

Police justified in shooting of David Fononga in Henderson

1. At about 10am on 17 March 2023, Mr Fononga committed an armed robbery at a Gull fuel station in Henderson, firing one round from his shotgun into the ceiling. He left the scene but returned about 30 minutes later and aimed a firearm at Police who were attending the scene of the robbery. This was the start of an incident which lasted approximately 18 minutes, in which Mr Fononga drove through the streets of Henderson, firing at Police officers from his car at six separate locations. His final destination was the Henderson Police Station, where he got out of his car, still holding his shotgun, and was shot by officers from the Armed Offender Squad (AOS). Officers performed first aid at the scene and an ambulance was called, but Mr Fononga later died from his injuries.

The Authority's Findings

Issue 1: Was the command, control, and communication during the incident appropriate?

The command and control of this incident was satisfactory in the extraordinarily difficult circumstances the officers faced.

Issue 2: Were Officers A and C justified in shooting at Mr Fononga?

Officers A and C were justified in shooting at Mr Fononga.

Issue 3: Was Officer D justified in shooting at Mr Fononga?

Officer D was justified in shooting at Mr Fononga.

Issue 4: Were Officers A, B and C justified in shooting Mr Fononga at the Henderson Police Station?

Officers A, B and C were justified in shooting Mr Fononga at the Henderson Police Station.

Summary of events

2. The incident giving rise to the issues considered in this report unfolded over the course of about 18 minutes. It was a fast-moving event, with Police following Mr Fononga at a distance through the streets of Henderson before he was shot by three officers outside Henderson Police Station. In order to understand the nature of the event, and the decision-making of officers, it is necessary to consider the event in its entirety. For this reason, we set out the factual background before considering the issues that arise.
3. On 17 March 2023 at about 10am, Mr Fononga committed an armed robbery at the Gull fuel station on Forest Hill Road in Henderson. He fired a single shot from his shotgun into the ceiling of the shop and took a container of cash from Armourguard staff who were replenishing the ATM machine inside the shop. Witnesses saw him place that container in the boot of a black BMW and drive away.
4. Police were notified and attended the scene at 10.13am. The Police helicopter, Eagle, was notified and started looking for Mr Fononga's car. At about 10.30am, while Police were still at the scene, Mr Fononga returned to the fuel station. Members of the public who had witnessed the armed robbery alerted Police that it was the same BMW that had returned. An officer said, in a radio transmission at 10.30am, *"the car's come back and he's got a gun"*. Mr Fononga drove into the forecourt of the fuel station and pointed his gun out the front passenger window of his car at the Police officers standing in front of the store, before driving away along Henderson Valley Road towards Pine Avenue. Eagle identified Mr Fononga's car and followed overhead for the duration of the event. We have viewed the video footage taken by Eagle. Witnesses at the fuel station described the gun as being long and possibly semi-automatic.
5. Mr Fononga drove onto Forest Hill Road, where Eagle footage shows him pointing a firearm out the window. He did a U-turn and, as he approached the roundabout at the intersection of Pine Avenue and Forest Hill Road, he fired a shot at a marked patrol car which was driving through the roundabout.
6. Mr Fononga continued driving and, as he approached the roundabout on Parrs Cross Road at the intersection with Bruce McLaren Road, he shot at another patrol car, which then headed north on Bruce McLaren Road. Mr Fononga drove east on Parrs Cross Road. After this, a radio transmission requested Police units to back off and wait for the AOS to arrive.
7. Eagle footage then shows Mr Fononga turning left onto Seymour Road. At this time an unmarked patrol car was parked outside a childcare centre on that road, with flashing lights activated as its driver (Officer L) retrieved her M4 rifle from the boot. She saw the BMW approaching and took cover between a civilian car and the childcare centre fence. The passenger (Officer K) was at the rear of the Police car preparing to deploy road spikes when he also saw the BMW approaching. At that point, he also took cover behind the civilian car. He saw Mr Fononga driving slowly towards them, before stopping directly parallel with the Police car. He then heard a loud bang and the shattering of glass and realised that they had been shot at. Officer K said that the BMW stayed stationary for a period, before driving slowly away. He observed *"at this point I felt as if the shooter was trying to stalk Police officers"* and felt that if it was not for the other marked

police cars following, Mr Fononga would have taken another shot at them or got out of his car and approached them. When Officer K returned to their patrol car, he saw that the driver's side window was completely smashed and there was a hole in the pillar behind that window. This shooting was witnessed by AOS Officers A, C, F and G who were in a vehicle at a nearby intersection. It was fortuitous that these officers were able to respond so quickly to this incident, as they happened to be in the area on a training day when they heard what was happening over the radio. Officer A observed:

"In my mind, my threat assessment was that this guy was not trying to escape, he wasn't driving at excessive speeds trying to avoid apprehension. He deliberately slowed down next to that Police vehicle, discharged the firearm and carried on driving".

