towards the pursuit, aiming to get in front of the other already pursuing vehicles, in order to carry out a non-compliant vehicle stop on the Nissan driven by McDonald.

Significant times

1:09pm	Firearm sighted.
1:15pm	Firearm sighting confirmed.
1:26pm	AOS commander telephoned – initial briefing.
1:29pm	AOS squad members paged.
1:34pm	AOS commander telephoned – subsequent briefing.
1:35pm	First squad member (Officer 80) arrives in the squad room.
1:50pm	Last squad member arrives in the squad room.
1:57pm	Team 1.1 mobile.
2.00pm ¹¹	Team 1.2 mobile.

¹¹ Officers 81 and 84 have said that they left the station within two to three minutes of team 1.1. However at the time team 1.1 left the station, Officer 80 believed it would take team 1.2 another five minutes before they were ready to leave. Officer 80 has explained that team 1.1 left the station without team 1.2 because it was considered imperative that an AOS unit should become mobile as soon as possible and they could not afford to wait for team 1.2 to be ready to leave.

AOS communications

103. AOS members use portable radios on an encrypted channel ('the AOS channel'), and monitor other 'general' police communications on their vehicles' radios. The AOS radios in use at the time had a limited range, particularly in a mobile situation, and the AOS members experienced difficulty communicating.¹² Specifically:
- i) The first time the AOS commander was able to get through to his staff on the AOS channel as they travelled towards McDonald's location was at approximately 2.00pm, when he instructed them that they were dealing with an 'active shooter' situation and they were to execute a non-compliant vehicle stop when the opportunity presented. According to the AOS commander, this instruction was acknowledged by one of the AOS members.
 - ii) Officer 80 partly heard this transmission from the AOS commander. Very soon afterwards Officer 80 lost contact with both the AOS commander and team 1.2.
 - iii) Officer 81 (in team 1.2's vehicle) could receive transmissions by AOS radio but could not transmit in response. This officer heard the AOS commander's transmission and, on the basis that it was an emergency action plan, understood that the AOS members would have to make tactical decisions themselves.¹³
 - iv) Officer 55 (the AOS qualified dog handler in the lead pursuit vehicle – see para 76) heard the AOS commander's transmission but otherwise heard only 'scratchy' communications.
104. As a result of these difficulties, AOS staff were not always aware of each other's locations and were unable to co-ordinate their responses. After teams 1.1 and 1.2 left the station, there were no communications between them, or with Officer 55, about the tactics to be used to carry out the non-compliant vehicle stop.
105. There was no contact on the general network radio between the AOS commander, his two teams, Officer 55 or the Eagle observer. While Eagle can communicate on the AOS channel this did not occur because Eagle was operating with a pilot and a single police observer, who later said that he did not have time to switch to the AOS channel, because at that time the pursuit was moving onto the motorway.
106. As earlier noted, the Eagle observer also said that because he was working by himself he found it difficult to undertake the tasks that would normally be undertaken by two officers (see paragraph 31). He said he had advised NorthComms that he was by

¹² They have since been upgraded.

¹³ An Emergency Action plan (EA) is planning for and reacting to an offender's unexpected actions.

himself. However, the NorthComms shift commander was not aware Eagle did not have a full crew of two police observers.¹⁴

Fire Orders

107. While team 1.1 was travelling towards the pursuit, Officer 77 reminded Officers 80 and 87 about General Instruction (GI) F061 (Fire Orders), which sets out the circumstances under which police can use firearms (see paragraphs 266-268). Officer 80 then reminded the other officers of the relevant provisions of the Crimes Act 1961 (see paragraphs 262-265).

108. In the team 1.2 vehicle, Officer 81 confirmed to Officer 84 that GI F061 applied.

EVENTS LEADING UP TO THE SHOOTING

Events on the North Western Motorway prior to the shooting

109. Team 1.2, despite having left the station after team 1.1, reached the North Western Motorway first, after joining it in Hopetoun Street (see paragraph 84). As the pursuit reached the Bond Street overbridge, team 1.2 became the third vehicle in the pursuit, behind Officer 55 and another dog unit, both of which were close behind the Nissan driven by McDonald. It was not until that point that Officer 84 realised that team 1.1 was not there, and, on that basis, formed the view that a non-compliant vehicle stop would not be an option at the time. Officers 81 and 84 were unaware that Officer 55, in the lead pursuit vehicle, was also AOS qualified and had been trained in the non-compliant vehicle stop procedure.

110. At 2.01pm NorthComms directed all non-armed units to pull out of the pursuit and let the AOS units through (see paragraph 85).

111. At about this time Officer 84 saw Stephen McDonald swerving to the left and right and at the same time pointing his firearm back towards the pursuing police vehicles.

112. Officer 55 was directly behind McDonald as the Nissan slowed to about 15kph. McDonald partially opened the driver's door and held the firearm up as the Nissan came to a halt. Officer 55 transmitted (at 2.02pm) *"He's carrying a firearm. Stay back."*

¹⁴ In addition to the pilot, Eagle had only one crewman (i.e. police observer) and a civilian ride along. One crewman is the minimum staffing. That person has responsibility for matters affecting aircraft safety which always over-ride observation of what is occurring on the ground. A second crewman allows for greater flexibility and considerably more focus on what is occurring on the ground. At the time there was no policy covering the civilian ride along but this has now been promulgated.

113. The Nissan came to a stop close to the median barrier (see paragraph 86), about 1500 metres from the Newton Road on-ramp. Stephen McDonald got out and fled on foot across the barrier onto the city-bound lanes. Over the next few seconds:
- i) McDonald tried to stop traffic in the city-bound lanes. Some witnesses say he pointed his firearm at oncoming traffic, and three witnesses said he fired shots in the direction of oncoming traffic or police, though no police staff saw or heard him fire these shots. Some drivers, seeing McDonald, took evasive action. One swerved and drove away; others stopped their vehicles and/or ducked their heads.
 - ii) On getting out of his car, Officer 55 said he saw Stephen McDonald briefly at the open passenger-side door of a white Toyota van (being driven by Mr Naitoko), which was near the barrier in the right city-bound lane – before McDonald moved off towards a white Isuzu truck (being driven by Mr Neville).
 - iii) Officer 55 crossed the median barrier and took cover behind the Toyota van. He had decided not to deploy his dog because he considered the circumstances were not conducive for setting the dog on McDonald with any certainty, and it was most likely the dog would be hit by traffic in the process.
 - iv) The dog handler in the second pursuit vehicle also got out of his car and drew his pistol. He too decided against deploying his dog.
 - v) Several other officers drew their weapons as they got out of their vehicles. One, Officer W1, who was armed with a Glock pistol, saw McDonald jump the barrier and as he was moving across the lanes, saw him point his firearm back in the direction of the police. Officer W1 called out: *“Stop, stop, stop, armed police”*.

He later said:

“The noise was intense, Eagle was above and that noise was very loud. [McDonald] didn’t flinch or appear to react. I could barely hear myself. I took aim.....I placed my finger onto the trigger, took one other look at the motorway traffic which was still some distance away, aimed my shot and being confident that there was nothing was (sic) behind the offender or in his vicinity I pulled the trigger and shot one round.... My aim was directed at centre mass in the area of his torso.”

The spent round was later recovered from a neighbouring property.¹⁵

¹⁵ See paragraph 253 for further discussion of the shot fired by Officer W1.

vi) Officers 81 and 84 got out of the third pursuit vehicle as this shot was being fired by Officer W1, and were about to cross the median barrier.

114. Contemporaneously, team 1.1 was approaching the scene in the emergency lane beside the median barrier. Officer 77 saw Stephen McDonald on the motorway, and also saw several police officers leave their cars. Another police car made a sharp turn into team 1.1's path and their vehicles collided about 35 metres from the Nissan. This incapacitated team 1.1's vehicle, effectively preventing the three officer occupants, including the team leader, from immediately engaging McDonald.

Events immediately prior to the shooting

The scene plans and photographs referred to from this point are police documents and can be found in the **Appendix**. Scene plans 1-3 and the photographs show the final positions of vehicles. Scene plans 4-7 were prepared, with significant input by ESR, to indicate estimated positions, measurements and trajectories when shots were fired. They are informed estimates only.

115. A number of police and civilians witnessed events as they unfolded from the time Stephen McDonald left the Nissan to the time he was apprehended. There were, however, very few eyewitnesses to the shots fired by police during that very brief period. Witnesses could provide an account of what they had seen taking place but their views of events were variously obscured by traffic or other people, and their subsequent recollections and interpretations therefore differed.

116. The section of the motorway in question consists of four lanes running in each direction. At the critical time there were vehicles in each of the city-bound lanes, approaching the point where McDonald crossed the median barrier. Vehicles of significance at the immediate scene were:

- i) In the inside (fast) lane, next to the barrier, a white Subaru Forester, behind which was the white Toyota van driven by Mr Naitoko (see paragraph 113(ii)).
- ii) In the lane to the north of that was a silver Audi sedan – which left the area before the shots were fired by Officers 84 and 81.
- iii) In the lane to the north of that was a white Isuzu truck driven by Mr Neville (see paragraph 113(ii)).
- iv) In the outside lane there was another vehicle that also left before the shots were fired by Officers 84 and 81.

117. Scene plans 1, 2 and 3, and Photograph 1, taken from Eagle, show the final positions of key vehicles – except the Audi and the vehicle in the outside lane, both of which had

quickly left the scene. Other non-police vehicles had also left the area before this mapping and photography took place.

Initial response of Officers 81 and 84

118. Officers 81 and 84 pulled in by the median barrier about 20 metres behind the Nissan and saw McDonald running across the motorway trying to stop vehicles, which slowed but continued past him. Carrying their Bushmaster rifles they exited their vehicle and crossed the median barrier to pursue him on foot. This was at about the same time as Officer W1 fired his Glock pistol at McDonald (see paragraph 113(v)).
119. Officers 81 and 84 did not stop to discuss tactics. They could see that McDonald was carrying what appeared to be a firearm. Officer 84 thought it looked like a sawn-off shotgun or similar and from the information that had already been relayed, including advice that McDonald had fired shots, believed the firearm to be real.
120. Officer 81 said later: *“Given the immediate nature of the threat and the fact that we could both see what was happening, there was no further need to discuss what actions were to be taken.”*
121. Officer 81 thought McDonald may try to stop a vehicle and escape, or may escape into the bush beside the motorway, and formed the view that there was a danger of his taking a hostage or hostages. In the officer’s view: *“[McDonald] was clearly a very real danger to the public and the Police and needed to be apprehended.”*
122. On Officer 84’s assessment McDonald was clearly posing a threat of death or grievous bodily harm to others, and the officer believed that he needed to be immediately stopped and that his arrest could not be effected by less violent means than the use of a firearm. Later, in a statement, Officer 84 said: *“I was aware that there was a real possibility that I would have to shoot the offender in accordance with section 39 [of the Crimes Act 1961].”*
123. Both officers moved across the lanes behind McDonald as he faced the oncoming traffic.

Confrontation between Stephen McDonald and Mr Neville

124. Mr Neville, who was driving his Isuzu truck towards the city (see paragraph 116(iii)), saw the Nissan and the police vehicles stopped in the west-bound lanes, and saw Stephen McDonald jump across the median barrier. He also saw two police officers dressed in black (Officers 81 and 84) behind McDonald. The city-bound traffic had slowed. Mr Neville was aware, from having listened to radio reports, that McDonald was armed.
125. As Mr Neville approached Stephen McDonald, he could see his eyes and believed he *“looked desperate”*. McDonald had stopped running and was standing in the truck’s

path. Seeing that he was indeed carrying a firearm, Mr Neville knew that McDonald had “involved me in what decision he had made”, and decided to hit him with his truck. He drove towards McDonald, who raised his firearm and aimed at Mr Neville. At this point the truck was about 10-15 metres away. Mr Neville could see one of the police officers behind McDonald and believed the other had moved to the left front corner of his truck.

126. Mr Neville thought about swerving to the right but the lane was blocked by other vehicles. In retrospect he thinks he ducked while driving forward and his foot came off the accelerator. He then heard a scratching as McDonald tried to get into his truck through the passenger’s door, which was locked.

THE FOUR SHOTS FIRED AT STEPHEN MCDONALD BY OFFICERS 84 AND 81

Shots fired at Stephen McDonald

127. What transpired next - and over a very short timeframe of only seconds – is that Officers 84 and 81 fired a total of four shots at Stephen McDonald. Officer 84 fired three of those shots and Officer 81 fired one. Mr Neville’s truck was coming to a stop as the shots were fired, and witnesses differ as to whether, at the time of the first two shots being fired by Officer 84, McDonald was still beside the truck or had climbed on to the deck. Each of the four individual shots is described in detail below.

Events leading up to the firing of the first shot

128. As Officers 81 and 84 ran after McDonald they saw him trying to get into the cab of Mr Neville’s truck through the passenger door. Officer 84 saw the truck jolting forward: “... as if the driver was slamming on the brakes”.
129. Officer 84, who was carrying the Bushmaster rifle in the low ready position (with the butt at shoulder height and the barrel pointed towards the ground), said that as McDonald was beside the passenger door of the truck trying to get into it:

“I was still running across the motorway towards him. I was not in the right position to shoot... I was on the wrong angle and not close enough. The truck driver was my first priority at that stage.

I said ‘48’ to myself in my head, just the number. I believe that the offender posed an immediate and very real risk to the life of the truck driver. There was only a piece of glass separating the offender from the truck driver and I was very concerned that the offender was either going to kill or seriously injure the driver, or alternatively use him as a hostage.”

130. This reference to “48” by Officer 84 is to section 48 of the Crimes Act 1961, which sets out the lawful justification for the use of reasonable force in self-defence or in the defence of others (this is discussed in more detail later in paragraphs 265 and 376-379).
131. Because of the angle and because both Officer 84 and McDonald were moving, Officer 84 could not fire at McDonald at that point without endangering oncoming traffic, so decided to get closer to McDonald in order to improve the angle.
132. At that stage, according to Officer 84, McDonald was holding his firearm in his right hand and pointing it at the two officers, though he did not appear to have it fully under control. Inside the cab of the truck Mr Neville heard voices that sounded like commands, and saw one officer moving down the side of his truck while the other stayed in front but moved closer. His impression was that the second officer was about two metres away with rifle raised.
133. Mr Neville then saw McDonald raise his firearm and point it at him and believed he may have been trying to scratch or smash the passenger window of his truck, which at that stage was still jolting forward. He said McDonald did not respond to the police commands but instead climbed on to the deck of his truck.
134. As soon as McDonald was on the deck of the truck Mr Neville said he: *“...stomped on the brake, hoping the offender would fall off the truck. Through the rear window I saw him lose his balance and fall forwards towards the headboard of the truck, putting him in a better position for police.”*
135. Meanwhile, Officer 55, who had left the cover of the Toyota van to follow Stephen McDonald, assumed a position between the Toyota van and Mr Neville’s truck. Later, in his evidence before Coroner Matenga, Officer 55 referred to scene plan 6, indicating his approximate position at this time to be in Lane 3 at the wording *“Strike to door”*.

Officer 84’s first shot

136. Officer 84, who had released the safety catch on the Bushmaster rifle, recalled shouting to McDonald to drop his firearm, or something to that effect.
137. The officer was aware that behind the truck in the line of fire there were some vehicles, although not in the immediate background. The officer was also aware of the possibility of a ricochet, but believed the urgent need to protect Mr Neville and others present outweighed any such risk.
138. At around the time McDonald reached the Isuzu truck’s passenger door and was trying to open it, Officer 84 had slowed down in order to get a stable platform from which to shoot. Officer 84 later described the situation as follows:

“The offender was only at the passenger door of the truck for a short period of time. He appeared to be totally focused on the truck and gaining access to it. He was in close proximity to us and he could have taken a shot at any one of us at anytime...”

139. At this point, Officer 84 estimated the proximity to McDonald as possibly only about 5-6 metres – and diminishing as the officer moved slowly towards him. McDonald was standing at the rear of the cab with his firearm in his right hand pointing towards the truck, while trying to open the passenger door with his left hand. Officer 84 said:

“When I fired the first shot the offender was moving around. He was trying to get into the passenger door of the truck and was looking around... the offender was on a slight angle towards me, not fully side on but he had his shoulders angled slightly towards the direction I was standing so that I could see part of his chest area.

I was moving at a tactical walk towards the offender, by this I mean I was slow and deliberate but cautious, I dropped my centre mass so I was low down and moving smoothly. I had a stable base from which to take a shot. Everything was very close.

I have an aim point on my rifle, it is like a red light that appears as a dot on the target but it doesn't project onto the target. It is like a visual illusion and you can only see it when you're looking through the sight. As per usual I looked through the sight of my rifle with my right eye with my left eye closed.

The offender was still moving in jerky movements. My aim point was on the centre mass of the offender in his chest area and upper torso. This is the biggest mass area which reduces the chances of missing the target. I fired to stop him, to incapacitate him. There is always a risk that a shot will kill but he needed to be incapacitated immediately.

The hand guard of my rifle rested on the palm of my left hand to stabilise the weapon. This is my usual stance. I put my finger on the inside of the trigger guard. The offender was in my sights. I wrapped my index finger around the trigger, squeezed the trigger and fired...”

140. This first shot fired by Officer 84 missed Stephen McDonald and went through the truck's windscreen on the passenger's side. The bullet fragmented and shrapnel from it struck Mr Neville, who suffered a number of small puncture wounds to his left upper and lower arm and his left hand. He also suffered a small puncture wound just below his left nipple and a further, similar wound in his lower left side.
141. Of this, Mr Neville said he heard a big bang: *“My left ear went deaf straight away. My arm felt like it had been peppered with little hot spray or stuff. Then I remember*

opening the door and getting out of the truck.” He ran and took cover by the driver’s side of the Subaru Forester (see paragraph 116(i)).

142. Subsequent examination by the Institute of Environmental Science and Research (ESR) estimated that this first shot by Officer 84 was fired from in front of the truck’s left front corner at a distance of 6.58 metres (see scene plan 7 and photograph 2). Photograph 3 shows the truck in its final position moments later.
143. Although Officer 84 recalled firing this first shot while McDonald was beside the passenger door, Mr Neville’s recollection, as noted in paragraphs 133-134, was of McDonald getting on to the deck of the truck before he was injured by flying shrapnel from the shot and immediately got out of the truck to run for cover.

Officer 84’s second shot

144. After firing this first shot, Officer 84 looked up and saw that Stephen McDonald had not been incapacitated. The officer then described the circumstances in which the second shot was then fired:

“By now he was moving down the side of the truck towards the tray on the back. Whilst the offender was somewhere between the passenger’s door and the tray of the truck I took a second shot. I can’t remember the exact location – everything was happening very fast and I was still on the move following the offender. I remember moving more towards the right so I was closer to him and had a better angle before taking the shot.”

145. Officer 84 further explained:

“Although I have been in high stress situations before I have never before fired shots at a person. There was a sharpness to what was happening. The shots that I fired appeared quiet even though I was not wearing any hearing protection at the time. When I pulled the trigger I remembering hearing two ‘pops’ a short distance apart. I felt very little recoil and I do not recall any smell from the shots.

After I took the shots I lowered the rifle back to the high ready position – this means that the butt of the rifle was in my right shoulder, the sights are just below eye level and if the threat presents itself again all you have to do is raise your left hand to get back in the aim.”

146. At the time of firing the second shot, therefore, Officer 84 placed Stephen McDonald somewhere between the passenger’s door and the deck of the truck – that is, still on the road. However the ESR reconstruction of the shootings and ballistic examinations

found that, at the time of the second shot, Stephen McDonald was in fact on the deck of the truck.

