

## Police justified in using sponge rounds in self-defence during arrest in Invercargill

1. On 18 July 2022, an Armed Offender Squad (AOS) officer shot a man (Mr Z) twice with sponge rounds on his back. He was subsequently diagnosed with three fractured ribs. Police notified us of the shooting, as required by section 13 of the Independent Police Conduct Authority Act 1988.<sup>1</sup>
2. Police and other agencies carried out an operation to arrest and search the property of the recipient of an intercepted package originally containing Class A drugs (the drugs were removed before delivery).
3. Mr Z received the parcel and took it to a rural address outside Invercargill. Mr Z has gang connections and convictions for drug and firearm offences. Police obtained a search warrant for the address. At 6pm, when the AOS went to secure the property, Mr Z ran away into a wooded area carrying the parcel. AOS officers pursued him on foot.
4. Mr Z dived into a hole in the ground. AOS officers approached and told him to show his hands. Mr Z had his back turned to the officers, who say he did not comply with their instructions, although Mr Z disputes this.
5. An AOS officer (armed with a 40-millimetre sponge round launcher) mistakenly believed Mr Z was loading a shotgun and shot Mr Z in the back with a sponge round. He says Mr Z continued to refuse to show his hands, so he fired a second sponge round at Mr Z's back. Mr Z then raised his hands and was handcuffed. Mr Z complained he had difficulty breathing and was taken to a nearby ambulance.
6. The Authority independently investigated the use of force during this incident. We spoke to Mr Z, who complained that several Police officers assaulted him after he was handcuffed which he

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<sup>1</sup> Section 13 says: "Where a Police employee acting in the execution of his or her duty causes, or appears to have caused, death or serious bodily harm to any person, the Commissioner shall as soon as practicable give to the Authority a written notice setting out particulars of the incident in which the death or serious bodily harm was caused."

believes caused the rib fractures. We have investigated Mr Z's complaint as part of our investigation.

## The Authority's Findings

### **Issue 1: Was Officer A justified in shooting Mr Z with the sponge rounds?**

Officer A was justified under section 48 of the Crimes Act 1961 in shooting two sponge rounds at Mr Z in defence of himself and others.

### **Issue 2: Did any Police officers assault Mr Z during his arrest?**

Mr Z was not assaulted during his arrest.

## Analysis of the Issues

### ISSUE 1: WAS OFFICER A JUSTIFIED IN SHOOTING MR Z WITH THE SPONGE ROUNDS?

7. In this section we describe what happened when Officer A shot Mr Z with the sponge rounds. We assess whether Officer A's actions were legally justified or protected from criminal responsibility under the Crimes Act 1961, which covers force used:
  - by officers to overcome force used by another person to resist arrest (section 39);<sup>2</sup>
  - by officers to prevent a person from escaping arrest (section 40);<sup>3</sup> and
  - by anyone to defend themselves or another person (section 48).<sup>4</sup>
8. These legal provisions require us to consider whether the force the officer used was necessary, proportionate, and reasonable in the circumstances.

#### **What does Mr Z say happened?**

9. Mr Z says he heard a commotion at the gate of the property and saw three cars speeding up the driveway. The cars did not have their flashing lights or sirens on, and he did not realise they were Police vehicles. He says he thought they were gangsters.
10. Mr Z explains he was previously shot by gangsters and suffers from post-traumatic stress disorder (PTSD)<sup>5</sup> which made him panic and flee to the rear of the property. He was aware that people were pursuing him and yelling at him, but he did not register what they said.

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<sup>2</sup> Section 39 is set out in paragraph 64.

<sup>3</sup> Section 40 is set out in paragraph 65.

<sup>4</sup> Section 48 is set out in paragraph 66.

<sup>5</sup> PTSD is a mental health condition that develops following a traumatic event, characterised by intrusive thoughts about the incident, recurrent distress/anxiety, and avoidance of similar situations.

11. When he heard the words: *“Police, get down! Don’t move!”* he knew it was Police and immediately complied with their instructions. Mr Z says he sat down on the ground with his back to Police and raised his hands. He was not holding anything when he raised his hands. According to Mr Z, Police shot him in the back, and he fell forward onto his stomach. Mr Z says he thought he had been shot with real ammunition, and seconds later, Police shot him again in the back.
12. Mr Z believes he was shot at close range because after the second shooting, he looked behind him, and saw the officers standing a mere *“metre or two”* away from him.