8. Mr Fononga drove away from the scene at about 40 kilometres per hour. After driving through roadworks, including stopping for traffic control, he continued on, turning right onto Awaroa Road heading east towards Great North Road. At 10.40am Officer C transmitted over the radio *"Comms I suggest that we keep wide cordons until we can get tactical units in place. We don't want to instigate anything. He is not shooting at the public at this stage"*. The Incident Controller repeated this advice and told all staff to be armed. Officers A and C and the other officers in their car followed the BMW through the roadworks. Officer A says he had some concern that Mr Fononga would shoot the traffic control worker and, by the time the BMW had passed through that area, Officer A's threat assessment was:

"This is an active armed offender, he has got a firearm with him...he's in a vehicle driving around looking for Police and posed a very extreme risk to any Police in the area, and the public as well".

9. The next shooting occurred at 10.41am on Awaroa Road. A marked Police car was stopped in the left lane, just before the intersection with Great North Road. NorthComms can be heard with urgency saying over the radio *"that Police car there, you want to get out of the way now"*, and then, *"Guys you need to go!"*. Mr Fononga's BMW can then be seen on Eagle footage stopping next to the Police car. Officer M was the officer in that car. He had previously been parked on the opposite side of the road and had taken cover behind his vehicle but, due to a miscommunication from Eagle, he thought Mr Fononga was going to be travelling down Great North Road, rather than Awaroa Road. He had therefore moved his car to the other side of the road and was still in the driver's seat when he heard the warning from NorthComms over the radio but did not realise the warning was directed at him.
10. Officer M says he then looked over his shoulder and saw the BMW approaching from behind, about 10 metres away. He says he did not know if it was the offending vehicle at that stage. He recalls that his window was at least partly down, and he looked across as Mr Fononga stopped alongside him. Officer M estimates he was no more than one to two metres away. He saw Mr Fononga raise the barrel of a gun pointing directly at him, and believes he heard him say *"Die Pig"* while he was looking at him. Officer M says he instinctively ducked his head down below window level and leaned across the front passenger seat. As he did so, he heard a loud bang and felt the thud of the impact against the side of the car. One to two seconds later, he believed he heard another gun shot and was sprayed with shattered glass as the shotgun blast smashed

through the driver's window narrowly missing him. Mr Fononga drove away, turning right onto Great North Road, and Officer M also moved off, continuing to monitor the BMW.

11. Mr Fononga drove a short way down Great North Road before performing a U-turn and heading north. Several Police vehicles had been following him, led by Officer C in his car with other AOS officers. Mr Fononga was now approaching these vehicles as he headed back in the opposite direction. At 10.42am one of those units reported the U-turn over the radio. An officer can be heard saying over the radio: *"Unit on G-N-R, pull off to the side. Get on the side road"*. Eagle footage shows the AOS car stopped on the side of the road near the intersection with Hepburn Road. Officers A, C, F and G, knowing Mr Fononga was now heading towards them, were taking cover behind their car. They had witnessed Mr Fononga shoot at Officers K and L on Seymour Road, as well as at Officer M on Awaroa Road.
12. As the BMW passed the AOS car, the officers heard gunshots and glass smashing as Mr Fononga shot at the front driver's side window of their car. Officer A could see what he believed to be the firearm pointing at them from the BMW's driver-side window. He fired two to three times at the driver's window of the BMW. Officer C also saw the barrel of Mr Fononga's shotgun pointing out the window at them. He says he fired one shot, then Mr Fononga returned fire and Officer C fired a further four to five times in quick succession. Eagle footage shows glass fragments blasting out of the rear windscreen of the BMW. The BMW then continued up Great North Road.
13. Officer M (the same officer who had been shot at on Awaroa Road), having observed the Police officers near the intersection of Hepburn Road and heard the gunfire, positioned his vehicle to stop the two lanes of southbound traffic that were heading towards that intersection. As the BMW passed him, Mr Fononga fired two shots out the window at him.
14. The BMW continued driving to the intersection of Great North Road and View Road, where there were four cars stopped at traffic lights in the two northbound lanes. Mr Fononga stopped on the median strip dividing the road. A marked patrol car was parked in the driveway of a house across the road, having taken cover there knowing Mr Fononga was in the area. Officer D was one of the officers from that car and when he saw the BMW stop on the median strip in front of them he took cover behind a car in the driveway. When he saw Mr Fononga was aiming a gun towards them, Officer D fired a shot at him. Eagle footage shows a plume of glass fragments coming out of the rear left passenger window of Mr Fononga's car, while the tip of Mr Fononga's shotgun can be seen protruding out of the driver's window pointing in the officer's direction.
15. From there, Mr Fononga drove to the Henderson Police Station, entering the front carpark through the station's vehicle exit. He stopped near the front entrance of the station and exited the vehicle, holding his firearm in his hand. The footage from Eagle was partially obscured by a tree, but an onlooker captured what happened on his mobile phone. Mr Fononga aimed his firearm at a Police car parked on Sel Peacock Drive. Six officers advanced towards Mr Fononga, including the AOS officers who had arrived at the scene. At 10.48am three AOS officers fired their M4 rifles at Mr Fononga, who fell to the ground. Officers administered first aid and an ambulance was called but Mr Fononga later died from his injuries.

