

Independence
trustworthiness
accountability

vigilance

integrity

Use of Force Against Rawiri Falwasser

August 2010



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



August 2010

IPCA
Level 8
342 Lambton Quay
PO Box 5025,
Wellington 6145
Aotearoa New Zealand
0800 503 728
P +64 4 499 2050
F +64 4 499 2053
www.ipca.govt.nz



Contents

Introduction.....	3
Background.....	5
The Authority’s Investigation	15
The Authority’s Findings.....	17
Conclusions.....	23

Glossary of officers

Officers	Roles	Comment
(A) Sergeant Keith Parsons	Officer in charge of the shift – general duties Police officer	Used OC spray on Mr Falwasser when attempting to move him from the holding cell to an observation cell Struck Mr Falwasser twice with his ASP baton, once on the arm and once on the head, causing him to bleed from the hairline Obtained a riot shield with intent to enter cell and restrain Mr Falwasser
(B) Sergeant Erle Busby	Sergeant in charge of the law enforcement team – general duties Police officer	Struck Mr Falwasser on the forearm with his ASP baton
(C) Constable John Mills	Watch house duties – general duties Police officer	Used OC spray on Mr Falwasser when Sergeant Parsons opened the door Sprayed OC spray into the cell through vents
(D) Senior Constable Laing	Constable stationed at Edgecumbe – general duties police officer	Sprayed OC spray into the cell through vents
Officer E	General duties Police officer	Obtained a riot shield with intent to enter cell and restrain Mr Falwasser
Officer F	General duties Police officer	Used OC spray on Mr Falwasser when the cell door was opened by Sergeant Parsons



Introduction

1. This report arises from a complaint about the use of force by Police officers against Rawiri Falwasser while he was in custody at the Whakatane Police Station on 23 October 2006.
2. A Police criminal and disciplinary investigation into the complaint led to criminal charges of assault with a weapon being laid against four officers. The investigation also resulted in disciplinary charges being laid under the Police internal disciplinary system in place at that time.
3. The officers were later acquitted of the criminal charges and ultimately the disciplinary charges proceeded against only one of the four officers.
4. The Police notified the (then) Police Complaints Authority (now the Independent Police Conduct Authority) on 31 October 2006 about the complaint and the Authority began independently investigating the matter.
5. The functions of the Authority in relation to such complaints are to investigate allegations of misconduct or neglect of duty on the part of any officer, as well as considering any issues relating to Police practice, policy or procedure. The Authority has no jurisdiction to review verdicts of the Courts or the Police disciplinary process and has not done so.
6. This report presents a synopsis only of the events that took place on 23 October 2006 at the Whakatane Police Station and makes findings about the conduct of Police officers involved in those events.



Background

INDEPENDENT POLICE CONDUCT AUTHORITY

EVENTS OF 23 OCTOBER 2006

7. At approximately 12.25pm on 23 October 2006, Rawiri Maui Te Kemihi Falwasser, then aged 26, was arrested in Edgumbe and charged with unlawfully taking a motor vehicle.
8. He was taken to the Whakatane Police Station. The officers who brought him in from Edgumbe described him as “spooked” and “on edge” and considered him possibly to be under the influence of drugs, or mentally ill. At Whakatane Police Station Mr Falwasser’s clothing was searched. He prevented a thorough search by pushing away the searching officer’s hands and pulling up the zip of his jacket.
9. Mr Falwasser was then placed in a holding cell in the station’s watchhouse prior to fingerprinting and completion of charge sheets. This holding cell is constructed of clear reinforced Perspex and has one sliding door, large vents at the top of its walls, and a small opening at ground level on one side.
10. Mr Falwasser was informed that he could contact a lawyer. He did not ask for a lawyer but did ask for a person he believed had “something to do with the law” who worked at Waikato University. Mr Falwasser was told it would not be possible to contact this person because it was a public holiday. He was asked whether he wished to contact a lawyer on the list held at the station but declined.
11. A short time later, officers felt concerned about his mental health and he was taken from the cell to speak with a Duly Authorised Officer, who is a registered mental health nurse.
12. The Duly Authorised Officer formed the view that Mr Falwasser was hyper vigilant (that is, in a heightened state of arousal and vigilance towards potential threat) and that he may be under the influence of some substance, but that he was relatively stable and not suffering from any mental disorder. He considered that the risk of Mr Falwasser harming himself or others was low.
13. Mr Falwasser was returned to the cell and then taken out again to be photographed and fingerprinted. He refused to provide fingerprints, and refused to sign a form stating that he

had been informed of and understood his rights under the New Zealand Bill of Rights Act. He said that he would not sign because the form said he was a prisoner and he was not. When told he was in Police custody and therefore a prisoner he stated: *"I have not been arrested and I am not in prison."*