### What do the officers say happened?

13. Officer A was the AOS team member armed with the 40-millimetre sponge round launcher during the arrest. This launcher fires a sponge-nose projectile and is a less-lethal tactical option used by specialist squads such as AOS.
14. He says before the operation, he and the other officers were briefed on Mr Z’s criminal background including his eight convictions for firearms offences, other convictions for serious offences such as kidnapping and supply of drugs, and that he was regarded as a high-risk offender. In addition, Officer A says he had dealt with Mr Z before.
15. At the property, Officer A followed the AOS Team Leader, Officer B, up a hill in pursuit of Mr Z.<sup>6</sup> Officer B describes that it was dark with limited visibility. Mr Z was pulling brown wrapping paper from the parcel he was carrying.
16. When Officer B reached the top of the hill, he could not see where Mr Z was. He switched on his torch and both he and Officer A saw Mr Z standing in a hole, approximately 15-20 metres away.
17. Officer B says Mr Z was standing with his back to them, when he suddenly moved his elbows from a high to a low position down his sides *“as if he was bending something in half.”* He thought Mr Z was loading a shotgun:

*“I can see the top of his body and that’s when I start yelling at him: ‘Hands! Hands! Hands!’, because that clear motion to me is loading a shotgun, and I’ve called: ‘Hands!’ and he has not shown his hands, he’s not done anything except he has looked around over his shoulder and eyeing up essentially my position... that’s when I’ve really started to become concerned.”*

18. According to Officer B, Mr Z’s right elbow then moved backwards and forwards, which further supported his belief. Officer B called to Officer A to step forward and consider using the sponge round launcher.
19. Officer A agrees with Officer B’s recollection. He says he could only see the upper back part of Mr Z’s body and recalls several officers yelling challenges, which Mr Z ignored: *“It was clear that*

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<sup>6</sup> The AOS Team Leader is responsible for co-ordinating a tactical team of AOS operators, tasked with carrying out the instructions of the AOS Forward Commander.

*[Mr Z] was notified that it was the Police and that he was under arrest. He at no point showed us his hands."*

20. Officer A also says Mr Z briefly looked over his shoulder at them, then moved his arms closer together, as if breaking a stick apart. Officer A also thought Mr Z had cracked the barrel of a shotgun:

*"He then started to perform an action that I considered he was loading a shotgun, and it was clear, it was very – the first movement I saw it appears if he had broken the shotgun in half and was loading the shotgun."*

21. Officer A says he heard Officer B call for the sponge round launcher to be brought up, and he aimed the firearm's laser sight on Mr Z's back. He says he repeatedly yelled at Mr Z to show his hands, but he did not comply:

*"I still couldn't see his hands... his arm was moving in a motion that appeared that he was loading a shotgun... so, his other hand wasn't moving, it was stabilised, and his other hand was moving in a motion that appeared to be loading the barrel of the shotgun."*

22. Officer A says he assessed that Mr Z intended to seriously harm or kill himself (Officer A) or the other officers. He also considered that Mr Z:

- had an extensive firearms history;
- was a known gang member;
- knew the terrain and environment well;
- had intentionally run towards a specific, possibly prepared location where firearms could be stored;
- had repeatedly been called upon to surrender but refused; and
- was now performing actions that looked like the loading of a shotgun.

23. Officer A says that he thought he was going to be shot:

*"At that point, I felt very, very exposed... I thought this was the point in my career where I was gonna be shot... I honestly thought that someone from the rest of the team is gonna have to shoot him."*

24. Officer A says he fired one sponge round at Mr Z's back. He reloaded the firearm as per his training. He cannot recall if Mr Z was still standing or had fallen over at this point, but Officer A says he was still refusing to show his hands when called to do so. He says Mr Z continued with the same arm movements as before, apparently loading a shotgun.