Analysis of the Issues

ISSUE 1: WAS THE COMMAND, CONTROL AND COMMUNICATION DURING THE INCIDENT APPROPRIATE?

16. In this section we describe who had command during this fast-moving incident and whether there were any concerns with the way updates and directions were communicated.
17. The Incident Controller was the shift commander at the Northern Communications Centre (NorthComms). He had overall command of the incident. The vast majority of the incident played out in moving vehicles, with numerous police units on the road attempting to follow Mr Fononga's BMW and keep observations on him. This made the role of Eagle critical. Other units were highly reliant on Eagle's updates, so it was appropriate that the dominant voice on the radio was that of an Eagle operator.
18. Overall, Eagle did an excellent job in providing real time updates as to Mr Fononga's actions and direction of travel. However, there was one critical point where the Eagle operator mistakenly provided an incorrect street name over the radio. He stated that Mr Fononga was on Great North Road, when in fact he was on Awaroa Road. This led Officer M to park his patrol car on Awaroa Road, not knowing that Mr Fononga was in fact approaching him from behind. Mr Fononga pulled up beside Officer M and fired at him through the driver's window. This is described in paragraphs 9 and 10.
19. The Eagle operator providing the radio updates told us that he realised his mistake after he had provided the location of Great North Road but was unable to get back on the radio to correct it due to other people speaking on the radio. There are two operators in the Eagle helicopter: one in the front seat operating the camera and providing radio updates; and the other in the backseat with the maps open in front of them. The front seat operator, who provided the incorrect street name, says he relies on the backseat operator to give consistent location updates. In this case, the front seat operator realised his own mistake, but was unable to get back on the radio to correct it. Instead, the Incident Controller, who was watching the live Eagle footage from NorthComms, tried to warn Officer M of Mr Fononga's approach but unfortunately did so using non-specific language (see paragraph 9), so Officer M did not know the warning was directed at him. The Incident Controller explained that he too had lost track of which street Mr Fononga was driving down at the time, so was unable to provide more detail to Officer M.
20. This error in what was otherwise very effective handling of the incident by Eagle, could have resulted in the death of Officer M. While there is a process within the Eagle helicopter for the back seat operator to provide location checks for the front seat operator, this is only of value if Eagle is able to quickly get back on the radio and correct a mistake. The way Police radios work currently is that if someone is on the radio, no one else can speak. This incident provides an opportunity for Police to explore an override capability, which would allow Eagle to interrupt a transmission when someone else is speaking.
21. In our interview with the Incident Controller, he was candid about the role he played and lessons he learned from the incident. It is apparent that in an incident like this, crowding on the radio

channel will always be a challenge, as evidenced by Eagle not having the opportunity to correct their incorrect transmission (paragraph 19). The Incident Controller noted the difficulty in being able to communicate effectively whilst also providing Eagle the opportunity to provide much needed commentary. The downside of this strategy appears to have been that units on the road were unsure who had control of the incident. Indeed, the Incident Controller told us that he often allowed the dispatcher, whom he was standing next to, to speak on his behalf to minimise the radio transmissions.

22. The Incident Controller told us that, despite the firearms training that all frontline officers now received, his strategy in this case was for units to maintain a distance from Mr Fononga and to wait for the AOS to arrive.
23. The shift inspector, who was on the way to the scene, directed over the radio that all staff should come to a stop and let Eagle continue the commentary, believing it was dangerous for general patrol staff to engage with Mr Fononga. There were also radio transmissions from the Incident Controller and others encouraging units to drop back from Mr Fononga. However, from our interviews with the officers involved it is apparent that the plan to follow Mr Fononga and await the arrival of AOS was not clearly communicated or understood.
24. There was also no radio communication informing other units that a patrol car containing Officers A, C, F and G was already following Mr Fononga. This would have provided some assurance to everyone that trained AOS staff were already in attendance. Officer C, the senior of the three, told us that he tried to communicate their presence over the radio but was unable to due to the busy radio traffic.
25. The Incident Controller was in the difficult position of needing to minimise radio transmissions so Eagle could have priority, while still effectively communicating his own instructions to mobile units. He told us that since this incident he has changed his practice and relies less on the dispatcher to relay his intent. This is partly to reduce the delay in transmitting a message through the dispatcher rather than himself and partly to ensure officers on the ground understand the instructions are coming from the Incident Controller who is in command:

"I've got quite a distinctive voice so they know that that's a shift commander, then bang that's it, let's not argue about it, I've given you the plan and that's it".

26. It started to become evident at a point during the incident that Mr Fononga may have been purposely driving in the direction of the Henderson Police station. With this possibility in mind, the District Commander, who was inside the station at the time, ordered the Police Station to be secured. This foresight is to be commended, as it gave people inside the station the opportunity to implement measures, ensuring they would be ready in the event Mr Fononga attempted to enter.