147. The second shot went through a vertical safety bar behind the passenger's side of the cab. The bullet fragmented and shrapnel from it struck McDonald, who received a penetrating wound to the lower right chest wall. Two fragments from the shot also struck Mr Naitoko's van in the lane beyond. One struck the edge of the passenger's door of the van and the other the passenger's side of the roof.
148. The ESR's reconstruction estimated that this shot was fired by Officer 84 from a location forward and to the left of the passenger's side of the truck, at a distance of 4.81 metres (see scene plan 6 and photographs 3 and 4). The scene plan indicates a close-to-direct continuation of two bullet fragments from the safety bar to Mr Naitoko's van, and therefore suggests that the van may have been in Officer 84's line of fire. However the vehicles were moving relative to each other and to Officer 84, and the trajectory of the fragments almost certainly altered after the bullet hit the safety bar; therefore the estimated position of the van in scene plan 6 must be treated with caution.

Officer 81's single shot

149. Officer 81, having crossed the median barrier, ran until in a position in the far left lane of the motorway near the tray of the Isuzu truck. While running, Officer 81 carried the Bushmaster in a 'low ready' position, with the safety catch on. In a statement made after the incident the officer said:

"The offender was in my sight during the entire time from when he got out of his vehicle until he was on the back of the truck, except for a brief moment when I was behind our vehicle after getting out."

150. While Stephen McDonald was at the passenger door of the Isuzu truck, Officer 81, who was about 15-20 metres away, yelled out: *"Stop, armed Police"*. For the first time, Officer 81 saw McDonald's firearm clearly and thought it looked like a sawn-off shotgun. McDonald was holding the weapon by his waist and Officer 81 did not see it raised or pointed in an 'aim' position. The officer said McDonald *"did not manage to open the truck door and did not respond to me."*
151. Officer 81 did not however take aim at McDonald while he was at the truck door, but focused on *"trying to get into a better position from which I could fire, minimising the risk to other people and also bringing other members into play"*. Later, in interview with the Authority's investigators, the officer said it was hard in retrospect to say what factor would have required taking aim at that point. Shooting McDonald while he was trying to get into the Isuzu truck would have been justified in terms of preventing him from escaping, or preventing him from taking Mr Neville hostage. McDonald was posing a general threat at the time, and had he opened the door to the Isuzu truck he would

have become an immediate threat to Mr Neville. Although McDonald never raised his firearm to take direct aim at the driver, he was nevertheless pointing the firearm in Mr Neville's general direction.

152. Officer 81 did not hear the shots fired by Officer 84 and was not aware that Officer 84 had fired at McDonald until later told during an on-scene meeting with the AOS commander (see paragraphs 183-184).

153. In relation to the single shot fired, Officer 81 said that when McDonald climbed on to the deck of the truck he:

"... turned around towards me in a counter-clockwise manner so he was facing me.

He was still holding the firearm. As I recall, it was in his left hand. He started to raise the gun in my direction and I thought he was going to shoot me. I brought my rifle up from the ready position it had been in, taking the safety off as I did so and fired one shot. No other traffic came through the lane during this time and there was none in my field of vision. The incident happened very quickly."

154. Officer 81 said this reactionary shot was fired while stationary and directly facing Stephen McDonald:

"I was facing straight on, toward him and there was no other traffic in the slow lane during the entire time..."

The shot was a reactionary shot, given the situation and distance. I brought the rifle up into the aim position and was looking through the sight at the offender's centre mass when I fired. His torso was not quite facing me, but was almost square on when I fired."

155. Officer 81 further described how the shot was fired:

"I was coming up from the position I was holding the rifle in, just coming to a stop, bringing it up into an aim position and firing. It's one movement as opposed to stopping, bringing the rifle up, holding that aim and then firing. It was aimed in that that was where my aim is but it's not coming up and holding that position and then firing, it's all one fluid movement."

The officer said this aiming occurred in a "tiny fraction of a second".

156. The shot fired by Officer 81 hit the side tray of the deck of the truck, then struck the tray wall behind the cab but did not enter the cab (see photograph 6). It did not strike Stephen McDonald.

157. The ESR examination estimated that, when this shot was fired, the truck had just stopped or was coming to a stop in its final position (see scene plan 4 and photographs 1 and 5). The fall of the shell case from Officer 81's shot, which was a significant factor in the ESR's estimate of Officer 81's position, is indicated by exhibit marker 18 in scene plan 4 and by the single orange cone in photographs 1 and 5.¹⁶

Officer 84's third shot

158. At around the time of Officer 81's shot, a third shot was fired by Officer 84.

159. According to Officer 84:

"[After my second shot] the offender was not incapacitated and just carried on. He appeared to be more and more desperate to evade Police and do all he could to avoid capture. He climbed quickly onto the deck of the truck with his back to us. He still had his gun in his hand. He stood up and turned and confronted us with his firearm. I can't recall whether he turned from the left or the right.

The offender raised his firearm in the direction of [Officer 81]. He was moving the firearm up towards chest height and pointing out from the middle of his body with his arm bent. He was bringing his firearm up towards a position that would have been pointing directly at [Officer 81] who was at a 90 degree angle to the truck. I was at approximately a 30-45 degree angle and a little bit further away from the offender but still close. The offender looked like a rabbit in the headlights – he appeared desperate and cornered but he refused to comply with any directions to put his weapon down. I heard another one or two 'pop' sounds but I do not believe that I discharged more than two shots and I know that another firearm was discharged other than mine. The offender dropped to the deck in the back of the truck.

The whole incident happened very fast. I would estimate that about 15-20 seconds had passed from the time that I exited the patrol car until the offender dropped in the back of the truck.

At the time that he dropped the offender was still an immediate threat to the truck driver, to [Officer 81] and to myself. When he raised his firearm at [Officer 81] there was only one lane separating the offender and [Officer 81]. He could easily have taken a shot at any one of us and he could have taken the truck driver as a hostage. In addition the

¹⁶ ESR tests found that shells ejected from Officer 81's rifle averaged a distance of about 3.49 metres rearwards and to the right of the weapon's ejection port.

motorway was by now quite full of people in cars and they represented further potential targets for the offender.”

160. The later scene examination and reconstruction estimated that Officer 84 had fired the third shot at a distance of 4.73 metres from the Isuzu truck. This shot crossed the tray of the truck, missing it and Stephen McDonald, and entered the white Toyota van in the lane nearest the median barrier (approximately 14 metres from Officer 84), fatally wounding its driver, Mr Naitoko (see scene plan 5). Photographs 1 and 7 show the truck and van in their final positions moments later.
161. The ESR reconstruction concluded that, while the three shots were being fired by Officer 84, the Isuzu truck was still moving forward. The position of shell cases ejected from Officer 84’s rifle indicated that the officer may have been standing in one position while pivoting and firing; or moving slightly and firing. The range of fall of shell cases from Officer 84’s three shots, which was a significant factor in the ESR’s estimate of Officer 84’s position and the sequence of the officer’s three shots, is indicated by exhibit markers 21, 20 and 19 in scene plans 7, 6 and 5 respectively; and the two adjacent orange cones in photographs 1 and 7.¹⁷
162. Scene plan 5 was described in ESR evidence to the Coroner as *“...a depiction of a possible scenario where the vehicles were located and Officer 84 was located when Mr Naitoko was struck by a bullet”*. The estimated positions are predicated on the assumption, from which the trajectory of the bullet was calculated, that Mr Naitoko was sitting upright and facing forward. If Mr Naitoko had been turned slightly at the time, the position of the van would be correspondingly different from that shown. Uncertainty about the movements of Officer 84 and the two vehicles also requires the depicted scenario to be treated with caution. There is however no doubt that Mr Naitoko was in the line of fire when the third shot was taken.
163. Officer 84 has no recollection of actually firing the third shot.¹⁸ In a statement to police six days after the incident the officer stated: *“I know I fired two shots. I cannot completely rule out the possibility that I fired three shots. If I fired three it is news to me. But I believe I only fired two.”* Subsequently, in a statement to police on 23 April 2009, the officer said:

“The fact that I am responsible for the death is a complete surprise... I still find it hard to believe that I fired the fatal shot.

¹⁷ ESR tests found that shells ejected from Officer 84’s rifle averaged a distance of about 4 metres rearwards and to the right of the weapon’s ejection port.

¹⁸ See paragraphs 431-434 for a discussion of the effects that stress can have on a person’s memory.

Even though I don't recall taking the third shot, I do believe that any shot taken until the offender was apprehended was justified. The risk that the offender posed was immediate and very serious until he was in police custody."

164. When giving evidence at the inquest into Mr Naitoko's death, Officer 84 said that although not remembering pulling the trigger, the circumstances when the third shot was fired were that Stephen McDonald was on the deck of the truck aiming at Officer 81.

Timeframe

165. The police investigation's estimation is that no less than 23 seconds and no more than 26 seconds elapsed between McDonald exiting the Nissan and his incapacitation on the rear of Mr Neville's truck.¹⁹
166. Officer 84 estimated that only 15 to 20 seconds elapsed between Officers 81 and 84 exiting the police vehicle and McDonald dropping in the back of the truck.

EVENTS AND INCIDENTS AFTER THE SHOOTING

Events immediately after the shooting

Restraining of Stephen McDonald

167. After the shots had been fired, Stephen McDonald fell to the floor of the truck and lay, face-down, with his head towards Officer 81. Officer 81 approached the truck while covering McDonald and ordered him not to move. The officer then moved McDonald's firearm, which was near his left hand, and continued to cover him with a rifle while other officers secured him.
168. Officer 84 saw McDonald drop, but could not see where he fell, as McDonald was concealed by the sides of the truck. The officer ran to the truck, climbed onto the deck and covered him with a rifle but could not see his hands (as they were under his body), and so nudged McDonald and repeatedly yelled at him to put his hands behind his back. McDonald did not respond. Officer 84 continued to cover McDonald until other officers secured him.
169. Officer 55 heard the shots, and saw Stephen McDonald collapse. The officer covered the deck of the truck with a Glock pistol and approached at the same time as Officers 81

¹⁹ This estimation is based on the reconstruction, witness accounts and an analysis of police radio traffic.

and 84, then saw Officer 81 pull McDonald's firearm away and Officer 84 climb onto the deck of the Isuzu truck. Officer 55 also climbed onto the deck of the truck and secured McDonald with plastic handcuffs. McDonald resisted this and his arms were forcibly pulled from under his chest area. Officer 55 was then assisted by another constable and by Officer 87. Officer 55 later said that McDonald was struggling violently:

"I punched the back of his legs as he was kicking out and trying to get up. All the time I was yelling at him to stop struggling. He kept fighting and struggling. I gave him two short knee jabs to his lower rib area and told him to stop moving. I told him he was under arrest."

The discovery of Mr Naitoko

170. While Stephen McDonald was being secured by police officers on the deck of the Isuzu truck, Officer W1 saw a Subaru Forester come to a stop in the right-hand city-bound lane. The white Toyota van behind it then lurched forward and crashed into the back of the Subaru. Officer W1 saw Mr Naitoko at the wheel of the van, and from a statement the officer made later it seems clear that Mr Naitoko was already in extremis.
171. Officer W1 did not however know that Mr Naitoko had been shot and thought he had gone into shock from the collision with the Subaru. He called for assistance from another constable and went to the driver's door of the van. He reached in through the open window and felt for Mr Naitoko's pulse. He then opened the van door and noticed blood on Mr Naitoko's shirt. He applied pressure to the wound.
172. Another constable also went to the driver's door and saw that Mr Naitoko's eyes were open and that he was staring straight ahead and shaking. He struck Mr Naitoko on the shoulder to try to get a response.
173. Officer 77, after reporting to the AOS commander that Stephen McDonald had been secured, also noticed Mr Naitoko, who was slumped over and bleeding from the left upper chest area. The officer opened the passenger's door of the van, lifted up Mr Naitoko's shirt and found a severe wound. Officer 77 told Officer W1 to continue applying pressure to the wound. A field dressing was then placed over the wound and pressure reapplied. Officer 77 felt for and found a weak pulse under Mr Naitoko's jaw.
174. The officers then moved Mr Naitoko onto the floor of the van and rendered further first aid, holding his head, elevating his feet, and continuing to apply pressure bandages to his wound until the arrival of the St John Ambulance Specialist Emergency Response Team (SERT) officers, who had responded to the AOS callout and followed the pursuit.²⁰

²⁰ SERT officers train with the AOS and respond to urgent armed offender callouts.

175. When the SERT paramedics arrived at the scene, they saw police officers attending to Mr Naitoko who was lying inside the back of the white Toyota van. While one paramedic attended to Mr Naitoko, the other went to their vehicle for an equipment bag – however by then Mr Naitoko was deceased.
176. The paramedics attached a monitor/defibrillator to Mr Naitoko to check for any electrical activity of the heart. No signs of heart activity were detected. Checks were performed for the next five minutes.
177. Officer 84 was talking with the AOS commander when one of the paramedics advised that Mr Naitoko was deceased. Officer 84 later said: *“At this stage I had no idea about the white van or that it was even there.”*
178. Officer 84 also stated:

“I had mixed emotions. My heart sank. I felt terrible and thought it was the offender who shot him. I know where my weapon was pointed and where I was aiming when I pulled the trigger. Someone indicated where the van was and I couldn’t see how either of us ([Officer 81] or I) could have been responsible. I thought I hadn’t done my job properly as the offender had killed the guy before we locked him up.”

Significant times

2.04pm	Officers render first aid to Mr Naitoko.
	NorthComms advised that civilian has been shot.
2.05pm	NorthComms advised that ambulance required for civilian.
	NorthComms advised to get ambulance for gunshot wound victim.
2.08pm	St John (SERT) paramedics recorded as being on-site.

Medical treatment for Stephen McDonald and Mr Neville

179. Mr Neville was taken to a police vehicle and examined by an ambulance officer. His injuries were not considered life threatening but he was taken to Auckland City Hospital.
180. Stephen McDonald was handcuffed in the rear of a police vehicle and taken to the Henderson police station, arriving there at 2.25pm. At 2.58pm, an interviewing officer was appointed. Gunshot residue samples were obtained from him and his clothing was seized. His injuries were noted and photographed. A doctor was called to examine him but when, by 5.25pm, the doctor had not arrived, McDonald was taken to a medical centre where he was examined, x-rayed, had shrapnel fragments removed, and had blood and urine samples taken. At 8.33pm, he was transported to Auckland City Hospital, arriving there at 8.50pm.

181. Stephen McDonald told the medical staff that:
- i) He had injected two half-gram doses of methamphetamine that day.
 - ii) He was in a police chase which was stopped on the motorway and he crashed the car.
 - iii) He then jumped over the barrier and stopped a truck.
 - iv) The truck went to drive around him but he jumped on the flat deck of the truck and the AOS was there.
 - v) He felt a burning sensation and thought that he had been shot.
182. When police subsequently interviewed McDonald, he said that he did not recall any of the incidents prior to his arrest on the back of the truck. He stated that he had not eaten or slept for days, and was heavily under the influence of various drugs including methamphetamine and cannabis.

Post-incident events

Securing the scene

183. The AOS commander arrived at the scene at 2.07pm. He was approached by Officer 80 who told him that shots had been fired by squad members. The AOS commander then gathered the AOS staff, with the exception of Officer 77 who was assisting with Mr Naitoko.
184. The AOS commander then learned that Mr Naitoko was deceased but that it was unclear who had fired the fatal shot. He also learned that Officers 81 and 84 had both fired shots.
185. The AOS commander directed that the AOS members retain possession of their firearms until they returned to the squad room, and arranged for Officers 81 and 84 to be transported there by Officer 80. The AOS commander remained at the scene until he was relieved by the appointed operation commander.
186. The shell casings were found and secured, and their positions marked. The approximate locations of Officers 81 and 84 at the time the shots were fired were established during a scene reconstruction that was subsequently undertaken (see paragraph 220).
187. A senior sergeant arranged for traffic to be diverted to protect the scene, and then for the motorway to be closed.

Securing the police firearms

188. On return to the squad room, Officers 81 and 84 placed their Bushmaster rifles on a bench. The firearms were in the condition in which they had been after Officers 81 and 84 fired their shots, except that the safety catches had been applied.
189. The rifles issued to Officers 81 and 84 were semi-automatic Colt (model M4LE) rifles, also referred to as M4 or Bushmaster rifles.
190. The AOS commander awaited the arrival of the exhibits officer, then cleared the weapons, and removed the magazine, sling, Aimpoint® optical sight, pop sight and torch from both. This was done without consulting the Officer in Charge of the homicide investigation, and was contrary to police instructions (see paragraphs 250-252 and 273).
191. After Officer W1 had fired his Glock at Stephen McDonald, he holstered the weapon. He retained possession of that firearm until approached by a senior NCO, who made the weapon safe, secured it, and later handed it to the exhibits officer.

Debriefing of the AOS

192. When the AOS commander returned to the AOS squad room, the five squad members and Officer 55 were present and he commenced a debrief at 2.50pm. The AOS commander said that whilst debriefing AOS members is standard practice, he was aware:

“... shots had been fired therefore there were other protocols to follow including being sensitive to the integrity of the investigation to follow and not discussing who did what in specific detail as the interview process was to follow and I recognised the importance of not contaminating individual recollections by groups discussions.”

193. He also said:

“However, it was still important and necessary for me to ascertain sufficient information so that I could brief senior management on the situation and so that I could also be satisfied that staff had followed sound operational procedures.”

194. Officer 80 led the debrief, outlining the conduct of the response. Officer 81 then outlined the response by team 1.2 including an account of the shots fired by both Officers 81 and 84.
195. After the debrief, the AOS commander told the squad members to have some refreshments in the police cafeteria, and to then prepare job sheets.

196. Officer 84 later said that the squad members went to the police cafeteria and talked about the incident but did not discuss the shooting in any detail. They then went to an office set aside for them and, at separate desks, prepared their job sheets. They also spoke to a police welfare officer, a Police Association representative and a support person from the Special Tactics Group.
197. On Saturday 24 January 2009, the day after the shooting, the AOS commander became aware that the bullet which killed Mr Naitoko had been fired from a police weapon. The commander arranged for squad members and Police Association representatives to meet at his house, where he briefed them on this development.
198. This meeting was to broadly discuss what had happened and what would happen from that point on. The squad members were informed that statements would need to be taken, and the Police Association representatives indicated the support they could give squad members. There was little detail about the incident itself.
199. There was no formal detailed debrief of the AOS members who attended the incident. There was a debrief of NorthComms personnel immediately after the event; and the pursuit was debriefed and reviewed (see paragraph 249).

Interviews of Officer 81 and Officer 84

200. The formal interview of Officer 81 commenced at 12.15pm on 27 January 2009 and concluded, following three sessions, at 12.46pm on 30 January 2009.
201. The formal interview of Officer 84 commenced at 5.00pm on 27 January 2009 and concluded, following eight sessions, at 7.30pm on 3 February 2009. There was a subsequent police interview of this officer in April 2009.
202. Officers 81 and 84 were provided with copies of the job sheets of other squad members on Wednesday 28 January 2009, during the period over which interviews were taking place.
203. Officers 81 and 84 and other members of the AOS team attended a group session with a psychologist on 28 January 2009. Officers 81 and 84 also met with a psychologist for one-on-one sessions on 28 and 30 January 2009. These sessions occurred while the interviews were still taking place (see paragraphs 459-468).

Return to duty

204. The New Zealand Police *Trauma Policy* does not provide for a compulsory stand-down period following a traumatic incident. However officers directly involved in a fatal

shooting must not be re-deployed with a firearm until approved by their District Commander or, as in this case, the Commander AMCOS.²¹

205. Officers 81 and 84 were both given approval to return to their normal duties after their interviews were completed and after being deemed fit to do so by a psychologist. Officer 81 returned to normal duties and AOS availability on 30 January 2009, and Officer 84 did the same on 3 February 2009. Both attended an AOS callout on 3 February 2009.
206. On 11 February 2009 both officers attended and passed an AOS qualification shoot for the Glock pistol and M4 rifle.
207. It was not confirmed until 16 February 2010, following forensic examination, that the fatal shot had been fired by Officer 84. The officer was advised on that date, and received further counselling.

PERSONS INVOLVED

Halatau Naitoko

208. Halatau Naitoko was born on 17 November 1991 and was 17 years of age when he died. He lived with his family in Mangere East and worked as a courier driver. He was driving a white Toyota Hiace van when he was shot.