25. Officer A heard Officer B call again for the sponge round launcher to be readied. Officer A fired a second sponge round, again hitting Mr Z's back. Officer A explained: *"I thought at any point he was gonna turn around with his shotgun and shoot, shoot at us, so I fired a second round."*
26. Officer C was the AOS Forward Commander.<sup>7</sup> He was some distance away from the arresting officers and saw them standing approximately 20 metres away from Mr Z. He corroborates both Officer A's and B's accounts that:
- Mr Z was standing in a depression in the ground with his back turned to the arresting officers; and
  - the arresting officers repeatedly yelled: *"Show me your hands!"* and Mr Z ignored their instructions.
27. Officer C says he heard Officer B call for the sponge round launcher and saw the subsequent two shootings. He recalls after the first shooting: *"[Mr Z] still wasn't compliant, he didn't even acknowledge Police, [he] continued to do what he did."*

### What does the Taser camera footage show?

28. During Mr Z's arrest, one of the AOS officers activated his Taser, and the integrated camera recorded footage of the shootings. The footage shows:
- It is dark, and visibility is limited.
  - Mr Z is standing in a hole in the ground, his upper body is visible, and he has turned his back to the officers.
  - Mr Z was wearing dark clothes so consequently we cannot see the movement of his elbows. However, it appears that his hands are doing something in front of his body. (It was found afterwards that Mr Z was trying to bury the parcel).
  - Several officers are heard yelling at least nine times at Mr Z to show them his hands. Mr Z does not comply with these instructions.
  - An officer is heard specifically yelling: *"Show us your hands or you'll be shot with the 40-mil [Mr Z]!"*
  - Mr Z can be seen looking over his right shoulder at the officers behind him, and then looking in front of him again.
  - Police fire the first sponge round, and Mr Z falls into the hole.

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<sup>7</sup> The AOS Forward Commander is responsible for controlling the overall AOS tactical response in the field, ensuring that the tactics planned by the tactical commander are implemented.

- The officers are not standing close to Mr Z when they fire the first sponge round (we estimate they were approximately 15 metres away from him).
- The officers approach Mr Z, who can be seen hunched on his knees in the hole.
- A further five calls were made to Mr Z to show his hands, he does not.
- The officers are approximately 6 metres away from Mr Z when Officer A fires the second sponge round. The sponge round hits Mr Z in the lower back.
- The officers again call to Mr Z to show his hands. He first puts up one hand, and a few moments later the other. The footage ends.

### Which account do we prefer?

29. Contrary to what Mr Z told us, the Taser footage shows that he did not surrender by sitting on the ground with his hands raised prior to Police shooting him.
30. The footage further shows that Officer B was not in close range when he fired the sponge rounds.
31. The Taser footage is consistent with the officers' accounts, specifically regarding:
  - Police repeatedly calling on Mr Z to show his hands;
  - Mr Z not complying with Police's instructions;
  - Mr Z moving his hands in front of his body while facing away from Police; and
  - Mr Z looking over his right shoulder at the officers behind him.
32. We are satisfied that Police accounts are the most reliable on the balance of probabilities, due to the consistency between the officers' recollections and their overall consistency with what the Taser footage shows.

### What are the possible defences for Officer A's use of force in these circumstances?

33. As noted in paragraph 7, sections 39, 40 and 48 of the Crimes Act 1961 address defences relating to the use of force.
34. Officer A told us that his primary defence for deploying the sponge rounds was section 48, as he did this in defence of himself and his colleagues. However, he thinks sections 39 and 40 are also available in the circumstances.
35. We know from the Taser footage that Mr Z was not running away when Officer A shot him with the sponge rounds; accordingly, the force cannot be said to have been used for purpose of preventing flight (as required under section 40).

36. Although it is arguable that Mr Z resisted the arrest by not showing Police his hands when instructed to, we do not consider this resistance was active. In our assessment, such passive resistance would not justify the degree of force Officer A used to overcome it and section 39 is not likely to succeed as a defence. Further, Police policy on the use of sponge rounds prescribes: *“Under no circumstances must the device be applied to an uncooperative but otherwise non-assaultive person to induce compliance.”*
37. Section 48 is the most applicable defence, and we will assess the force used accordingly.