Conclusion

27. Overall, we are satisfied that the command and control of this incident was satisfactory in the extraordinarily difficult circumstances the officers faced. We find that the Incident Controller could have made it clearer to all units that he had command and control of the incident. This may have given more certainty to staff of his instruction and intent for units to drop back from Mr Fononga and await the arrival of AOS. Other difficulties arose from crowding of the radio channel. The most significant consequence of this was Eagle's inability to correct the mistake made in giving the wrong location for Mr Fononga when he was on Awaroa Road. This led to Officer M being caught by surprise and shot at twice at close range.
28. We accept that the solution to this overcrowding is not obvious. However, we recommend Police revisit the advantages and disadvantages of an override button for Eagle, so that critical transmissions can be made over other radio chatter.

FINDING ON ISSUE 1

The command and control of this incident was satisfactory in the extraordinarily difficult circumstances the officers faced.

ISSUE 2: WERE POLICE JUSTIFIED IN SHOOTING AT MR FONONGA NEAR THE INTERSECTION OF GREAT NORTH ROAD AND HEPBURN ROAD?

29. In this section we describe what happened when Officers A and C shot at Mr Fononga. We then assess whether the officers' actions were justified, or protected from criminal responsibility, under section 48 of the Crimes Act 1961, which covers force used by anyone to defend themselves or another person.
30. As described in paragraphs 7 to 12, a car containing AOS Officers A, C, F and G had been attending a training day nearby. After they heard on the radio that Mr Fononga had returned to the service station and pointed his firearm at officers, they decided to travel to the scene. They encountered Mr Fononga's BMW at Seymour Road, where they saw him fire at the car of Officers L and K. They then followed him at a distance, through the roadworks and along Awaroa Road, where they saw him fire at Officer M. They were still following him on Great North Road when he performed a U-turn and headed back in their direction. At that point they pulled over and were able to get out of the car and take cover.
31. As described in paragraph 12, both Officers A and C fired shots at Mr Fononga as he drove past. Mr Fononga also fired at least one shot at them.

Were Officers A and C legally justified in shooting at Mr Fononga?

32. Officer C maintains that he was justified in shooting Mr Fononga under section 48 of the Crimes Act, because he could see that Mr Fononga was aiming his firearm in his direction and he knew a fellow officer was yet to take cover. When assessing whether use of force is justified under section 48 of the Crimes Act, we assess the officer's actions on both a subjective basis (what

Officer C genuinely believed the circumstances to be) and an objective basis (what a “reasonable” person would have done if they believed what Officer C believed).

What were the circumstances as Officer C believed them to be?

33. Officer C had witnessed Mr Fononga shoot into the car carrying Officers L and K as well as at Officer M. Immediately before he fired, he says he recalled seeing a firearm held by Mr Fononga and pointing in the direction of their car. He says:

“I’d describe the firearm as black and having a long barrel. I had no doubt in my mind that the offender was going to shoot at myself and my team and that if I allowed him to do so it would either kill or cause serious injury to myself and my team. And if he continued driving up the hill it would likely cause injury to the further Police members that I was aware were in that area somewhere.”

34. Officer C says he was aware there were no other civilian cars in the line of fire and he could see the retaining wall and grass bank behind the BMW. He recalls firing one shot at Mr Fononga, who then fired back. Officer C then fired four or five shots back in quick succession “in an attempt to either neutralise the threat and prevent him from firing more shots back at us”. Officer C says he tried to report over the radio that he had fired shots but was unable to get on due to radio traffic.
35. Officer C’s recollection is that, as an AOS team leader, he believed his team had better training and a better capability to deal with the threat that was presented than other frontline staff in the vicinity. For this reason, he deemed it necessary to get out of the car and prepare to engage the threat posed by Mr Fononga.

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

36. Officer A had witnessed the same shootings by Mr Fononga as Officer C. After he got out of the patrol car, he says he used it as cover, kneeling at the rear of the car. He says he could see the BMW driving up Great North Road towards them, and describes the moment before he shot:

“I was still taking cover at the rear and pretty much instantly from when he came into my sight um there were already, had already been shots exchanged, glass smashing around me, um I knew that we were being shot at and I could see the rifle outside the driver’s window and so I aimed at the driver’s window and tracked him and fired what I believe to be two or three rounds.”

37. Officer A also told us:

I feared, firstly I feared that he was going to kill us. I watched him shoot. I firstly heard multiple officers reporting that he had been shooting at them. I’d watched him shoot on two separate occasions at two different police vehicles or at police staff and then he shot at us and I believe that he was hunting down police to shoot and kill police including myself.

38. Officer A says that Mr Fononga shot at the Police car before he fired. He says he considered the risk to members of the public and was aware that beyond Mr Fononga’s car was a retaining wall and grass bank, providing a safe background for him to shoot.

Were the officers' uses of force against Mr Fononga for the purpose of defending themselves or others?

39. It is clear from the evidence outlined above that both Officer A and Officer C used their firearms for the purpose of defending themselves and the other officers they were with.

Were Officers A and C's uses of force against Mr Fononga reasonable in the circumstances as they believed them to be?