Pathologist's report

209. The pathologist who examined Mr Naitoko found that his death was directly caused by a gunshot wound to the chest.

Richard Stephen Neville

210. Richard Stephen Neville, a blacksmith of Glen Eden, was 30 years old at the time of this incident.
211. He suffered a number of small puncture wounds to his left arm and hand, and small puncture wounds in his chest and left side.

Stephen Hohepa McDonald

212. Stephen Hohepa McDonald was 50 years old at the time of this incident.

²¹ AMCOS stands for Auckland Metro Crime and Operations Support – a Police group that includes specialist units.

213. He sustained a penetrating wound to the lower right chest wall and laceration/abrasion to the left shoulder and left cheek. Multiple metallic fragments measuring up to 6mm in diameter were found within his chest wall.
214. McDonald had 180 previous convictions dating from August 1973 to December 2008 – for dishonesty, violence, escaping from custody, misuse of drugs, firearms and traffic offences. He has spent a considerable amount of time in prison.
215. At the time of this incident McDonald was a disqualified driver. On 3 December 2008, he had been disqualified from driving for a period of six months. He had been disqualified 18 times and had 15 convictions for driving while disqualified, as well as several convictions for driving under the influence of alcohol.

ENVIRONMENT

216. Throughout the three-phase police pursuit, the weather was fine and the roads were dry. All of the roads used during the pursuit except for the North Western Motorway are governed by 50 kph restrictions. For the first 1.4 kilometres of the motorway from Pitt Street the speed limit is 80 kph, and from there it becomes 100 kph.
217. Traffic volumes during the pursuit varied from minimal to extremely heavy. The pursuit traversed residential and commercial areas, shopping centres, school precincts, car park entrances, private driveways and intersections controlled by give way and stop signs. Other intersections were controlled by traffic lights.

POLICE INVESTIGATIONS AND REVIEWS

Police investigation of the shootings

218. Following the shootings, police carried out a homicide investigation into Mr Naitoko's death headed by Detective Inspector Peter Devoy from the Waikato Police district.

Scene examination and reconstruction

219. An initial scene examination was carried out by officers on-site at the time, and at 2.15pm a Serious Crash Unit (SCU) investigator arrived and began a detailed scene survey.²²

²² SCU investigator/analysts have specialist training in surveying vehicle crash and major incident scenes. The SCU officer prepared the scene plans referred to in this report.

220. On 12 February 2009, police and the ESR reconstructed the shooting scenario, setting out all vehicle positions, the central median barrier, the lane markings and other features, and incorporating measurements obtained from the original scene survey data. Authority representatives observed this reconstruction.

ESR reconstruction

221. Accepting that there are significant uncertainties around the sequence of events, the ESR described a probable scenario:

- i) The Subaru Forester, Mr Naitoko's white Toyota van and an Audi came to a stop in the two right-hand city-bound lanes as Stephen McDonald crossed into the city-bound side of the motorway.
- ii) McDonald stood to the side of the front of the Audi and appeared to fire across its bonnet.
- iii) Mr Neville's truck slowed as he approached alongside the Audi. McDonald moved to the passenger's side of the truck.
- iv) Officer 84 fired a shot which struck the windscreen of Mr Neville's truck.
- v) The truck moved forward and McDonald got on to the deck. Officer 84 fired a shot that struck the vertical bar behind the passenger's side of the cab. The bullet fragmented. Some fragments struck McDonald and two fragments continued on to strike Mr Naitoko's van.
- vi) The truck moved forward to about where it was finally positioned. Mr Neville left the truck. Officer 84 fired across the rear of the truck, missing McDonald and striking Mr Naitoko. Officer 81 fired a shot which entered through the side tray of the rear of the truck and struck the front deck but did not strike McDonald.
- vii) Mr Neville moved to the side of the Subaru Forester.
- viii) Mr Naitoko lost consciousness and his van moved forward, striking the Subaru and nudging it forward (see scene plans 1-3 and photographs 1 and 7 for the final positions of vehicles).

Ballistics

222. An ESR scientist examined the Nissan Skyline stolen by Stephen McDonald and found that a bullet had been fired from his firearm inside the vehicle. The bullet had made a hole in the rear window but had not passed through and was found in the vehicle.

223. A spent shell case was located in the driver's foot well of the Nissan and a live round was found in the front passenger's foot well.
224. A fired case was also found in the chamber of McDonald's firearm, indicating that the last shot, whenever fired, failed to eject the shell case from the weapon (see paragraphs 236-237).

Police Armoury inspection

225. The police armourer received the firearms used by Officers 81 and 84 for examination on 29 January 2009. When received at the armoury, their accoutrements, comprising sights, (both iron and electronic), slings, torches and magazines had been removed. Sound suppressors had not been fitted to the rifles during the incident. The missing accoutrements were delivered to the armourer later that evening.
226. The armourer's report stated: *"This is not normal practice with firearms which have been discharged during police shooting incidents and severely limits the testing able to be performed by the armoury."*
227. The removal of these accoutrements from the rifles was contrary to police instructions and was the subject of a police internal investigation, overseen by an Authority investigator pursuant to section 17(1) (c) of the Independent Police Conduct Authority Act 1988 (see paragraphs 250-252).
228. The magazine from Officer 84's rifle had a 20 round capacity and contained 17 live .223 Remington Power Lokt bullets. This is the current standard operational ammunition for both general duties and AOS rifles.
229. The magazine from Officer 81's rifle had a 30 round capacity and contained 30 live .223 Remington Power Lokt bullets. The base plate of this magazine was not correctly held by its retaining bends and it was possible to load 31 rounds.
230. Both of the officers' rifles were fitted with Aimpoint® Reflex Sights. These sights are described by the makers in the following way:²³

"Rugged precision electronic optical red dot sights developed for civilian, military and law enforcement application. Aimpoint are designed for the 'two eyes open' method of sighting, which greatly enhances situational awareness and target acquisition speed. Thanks to the parallax-free design, the dot follows the movement of the user's eye

²³ Aimpoint® User Manual.

while remaining fixed on the target, eliminating any need for centering. Further, the sight allows for unlimited eye-relief."

231. The Aimpoint® sights had been placed on the mounting area of the rifles, termed a Picatinny Rail. This is a mounting system, integral to the firearm, and in most cases the sight can be removed and replaced on the rail with little or no effect on the rifle's point of impact, provided the same position on the rail is used.
232. If the sight is not replaced in the originally selected position and zeroed by the operator the fall of shot can be affected. Because the sights had been removed, the armourer considered it prudent to return the rifles, sights and accoutrements to have Officers 81 and 84 reconfigure the firearms to the best of their ability. This was completed on 29 January 2009 and the firearms, with accoutrements, were returned to the armourer.
233. Because the accoutrements had been removed and replaced, the point of aim and point of impact findings were based on the positions of the sights as reconfigured by Officers 81 and 84.
234. The police armourer concluded:

"The range at which this incident occurred is understood to have been 15 metres. Given the short range over which these test firings have been conducted the variations in fall of shot appears relatively insignificant."

235. The armourer found no mechanical faults which would account for an accidental discharge of either rifle.
236. The armourer also examined Stephen McDonald's firearm, a .22-calibre Ruger semi-automatic rifle. The rifle's barrel had been sawn down and its butt-stock refashioned into a pistol grip. The firearm had been shortened to an overall length of 171 millimetres which, for the purposes of the Arms Act 1983, is considered a pistol.
237. Due to the shortened barrel, the amount of explosive pressure available to cycle the mechanism of this weapon was decreased and affected its reliable operation. During test firing it occasionally failed to eject the expended case, necessitating the manual cocking of the weapon.

Toxicology

238. Analysis of Stephen McDonald's blood and urine found evidence of cannabis, methamphetamine, tramadol, methadone, metoclopramide, morphine, diazepam, clonazepam and nitrazepam. Given the number of drugs, all of which have complex effects on the body, the forensic toxicologist could not say what the combined effect would be. No alcohol was detected.

239. Mr Naitoko's blood was examined for the presence of drugs and alcohol. None were found.
240. There was no examination of any police officers for the presence of alcohol or drugs in their blood or urine. When interviewed, Officers 81 and 84 said that they were not taking any medication and had not consumed alcohol in the 48 hours prior to the incident.
241. Police instructions provide that no member of the police who is armed, or may be required to be armed while carrying out an assignment, shall consume intoxicating liquor within a reasonable period of time before commencing duty or during his period of duty. This includes while on AOS standby.

Consideration of criminal liability

Stephen McDonald

242. Police sought an independent legal opinion from a Crown Solicitor as to whether Stephen McDonald was criminally culpable for the murder or manslaughter of Mr Naitoko.
243. On the basis of the Crown Solicitor's advice, no charges were brought against Stephen McDonald for either the murder or manslaughter of Mr Naitoko.

Officers 81 and 84

244. A legal opinion was also provided by a Senior Police Legal Advisor, addressing the issue of culpability of Officers 81 and 84.
245. In relation to Officer 84, potential liability for the first two shots fired was considered under both the Arms Act 1983 and the Crimes Act 1961 and concerned the discharge of a firearm. In respect of the third and fatal shot fired by Officer 84, potential liability was considered under the culpable homicide provisions of the Crimes Act in light of the lawful justifications provided in sections 39 and 48 of the Crimes Act.
246. In relation to Officer 81, potential liability for the single shot fired was considered under the Arms Act 1983 and the Crimes Act 1961 and again concerned the discharge of a firearm.
247. The legal advisor concluded that there was not enough evidence to overcome a defence that sufficient justification existed for the discharge of the three shots fired by Officer 84 and the one shot fired by Officer 81, and that their response in firing those shots was both reasonable and necessary.

248. Police engaged a Queen’s Counsel to independently review the police legal advisor’s opinion. Counsel was of the view that the opinion was correct in its analyses and conclusions.

Police review of the incident

249. Police conducted a debrief and two comprehensive reviews of the management of this incident. The pursuit stages were reviewed by Waitemata District Road Policing Manager, Superintendent John Kelly. A further review (Operation Madison - Practice, Policy and Procedural Review) was undertaken on behalf of the Auckland District Commander.²⁴ These reviews resulted in a significant number of recommendations.²⁵

Police investigation into actions of AOS Commander and Officer W1

250. Police also conducted an investigation into the actions of the AOS commander, who dismantled the rifles used by Officers 81 and 84 (see paragraph 190); and the actions of Officer W1, who fired one round from his Glock pistol at Stephen McDonald (see paragraph 113(v)).

251. The police investigation into the actions of the AOS commander concluded:

“[The officer] has clearly breached General Instruction F066 and instructions relating to procedures to be followed when someone has been shot by police. He has interfered with the firearms exhibits when the instructions clearly prohibit him from doing so.”

252. The investigation into this aspect of the incident recommended a Police Code of Conduct/employment investigation into the actions of the AOS commander, and that investigation was finalised in December 2009. Police instructions concerning the handling of firearms fired by police have since been clarified (see paragraph 274).

253. With regard to the shot fired by Officer W1, an opinion was obtained from a police legal advisor, which was also independently peer-reviewed by a Queen’s Counsel. The legal opinion was that a criminal case could not be considered. Officer W1 was however the subject of a Police Code of Conduct enquiry which found: *“That whilst the actions of W1 do not constitute misconduct, they do warrant an informal intervention.”* In consequence Officer W1 was counselled on firearms strategy and was not permitted to be issued with a firearm until he had successfully completed firearms training on 2 March 2009.

²⁴ Operation Madison was the Police’s name for this incident.

²⁵ Where pertinent, these recommendations have been taken into account in the development of this report.

SENTENCING OF STEPHEN MCDONALD

254. Stephen McDonald pleaded guilty on 14 July 2009 to 23 charges relating to his actions on 23 January 2009. On 22 September 2009 he appeared in the Auckland High Court and was sentenced to 13 years imprisonment for the offences of: using a firearm against a law enforcement officer (nine counts); carrying a firearm with intent; aggravated burglary (three counts); demanding with intent to steal; unlawful possession of a firearm (representative); commission of a crime with a firearm; conversion of a motor vehicle (two counts); unlawfully getting into a motor vehicle (two counts); failing to stop (representative); dangerous driving (representative); and driving whilst forbidden (representative).

CORONER'S INQUEST

255. Coroner Gordon Matenga's Inquiry into the death of Halatau Naitoko commenced in Auckland on 23 November 2009. It was partly heard during the week of 1-5 March 2010 and was completed over 20 and 21 December 2010. The Coroner's Findings were released publicly on 23 August 2011.
256. The essence of Coroner Matenga's Findings was that Mr Naitoko died as a result of a gunshot wound to the chest, having been accidentally shot by police. Having briefly outlined in his Findings the circumstances leading to AOS officers confronting Stephen McDonald, Coroner Matenga said:²⁶

"Two members of the Auckland Armed Offenders Squad followed McDonald to apprehend him. When McDonald pointed his weapon at a member of the public and the officers, four shots were fired. McDonald was injured and apprehended. One of the shots fired by the AOS officers missed the intended target and hit Mr Naitoko who had driven into the scene at the time. The bullet struck him in the chest and he died as a result. His death was accidental."

257. It is not necessary in this report to reiterate Coroner Matenga's Findings in full; however certain of his observations have particular relevance to the Authority's investigation.
258. Coroner Matenga found, when delivering his Findings on the actions of Officers 81 and 84:²⁷

²⁶ Inquest into the death of Halatau Kianamanu Naitoko – Findings of Coroner Gordon Matenga (22 August 2011), para 56.

²⁷ Inquest into the death of Halatau Kianamanu Naitoko – Findings of Coroner Gordon Matenga (22 August 2011), paras 45-46.

“... I accept that [Officers 81 and 84] correctly recognised the risk that McDonald posed to the public and more particularly to other users of the motorway so therefore took immediate steps to engage the offender and neutralise the risk to the public. In my assessment of the evidence, [Officer 81] has appreciated the danger to others if [Officer 81] was forced into the position of having to fire upon McDonald and so moved to a position to minimise that danger. [Officer 84] did not in my view have the same degree of appreciation of the dangers to others. ... I appreciate that up until the firing of the third and fourth shots by [Officers 84 and 81], the truck was moving slowly forward. Nevertheless, it is clear to me from the evidence that [Officer 84] had not appreciated that the white Toyota, containing Mr Naitoko and providing cover for [Officer 55], was in that position....

Whilst I am being critical of [Officer 84's] awareness of the situation, I do not criticise the actions taken by either officer. ... In my view the actions of [Officers 81 and 84] were justified.”

259. Coroner Matenga, commenting on the accuracy of the shots fired by Officers 81 and 84, and the pairing of those officers, who were the least experienced of the responding AOS members in terms of length of service as members of the AOS, stated:²⁸

“What is of greater concern to me, after careful consideration of all the evidence including the explanations of [Officers 81 and 84], is the fact that [Officers 81 and 84] essentially missed their intended target with four shots from reasonably close range of between 7 and 9 metres. When this is combined with the failure of [Officer 84] to appreciate what was within the line of fire indicates to me a need for further training and an acknowledgement by AOS that experience matters.”

260. Coroner Matenga further observed that Officers 81 and 84 were paired on the basis of which officers in the AOS squad room were ready to deploy, and that the uniqueness of the situation should have caused the relative experience of squad members to be taken into account when AOS teams were being formed.
261. Coroner Matenga made a number of recommendations. They are not repeated here but several find resonance in the Authority's recommendations at the end of this report.

²⁸ Inquest into the death of Halatau Kianamanu Naitoko – Findings of Coroner Gordon Matenga (22 August 2011), para 48.



Applicable Laws and Policies

INDEPENDENT POLICE CONDUCT AUTHORITY

USE OF FIREARMS BY POLICE

Crimes Act 1961

262. Section 39 of the Crimes Act 1961 provides for law enforcement officers to use force in the execution of their duties, such as arrests and the enforcement of warrants. Specifically, it provides for officers to use *“such force as may be necessary to overcome any force used in resisting”*, and applies only if the arrest or process *“cannot be executed by reasonable means in a less violent manner”*.
263. Section 40 of the Crimes Act provides for officers to also use force to prevent the escape of any person *“if he takes flight in order to avoid arrest”*, unless the escape can be prevented by reasonable means in a less violent manner.
264. Section 62 of the Crimes Act renders law enforcement officers criminally liable for any excessive use of force.
265. Section 48 of the Crimes Act 1961 provides that:

“Everyone is justified in using, in the defence of himself or another, such force as, in the circumstances as he believes them to be, it is reasonable to use.”

Police policies

266. At the time of this incident (January 2009), the Crimes Act provisions were mirrored in the police General Instructions, which restricted the circumstances in which police could issue, carry and discharge firearms.²⁹
267. General Instruction (GI) F061 prohibits the use of firearms by police except:

²⁹ All of these General Instructions (GIs) apart from GI F061 have now been incorporated into the *Police Firearms* chapter of the Police Manual.

- “(a) to DEFEND THEMSELVES OR OTHERS (Section 48 of the Crimes Act 1961) if they fear death or grievous bodily harm to themselves or others, and they cannot reasonably protect themselves or others in a less violent manner;
- (b) to ARREST an offender (Section 39 of the Crimes Act 1961) if: they believe on reasonable grounds that the offender poses a threat of death or grievous bodily harm in resisting his arrest; AND the arrest cannot be carried out in a less violent manner AND the arrest cannot be delayed without danger to others;
- (c) to PREVENT THE ESCAPE of an offender (section 40 of the Crimes Act 1961) if: it is believed 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 he takes flight to avoid arrest, or escapes after his arrest AND such flight or escape cannot reasonably be prevented in a less violent manner.”

268. GI F061(3) directs that an offender is not to be shot:

- “(a) until he or she has first been called upon to surrender, unless in the circumstances it is impracticable and unsafe to do so;
- AND
- (b) it is clear that he or she cannot be disarmed or arrested without first being shot;
- AND
- (c) in the circumstances further delay in apprehending him or her would be dangerous or impracticable.”

269. GI F060(6) authorised the issue of firearms to members in any of the circumstances prescribed in F061 above, and GI F066 authorised the deliberate discharging of a firearm in any of the circumstances described in F061.

Basic principles

270. The *Use of Firearms by Police* policy set out the basic principles for police responding to an armed incident:³⁰

³⁰ These principles are now listed in the *Police Firearms: Firing at Offenders* chapter of the Police Manual.

“When dealing with an armed suspect, or a suspect believed to be armed, observe the following basic principles:

- (a) It is better to take the matter too seriously than too lightly;*
- (b) Treat all armed suspects, or suspects believed to be armed, as dangerous and hostile unless you have definite evidence to the contrary;*
- (c) Every effort must be made to prevent casualties;*
- (d) Caution is not cowardice. When the actions of the suspect permit, time should be taken to cordon the area, and the wait and appeal role should be adopted in order to negotiate a surrender. Police should never go unnecessarily into danger. However, if the suspect is acting in a way that makes casualties likely, police must act immediately to prevent this;*
- (e) Any force used should be the minimum necessary to achieve the objective, and reasonable under the circumstances;*
- (f) No AOS member may take part in any activity in an AOS capacity without the authority of the O/C AOS, except in an emergency.”*

Police Manual

- 271. Further guidance is provided in the Police Manual, which reinforces the relevant provisions of the Crimes Act 1961 and reminds staff that there is no justification for shooting a person who is not at that moment a threat to life.
- 272. The Manual also sets out approaches for responding to violent offenders, including tactics to be used. In essence, it outlines an approach in which such offenders should be contained if possible using a “wait and appeal” approach. However, if the offender is acting in a way that makes casualties likely, police must act to prevent this.