### Was Officer A justified in firing the sponge rounds at Mr Z in defence of himself and others?

38. Section 48 of the Crimes Act 1961 provides that any person (including a Police officer) is legally justified in using reasonable force in defence of themselves, or another. Under section 48, we must assess Officer A’s actions on both:
- a subjective basis (that is, what Officer A genuinely believed); and
  - an objective basis (what a “reasonable” person would have done).
39. This assessment involves three questions:
- a) What were the circumstances as Officer A believed them to be (a subjective test)?
  - b) Was Officer A’s use of force against Mr Z for the purpose of defending himself or another (a subjective test)?
  - c) Was Officer A’s use of force against Mr Z reasonable in the circumstances, as he believed them to be (an objective test)?

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

40. Officer A describes the circumstances as he believed them to be in paragraphs 14-25, specifically that Mr Z was loading a shotgun and was preparing to shoot Officer A and other officers. In fact, Police did not subsequently find any firearms on or near Mr Z.
41. When someone acts under an honest, but mistaken or objectively unreasonable belief, the force must be assessed against that belief, as if it were accurate.<sup>8</sup>
42. Although Officer A held a mistaken belief, we accept that it was a reasonable perception of the situation and genuinely held. Mr Z was a high-risk offender with a history of firearms convictions; most relevantly, the unlawful possession and reckless discharge of firearms. Officer A’s stated belief was also held by Officer B, and the Taser footage corroborates that Mr Z’s movements could reasonably be interpreted in this way.

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<sup>8</sup> This view was confirmed by the Court of Appeal in *Fairburn v R* [2010] NZCA 44, at [39].

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

43. We accept that, given his belief, Officer A's use of force was for the purpose of defending himself and his colleagues.

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

44. For Officer A's use of force to be reasonable it needs to have been proportionate and necessary in the circumstances as he believed them to be. Police (including Officer A) first tried to use tactical communication to get Mr Z to show his hands, but this was unsuccessful, and Mr Z continued to perform actions that looked like the loading of a shotgun out of direct view of the officers.
45. We accept that moving closer to Mr Z to disarm him manually or by using a Taser was unreasonable and unsafe. Further, the officers did not have a Police dog with them to use as an alternate less-lethal tactical option.
46. Officer A states that he considered the use of sponge rounds was the only viable, less-lethal tactic available to him in the circumstances to prevent Mr Z turning and shooting him and his colleagues. We agree and accept that Mr Z continued to present this apparent threat until he physically complied with Police instructions and, crucially, his hands were visible to Police. This only happened after Officer A fired the second sponge round.
47. Police policy recommends the use of sponge rounds, as the least forceful tactical option, when responding to someone who is assessed as at least 'assaultive' – that is, the person displays an intent to cause harm, through body language or physical action. We accept Officer A believed Mr Z in fact presented a greater threat, that of causing grievous bodily harm or death to officers. This means that the level of threat Mr Z posed exceeded the minimum threshold for the use of a sponge round according to policy.
48. Police policy also recommends that the head, neck, spinal cord, and kidney areas should not be targeted by the operator of the sponge round launcher, as these carry the greatest potential for a serious or fatal injury, *"unless there is a need to escalate the response to a higher tactical option."*
49. A photo of Mr Z's back shows the rounds hit him on the left lower back, the other impacted on his right upper back (beneath the shoulder blade). Both contusions were next to, and not directly on Mr Z's spinal cord.
50. In this case, we acknowledge that Mr Z's upper body was the only part visible to Police, and that he had his back turned to them. Given the circumstances, it was reasonable for Officer A to have shot Mr Z in the back with the sponge rounds.
51. We conclude that Officer A was justified in shooting Mr Z, on both occasions, with the sponge rounds in defence of himself and his colleagues.



## FINDING ON ISSUE 1

Officer A was justified under section 48 of the Crimes Act 1961 in shooting two sponge rounds at Mr Z in defence of himself and others.