40. Both Officers A and C had seen Mr Fononga shoot at other officers on two occasions in the previous few minutes. They knew he had the capability and the intent to fire. At the moment they each fired their shots, Mr Fononga was aiming his shotgun in their direction. Officer A told us that Mr Fononga had already fired a shot when he fired. This is consistent with Officer C's description, whereby he fired, then Mr Fononga fired.
41. The only other tactical option Officers A and C had was to take cover. The Police investigator asked Officer A why he did not just take cover rather than firing at Mr Fononga. Officer A described a split-second decision to try and stop the BMW by shooting, rather than letting Mr Fononga leave and continue to target Police officers. Officer C describes Mr Fononga aiming his shotgun in his direction at the time of his first shot. By the time he fired several more shots (paragraph 12), Mr Fononga was driving away, up Great North Road and would no longer have posed a threat to the officers from Officer C's vehicle. We accept, however, that in these fast-moving circumstances, Officer C held a genuine fear for the other officers in the area, whom Mr Fononga had been targeting, and who had less capability to respond to the threat than himself.
42. At the time the officers fired, they were on the side of a busy road. A consideration in the reasonableness of their decision to shoot was the presence of members of the public in the area. Officer A told Police that one of his considerations was that:

"directly opposite us we've got an elevated bank, a retaining wall and there were no pedestrians directly opposite us, or members of the public, that would be put to any unnecessary risk...should I need to fire".

43. Officer C recalls there were no other civilian vehicles directly behind Mr Fononga's BMW and that Great North Road was blocked in one direction from civilian traffic. He, too, noted the cemetery, grass bank and retaining wall on the opposite side of the road.
44. We are satisfied that Officers A and C gave due consideration to the risks to members of the public before they fired their weapons. We are also satisfied that Mr Fononga posed an immediate threat to Officers A and C, and their colleagues, and their uses of force in shooting at Mr Fononga were reasonable and justified in the circumstances.

FINDINGS ON ISSUE 2

Officers A and C were justified in shooting at Mr Fononga on Great North Road.

ISSUE 3: WAS OFFICER D JUSTIFIED IN SHOOTING AT MR FONONGA ON GREAT NORTH ROAD NEAR VIEW ROAD?

45. In this section we describe what happened when Officer D shot at Mr Fononga. We then assess whether Officer D's actions were justified, or protected from criminal responsibility, under section 48 of the Crimes Act 1961, which covers force used by anyone to defend themselves or another person.
46. The circumstances of this shooting are summarised at paragraph 14 above. Officers D, H and I were at Henderson Police station when they heard over the radio there had been an armed robbery at the Gull service station. They armed themselves and drove to the service station but, by the time they had arrived, Mr Fononga had left. While searching the neighbourhood, they heard over the radio that Mr Fononga had returned to the service station and pointed a firearm at Police. Officer D does not recall receiving any directions from NorthComms. He does recall hearing over the radio that Mr Fononga had shot at officers multiple times.
47. After hearing the direction on the radio for Police to stay off the road, the officers decided to pull into the driveway on Great North Road to seek cover. Officer I recalls that it was Officer D who made that decision. At that point, the officers believed Mr Fononga was heading south away from them. They reversed into a driveway on the south-bound side of Great North Road and Officer H recalls that as they were doing this they heard over the radio that Mr Fononga had done a U-turn and was now heading back in their direction. As they were still reversing into the driveway, Officer I recalls Officer H pointing out the BMW in front of them, that had pulled to a stop at the intersection. Eagle footage and CCTV footage from the address corroborates this, showing the patrol car still reversing into the driveway as Mr Fononga approaches the red traffic lights at the intersection directly in front of them. Mr Fononga stopped on the median strip at the lights. He was separated from the Police car by two vehicle lanes and about five metres of driveway. Four civilian cars were stopped at the lights in the north-bound lanes to the left of Mr Fononga's car.
48. Officer D got out of the front passenger door of the patrol car and sought cover behind another vehicle parked in the driveway. Officer H exited the rear right hand door of the patrol car and also ran to seek cover behind the other vehicle. He recalls:

"I'm...running for cover across open space essentially expecting to get hit or shot by him, and that's going off what he's done leading up to this point and he's got the perfect opportunity. He knows we're there. He's now seen me out of the car".

49. Officer H went on to describe the moment he heard shots being fired: *"I believe just as I'm approaching cover that's when I've heard that first crack."*
50. Officer D fired a shot at Mr Fononga. The shot went through Mr Fononga's vehicle exiting the left rear passengers window.

Was Officer D legally justified in shooting at Mr Fononga?

51. Officer D says that he was justified in shooting Mr Fononga under section 48 of the Crimes Act, because he could see that Mr Fononga was aiming his firearm in his direction, and he knew that Officer H was yet to reach cover.

What were the circumstances as Officer D believed them to be?