Securing firearms

- 273. F066 provided that when someone is shot by a member of the AOS, the officer in charge of the AOS must, inter alia, ensure that all weapons are safe, including the weapons used. Any weapon used should merely be opened and kept until it can be examined.
- 274. The *Police Firearms: Discharge of Police firearms in operational situations* section of the Police Manual (as amended on 21 October 2009) now provides: *“On no account is the firearm to be altered or items/accessories removed. It must be secured in the state at which it was at the time of firing.”*

COMMAND AND CONTROL

275. The National Protocol for Interaction between Communication Centre and Field Staff in place at the time this incident took place had been implemented on 1 July 2007.³¹
276. The Protocol provided that the ability of communication centres to manage events and resources efficiently requires an up to date and accurate knowledge by the dispatcher of the location and status of all units. In order for the CAD (Computer Assisted Dispatch) system to maintain an accurate picture of unit availability, mandatory logon, logoff and status reporting protocols are required. All users are required to identify themselves using approved call signs.
277. The 2007 Protocol also provided that the initial command of all incidents reported to the communications centre is the responsibility of the communications centre shift commander. During the period from first notification to the communications centre until the role of incident controller is formally passed to a suitable member of police in the district, the communications centre will fulfil the role of incident controller.
278. The Protocol stated:

“For the avoidance of doubt and confusion it is important that the command responsibility for the management of events is clearly identified, and the procedure for transferring command between Communication Centres and field staff is documented and understood by all parties.”

279. It required that when a suitable member from the district is able and willing to assume the role of incident controller, the command responsibility will be transferred from the communications centre to the district member and the transfer must be recorded in the event record.
280. And, when a dispatcher formally appoints an incident controller, they will at the same time, assign a command call sign. For example:

“HQA3, you are incident controller. Adopt the call sign Sussex Command. Acknowledge.”

HQA3 will respond:

“Sussex command. Roger, out.”

³¹ The National Protocol for Interaction between Communication Centre and Field Staff was revised as Radio Protocols and published on 7 May 2009.

281. The appointment of the incident controller was required to be entered into the event record to show that the incident controller had been appointed and when.
282. By way of comparison, the 2009 revision of the National Protocol provides that in some instances the shift commander may retain command responsibility, or take command responsibility back from a previously appointed district incident controller.
283. The 2009 Protocol requires that the dispatcher (under instruction from the shift commander) must notify the nominated field unit that they are appointed as the incident controller designate but that incident control will remain with the communication centre until they have arrived at the scene, Safe Forward Point or other place; been fully briefed; and formulated their tactical response plan. The field unit must then advise that they are ready to assume incident control, at which time the formal handover will occur (see paragraph 280).

CONDUCT OF PURSUITS

Legislative authority for pursuits

284. Under the Land Transport Act 1988, the police are empowered to stop vehicles for traffic enforcement purposes. Under the Crimes Act 1961, the police are empowered to stop vehicles in order to conduct a statutory search or when there are reasonable grounds to believe that an occupant of the vehicle is unlawfully at large or has committed an offence punishable by imprisonment. Where such a vehicle fails to stop, the police may begin a pursuit.

Police pursuit policy

285. On 18 October 2010, New Zealand Police introduced the *Fleeing Driver* policy which replaced the pursuit policy that was in force during this incident. The Authority has undertaken its investigation and makes its findings and recommendations based on the policies and practices that were in place at the time of the pursuit (January 2009).

Definition

286. A pursuit occurs when (i) the driver of a vehicle has been signalled by police to stop, (ii) the driver fails to stop and attempts to evade apprehension, and (iii) police take action to apprehend the driver.

Overriding principle

287. Under the police pursuit policy, the overriding principle for conduct and management of pursuits is: *“Public and staff safety takes precedence over the immediate apprehension of the offender.”*

Risk assessment

288. Under the policy that applied at the time of the pursuit, before commencing a pursuit an officer was required to first undertake a risk assessment. This involved consideration of the speed and other behaviour of the offending vehicle, traffic and weather conditions, the identity and other characteristics of the people in the pursued vehicle, the environment, and the capabilities of the police driver and vehicle. The officer must then determine: *“Whether the immediate need to effect immediate apprehension of the offender is outweighed by the risks posed by a pursuit to the public, the occupants of the pursued vehicle, or police.”*
289. Throughout a pursuit, police must continue to assess the risks involved and they must abandon it if the risks to safety outweigh the immediate need to apprehend the offender.

Warning

290. Under the policy, when a pursuit commences the communications centre is required to give the pursuing officers the following warning: *“If there is any unjustified risk to any person you are to abandon pursuit immediately. Acknowledge?”* The officers must then acknowledge the warning.

Non-compliant vehicle stop

291. Clause 24 of the *Conduct and Management of Police Pursuits* policy prohibited staff from using the *“moving block technique”* – that is, the non-compliant vehicle stop. However, police General Instruction V002 granted an exemption to this for AOS and STG members on active AOS/STG duty, permitting them to conduct non-compliant vehicle stops if they have been trained to carry out such stops, if the stop has been authorised by an AOS or STG commander, and if there is no other practical method of containing a mobile armed offender or neutralising the threat.³²
292. The AOS standard operating procedure requires three vehicles and at least eight staff to carry out a non-compliant vehicle stop. However, as a contingency measure, AOS members practice this procedure using fewer vehicles and staff.

Other requirements of the pursuit policy

293. The policy also sets out requirements for the information to be provided to the nearest police communications centre, the roles and responsibilities of all staff involved, the tactics which may be used, and the procedures for abandoning and restarting pursuits.

³² This instruction is now part of the *Fleeing Driver* Policy that was introduced in October 2010.

294. Under the policy, the driver of a police vehicle has primary responsibility for the initiation, continuation and conduct of a pursuit; and the pursuit controller at the communications centre is responsible for coordinating the overall police response.

POST INCIDENT POLICIES

295. In January 2009, police had in place a *Post Lethal Force* policy which covered various issues, including interviewing and investigation requirements, confidentiality, and the welfare of officers involved in the use of deadly force.

296. In respect of the interviewing of staff involved in lethal force incidents, the policy provided:

“(1) The following considerations need to be taken into account ... when preparing interviews:

- (a) the need to conduct interviews while events are fresh in the witnesses’ minds;*
- (b) Standard Operating Procedures for similar incidents in which police are not involved;*
- (c) the availability of service organisation and legal support for staff being interviewed.*

(2) The following procedure is recommended for the staff involved:

- (a) a two hour lay off prior to interview;*
- (b) investigators then to have a brief interview with them;*
- (c) the following day detailed interviews take place”*

297. In terms of the welfare of the officers involved, the Post Lethal Force policy provided that: *“Incidents are to be treated on a case by case basis but the Trauma Policy ... must always be implemented.”*

298. The Trauma Policy is designed to provide officers with psychological support as required by *“the sometimes traumatic and disturbing nature of police work”*. The policy which applied at the time of these events provided:

*“The guiding principle of the Trauma Policy is the provision of a quick response to, and **confidential** support contact between members of Police and mental health professionals who provide such services. Support is defined as treatment and/or assessment for the purposes of treatment.*

...

6b) Mandatory Referrals

In certain cases members are required to be offered, and strongly encouraged to attend, a confidential post-incident debriefing as a matter of policy. Participation is voluntary. It should be clearly conveyed to staff that with certain events such an offer is a matter of policy, and that the consultation is confidential.

...

Such cases are characterised by the serious nature of the incidents concerned, and are mandatory in recognition of their inherent potential for later adverse reactions. These incidents include –

- *Use of Deadly Force...*
- *Accidental Death or Serious Injury of the Public... [emphasis in original]."*

299. The *Post Lethal Force* policy also stated that:

"Staff directly involved in the application of force shall not be re-deployed with a firearm until approved for such by the District Commander ... in consultation with the O/C Squad and any health professional assigned to the case. This should not usually take longer than 24 hours...."

Policy developments since January 2009

300. In July 2010 a new version of the *Trauma Policy* was published as a chapter in the Police Manual, and in December 2010 the *Post Lethal Force* policy was replaced by a chapter in the Police Manual titled *Police involvement in deaths and serious injuries*.

301. Under the new version of the *Trauma Policy*, all officers involved in the discharge of a lethal weapon resulting in injury or death must be referred to a psychologist for a one-on-one assessment and/or debrief before being cleared fit to return to duties.

302. The new Police Manual chapter *Police involvement in deaths and serious injuries* sets out a recommended procedure for interviewing officers involved in the use of lethal force. The chapter provides: *"Investigators must also ensure employees [i.e. the officers involved in the incident] are directed not to discuss the incident with each other as this can corrupt their own accounts."* The chapter also states:

*"Obtain **brief** details initially of what has occurred from the employees involved ... Take care not to contaminate the employee's recall of the events as they will be interviewed on a more substantive basis later.*

...

Conduct the [formal] interview at a time that balances the need to conduct the interview as near to the incident as possible and the employee's welfare. This could be several hours after the incident or much later after the employee has had a chance to sleep and compose themselves."



The Authority's Investigation

INDEPENDENT POLICE CONDUCT AUTHORITY

THE AUTHORITY'S ROLE

303. Pursuant to the Independent Police Conduct Authority Act 1998 (the Act), the Authority's functions are to:

- receive complaints alleging misconduct or neglect of duty by any police employee, or concerning any practice, policy or procedure of the police affecting the person or body of persons making the complaint; and to
- investigate, where it is satisfied there are reasonable grounds for doing so in the public interest, any incident 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.

304. Section 27(1) of the Act requires the Authority, on completion of its investigation, to form an opinion on whether any police decision, act, omission conduct, policy, practice or procedure was contrary to law, unreasonable, unjustified, unfair, or undesirable.

THE AUTHORITY'S INVESTIGATION

305. As required by section 13 of the Act, police notified the Authority of the shooting of Halatau Naitoko, Richard Neville and Stephen McDonald.

306. The Authority received the notification within an hour of the event and started an independent investigation pursuant to section 12(1)(b) of the Act. An Authority investigator attended the scene that day, and investigators later carried out a further scene examination and viewed the body of Mr Naitoko and the vehicles involved.

307. The Authority's investigation included a review of police interviews, forensics, the ESR reconstruction and legal opinions. The Authority's investigators conducted interviews with members of the AOS and other officers who attended the incident, as well as personnel from NorthComms and other police staff. The investigators were also present

at the police and ESR reconstruction, and attended the Inquest. They have maintained liaison with Mr Naitoko's family.

ISSUES CONSIDERED

308. The Authority considered the following issues:

- 1) the justification for, and conduct of, the pursuits;
- 2) whether command of the police operation was satisfactory, and whether the available resources were controlled effectively in order to contain Stephen McDonald, minimise the risk to safety and effect his apprehension;
- 3) whether police were justified in arming themselves in response to Stephen McDonald's activities, and whether they complied with all procedures for arming;
- 4) whether the AOS was notified and deployed as soon as practicable, and whether the number of AOS members who responded was adequate;
- 5) whether difficulties with AOS radio communications affected the police response;
- 6) whether the AOS decision to use a non-compliant vehicle stop was appropriate;
- 7) whether it was an tactically sound for Officers 81 and 84 to pursue Stephen McDonald on foot;
- 8) whether Officers 84 and 81 were justified in shooting at Stephen McDonald and, if so, whether the number of shots fired was justified;
- 9) why none of the shots struck Stephen McDonald directly;
- 10) why Officer 84 failed to identify Mr Naitoko's van in the line of fire;
- 11) why the officers' memories of the shooting were inconsistent;
- 12) whether other tactical options were available to Officers 81 and 84;
- 13) whether all reasonable assistance was given to Halatau Naitoko, Richard Neville and Stephen McDonald after they were shot; and
- 14) whether police's post incident actions were appropriate.



The Authority's Findings

INDEPENDENT POLICE CONDUCT AUTHORITY

EVENTS PRIOR TO THE NORTH WESTERN MOTORWAY

Issue 1: Was the pursuit justified and conducted according to policy?

309. The requirements of the police pursuit policy are set out in paragraphs 284-294.

First phase

310. The pursuit began after two constables sought to stop the Toyota driven by Ms Mann, on the (correct) suspicion that it had been stolen. Legally, the officers were not empowered under the Crimes Act 1961 or Land Transport Act 1988 to stop the vehicle nor to commence a pursuit on the basis of suspicion alone.

311. The officers commenced the pursuit without first carrying out a risk assessment as required under the policy. They did not provide NorthComms with the reason for the pursuit and were not asked for one. This phase of the pursuit lasted less than two minutes and there was little time for NorthComms to become involved. Information about speed, manner of driving and other risk factors were provided by Officer B without prompting.

312. The required pursuit warning was delivered by NorthComms and acknowledged by Officer B (see paragraph 9).

Second and third phases

313. The second and third phases of the pursuit occurred after Stephen McDonald had seized vehicles while armed, and had attempted to evade arrest while presenting and firing a firearm at police. Commencement of the pursuit in both phases was justified under the Crimes Act 1961 and, based on the risk posed by McDonald, was in accordance with policy.

314. During these phases, NorthComms did not issue the required warning – that the pursuit must be abandoned if the risks to safety outweighed the immediate need to apprehend the offender.
315. There were numerous breaches of radio discipline, which contributed to the NorthComms shift commander (who was the pursuit controller) not knowing how many police vehicles were involved and which of their crews were armed. NorthComms did not proactively seek this information.
316. At 1.52pm, the NorthComms dispatcher (on behalf of the NorthComms shift commander) directed all patrols to maintain “*radio silence unless urgent while Eagle is giving commentary*”. This was a sound instruction. As a consequence, however, although the Eagle observer provided information about McDonald’s movements, the lead pursuit units had relevant information that was not passed on – such as the speed of the pursuit and other information relevant to the pursuit controller’s ongoing risk assessment. The result was that NorthComms did not have all the available information for making sound decisions about the control of the pursuit and tactics for responding effectively to McDonald’s actions.
317. As the pursuit progressed, McDonald’s driving became more reckless. The shift commander’s view was that continuing the pursuit was justified because, although there were risks to public safety, these were outweighed by the risks associated with not maintaining contact with an armed offender.
318. A contrary view was expressed by Mr Neville Matthews, a former senior police officer with considerable command experience.³³ Mr Matthews was of the view that by the early stages of the third phase, McDonald’s increasingly dangerous driving should have caused the pursuit to be abandoned. Mr Matthews considered that, with surveillance continued by Eagle, abandonment may have resulted in McDonald going to ground, thus reducing the risk to the public and allowing police to consider other tactics for apprehending him.
319. The Authority carefully considered and respects Mr Matthews’ opinion; and agrees that abandonment was a valid option. However, the Authority is of the view that, on balance, continuing the pursuit to maintain contact was safer than risking losing such a dangerous and unpredictable offender – there being no guarantee that he could be apprehended safely later.

³³ Neville Matthews was engaged by Coroner Matenga to report on aspects of the evidence presented at the Inquest.

320. There should, however, have been clearly logged and communicated decisions and tactical assessments of the situation, and directions on continuation, particularly when Stephen McDonald's identity was established (see paragraph 73), and again when he collided with another vehicle at the corner of Sandringham and New North Roads (see paragraph 81).
321. The speeds of police vehicles at times exceeded 100 kph in 50 kph areas. The Authority accepts there was some justification for this as a consequence of the particular circumstances. Despite Eagle's ability to provide commentary, there was a need for some ground units to be positioned to respond quickly to the offender's movements.
322. An unknown number of responding units did not log into the communications system and NorthComms was not aware of their participation and availability.
323. The number of vehicles in direct pursuit, reported by observers to have been around 20, and the tactical deployment of others, was not under the effective control of the pursuit controller.

FINDINGS

Officers A and B did not have legal justification for commencing the first phase of the pursuit and did not initially comply with the pursuit policy; however they then complied with policy in relation to communication and risk assessments.

Continuing the pursuit through phases 2 and 3 was justified.

NorthComms did not establish and maintain firm command and control over the pursuit.

Issue 2: Was there clear command of the police operation throughout its phases, and were the available resources controlled effectively in order to contain Stephen McDonald, minimise the risk to safety and effect his apprehension?

324. Command and control is widely and variously described in the context of military and police operations. In essence, command is the exercise of authority and direction by a properly designated commander for the purpose of accomplishing a task – and includes responsibility for effectively controlling the available resources for that purpose.
325. In the New Zealand Police context (as noted in paragraph 277) incident command rests with the communications centre shift commander until a suitable incident controller is appointed in the field. This is sound practice, particularly when an offender is mobile and cannot be readily contained. During this event, however, NorthComms did not make it clear that command rested with the shift commander and that Eagle was under NorthComms' control. When McDonald was on foot (between the pursuit phases) there was no indication from NorthComms that a specified officer in the field should take control of forward activities.

326. This event quickly turned from a pursuit into a major critical incident of which pursuit was a part. Stephen McDonald's actions demonstrated his desperation. He was prepared to use a firearm, take great risks, and threaten police and members of the public in order to evade apprehension. The NorthComms shift commander's initial strategy was to cordon and contain Stephen McDonald. However, when McDonald escaped in the Hyundai, the plan changed to one of staying in contact with the vehicle until the AOS was in a position to take effective action.
327. In addition to the lack of information available to NorthComms – regarding which units were responding, which were in direct pursuit, and which of them were armed – there was a conflict in perception among some police staff – between Eagle as an aid to control exercised by NorthComms, and control actually being exercised from Eagle. Some understood that when Eagle is deployed, an incident is controlled from it. On this occasion the Eagle observer believed he had assumed that role from the time he was asked by NorthComms to set up cordons; although he was unable to properly fulfil it without a second experienced crew member (see paragraph 106).
328. Officer C had been advised that he would be the incident controller and believed he had been so appointed until, in his view, incident control passed to Eagle. The shift commander's intent however, was not to appoint Officer C as incident controller at that time, but rather to "sow the seed" in Officer C's mind that he would become incident controller and should start preparing for that role.
329. In order to exercise firm command and control in an operation of this nature it should have been clearly reinforced by NorthComms, using the shift commander's allocated call sign (which should have been used throughout this incident but was not), that the shift commander was in command. The situation regarding the appointment of an incident controller in the field should also have been made absolutely clear. When an offender goes to ground in such a fluid situation, senior staff in the field are expected to use initiative and take control of forward resources; however this can be significantly enabled by the appointment of a forward commander to deal with the particular situation.
330. In the context of Eagle's role, the exercise of command and control from it by a suitably qualified commander could potentially have been viable in the circumstances of this operation – providing such a structure had been planned and practiced, and there was an opportunity to activate it.
331. In order to position tactically to deal with a mobile offender, the AOS may take responsibility for the control of a pursuit. However, although the AOS had been deployed, the circumstances were such that neither the AOS commander nor his teams were in a position to assume that responsibility, and command and control of the operation properly remained with NorthComms.

332. The AOS commander and AOS teams made decisions about how to stop and arrest McDonald without the NorthComms shift commander's input or knowledge. The shift commander was disadvantaged by not knowing AOS numbers, teams or proposed tactics.
333. The shift commander was under considerable pressure. It was not until 1.35pm that another commissioned officer (who had arrived to begin the next shift) assisted the shift commander by dealing with the media and taking responsibility for all other NorthComms operations.

Option of using road spikes

334. NorthComms instructed patrols not to use road spikes, because stopping Stephen McDonald in an urban area may have put the public in danger. Rather, as noted in paragraphs 31 and 53, the plan was to contain the offender.
335. The review by Superintendent Kelly supported the decision to keep McDonald mobile and not use spikes (see paragraph 249).
336. Spikes were nevertheless deployed on two occasions (see paragraphs 44 and 71), and on a third occasion (see paragraph 44) an officer prepared to use spikes. This was not known to NorthComms and was contrary to NorthComms' directives and to policy in respect of the use of road spikes.
337. Given the information available to the NorthComms shift commander, the decision not to use spikes was reasonable. However, had the shift commander been aware of the resources available to him in Pine Street (see paragraphs 54 and 341), the use of spikes in that situation may have been a valid tactical option.

Glendale-Glengarry Road and Pine Street

338. The basic principles for police when dealing with armed offenders are set out in paragraph 270.
339. When Stephen McDonald first confronted police in the Glendale-Glengarry Road area, only one armed officer was in the immediate vicinity. Unarmed officers followed the basic principles and sought to contain the offender without directly confronting him.
340. There was little opportunity for armed police to contain McDonald in the Glendale-Glengarry Road area. On one occasion, McDonald drove towards a police road block. These officers were in unmarked cars, were unarmed and were not wearing ballistic armour; so they let McDonald drive through. In the circumstances their actions were sensible.