## ISSUE 2: DID ANY POLICE OFFICERS ASSAULT MR Z DURING HIS ARREST?

52. In this section we describe what happened when Police arrested Mr Z and assess whether he was assaulted.

### What does Mr Z say about Police assaulting him?

53. Mr Z says that, after he was shot, Police told him to get onto his front, which he did. An officer then jumped on top of him and handcuffed him, and multiple officers kicked him. According to Mr Z:

*"I just remember the handcuffs, and them freaking out loudly, kicking at me, jumped on the back of my head. They kicked the hell outta me... it went on for about 10 seconds... jumping all over me, kicking me in the head, and they just wouldn't stop kicking me. They'd kicked me all over the back, all over the front. On the back of my head, my face, I had markings."*

54. Mr Z says the AOS officers wore masks so he cannot identify who had assaulted him. He, however, thinks two or three officers assaulted him. Mr Z thinks this might have caused his fractured ribs.

### What do the officers say about Mr Z's complaint?

55. All of the officers deny that anyone assaulted Mr Z during or after handcuffing him.

56. Officer C was not involved in the arrest procedure but watched from a distance; his evidence was very detailed, accurate, and credible. Officer C told us: *"No I can say, hand on heart, that I saw the actual apprehension, the handcuffs going on, and there was no way that me, or any of the other team would stand for any of that."*

57. Officer A denies that he assaulted Mr Z in any way. Further, he does not think the impact of the sponge rounds on Mr Z's back caused the rib fractures that Mr Z was subsequently diagnosed with. He suspects the injury was sustained when Mr Z fell into the hole, likely falling onto a large stone or tree branch.

### What other evidence have we considered?

58. As mentioned above, Mr Z's medical records show that he sustained cartilage fractures to three of his left front ribs.

59. Mr Z did not disclose to medical staff that he had been assaulted when he was examined after his arrest. Mr Z's medical records do not note any bruising, other than the sponge round contusions, on his back. Neither was any bruising found on Mr Z's abdominal area.
60. Mr Z directed us to speak to Mr Y, who he says had information about the alleged assault. We did so but have discounted his evidence as inconsistent with the medical evidence described above.

### What have we concluded?

61. On balance, we think it unlikely that Mr Z would not have reported to medical staff that he had been assaulted when they examined him. Mr Z's medical records do not record injuries indicative of someone who had been kicked repeatedly on his back and front, to the extent that it caused fractures to three of his ribs.
62. We found the officers credible when we interviewed them and have no reason to believe they were untruthful as to what had happened. We prefer the evidence of the officers.
63. We conclude that Mr Z was not assaulted as he claims.

### FINDING ON ISSUE 2

Mr Z was not assaulted during his arrest.



**Judge Kenneth Johnston KC**

Chair  
Independent Police Conduct Authority

16 November 2023

**IPCA: 22-14546**

## Appendix – Laws and Policies

### LAW

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#### Crimes Act 1961

64. Section 39 says:

***“Force used in executing process or in arrest***

*Where any person is justified, or protected from criminal responsibility, in executing or assisting to execute any sentence, warrant, or process, or in making or assisting to make any arrest, that justification or protection shall extend and apply to the use by him or her of such force as may be necessary to overcome any force used in resisting such execution or arrest, unless the sentence, warrant, or process can be executed or the arrest made by reasonable means in a less violent manner:*

*provided that, except in the case of a constable or a person called upon by a constable to assist him or her, this section shall not apply where the force used is intended or likely to cause death or grievous bodily harm.”*

65. Section 40 says:

***“Preventing escape or rescue***

(1) *Where any person is lawfully authorised to arrest or to assist in arresting any other person, or is justified in or protected from criminal responsibility for arresting or assisting to arrest any other person, that authority, justification, or protection, as the case may be, shall extend and apply to the use of such force as may be necessary—*

(a) *to prevent the escape of that other person if he or she takes to flight in order to avoid arrest; or*

(b) *to prevent the escape or rescue of that other person after his or her arrest—*

*unless in any such case the escape or rescue can be prevented by reasonable means in a less violent manner:*

*provided that, except in the case of a constable or a person called upon by a constable to assist him or her, this subsection shall not apply where the force used is intended or likely to cause death or grievous bodily harm.”*

66. Section 48 says:

***“Self-defence and defence of another***

- (1) *Every one is justified in using, in the defence of himself or herself or another, such force as, in the circumstances as he or she believes them to be, it is reasonable to use."*

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## About the Authority



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### 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.

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### 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.

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### 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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