52. Officer D described his experience in both his Police and IPCA interviews. His account accords with those of Officers H and I, as well as the Eagle and CCTV footage we have viewed. As described in paragraph 46, Officer D was receiving real time updates from Eagle over the radio each time Mr Fononga shot at an officer. He thought Mr Fononga was driving away from their position when he decided they should seek cover in the driveway. He describes how he and Officers H and I were still sitting in the reversing vehicle when Officer H suddenly exclaimed “*oh fuck that's him*” and they saw the BMW at the traffic lights in front of them. Officer D describes the moments after they saw Mr Fononga:

“I think we all kind-a just paused there for a bit staring at him and then he's turned and looked at us and it was kind-a just like the way that he looked at us I was like fuck that's him, like this is our guy. And ...he's looked at us for a bit, we kind-a just stared at each other and ... I don't think any of us were moving at that point, but then he's turned and looked down to his left, and kind of bent over, like he was going to grab something. So straight away I thought fuck he's grabbing the gun.”

53. Officer D says at that point he got out of the vehicle and started running for cover:

“I was still kind of looking at him at that point and just as I was turning the last thing I remember seeing is the gun coming up over the... door there..., so I've just fucking run... I thought I was about to get... shot.”

54. When Officer D reached cover and looked out to assess the situation, he told us he could see Mr Fononga hunkered down on his door:

“and I could see...a circle looking at me, so like the barrel of his gun. So I believed he was getting ready to shoot me...Well I thought I was going to die. I thought he was going to shoot my mate”.

55. The mate Officer D was referring to was Officer H, who he recalls still running for cover. This was corroborated by Officer H, as set out in paragraphs 48 and 49.

56. Officer D described to us his reason for shooting at Mr Fononga:

“like I said I've looked out, my colleague was still running to cover... I believed he was going to shoot us..., I feared for my life and I feared for my friends' lives.

if I didn't fire at him then he might have had the chance to shoot at [Officer H] and he could have gotten out of his vehicle and hunted us down if we remained in cover...”.

57. On the balance of the available evidence, including the accounts of bystanders and other officers present as well as Eagle and CCTV footage, we accept that at the time Officer D fired a shot at Mr Fononga, he thought Mr Fononga was about to fire at himself or Officer H, who was still running for cover.

58. We asked Officer D what he recalled of other cars and houses in the vicinity at the time he fired his M4 at Mr Fononga. He says that, while he recalled there were other cars also stopped at the intersection and houses beyond, his line of sight to and beyond Mr Fononga was clear, recalling *“it was just his silhouette and there was nothing else behind it”*. He says there was nothing between him and Mr Fononga and there were no vehicles directly behind Mr Fononga.

Was Officer D’s use of force against Mr Fononga for the purpose of defending himself or others?

59. It is clear from the evidence outlined above that Officer D’s use of his firearm was for the purpose of defending himself and Officer H.

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

60. We have considered whether Officer D’s shooting to defend himself and Officer H was reasonable in the light of our conclusions about his perception of the threat he confronted, as outlined in paragraphs 52 to 58. Force is reasonable if it is proportionate to the threat, taking into account the consequences if the risk materialises, the imminence of that risk and the likelihood of it occurring. It is also necessary to consider the nature and seriousness of the likely harm resulting from Officer D’s use of force to avert the risk.
61. The circumstances in this case were unusual. At the moment Officer D pulled the trigger, he believed that Mr Fononga was aiming his firearm at him. He had heard updates from Eagle in the preceding 10 minutes when Mr Fononga had discharged his firearm at other officers. Mr Fononga had in fact fired on six separate occasions, although we do not know whether Officer D was aware of all of these.
62. Officer D told us that he did not feel he had any tactical options other than shooting. He said the distance between himself and Mr Fononga would render his Taser or pepper spray ineffective and he acknowledged that Mr Fononga’s location inside a car presented a further obstacle, because he had not been trained to deal with armed offenders behind cover. The BMW was stationary at the time Officer D shot. Officer D had the tactical option of taking cover, but this would not have prevented Mr Fononga shooting Officer H, who was yet to reach cover.
63. Our only concern with Officer D’s shot relates to the presence of members of the public in other cars at the intersection. Indeed, the post-incident Police investigation revealed that Officer D’s round had hit a civilian vehicle’s ‘A’ pillar and driver’s door panel due to the single round fragmenting into at least two pieces. The driver was sitting in the driver’s seat at the time.
64. Officer D was not AOS trained and he was about 25 metres from the BMW. Mr Fononga had partial cover from his driver’s side door. These factors suggest to us that Officer D would have been aware that his chances of hitting Mr Fononga were slim. The presence of civilians in the four vehicles at the intersection presented a real risk that taking a shot from about 25 metres, could cause death or grievous bodily harm to them, evidenced by the projectile hitting the bystander’s car.

65. In applying section 48 to assess the reasonableness of Officer D's shot in the circumstances as he believed them to be, we need to balance the imminence and likelihood of Mr Fononga taking a shot that would kill or cause grievous bodily harm to Officers D and H, against the risk that Officer D's shot would kill or cause grievous bodily harm to a member of the public.
66. Given the real risk to members of the public in taking the shot, our conclusion that Officer D's decision to shoot was justified rests on Mr Fononga's behaviour over the previous 10 minutes. We accept that Officer D believed there was not just a chance Mr Fononga would pull the trigger, but that it was almost certain he would. That risk was both imminent and almost certain to materialise. Balanced against this, Officer D says he turned his mind to the risk his shot could pose to the public and he believed he had a clear shot (paragraph 58). In these circumstances, our assessment is that the risk Officer D believed Mr Fononga posed outweighed his perception of the risk his own shot might hit a member of the public. Officer D took a calculated risk. Our assessment is, in all the circumstances, his decision to shoot was justified.