341. In Pine Street, a dog handler and an armed officer did confront McDonald briefly, but he was able to take another vehicle and drive through the cordon point. At that time, four senior non-commissioned officers, 19 armed staff, three dog handlers, and at least three vehicles with road spikes were in the vicinity. Although the situation was fast-moving, some armed cordon points had been established and there was an opportunity to contain McDonald there.
342. That containment was not achieved at that point reflected:
- i) that there was limited time available to achieve effective containment (six minutes);
 - ii) that nobody was clearly in command and exercising effective overall control of police resources, either at NorthComms or in the field;
 - iii) a lack of awareness of the resources available;
 - iv) poor radio discipline; and
 - v) an approach that relied on eventual AOS action, rather than having non-specialist officers confront McDonald.

Non-compliant vehicle stop

343. A non-compliant vehicle stop was not a permitted tactical option except by the AOS. There is therefore a question about what tactics were available had it been necessary to prevent McDonald driving into a high risk area such as the city's downtown shopping streets.
344. In his review, Superintendent Kelly recommended that some method of stopping non-compliant drivers should be available to general duties staff. Whilst sympathetic to that view, the Authority recognises the dilemma facing police with regard to safely managing vehicle stops by 'non-expert' officers.

FINDINGS

Police resources should have been controlled more effectively, particularly in Pine Street.

The attempted use of road spikes was contrary to NorthComms instructions and to policy.

AOS should have communicated information about their numbers and tactics to the NorthComms shift commander.

NorthComms should have removed any uncertainty and exercised firm command of the operation.

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

345. Under GI F060(6), police are justified in arming themselves if any of the circumstances set out in F061 exist – that is, in order to defend themselves or others, or to arrest an offender, or to prevent an escape when the offender poses a threat of death or grievous bodily harm and there are no less violent means available (see paragraphs 266-269).
346. The arming of general duties officers and the AOS was justified on the basis that Stephen McDonald was an armed, mobile offender who had fired at Eagle and had presented his firearm in order to evade arrest. The officers who responded were complying with the basic principles for dealing with an armed offender in accordance with policy (see paragraph 270).
347. Non-AOS officers either carried firearms in their vehicles or were issued with them at their stations. The Non-AOS staff were given fire orders as they were issued with weapons.
348. The AOS officers were deployed in their designated role and carried firearms specifically issued to them. The authority for them to carry firearms was inherent in the commander's direction that the squad be paged.
349. All AOS members had reasonable grounds to believe that when they encountered McDonald he would be armed and would pose a threat of death or grievous bodily harm to themselves or others.
350. Although no formal fire orders were given to AOS members, they were reminded that standard fire orders applied and they were fully conversant with the requirements. Additionally, having been told that they were dealing with an "active shooter", the officers were aware that they were likely to be required to take emergency action when contact was made with McDonald.
351. The training of all AOS members was current and they were authorised to carry the weapons with which they deployed.

FINDING

Both general duties and AOS officers were justified in arming themselves.

THE ARMED RESPONSE AND SHOOTING

Issue 4: Was the AOS notified and deployed as quickly as practicable, and was the number of AOS officers responding adequate?*Initial call*

352. NorthComms was first told that a weapon had been presented at 1.09pm, and this is recorded in the NorthComms event chronology. The fact that McDonald had presented the firearm was confirmed at 1.15pm. The AOS commander was informed at 1.26pm.
353. The NorthComms shift commander did not advise the AOS Commander at the first available opportunity (see paragraph 92). He believed that he had given an instruction to contact the AOS between 1.15pm and 1.21pm (see paragraph 91).
354. The NorthComms dispatcher for Auckland West said that the call to AOS occurred “*within minutes*” of communications switching to her channel (which occurred at 1.13pm), and before McDonald went into the first house and stole the Hyundai (which occurred at 1.30pm). She added:

“AOS was discussed when it was mentioned that the reason why [the second phase of] the pursuit was originally initiated was because the unit had seen a firearm. Yeah and then I was told that when he was out on the street firing that AOS has been paged.”

355. In the Authority’s view there is no room for any doubt about procedures for notifying AOS. They should have been called more promptly.

Number responding

356. As explained in paragraph 94, six AOS staff were rostered on duty, none of whom was an NCO,³⁴ and five of those responded to the call out. The on-call AOS dog handler (Officer 55) also responded and directly joined the pursuit. Some staff were on annual leave (it was a holiday weekend), and the STG was on duty out of town. Under normal circumstances it would have been expected that at least 15 members would have responded.
357. There were fewer AOS members than is required under the AOS standard operating procedures for a non-compliant vehicle stop (see paragraph 292).

³⁴ See footnote 1 above for the definition of an NCO.

358. The AOS commander has said that there were sufficient AOS members to deal with this event. In the Authority's view the number available, together with the lack of an NCO, was insufficient for an operation of this nature in a metropolitan area, given the contingencies inherent in such an event – such as the incapacitation on this occasion of an AOS vehicle at a critical time (see paragraph 114).
359. This number of AOS members would also have been stretched to set up effective containment had McDonald gone to ground.

Response time

360. All rostered AOS members who responded were prepared and mobile within 28 minutes of being paged. This is considered by police to be acceptable and appears to be a realistic mobilisation time.

FINDINGS

The AOS commander should have been notified as soon as the firearm sighting was reported; however the delay in the AOS response was not significant.

Insufficient members were available for the AOS to respond to an event of this nature with full effectiveness.

Issue 5: Did difficulties with AOS radio communications affect the police response?

361. As noted in paragraph 103, the AOS was using an encrypted radio channel that could not be heard by NorthComms or units in the field. The radios in use at the time had a limited range, particularly in mobile situations, and during this incident AOS members had difficulty communicating with each other. As a result:
- i) As they reached the motorway, the AOS teams were not aware of each other's locations.
 - ii) Neither was aware that an AOS member, Officer 55, was leading the pursuit and could have taken part in a non-compliant vehicle stop. Officer 55, in turn, was not aware of the locations of the other AOS members.
 - iii) NorthComms was aware that the AOS had deployed but did not know how many AOS staff had responded, what teams they had formed, or their intended tactics.
362. The AOS commander was aware of the limited range of AOS radios. He said that although he could not hear teams 1.1 and 1.2, he knew from previous experience that

they would be able to hear him.³⁵ On that basis, he “*was comfortable in giving them instructions*”.

363. There are valid reasons for the AOS to operate on an encrypted channel. However in this particular situation, when the AOS formed part of a larger operation in a mobile situation controlled from NorthComms, it was highly desirable for the AOS to communicate with NorthComms on the general channel (which other units would also hear).
364. In the Authority’s view, communications centres should have the ability to access the encrypted channel during critical situations involving the AOS.

FINDINGS

The AOS tactical response was compromised by the limitations of their radio communications.

It was a high risk assumption on the part of the AOS commander that his staff could hear his instructions on the AOS channel.

In the circumstances, the AOS should have communicated with NorthComms on the general channel.

Issue 6: Was the AOS decision to use a non-compliant vehicle stop appropriate?

365. The initial plan of the AOS team members was to use a non-compliant vehicle stop. Authorisation for this tactic was subsequently provided by the AOS commander in a radio message to his staff.
366. Policy requires that a non-compliant vehicle stop be carried out using at least three vehicles involving eight staff and a dog handler. The plan to use two vehicles and five AOS personnel was contrary to policy; however experienced AOS personnel are of the view that it could nevertheless have been used successfully.
367. AOS staff who responded had been trained in the use of non-compliant vehicle stops, including using less than the optimum resources. No other viable option was immediately available, and planning to implement this tactic was realistic.
368. Accepting that there was a need for the AOS to respond urgently, in order to facilitate a non-compliant vehicle stop it was tactically desirable for the two AOS teams to leave the station together with a view to moving into position behind McDonald’s vehicle at the same time. However this was not the sole consideration; Officer 80 regarded the need

³⁵ The AOS commander said he knew that the range of the AOS members’ portable radios was not as powerful as that of the police vehicle radio he was using – therefore if he could hear them, then they could hear him.

to have an AOS team available in the field as critical to being able to respond effectively to the changing situation. Ultimately the non-compliant vehicle stop tactic was not able to be used because McDonald abandoned the Nissan before the AOS teams were in position to carry it out.

FINDING

Although contrary to policy, the decision to use a non-compliant vehicle stop was appropriate and justified in the circumstances.

Issue 7: Was it tactically sound for Officers 81 and 84 to pursue Stephen McDonald on foot?

369. When Stephen McDonald left the Nissan on the motorway he was seen to be armed as he fled across the median barrier.
370. In an ideal scenario AOS Teams 1.1 and 1.2, and Officer 55, would have arrived at the scene together under the immediate command of Officer 80; and, with those resources, containment of McDonald may have been attempted.
371. However, in the absence of a coordinated arrival by the teams (and thus adequate and immediate support), the Authority accepts that Officers 81 and 84 saw the pursuit of an escaping armed and dangerous offender as imperative and acted accordingly.
372. Following the simultaneous decision by the officers that they had to act immediately, they might have briefly conferred – e.g. by shouting out a plan. However, instead, each acted instinctively in accordance with patrolling practices, keeping separation between them and confronting McDonald from different angles. This was appropriate.
373. Finding themselves in the position of having to take their own emergency action, it is difficult to imagine what other acceptable tactical option was available to Officers 81 and 84 (see paragraphs 435-442 for other tactical options).

FINDING

In the circumstances as they unfolded, Officer 81 and 84's decision to immediately pursue Stephen McDonald on foot was tactically sound. The instinctive approach they adopted was in accordance with their training.

Issue 8: Were Officers 84 and 81 justified in shooting at Stephen McDonald, and if so, was the number of shots fired justified?

374. The Authority has considered whether the use of force by Officer 84 and Officer 81 was excessive in the circumstances or was justified under sections 39, 40 and 62 of the Crimes Act 1961, and/or under section 48 of the Crimes Act (see paragraphs 262-272 for relevant law and policy). The Authority has also considered whether any offence

relating to the discharge of firearms under the Crimes Act or the Arms Act 1983 may have been committed.³⁶

375. Sections 39 and 40 of the Crimes Act give police the power to use force when making an arrest or preventing the escape of a person attempting to avoid arrest, unless the arrest can be made (or the escape prevented) *“by reasonable means in a less violent manner”*. Section 62 provides that police are criminally responsible for any excessive use of force.
376. The officers would also be justified in using force under section 48 of the Crimes Act, so long as:
- the force they used was in defence of themselves or another person; and
 - the level of force was reasonable *in the circumstances as they believed them to be* (Authority’s italics).
377. The starting point for consideration of self-defence or defence of another under section 48 is to assess what Officers 81 and 84 believed the circumstances to be, from their own subjective points of view, at the time each fired at Stephen McDonald. The second matter to be considered is whether, bearing in mind each officer’s subjective belief about what was happening, each was acting in self-defence or in the defence of another, again to be considered from each officer’s point of view. The third step is to ask whether, given each officer’s respective belief, the force used by each was reasonable in the circumstances as the officer believed them to be. In other words, whether on an objective assessment the degree of force was proportionate to the level of threat as Officers 81 and 84 each perceived it. The essential balancing requirement is for the subjective element of the test to be objectively assessed in light of the circumstances as each officer believed them to be.
378. The situation in which a police officer has to decide whether to fire at an armed offender may change rapidly and the ultimate decision will inevitably be split-second. The officer must personally make the decision to fire and be satisfied that, in the circumstances as he or she believes them to be, there is lawful justification for doing so. Thus the decision to fire will be based on the officer’s immediate observations, coloured by information received from other sources. There is no lawful justification for any person, including a law enforcement officer, shooting a person who is not, at the instant of firing, perceived to be a threat to life.
379. For the purposes of section 48, therefore, the police officer is a citizen, subject to the same law as any other citizen. There is a distinctive overlay however. The police officer

³⁶ Refer to sections 198(1) and (2) of the Crimes Act and sections 48 and 53 of the Arms Act.

is a 'citizen in uniform', who may be required to confront a potentially lethal situation in the execution of his or her duty and in accordance with the police oath to "*keep the peace and prevent offences against the peace*". There is no such obligation on the ordinary citizen. The police officer may have to face a section 48 situation or be in neglect of his or her sworn duty.

Circumstances in which shots were fired

380. When Officers 81 and 84 followed Stephen McDonald over the median barrier they knew that he was armed, that he had presented the firearm he carried at police and at civilians alike, and that he had fired at police. As they drew near to him they saw him trying to get into Mr Neville's Isuzu truck, in an apparent attempt to evade arrest by hijacking the truck and taking Mr Neville hostage.
381. Seeing McDonald at the door of the Isuzu trying to open it, both officers called out commands advising that they were armed police, and directing him to drop his weapon (or words to that effect), but McDonald did not respond.
382. The officers were well aware of McDonald's likely state of mind, including that he appeared to be under the influence of drugs and had graphically demonstrated reckless disregard for his own safety and for the safety of others during the immediately preceding events.
383. Thus the officers had sufficient information to believe that McDonald posed a threat of death or grievous bodily harm to anyone whom he confronted while he remained at large. In terms of sections 39 and 40 of the Crimes Act they were justified in considering the use of their firearms to arrest McDonald; or to prevent his escape, provided he was posing a direct threat at the time. They were also justified in using their firearms in defence of themselves and others under section 48 of the Crimes Act, should that contingency arise.

Officer 84's first shot

384. When Stephen McDonald left the Nissan and ran onto the motorway, Officer 84 considered there was a very real possibility that he would have to be shot.
385. In a later statement, Officer 84 said that as the two officers approached McDonald on foot he was trying to get into the Isuzu truck through the passenger's door with the firearm in his right hand while trying the door with his left hand. On being unable to open the door, Officer 84 said McDonald turned around and looked towards the two officers with his weapon pointing at them, but seemingly not under proper control. Officer 84's perception was that McDonald could have taken a shot at any time.

386. In the officer's words:

"I believe that the offender posed an immediate and very real risk to the life of the truck driver. There was only a piece of glass separating the offender from the truck driver and I was very concerned that the offender was either going to kill or seriously injure the driver or alternatively use him as a hostage."

387. Officer 84 further said:

"He appeared to be totally focused on the truck and gaining access to it. He was in close proximity to us and he could have taken a shot at any one of us at anytime...."

388. The first shot fired by Officer 84, as described by that officer, was discharged while McDonald was positioned in line with the passenger's door near the pillar that separates the cab from the deck of the truck. The bullet missed McDonald and went through the truck's windscreen on the passenger's side fragmenting as it did so, with flying fragments from it striking Mr Neville (see scene plan 7 and photographs 2 and 3).

389. The Authority accepts that Officer 84's subjective belief, at the time of firing the first shot at McDonald, was that he could not be disarmed or arrested without first being shot; and that further delay was impracticable and dangerous. McDonald's demonstrable lack of concern for his own and the public's safety during the events of the protracted pursuit supported a belief that he was intent on avoiding arrest with no regard for the consequences. He was clearly capable of posing a continuing and serious risk to the life and safety of any persons he encountered, in particular Mr Neville but also anyone in the immediate vicinity.

FINDINGS

In the circumstances as Officer 84 perceived them to be, the officer's action in firing this first shot at McDonald satisfied the tests in both sections 39 and 40 and was also lawfully justified under section 48 of the Crimes Act. The officer believed there was an immediate need to protect Mr Neville and also any others present. The force used was reasonable and proportionate in these circumstances.

The issue of whether there was careless use of a firearm under section 53 of the Arms Act through failure to hit the intended target (resulting in an indirect wounding of Mr Neville) is also answered by reference to the lawful justification provided in section 48 of the Crimes Act.

A consideration of offences relating to the discharge of a firearm (sections 198(1) and (2) of the Crimes Act and section 48 of the Arms Act) is not required, as those provisions do not apply in this situation.

Officer 84's second shot

390. Officer 84 said that after the first shot: *"The offender was not incapacitated and just carried on. He appeared to be more and more desperate to evade police and do all he could to avoid capture."*
391. McDonald appeared quite unaware that Officer 84 had fired at him. Instead he moved towards the deck of the truck and as he did so Officer 84 fired the second shot.
392. While Officer 84 believes this second shot was fired at McDonald while he was still on the road, it is clear from the ESR reconstruction that McDonald had climbed onto the deck of the truck by the time Officer 84 fired the second shot. The bullet hit an upright safety bar situated behind the cab of the truck and fragmented. Some of the fragments struck McDonald. Shrapnel from this shot also continued on to strike Mr Naitoko's van (see scene plan 6). Photographs 3 and 4 show the truck in its final position and the bullet strike on the upright.
393. In the very short space of time between the first and second shots fired by Officer 84, the beliefs which had justified the officer in firing the first shot still prevailed (see paragraphs 380, 382 and 386). Officer 84 believed Stephen McDonald was continuing to pose a serious risk to those in the immediate vicinity, and in particular to Mr Neville, and that he could not be reasonably apprehended by any less violent means. Given the ESR reconstruction and ballistics test results there is also the possibility that this shot in fact was fired in defence of Officer 81.

FINDINGS

The Authority repeats the findings made in relation to the first shot fired by Officer 84, with the additional factor that Officer 81 may have come under direct threat from McDonald at the time this shot was fired.

Officer 81's single shot

394. Officers 81 and 84 initially saw the situation from differing perspectives. From the time Stephen McDonald abandoned the Nissan and ran onto the motorway, Officer 84 considered there was a real possibility he would have to be shot – whereas Officer 81 saw the threat as less immediate.
395. When Officers 81 and 84 first saw McDonald at the door of the Isuzu and commanded him to drop his weapon (or words to that effect), Officer 81 perceived him as a general threat to Mr Neville (see paragraph 151). The officer said McDonald was in sight the *"entire time from when he got out of his vehicle until he was on the back of the truck"* and, unlike Officer 84, did not see McDonald turn and point his firearm in both officers' direction before getting onto the deck of the truck (see paragraphs 132 and 150).

396. Once McDonald was on the deck of the truck, both Officers 81 and 84 saw him turn and point his firearm at Officer 81. It was at this point that Officer 81 fired at McDonald. At the time of doing so, Officer 81 was unaware that Officer 84 had fired any shots.
397. Officer 81's shot struck the side of the deck tray and missed Stephen McDonald, fragmenting and going into the rear of the cab without causing injury (see scene plan 4 and photographs 5 and 6).
398. The Authority accepts that at the time Officer 81 fired this shot, McDonald was posing an immediate and direct threat to Officer 81's life, and on any analysis the shot fired in response can only be construed as an act of self-defence.
399. After firing this shot, Officer 81 saw McDonald fall to deck of the truck and mistakenly believed that the shot had hit its target.

FINDINGS

In the circumstances as Officer 81 perceived them to be, the officer was justified in firing at Stephen McDonald in order to remove the immediate threat of death or serious bodily harm. The shot was clearly retaliatory and the force offered entirely proportionate to the threat and therefore lawfully justified under section 48 of the Crimes Act.

The issue of whether there was careless use of a firearm (section 53 of the Arms Act) through failure to hit the intended target is also answered by reference to the lawful justification provided in section 48 of the Crimes Act.

Sections 198(1) and (2) of the Crimes Act and section 48 of the Arms Act relating to the discharge of a firearm are not applicable.

Officer 84's third shot

400. The third shot that was fired by Officer 84 missed Stephen McDonald and struck Mr Naitoko with fatal consequences (see scene plan 5). Photographs 1 and 7 show the positions in which the Isuzu truck and the van driven by Mr Naitoko finally came to a stop seconds later.
401. Officer 84 does not recall actually firing this third shot. However, when later giving evidence at the coronial inquest, although not remembering the action of pulling the trigger, Officer 84 did remember the circumstances surrounding the third shot – namely, that at the time Stephen McDonald was aiming his firearm at Officer 81.
402. The ballistic tests and ESR examinations established that the wounds Stephen McDonald sustained were from bullet fragments from Officer 84's second shot while on the deck of the truck. It is likely he began falling to the deck of the truck shortly after that, and

that the third shot was fired just as McDonald began to fall. The third shot hit Mr Naitoko directly.

403. All three shots fired by Officer 84 were discharged within a very short space of time; literally within seconds, and in an environment that was far from static. Everybody involved was moving and the Isuzu truck was jolting or had just jolted forward.
404. Although not having an actual memory of the event, the Authority accepts that, at the time of discharging this third shot, Officer 84 believed McDonald was offering, or appearing to offer, a direct threat to Officer 81's life; this in addition to the officer's continuing belief that until McDonald was clearly disabled or apprehended, any shot fired at him was justified (see paragraph 163).
405. The further and related issues of why both officers failed to hit their target and the issue of Officer 84's failure to identify risks in the line of fire are separately discussed under the next two headings (Issues 9 and 10).

FINDINGS

In the circumstances as Officer 84 perceived them to be, the officer was justified (under sections 39, 40 and 48 of the Crimes Act) in firing a third shot at Stephen McDonald, who was posing a direct threat to Officer 81 at the time. The force offered by Officer 84 in response was proportionate to the threat as perceived.

A finding in respect of the application of section 53 of the Arms Act is made under Issue 10.

Sections 198(1) and (2) of the Crimes Act and section 48 of the Arms Act relating to the discharge of a firearm are not applicable.

Issue 9: Why did none of the shots strike Stephen McDonald directly?

406. Neither the police investigation nor any subsequent formal police review has addressed the issue of why four shots fired by AOS officers in close proximity, using Aimpoint® sights, missed the target on each occasion; and more particularly, why a series of three rapidly fired shots by Officer 84 failed to hit their intended target.
407. Nor has the related issue of why Officer 84 fired the third shot (and possibly also the second shot) when Mr Naitoko was directly in the line of fire behind Stephen McDonald been investigated by police. This is discussed below as Issue 10.
408. Factors which may contribute to an explanation for the officers failing to hit their target on each of four occasions include the following.

The circumstances

409. The shooting took place in a complex situation where:
- i) the officers' target, Stephen McDonald, was moving around on the road and then on the back of Mr Neville's truck;
 - ii) the officers were moving across the motorway and towards McDonald; and
 - iii) the vehicles on the motorway were also moving at various speeds – including Mr Neville's truck which was jolting forward as Mr Neville stomped on the brakes.
410. The incident unfolded very quickly and all four shots were taken within a matter of seconds. Because of the urgency of the situation in which they found themselves having to act, Officers 81 and 84 did not have the advantage of being under the direct command of a more experienced AOS officer.

Level of experience

411. Officers 81 and 84 were relatively new members of the AOS. Both officers had attended three day AOS selection courses, at which they were primarily tested for endurance, physical fitness, ability to respond under pressure and aptitude. On selection, they attended a three week qualification course.
412. The qualification course did not involve shooting with the Bushmaster rifle. It provided practice in shooting with the Glock pistol over three days, including a 'stress shoot', during which the officers were placed under pressure. Candidates also undertook room clearing exercises, emergency action drills, a live firing exercise while wearing protective clothing, and an exercise using FX simmunition.³⁷ At the end of the course there were drills and a qualification shoot to check the participants' competency.
413. Since qualification, Officer 81 had attended 14 training days, two of which involved live shooting – one using tactical movements and vehicles, and one using jungle lane live firing.³⁸ Officer 84 had attended 8 training sessions, one of which involved jungle lane live firing.
414. Although the officers received training in emergency actions and "*shoot, don't shoot*" scenarios, they had limited experience of shooting at moving targets, or of shooting while on the move.

³⁷ FX simmunition involves live firing scenarios using paintball ammunition.

³⁸ Jungle lane live firing involves advancing and firing at targets as they are presented.

415. In 2009, police districts were required to conduct AOS training, according to a national directive, over at least 14 days per year. In 2010 the training requirement increased to a minimum of 18 days per year.

The effects of high levels of stress

416. The Authority sought advice from two expert sources on the effects of high levels of stress in such a complex and highly charged situation and the likely effect of that on the ability to shoot accurately.³⁹ The expert opinions confirmed that stressful situations with competing distractions demand more of a person's limited cognitive resources than ordinary situations; and that *"working memory capacity"* (a person's ability to focus attention on a specific task while shutting out distractions that take attention away from that task) may suffer as a result and many competing distractions may impair shooting accuracy.⁴⁰ Essentially, the advice was that the cognitive effects of the stress response *"have an intimate effect on speed of processing and cognitive decision making."*⁴¹
417. One of the means of overcoming the negative effects of a *"fight or flight"* response and the effects of over arousal is intensive training and experience in weapons handling and *"shoot, don't shoot"* scenarios, in order to build up what is commonly referred to as *"muscle memory"* – *"... many iterations of weapons drills ... produce a state where there is less cognition required in a response but an effective result"*.⁴²

The Aimpoint® sight on the Bushmaster rifle

418. The Authority also sought comment from AOS supervisors about the fact that Officer 84's aim was taken with one eye closed, contrary to the design of the Aimpoint® sight for the 'two eyes open' method of shooting – which facilitates situational awareness. The advice given to the Authority was that AOS members are taught to use the 'two eyes open' method for close range shooting but it is not a requirement; and it is not regarded as 'wrong' to aim with one eye closed. The officer's accuracy should not have been affected by aiming with one eye closed, but situational awareness may have been.

FINDING

The inaccurate marksmanship occurred because the officers were operating in a highly stressful and challenging shooting environment for which their level of training and experience had not equipped them.

³⁹ The Authority consulted Professor Maryanne Garry, a cognitive scientist and Professor of Psychology at Victoria University of Wellington; and Dr Charmaine Tate, a medical officer within the New Zealand Defence Force.

⁴⁰ Garry M, IPCA comment (June 2011, unpublished) 10.

⁴¹ Tate C, Review for IPCA – Physiological Response to Threat and Performance Outcomes (28 July 2011, unpublished) 1.

⁴² Tate C, Review for IPCA – Physiological Response to Threat and Performance Outcomes (28 July 2011, unpublished) 1.

Issue 10: Why did Officer 84 fail to identify Mr Naitoko's van in the line of fire?

419. Under this heading the Authority has considered the apparent failures by Officer 84 to correctly assess the likely risks presenting in the immediate background and to identify persons and/or objects directly in the line of fire.
420. The environment in which all four shots were fired was complex and far from static. The scenario took place in the eastbound lanes of the Northwestern Motorway just before the Newton Road on-ramp at 2.03pm on a Friday afternoon. As was to be expected at that time of day, traffic flow was heavy and all four eastbound lanes were filled with slow moving traffic. Thus it was a high risk environment in which to discharge a firearm.
421. As earlier described, two fragments of Officer 84's second shot (which went through a vertical safety bar behind the passenger's side of Mr Neville's truck) struck Mr Naitoko's van in the lane beyond. One struck the edge of the passenger's door of the van and the other the passenger's side of the roof. Scene plan 6, based on the ESR reconstruction, indicates a close-to-direct continuation of the two bullet fragments from the safety bar to Mr Naitoko's van, and therefore suggests that the van may have been in Officer 84's line of fire (see paragraphs 148 and 221(v)).
422. Mr Naitoko's van was still coming to a stop or had just come to a stop at the point Officer 84 fired the third shot. The estimated position of the van is shown on scene plan 5, and Photographs 1 and 7 show the final positions of the vehicles. Officer 55, who had moved from behind Mr Naitoko's van to around a position indicated by the words "Strike to door" in Lane 3 of scene plan 6, was also potentially in the line of fire.
423. Evidence was given at the Coroner's Inquest, based on a reconstruction of the events, that Officer 84's view of Mr Naitoko's van in the far lane may have been partially obstructed by the cab and/or tailgate of Mr Neville's truck. Stephen McDonald's movements would also have been a distraction. At later interview, Officer 84 said:
- "I don't recall vehicles being in the immediate background except for [Mr Neville's] truck. When I took my shots I did not believe any other people or vehicles were at risk."*
424. Officers' training should ensure that they are alert to objects in the line of fire and highly tuned in making 'shoot, don't shoot' decisions. Under optimal circumstances, Officer 84's situational awareness would have been such that Mr Naitoko's van would have been noted as it came into the line of fire, as well as the presence of Officer 55 in that vicinity; and potentially, this should have triggered a 'don't shoot' reaction. As expert opinion advises, however, the fact that Officer 84 did not register the presence of Mr Naitoko's van is not inexplicable, because the officer's attention is likely to have been focused on the immediate threat (McDonald) at the expense of other factors, coupled with the officer's lack of experience in "shoot, don't shoot" scenarios.

425. The Authority has considered whether the failure by Officer 84 to identify risks in the line of fire when discharging the third and fatal shot was “*contrary to law*” as provided for under section 167(c) of the Crimes Act 1961;⁴³ under sections 53 of the Arms Act 1983 and 171 of the Crimes Act;⁴⁴ and under sections 150A, 156 and 157 of the Crimes Act.⁴⁵
426. In terms of section 167 of the Crimes Act (culpable homicide), the Authority is satisfied that the “*accidental*” nature of Mr Naitoko’s death was not caused by any transferred malice on the part of the officer. In other words there was no *mens rea* (or malicious intent) on the part of Officer 84 that was accidentally transferred to Mr Naitoko. At the time the fatal shot was discharged, Officer 84 was acting in the execution of a difficult and dangerous duty and in the defence of another (Officer 81). These imperatives provide lawful justification and negate any criminal liability.
427. Likewise, in relation to the possible application of section 53 of the Arms Act (careless use of a firearm) and section 171 of the Crimes Act (manslaughter), the omission by Officer 84 to identify risks in the line of fire is overcome by the same considerations.
428. Again, on consideration of the Crimes Act provisions imposing a legal duty to exercise reasonable skill and care on:

⁴³ Section 167(c) of the Crimes Act provides: “*Culpable homicide is murder in each of the following cases: ... (c) if the offender means to cause death, or, being so reckless as aforesaid, means to cause such bodily injury as aforesaid to one person, and by accident or mistake kills another person, though he does not mean to hurt the person killed.*”

⁴⁴ Section 53 of the Arms Act provides: “(1) Every person commits an offence and is liable on conviction on indictment to imprisonment for a term not exceeding 3 years or to a fine not exceeding \$4,000 or to both who causes bodily injury to or the death of any person by carelessly using a firearm, airgun, pistol, or restricted weapon. ... (3) Every person commits an offence and is liable on conviction on indictment to imprisonment for a term not exceeding 3 years or to a fine not exceeding \$4,000 or to both who, without reasonable cause, discharges or otherwise deals with a firearm, airgun, pistol, or restricted weapon in a manner likely to injure or endanger the safety of any person or with reckless disregard for the safety of others. (4) It shall be no defence to the crime of manslaughter that the guilty act or omission proved against the person charged upon the indictment is an act or omission constituting an offence against this section.” Section 171 of the Crimes Act provides: “Except as provided in section 178, culpable homicide not amounting to murder is manslaughter” (section 178 relates to infanticide).

⁴⁵ Section 150A of the Crimes Act provides: “(1) This section applies in respect of the legal duties specified in any of sections 151, 152, 153, 155, 156, and 157. (2) For the purposes of this Part, a person is criminally responsible for— (a) omitting to discharge or perform a legal duty to which this section applies; or (b) neglecting a legal duty to which this section applies— only if, in the circumstances of the particular case, the omission or neglect is a major departure from the standard of care expected of a reasonable person to whom that legal duty applies in those circumstances.” Section 156 of the Crimes Act provides: “Every one who has in his charge or under his control anything whatever, whether animate or inanimate, or who erects, makes, operates, or maintains anything whatever, which, in the absence of precaution or care, may endanger human life is under a legal duty to take reasonable precautions against and to use reasonable care to avoid such danger, and is criminally responsible for the consequences of omitting without lawful excuse to discharge that duty.” Section 157 of the Crimes Act provides: “Every one who undertakes to do any act the omission to do which is or may be dangerous to life is under a legal duty to do that act, and is criminally responsible for the consequences of omitting without lawful excuse to discharge that duty.”

- persons who have under their control anything, the operation of which (in the absence of precaution and care) may endanger life (section 156 of the Crimes Act); and
- persons undertaking a lawful act which may be dangerous to life (section 157 of the Crimes Act);

the question of whether Officer 84's omission was contrary to law is answered by the defence of lawful justification.

429. In addition to the overlay of the 'civilian in uniform' being required to act in the execution of a difficult and dangerous duty, the significantly influencing factors of immediacy, movement, the effects of stress, and the level of weapons training and "shoot, don't shoot" experience, render it unreasonable to conclude that the officer's actions were other than lawfully justified.
430. In relation to any deficiency in training and experience, the Authority appreciates that the AOS, although regularly deployed, is not a full-time unit, either in Auckland or elsewhere in New Zealand, and that both training time and weapons training facilities are limited. However the degree of weapons training undertaken by Officer 81 and 84 had not prepared them to deal effectively and safely with the particularly challenging environment they faced on the North Western motorway. As Coroner Matenga found, the related issues of failed marksmanship and the failure by Officer 84 to appreciate what was in the line of fire indicates *"a need for further training and an acknowledgment by AOS that experience matters."*⁴⁶

FINDINGS

The standard of shooting and failure to see Mr Naitoko's van in the line of fire has raised concerns about the depth and degree of AOS weapons training.

Given the circumstances in which Officer 84's failure to accurately identify risks in the line of fire occurred, the defence of lawful justification necessarily arises and would undoubtedly negate the application of any of the legal provisions considered above.

Issue 11: Why were the officers' memories of the shooting inconsistent?

431. There are a number of gaps and inconsistencies in the officers' recollections of the incident. These include:

⁴⁶ Inquest into the death of Halatau Kianamanu Naitoko – Findings of Coroner Gordon Matenga (22 August 2011), para 48.

- i) that neither Officer 81 nor Officer 84 recalled seeing Mr Naitoko's van, when it was hit by shrapnel continuing from Officer 84's second shot, and when in the direct line of fire for the third shot;
- ii) Officer 84 said that Stephen McDonald pointed his firearm in the direction of the officers when he was standing beside the passenger door of Mr Neville's truck, but Officer 81 said that McDonald was in sight the entire time and held the weapon down beside his waist;
- iii) Officer 84 believed that McDonald was still standing on the road when the first and second shots were fired, whereas the ESR reconstruction has established that McDonald was on the deck of the truck when Officer 84's second (and third) shot was fired;
- iv) Officer 84 cannot recall firing the third shot; and
- v) Officer 81 was not aware of any of Officer 84's shots.

432. In a later statement, Officer 84 reported experiencing some perceptual distortions, saying:

"Although I have been in high stress situations before I have never before fired shots at a person. There was a sharpness to what was happening. The shots that I fired appeared quiet even though I was not wearing any hearing protection at the time. When I pulled the trigger I remembering hearing two 'pops' a short distance apart. I felt very little recoil and I do not recall any smell from the shots."

433. During this incident, both officers' attention was focused on Stephen McDonald and particularly on the firearm he was carrying. Their ability to see, hear and remember the other details of the incident has clearly been compromised by the high levels of stress they were placed under during the incident.⁴⁷

434. Disparity between eyewitness accounts subsequently given is notorious and well understood in the forensic arena. In this context, an expert consulted by the Authority said:⁴⁸

"There is ... evidence to suggest that the very act of recollection puts memories in a fragile state – one that predisposes them to distorting influences. Note also the evidence that expertise does not necessarily

⁴⁷ The AOS weapons were not fitted with sound suppressors (see paragraph 225).

⁴⁸ Garry M, IPCA comment (June 2011, unpublished) 7.

protect people from memory distortions, even when those experts are specifically trained to perform in exceedingly high stress situations.

One caveat: although the deleterious effects of stress are well documented, it is impossible to say how any particular person's memory might have been affected."

FINDING

The officers' ability to accurately remember the details of the shooting is likely to have been impaired by the high levels of stress they were under during the incident and the influence of post-event information.

Issue 12: Were other tactical options available to Officers 81 and 84?

435. Had the circumstances permitted, other options could have been considered at the motorway scene. They would have included:
- i) cordon and containment;
 - ii) retreat or delaying an arrest;
 - iii) using oleoresin capsicum (OC) spray and/or a baton;
 - iv) using police dogs;
 - v) using a distraction device;
 - vi) using a Taser; and
 - vii) firing a warning shot.
436. Cordon and containment involves setting up a cordon to restrict movement into and out of an area. While there had been an opportunity to contain Stephen McDonald in the Pine Street environs, after he escaped from that area there was no further opportunity to contain him. Once he had stopped on the motorway McDonald presented an immediate threat, and, in the absence of immediate AOS support, containment was not a valid option.
437. Neither retreat nor delay was a realistic option due to McDonald's aggression, mobility and the immediate threat he posed.
438. The use of OC spray or a baton would have required an officer to approach McDonald, and this was clearly not an option.
439. Two police dogs, one of which was AOS qualified, were in the lead pursuing vehicles. Both dog handlers chose not to deploy their dogs when McDonald started to cross the

median barrier, each deciding that their dog would most likely be hit by a vehicle, and that it would be difficult to control the dog in that environment.

440. A distraction device is detonated in the vicinity of an offender to provide a brief tactical advantage to AOS. There was neither time nor safe opportunity to use such a device.
441. At the time of this incident the Taser was not available to the officers and they had not been trained in its use. In any event, a Taser would not have been a viable option in confrontation with a person who had fired and was presenting a firearm.
442. There was nothing in the behaviour of McDonald to indicate that he might be influenced by a warning shot. Officers may fire a warning shot in appropriate circumstances, however the immediacy of the threat in this case meant that this was not a sound option.

FINDING

After Stephen McDonald left the Nissan, his actions precluded the use of any tactical option other than foot pursuit and the use of firearms.

POST-SHOOTING MEDICAL CARE

Issue 13: Was all reasonable assistance given to Mr Naitoko, Mr Neville and Stephen McDonald after they were shot?

443. As soon as Mr Naitoko was seen to be in difficulty, police officers gave him first aid and an ambulance was called. Two SERT paramedics were on the scene almost immediately and began treating Mr Naitoko. His wound was not survivable. In the circumstances, he was provided with the best care available.
444. Mr Neville's wounds were not life-threatening, and after examination by ambulance staff he was transported to hospital.
445. Stephen McDonald's wounds were not life-threatening. He was taken to the Henderson police station and a doctor was called. When it became clear that the doctor would not arrive for some time, McDonald was taken to a medical centre and hospital.

FINDING

Appropriate medical assistance was given to Mr Naitoko, Mr Neville and Stephen McDonald.

POST-INCIDENT ACTIONS

Issue 14: Were police's post incident actions appropriate?

446. For relevant policies and procedures, see paragraphs 273-274 and 295-302.

Securing of firearms

447. The AOS Commander dismantled the firearms used by Officers 81 and 84 prior to delivering them to the exhibits officers and without consultation with the officer in charge of the criminal investigation. This was contrary to police instructions and jeopardised the integrity of the weapons as exhibits (see paragraphs 190 and 250-252).

Post incident briefings and interviews

448. The *Post Lethal Force* policy, which was in force at the time of this incident, stated that the recommended procedure for interviewing staff involved in critical incidents was to conduct a brief interview at least two hours after the incident and then conduct a detailed interview the following day. This policy did not explicitly prohibit the officers involved from discussing the incident with each other before giving statements or being interviewed.

449. In this instance, there was a debrief on return to the AOS squad room after the incident, at which a member of each AOS team took it in turn to speak about the incident in broad terms. The AOS commander was aware of the need to avoid "*contaminating individual recollections by group discussions*" (see paragraphs 192-194). Officers 81 and 84 were present at the debrief. The officers were then asked to write up job sheets. Their formal interviews began four days later – Officer 81's interview took four days (three sessions) and Officer 84's interview took just over a week (eight sessions) to complete.

450. The Authority recognises that there are sound operational, morale and welfare reasons for holding squad debriefs immediately after a significant incident, and that such debriefs are encouraged as part of a squad's routine. There is however a potential conflict between that practice and the danger that officers' recollections of what transpired in the course of a traumatic event may be contaminated through conferring with others.