FINDING ON ISSUE 3

Officer D's decision to shoot at Mr Fononga was justified.

ISSUE 4: WERE OFFICERS A, B AND C JUSTIFIED IN SHOOTING MR FONONGA AT HENDERSON POLICE STATION?

67. In this section we consider whether the three officers were justified in shooting Mr Fononga in the Henderson Police Station carpark.
68. The broad circumstances in which Mr Fononga arrived in the carpark of Henderson Police Station and was shot, are outlined in paragraph 15. We have viewed footage from Eagle, CCTV, and an onlooker's phone. We have also relied on evidence of both Police and civilian witnesses who were in and near the carpark and witnessed Mr Fononga being shot.
69. From the evidence, Mr Fononga drove into the carpark and stopped his car in front of the entrance to the station. He got out of the car, holding the shotgun in his right hand, with his hands out to the side. When he saw a Police car pull up on the street outside the station, about 9 seconds later, he took aim at that car. He appeared to be aiming his shotgun intermittently at Police for around nine seconds, before lowering both his arms out to the side, while still holding the shotgun in his right hand. This was the position he was in when he was shot about 12 seconds later.
70. The three officers all fired at almost the same time. They are all AOS officers from the same team. Officers A and C had been in a car following Mr Fononga and had earlier fired shots at him as described in Issue 2. For these reasons, while we make findings on each individual officer's actions, the similarity of circumstances allows us to consider some common elements in respect to all three.
71. In order to determine whether each of the three officers was justified in using lethal force against Mr Fononga, we apply the same test we applied in Issues 2 and 3, as each officer relied

on section 48 of the Crimes Act as their defence in deciding to shoot. That is, they were acting in defence of themselves or others.

What were the circumstances as the officers perceived them to be?

Officer A

72. Officer A was the same officer who shot at Mr Fononga earlier on Great North Road, and whose actions we considered in Issue 2. His car stopped on the road short of where Mr Fononga entered the station and he approached Mr Fononga on foot, in formation with the other officers in the car and led by Officer C. His initial belief was that Mr Fononga had gone inside the station building but, as they approached, he saw Mr Fononga standing outside his driver's side door with the firearm in his right hand. He says they then took cover behind a parked car about 15 to 20 metres away and yelled at Mr Fononga to "drop the gun", while hearing other officers yelling words to the same effect. Officer A recalls his thinking at the time:

...he's shot at us, I've watched him shoot at other Police. I believed that he was going to go into that front counter and shoot staff. At the time he's standing facing our direction with that gun in his right hand and so I've shot him two or three times..."

73. We asked him why he thought Mr Fononga posed an imminent threat, even though he was holding his hands out to the side, no longer aiming the firearm, at the time Officer A shot. He told us the threat posed by Mr Fononga was immediate because, while Mr Fononga was holding the gun away from him, the barrel was raised somewhere between the ground and the sky and he did not perceive Mr Fononga's stance as indicating an intention to surrender. He also recalls officers asking him to drop his gun, which he refused to do. Officer A's perception was that Mr Fononga would be able to shoot him faster than he would be able to react and shoot back. He told us that while his initial perception was that the biggest threat was to front counter staff inside the Police Station, at the time he shot, his biggest concern was that Mr Fononga would shoot one of the officers he was facing.

Officer C

74. Officer C was in essentially the same position as Officer A on arrival at Henderson Police Station. He says, like Officer A, that he anticipated that Mr Fononga had gone to the station in order to go inside and start shooting at people. He believes that his team's actions in advancing, along with Officers B and E, prevented Mr Fononga from doing that.
75. Officer C recalls standing about seven metres from Mr Fononga, who had both hands slightly out to the side, with the firearm in one hand. He does not recall the gun ever being pointed directly at him but says he is aware that, if Mr Fononga decided to shoot, he could do so faster than Officer C could react to that. He described Mr Fononga's stance as aggressive. It was for that reason, and because Mr Fononga had shown an intention to shoot officers and had not complied with a verbal warning, that Officer C decided to shoot. He told us:

"before I saw him I thought he was there to go into the station to shoot and kill people, When I saw him I believe that he was there to shoot and attempt to kill

us. I know the question was asked... 'did you think he was there to surrender?' At no stage did I think he was there to surrender... If he was going to do that he would have got out of that car with nothing in his hands and listened to instructions and he didn't do that".