451. New information about an event can have an unintended influence on a person's recollection of it. Memories are vulnerable to post event information, and recollection may be distorted, even without awareness, to create a memory that makes sense and

matches the new information. Professor Garry, an expert consulted by the Authority, explained that:⁴⁹

“... [M]emory does not work like a video recorder.... Instead, people take in only some of what happens during the event, and they “colour in” that limited information with additional postevent suggestions drawn from their previous experiences, their biases, their expertise or lack of it, their goals and expectations, imagination, talking with others, and so on. ...

Postevent suggestions can be any information people gain access to after an event, whether by talking to each other, reading the newspapers, listening to conversations, imagining “what if” scenarios, and so on. Hundreds of scientific studies from around the world show that postevent suggestions can impair memory and cause it to be inaccurate

In short, the act of “remembering” is not the act of playing back some mental video track. Instead, it is a reconstruction. Sometimes people are aware they are reconstructing (and their language indicates it) while other times they are not aware of it.”

452. There is no legal barrier to officers discussing what occurred in the aftermath of such an event; and it is not known whether, on this occasion, the recollections of the AOS members, as they were later recorded in formal statements, were significantly influenced as a consequence of conferring with their colleagues at the debrief.
453. The Authority notes that there were practical reasons why police were unable to comply with the *Post Lethal Force* policy’s recommended timeframe for interviewing on this occasion, including the need to bring in suitably qualified and independent investigators to interview key officers. However, the delay of four days before the interviews began may have resulted in valuable information being lost. Professor Garry said:⁵⁰

“In my view, such a delay is unacceptable if the goal is to maximise accuracy and minimise distortions. Information in memory fades rapidly; in just one study, witnesses who answered questions about an event two days later were half as accurate than [those] who answered immediately after the event; inaccurate information also produced more memory distortions as time went by”

⁴⁹ Garry M, IPCA comment (June 2011, unpublished) 1-2.

⁵⁰ Garry M, IPCA comment (June 2011, unpublished) 9.

454. The Authority also questions the structure of the post-incident process – which interspersed formal interviews of the officers with group and individual counselling sessions, as well as other welfare and support interactions with the officers.
455. On Wednesday 28 January 2009, while their interviews were still taking place, Officers 81 and 84 were provided with copies of the job sheets of other squad members (see paragraph 202). The Authority’s opinion, with which Professor Garry agrees, is that this was ill advised.
456. In the Authority’s view, it would be prudent for police to further develop the policy for the post-incident management of directly-involved staff – so that there is transparency around what interactions there have been before the officers’ accounts are formally recorded.
457. The Authority notes guidance developed by the Association of Chief Police Officers which states:⁵¹

“As a matter of general practice officers should not confer with others before making their accounts (whether initial or subsequent accounts). The important issue is to individually record what their honestly held belief of the situation was at the time force was used. There should therefore be no need for an officer to confer with others about what was in their mind at the time force was used. If, however, in a particular case a need to confer on other issues does arise, then, in order to ensure transparency and maintain public confidence, where some discussion has taken place, officers must document the fact that this has taken place....

There is a positive obligation on officers involved to ensure that all activity relating to the recording of accounts is transparent and capable of withstanding scrutiny.”

458. In December 2010 New Zealand Police published a new chapter in the Police Manual titled *Police involvement in deaths and serious injuries*. This policy states: *“Investigators must also ensure employees [i.e. officers involved in the incident] are directed not to discuss the incident with each other as this can corrupt their own accounts.”* In the Authority’s view, whilst this is sound policy, it does not go far enough, and police should

⁵¹ The Association of Chief Police Officers (England, Wales and Northern Ireland) – Manual of Guidance on the Management, Command and Deployment of Armed Officers, 2nd Edition, 2010, paras 7.94 and 7.95.

investigate the introduction of a self-administered interview, designed to elicit a comprehensive initial statement, as described by Gabbert et al (2009).⁵²

Return to duty

459. Officer 84 attended a group session with a psychologist and the other members of the AOS on the second day of the interview process, and two 'one-on-one' sessions with a psychologist, also before the interview process was completed.
460. This officer was deemed fit to return to normal duty on 3 February 2009 and attended an AOS callout that day. It was not until 11 February 2009 that the officer undertook and passed a qualification shoot.
461. Officer 84 was not formally advised who had fired the fatal shot until 16 February 2009, and then continued with counselling.
462. Officer 81 also attended the group session on the second day of the interview process, and attended two 'one-on-one' sessions with the psychologist before the officer's interview was completed. This officer returned to normal duties on 30 January 2009 and also attended the AOS callout on 3 February, a week before passing the qualification shoot.
463. The shoot undertaken by Officers 81 and 84 on 11 February 2009 was a standard qualification shoot, which involves physical exertion, and firing from different ranges and positions at static targets.
464. Both officers were approved for redeployment with a firearm by the Commander AMCOS before returning to normal duties, as required by the *Post Lethal Force* policy (see paragraph 299).
465. In the Authority's view, the failure of the officers to hit their target (Stephen McDonald), and the tragic outcome of that failure, should have resulted in a more rigorous assessment of whether they should return to AOS duties and, as a minimum, weapons re-training rather than re-qualification.
466. On 3 June 2009, following legal advice, the Auckland District Commander decided that Officers 81 and 84 should not face any criminal sanctions.
467. In the Authority's view, sound and prudent practice would have been for the officers (and others in similar circumstances) to have been stood down from AOS duties until:

⁵² Gabbert F, Hope L and Fisher R P: 'Protecting Eyewitness Evidence: Examining the Efficacy of a Self-Administered Interview Tool (2009) *Law and Human Behavior*, 33, 298-307.

- i) they had been certified fit for such duties by a psychologist;
 - ii) they had undergone weapons re-training, rather than re-qualification;
 - iii) it was known which of them had fired the fatal shot; and
 - iv) that officer had been cleared of criminal liability.
468. Permitting the officers to return to AOS duties and to attend an armed offender callout just 11 days after this incident was, in the Authority's view, imprudent.

FINDINGS

The dismantling of Officer 81 and Officer 84's weapons by the AOS Commander was bad practice and contrary to policy.

The post-incident process was not well managed or sufficiently robust.

Officers 81 and 84 should not have been returned to active AOS duties without there having been a more comprehensive assessment of their competency to do so.



Conclusions

469. The death of Halatau Naitoko and the wounding of Mr Neville and Stephen McDonald was the tragic outcome of a rare combination of events.
470. Stephen McDonald committed serious offences whilst armed and under the influence of drugs. He had one objective, which was to evade arrest by any means, including entering homes and demanding vehicles; presenting a firearm at police and members of the public; firing at police; and driving in a manner that showed total disregard for his own safety and for the safety of others.
471. The pursuit phases of this operation were testing for police command and control. There were breaches of pursuit policy and greater control should have been exercised. NorthComms' ability to do so was compromised. In particular, no doubt with the intention of being tactically positioned when Stephen McDonald was finally stopped, many patrols joined the pursuit – often without NorthComms' knowledge. Additionally, there was radio indiscipline at times, and a poor flow of sound tactical information from ground units. Given the intensity of the situation, those problems were to be expected and should have been both anticipated and better managed. Nevertheless, with those reservations, the pursuit phases were adequately handled.
472. In the Authority's view, the overall operation, of which the pursuit phases were a part, lacked effective command and control. In terms of communicating clear tactical decisions to achieve a specific objective, that responsibility rested with the NorthComms shift commander.
473. To be fair, the shift commander was under significant pressure – which raises questions around whether there was sufficient readily-available support for the commander; and whether command and control training, resources and systems for dealing with events of this nature are adequate in police communications centres.
474. The lack of tactical control was exemplified in the Pine Street area, where there was a potential opportunity to contain McDonald. This opportunity was not taken because NorthComms was not aware of the resources available, nobody was clearly in command, and there was an expectation of an ultimate AOS resolution.

475. As well as failures by field units contributing to poor control of resources; other contributing factors were the lack of a clear understanding of the role of Eagle with regard to field command, and the AOS deploying without adequate communications within the squad and to NorthComms.
476. In addition to being compromised by communication difficulties, the AOS turnout of seven (including the commander and a dog handler, Officer 55) was insufficient for an incident of this nature.
477. The Authority notes that in the course of this operation a number of officers, without concern for their personal safety, took initiatives which placed them in danger. Others demonstrated sound tactical thinking, for example by attempting to restrict McDonald's movement by blocking roads and traffic; by trying to organise armed officers into close cordon points in Pine Street (Officer C); and by setting up a moving block behind Stephen McDonald on the motorway.
478. The Authority is satisfied that, on the motorway, Officers 81 and 84 properly took immediate action in the face of the threat presented by Stephen McDonald. Their actions in confronting him were commendable.
479. Taking into account:
- i) that Stephen McDonald, the vehicles and the officers were all moving;
 - ii) the immediacy of Officers 81 and 84's decision-making;
 - iii) the high-stress circumstances; and
 - iv) that the officers were not intensively trained in the type of shooting required;
- in the Authority's view, the actions of Officer 81 and 84 were reasonable and justified in law.
480. Stephen McDonald created a situation on the North Western Motorway that was dangerous to all involved, and Officers 81 and 84 found themselves having to take immediate action. While the environment was challenging and the officers were under considerable stress, having never before been in such a situation, the shots fired by Officers 81 and 84 were not accurate or safe, as demonstrated by the outcomes. Their failure to shoot accurately and, in Officer 84's case to identify the risk beyond the target, does raise concerns about the depth and degree of their weapons training, including experience in 'shoot, don't shoot' decision-making. The officers had a responsibility not only to hit the target but to ensure that the line of fire beyond the target was clear when their shots were fired.

481. Given the environment in which AOS officers may be required to perform, there is an onus on police to ensure that the selection and training of AOS members is such that the risks of their failing to perform to the highest standard when under stress are negated as far as practicable.

SECTION 27(1) OF THE ACT

482. In terms of the requirements of section 27(1) of the Act, the Authority has formed the following opinions.
483. The actions of Officers 81 and 84, in firing at Stephen McDonald, were justified and therefore not contrary to law.
484. The following were undesirable:
- i) NorthComms did not establish and maintain firm command and control over the police operation;
 - ii) the AOS tactical response was compromised by limited communications and by the number of members available;
 - iii) Officers 81 and 84's shooting was inaccurate and therefore unsafe;
 - iv) the failure by Officer 84 to identify risks in the line of fire;
 - v) the AOS commander's dismantling of the weapons of Officers 81 and 84; and
 - vi) the post-incident process was neither well coordinated nor sufficiently robust.

Recommendations

INDEPENDENT POLICE CONDUCT AUTHORITY

485. In terms of section 27(2) of the Act, the Authority recommends that the New Zealand Police:

- 1) reinforce the requirement that all responding units log into the communications system, and adhere to radio protocols and pursuit policy;
- 2) review command training for communications centre shift commanders, and support for them during critical incidents;
- 3) provide access to AOS radio communications by communication centres;
- 4) review Auckland AOS planning with regard to the number of members available to respond to incidents;
- 5) clarify the role of Eagle in critical incidents and develop its capability as a command and control platform;
- 6) review the efficacy of the AOS weapons training; and
- 7) develop a more structured, transparent and comprehensive post critical incident policy.



HON JUSTICE L P GODDARD

CHAIR

INDEPENDENT POLICE CONDUCT AUTHORITY

April 2012



Photograph 1: final positions of the vehicles



Photograph 2: bullet hole from Officer 84's first shot



Photograph 3: Mr Neville's truck



Photograph 4: bullet hole from Officer 84's second shot



Photograph 5: position of shell casing from Officer 81's shot

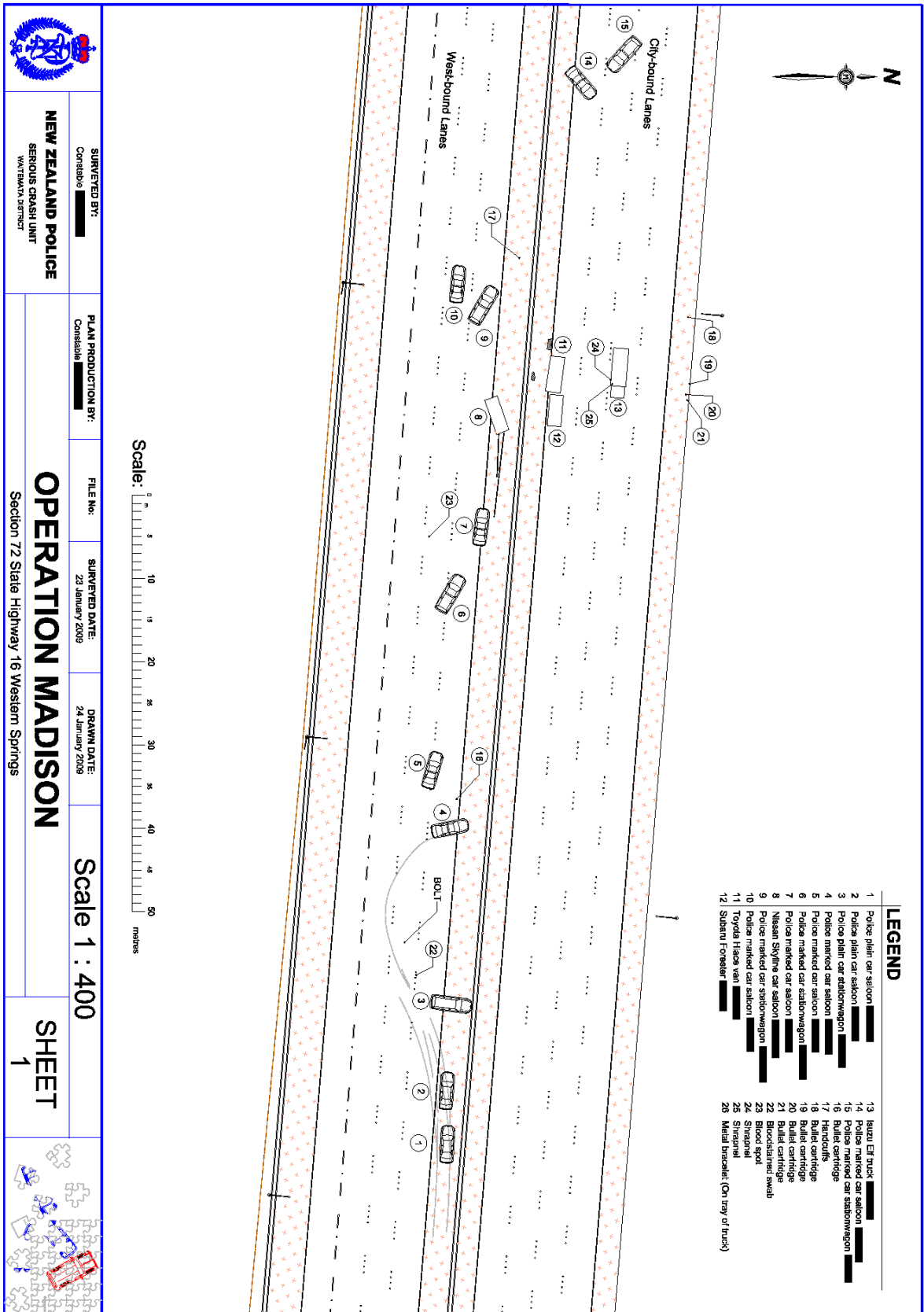


Photograph 6: bullet holes and trajectories of Officer 84's second shot and Officer 81's shot