Officer B

76. Officer B is an AOS-trained officer, and senior in rank to Officers A, C, F and G, although he had not been in the same car as them during the incident. He was monitoring events on the radio at Henderson Police station and when he heard Mr Fononga had returned to the petrol station and pointed his weapon at Police, he and Officer E (Officer B's supervisor and an AOS officer) started to arm themselves and arranged a patrol car. Officers B and E pulled out of the Henderson Police Station carpark, turned right, then turned into a carpark of a nearby swimming centre, hoping to do a U-turn and wait for Mr Fononga, facing the direction from which he understood Mr Fononga to be coming. Officer B says he saw what he believed to be Mr Fononga's car approaching, followed by Police cars with their lights flashing. Officer B says he and Officer E pulled out and followed as the first Police car in line after Mr Fononga. His car was then overtaken by Officers A and C as they followed Mr Fononga back towards the station. Officer B heard over the radio that Mr Fononga had entered the station carpark. He passed the car containing Officers A and C which had stopped just short of the station, saying his intention was to stop somewhere he could contain Mr Fononga in the carpark. He saw Mr Fononga standing outside his car and, as Officer B reached across to get his M4 firearm before getting out of the vehicle, he described to Police what he saw:

"I'm reaching across to grab my weapon, looking at him point the weapon at us, pushing my door open and seeing him point the barrel directly at us and pull the trigger...and I remember a metallic click of the trigger being pulled...he very quickly has gone from pulling the trigger, the weapon not firing to actioning the weapon to try to get the weapon working again, because obviously it didn't work the first time".¹

77. Officer B's recollection (corroborated by Officer E) is that Mr Fononga had tried to shoot at them, but that there was a misfire. Officer B describes feeling very exposed as Mr Fononga was trying to shoot him and says that Officer E was even more exposed as his side of the car was closer. He decided to move, to make himself a more difficult target, as well as to try and distract attention from Officer E. As Officer B moved towards cover, he says he had a less obstructed view of Mr Fononga and saw him pointing his firearm back in the direction of the other officers (including Officers A and C). He says he heard someone yelling at Mr Fononga to get on the ground and heard Mr Fononga yelling words like "shoot" or "shoot me".
78. Officer B did not know whether members of the public might be in parked cars or inside the entrance of the Police station behind Mr Fononga, so intentionally aimed low so that if his shot missed, the round would go into Mr Fononga's vehicle or the ground. Officer B recalls that, as he pulled the trigger, he heard "like a ripple of shots" from other officers firing. He fired one shot to incapacitate Mr Fononga. He told us that he did not issue a warning to Mr Fononga because most of his thought process was on moving so Mr Fononga could not shoot him. He also says

¹By "actioning", Officer B describes pulling the charging handle on a semi-automatic weapon back, in order to ready it.

that he did not consider Mr Fononga was surrendering when he held his arms out to the side, as he had pointed the weapon at officers and had pulled the trigger at Officer B a few seconds earlier. As he described it to us:

He's pointed a weapon [at other officers] – immediately before this he's pointed the weapon at me and pulled the trigger...The weapon has clearly in my mind misfired and he's taken really quick and professional steps to remedy the weapon and exactly the steps I would've taken to remedy that weapon and make it operational again. He's got...targets that he's been shooting at, in uniformed police staff approaching him that he's just been shooting at before. In my mind he's there, the gun's pointed, he's about to discharge the weapon".

Were the officers' uses of force against Mr Fononga for the purpose of defending themselves or others?

79. We are satisfied on the evidence that all three officers fired for the purpose of defending themselves and other officers, both outside and inside the station.

Were the shots fired by the officers reasonable in the circumstances as they believed them to be?

80. Officers A and C acknowledged that at the time they each shot at Mr Fononga, Mr Fononga was not aiming his firearm at them. Instead, he was holding it out to the side. Nevertheless, we accept the officers' evidence at paragraphs 73 and 75 that they did not view this as indicating that Mr Fononga no longer presented a lethal threat.
81. Officer B perceived that Mr Fononga was aiming his firearm at the group of AOS officers, which included Officers A and C. Moments before, he had watched Mr Fononga aim at himself and Officer E and, he believes, pull the trigger. In these circumstances, we accept Officer B's perception that he did not perceive that Mr Fononga was intending to surrender.
82. All three officers knew Mr Fononga had shown an intention to shoot Police officers. He was still armed and would have been able to fire again before an officer had time to react. There were no other tactical options reasonably available. Officer B highlighted the risk in taking a shot (paragraph 78), but we are satisfied that the immediacy of the threat posed by Mr Fononga outweighed this risk, particularly with the mitigating steps Officer B took. In these circumstances, our conclusion is that the shots fired by Officers A, B and C were justified.

FINDING ON ISSUE 4

Officers A, B and C were justified in shooting Mr Fononga at the Henderson Police Station.

Recommendation

83. We recommend that Police explore the viability of giving the Air Support Unit (Eagle) operator an ability to override other users of the Police radio in order to transmit critical information.

A handwritten signature in blue ink, appearing to read 'Kenneth Johnston', is centered on the page.

Judge Kenneth Johnston KC

Chair
Independent Police Conduct Authority

6 August 2024

IPCA: 23-17277

About the Authority

WHO IS THE INDEPENDENT POLICE CONDUCT AUTHORITY?

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

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

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

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

WHAT ARE THE AUTHORITY'S FUNCTIONS?

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

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

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

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

THIS REPORT

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



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