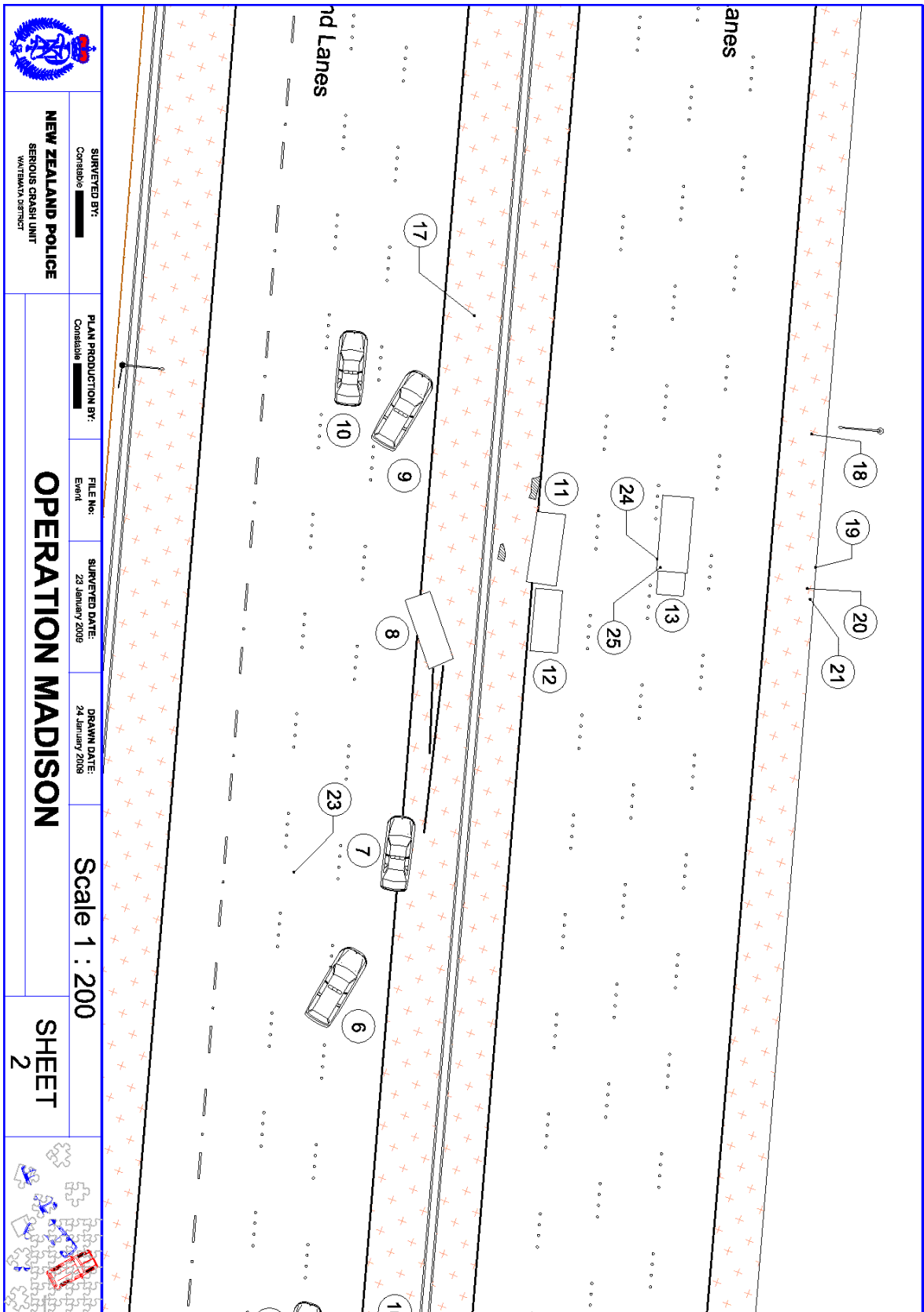


Photograph 7: side-on view of the vehicles

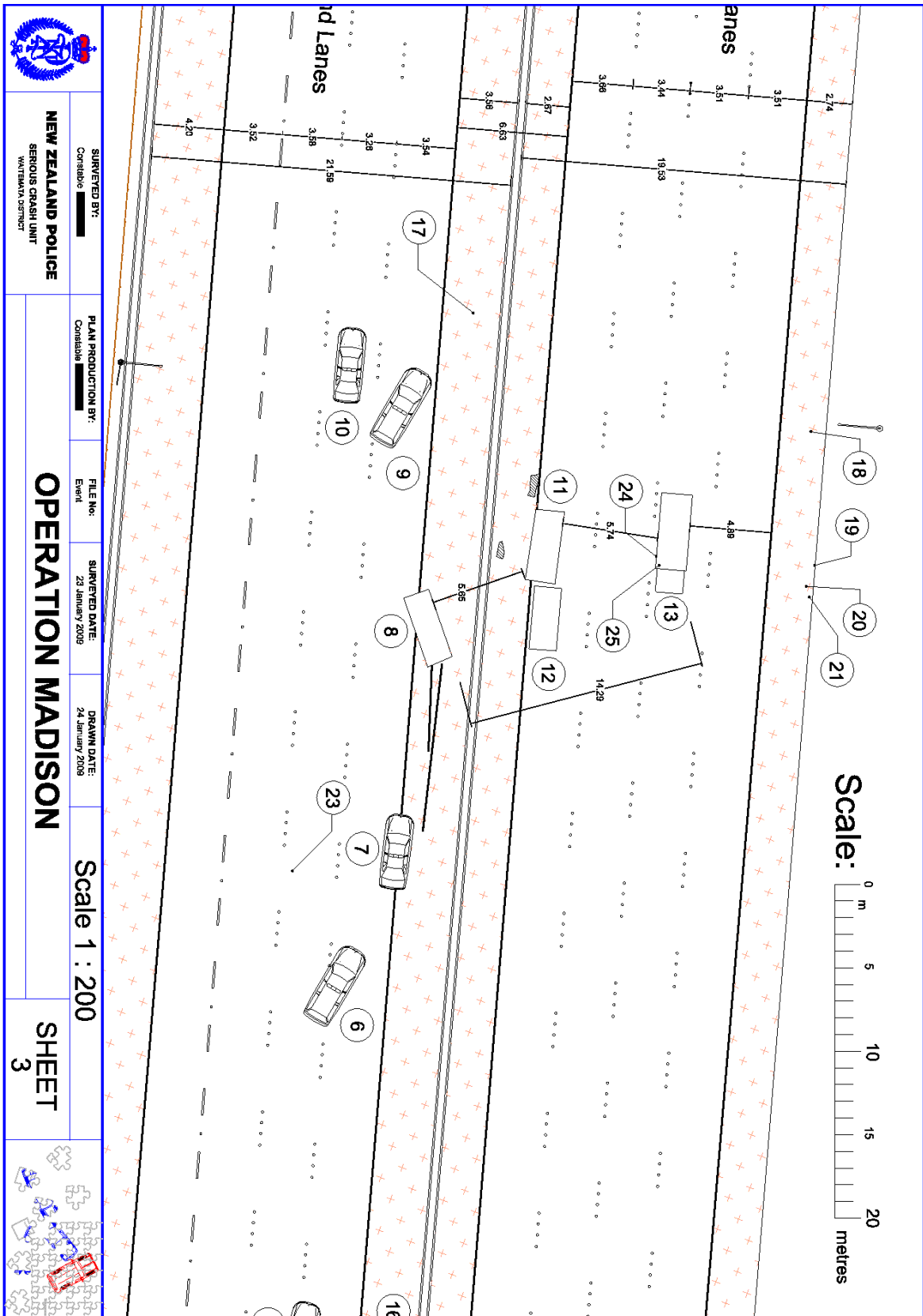
Scene plan 1: final positions of the vehicles



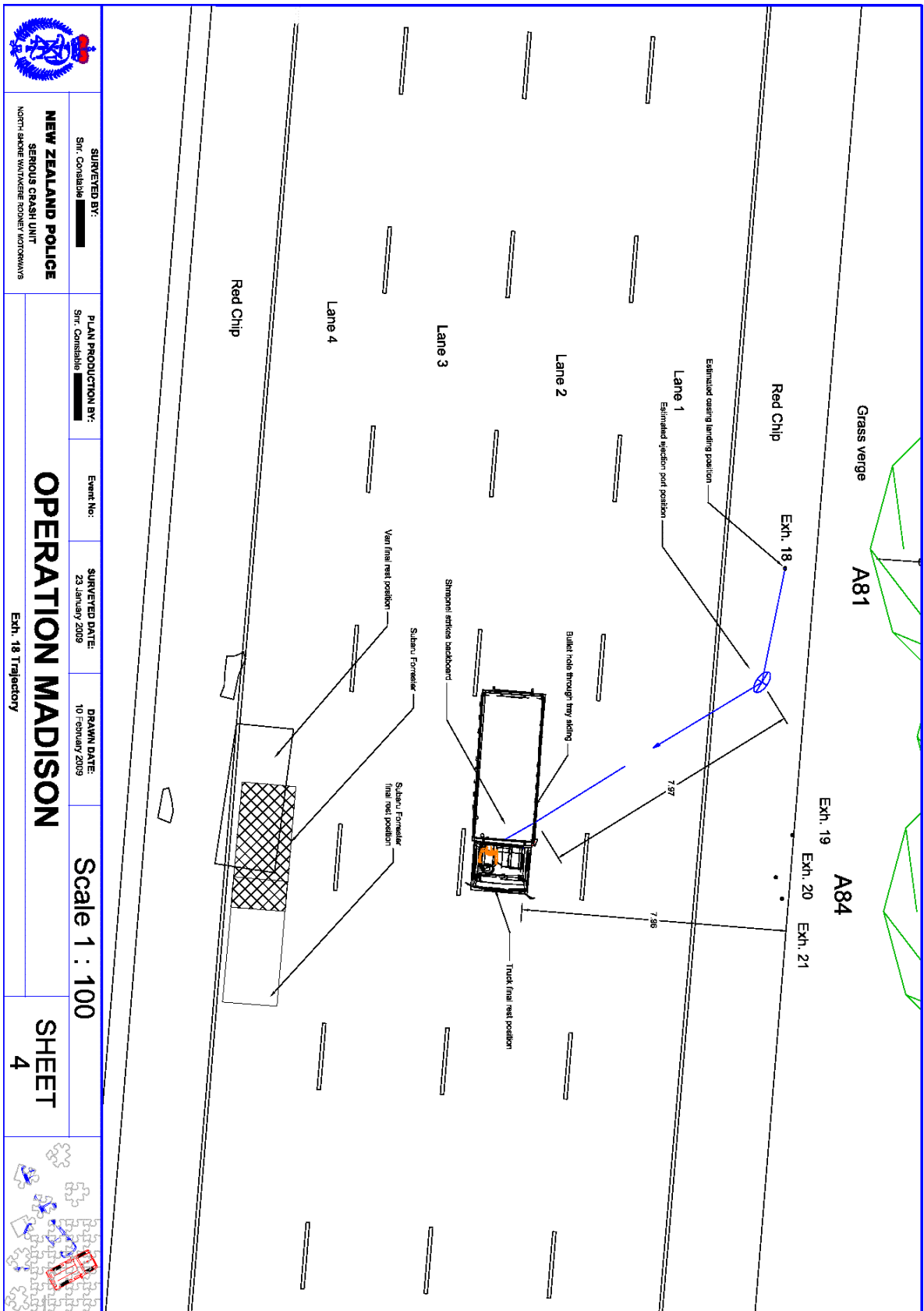
Scene plan 2: close-up of the scene



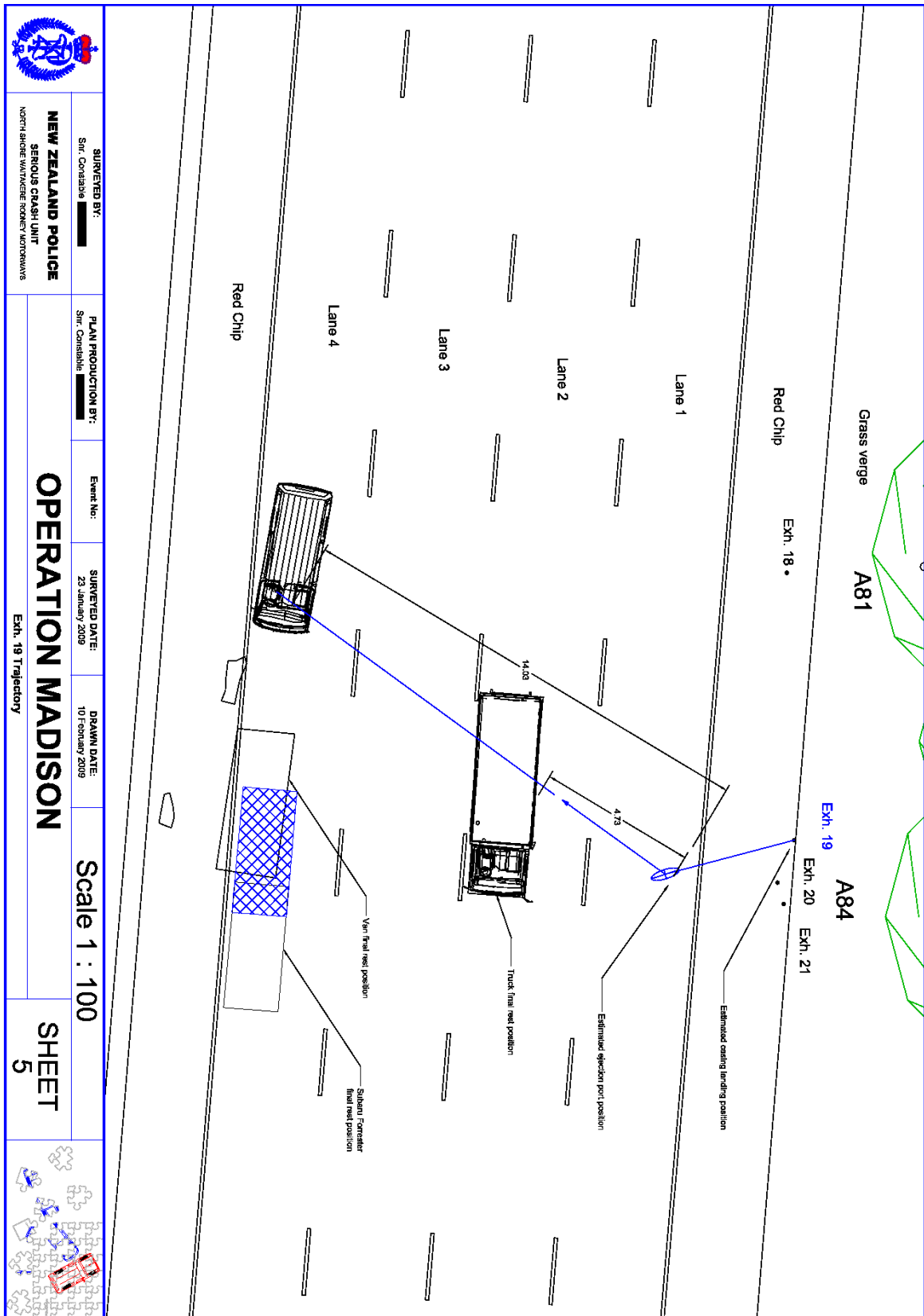
Scene plan 3: close-up with distances marked







Scene plan 4: Officer 81's shot

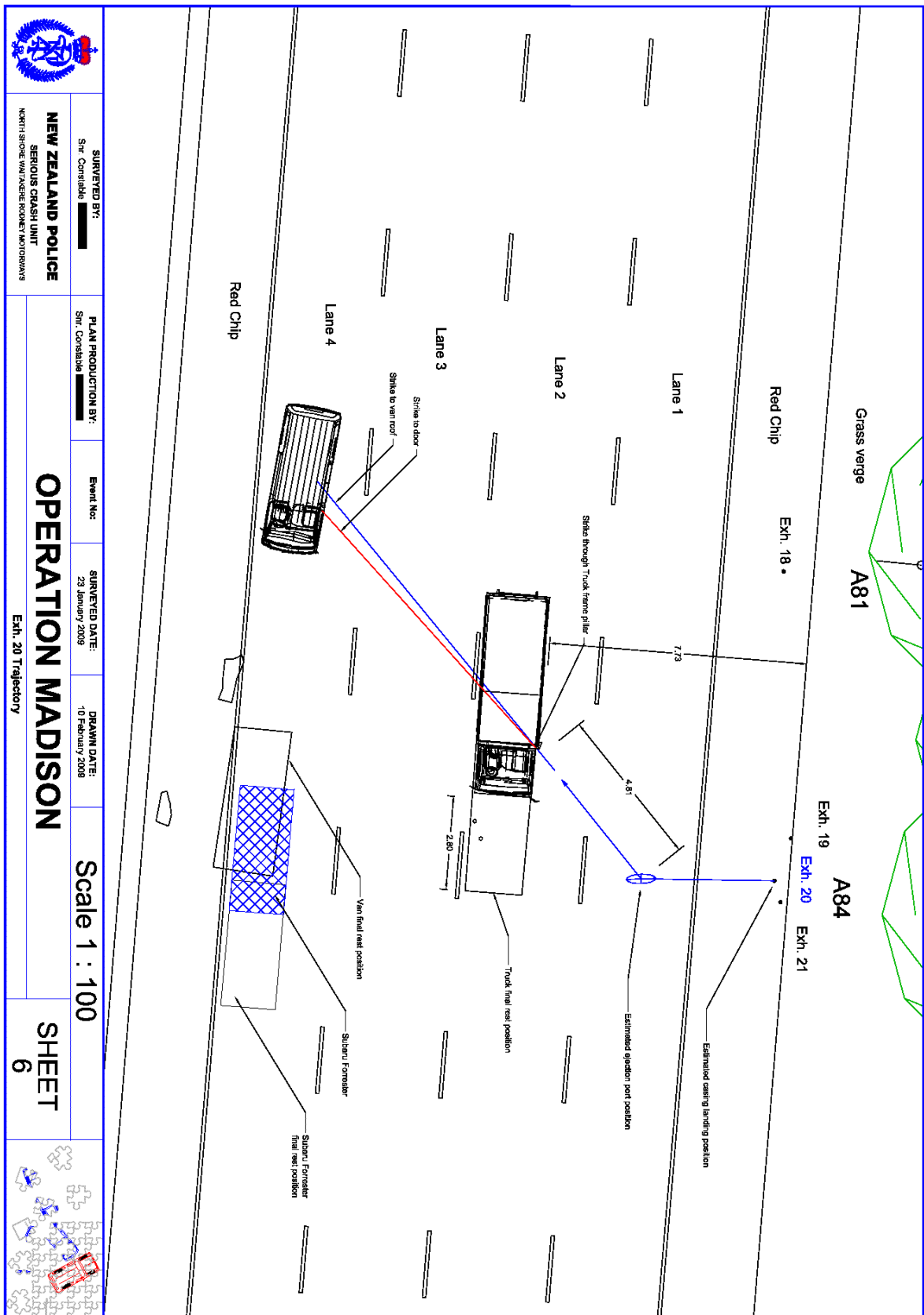


Scene plan 5: Officer 84's third shot

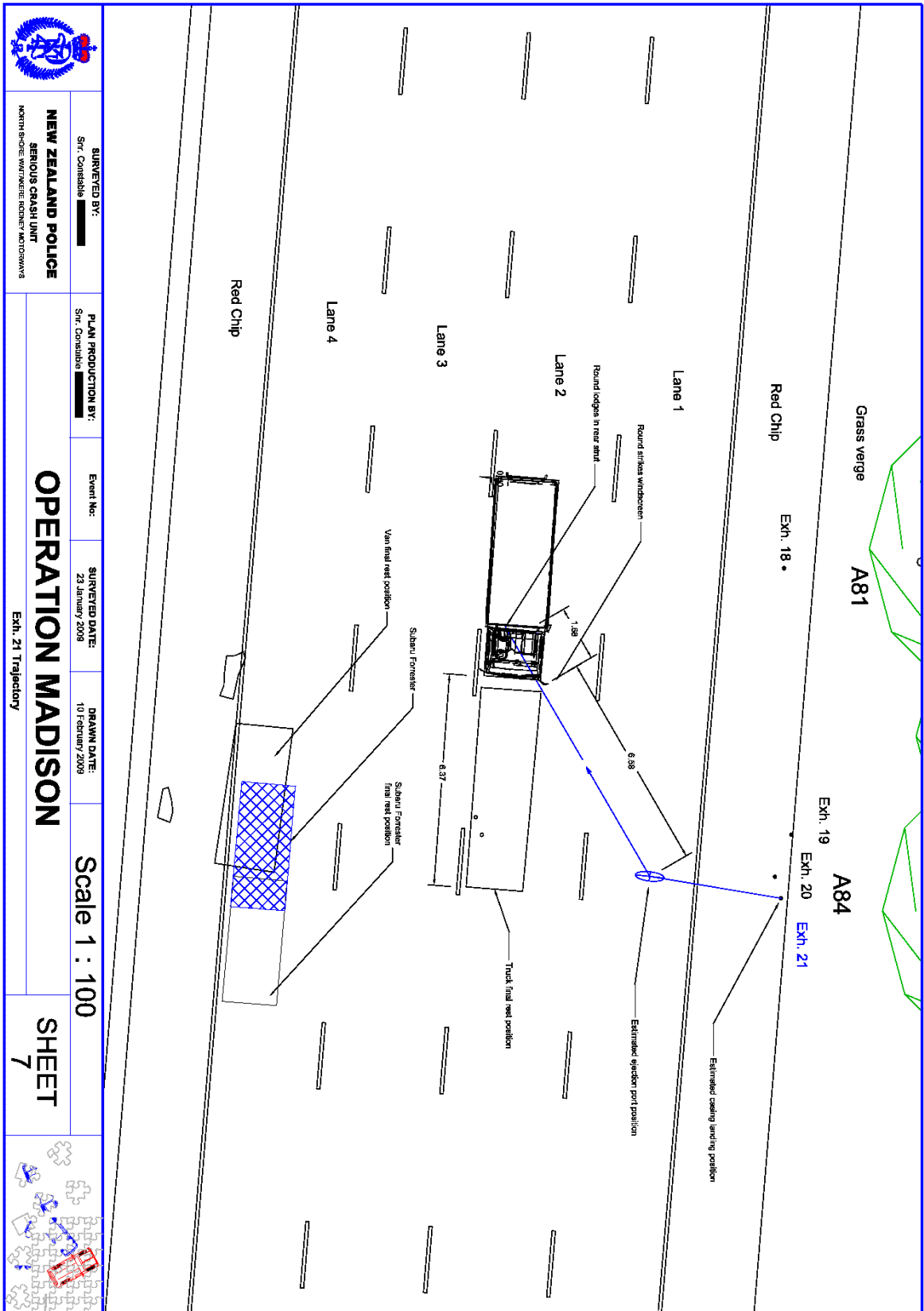


 <p>NEW ZEALAND POLICE SERIOUS CRASH UNIT NORTH SHORE WAIKARE ROBINY KOTOMAWA</p>	<p>SUBMITTED BY:  Sgt. Constable</p>	<p>PLAN PRODUCTION BY:  Sgt. Constable</p>	<p>Event No:</p>	<p>SUBMITTED DATE: 23 January 2009</p>	<p>DRAWN DATE: 10 February 2009</p>	<p>OPERATION MADISON</p> <p>Exn. 19 Trajectory</p>	<p>Scale 1 : 100</p>	<p>SHEET 5</p>	
	<p>OPERATION MADISON</p>								

Scene plan 6: Officer 84's second shot



Scene plan 7: Officer 84's first shot



About the Authority

WHAT IS THE INDEPENDENT POLICE CONDUCT AUTHORITY?

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

It is not part of the Police – the law requires it to be fully independent. The Authority is chaired by a High Court Judge and has other members.

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

The Authority has highly experienced investigators who have worked in a range of law enforcement roles in New Zealand and overseas.

WHAT ARE THE AUTHORITY'S FUNCTIONS?

Under the Independent Police Conduct Authority Act 1988, the Authority:

- receives complaints alleging misconduct or neglect of duty by police, or complaints about police practices, policies and procedures affecting the complainant;
- investigates, where there are reasonable grounds in the public interest, incidents in which police actions have caused or appear to have caused death or serious bodily harm.

On completion of an investigation, the Authority must determine whether any police actions were contrary to law, unreasonable, unjustified, unfair, or undesirable. The Authority can make recommendations to the Commissioner.



IPCA

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