14. The Police contacted Mr Falwasser's brother, who came to the station and attempted, without success, to persuade Mr Falwasser to sign the Bill of Rights document and provide fingerprints. Having been unsuccessful, his brother left after about five minutes.
15. At about 2.30pm, Sergeant Keith Parsons opened the cell door and informed Mr Falwasser that he would be moved from the holding cell to an observation cell in the cell block. In later explanation, Sergeant Parsons said this was usual practice with prisoners who refused to provide fingerprints. Mr Falwasser said he would not move. Sergeant Parsons warned Mr Falwasser that he would be pepper-sprayed if he did not comply. Mr Falwasser refused to comply, and Sergeant Parsons then sprayed him with oleoresin capsicum (OC) spray on the arms and face. He later justified this by saying Mr Falwasser had his arms out and he believed Mr Falwasser was *"coming at me in an aggressive way, it is hard to explain what I mean."* In the Authority's view, the closed circuit television coverage (CCTV) does not show aggression by Mr Falwasser before he was sprayed by the sergeant.
16. According to the officers present, Mr Falwasser then lunged at Sergeant Parsons, attempting to grab or punch him. These punches were described as *"jabs"*.
17. Having heard raised voices indicating that a situation was escalating in the cells, Sergeant Erle Busby went towards the area, smelling OC spray in the air as he did so. Sergeant Busby later said that he believed Sergeant Parsons was under attack and so drew his ASP (extendable) baton and struck two or three blows to Mr Falwasser's extended forearm. Sergeant Parsons also struck Mr Falwasser twice with his ASP baton, the first blow striking Mr Falwasser's arm and the second his head, causing him to bleed from the hairline. Mr Falwasser retreated into the cell and the door was closed.
18. Sergeant Parsons said later that he had not intended to strike Mr Falwasser's head.
19. In a statement taken after the event Mr Falwasser denied that he had thrown any punches at the officers and said he was trying to defend himself from the spray. In the Authority's view the CCTV footage supports Mr Falwasser's version of events – until he was sprayed, when he clearly responded aggressively. Mr Falwasser said that at this point he had decided he would never cooperate with the Police because, in his view, he had been unfairly treated and had not been given his rights.
20. Several officers saw Mr Falwasser bleeding profusely. A Police doctor was called.
21. The officers say that they then considered their options in light of the fact that Mr Falwasser had not been thoroughly searched and that the seriousness of his injury was

- unknown. Sergeant Parsons and another officer (Officer E) obtained shields, with the intention of entering the cell and using the shields to restrain Mr Falwasser.
22. Sergeant Busby picked up his PR24 (side handled) baton and instructed a constable (Officer F) to also get his baton. Both officers were qualified to carry and use the PR24 baton in appropriate circumstances.
 23. Constable John Mills was instructed to adopt a position from which to OC spray Mr Falwasser, if needed, when the door was opened.
 24. At about 2.39pm, Sergeant Parsons and Officer E stood outside the cell door. According to one of the officers present, either Sergeant Parsons or Sergeant Busby then instructed Mr Falwasser to back away from the door of the cell and to sit down. Mr Falwasser was told that if he did not comply he would be sprayed.
 25. Sergeant Parsons then opened the door to the cell and Officer F sprayed Mr Falwasser. Mr Falwasser became hostile and threw punches at the two officers who were equipped with shields. The officers withdrew and shut the cell door. The officers later said that they only sprayed Mr Falwasser after he launched at them but the CCTV footage shows that Officer F used his OC spray the moment the door was opened. In the subsequent investigation, this was confirmed by another officer present.
 26. Constable Mills also directed OC spray at Mr Falwasser and continued to spray him until his canister was empty. Believing that the spray was starting to have an effect, he went to get another canister. Constable Mills then discussed with Sergeant Parsons the possible deployment of spray into the cell through the air vent at the top.
 27. Sergeants Parsons and Busby decided to direct OC spray at Mr Falwasser from outside the cell, so that the door could be opened safely and he could be restrained.
 28. Constable Mills and Senior Constable Laing then directed spray into the cell through the grille at the top and the opening at ground level. According to Sergeant Busby, Mr Falwasser attempted to reach out and grab Constable Mills' hand, and to kick him. The sergeant used his PR24 baton, striking the floor near Mr Falwasser's hand.
 29. In total, five cans of OC spray were used. The effect, in the relatively confined space, was that officers were forced to leave the area and some resorted to wearing face masks. Mr Falwasser later stated that he could hardly breathe, his vision was blurred, and his face was burning as if hot water had been poured on it. He said, and the CCTV footage supports this, that he dropped to his knees to try to breathe through the ground-level vent. Another prisoner described hearing Mr Falwasser groaning as if he were in serious pain.
 30. The Police doctor (a consultant psychiatrist) arrived at about 2.45pm. She found Mr Falwasser coughing and with bloodshot eyes, and said he was pacing and appeared

anxious. He was licking blood from the walls, singing in Maori, and at one point wrote the word "Jesus" in blood on the Perspex. She tried to treat Mr Falwasser but he would not consent. The doctor described a burning sensation in her own throat from the OC spray and said that at times she also had to leave the room to get fresh air.

31. The Duly Authorised Officer returned and described Mr Falwasser at this point as holding his head, saying "Jesus" repeatedly, and apparently paranoid and delusional. The Duly Authorised Officer contacted Mr Falwasser's brother, who returned to the station.
32. The Duly Authorised Officer then also called a second consultant psychiatrist, who found Mr Falwasser bleeding from the head, with dried blood on his hands and face, and shouting religious and paranoid statements. In her view, it was possible that Mr Falwasser was suffering a psychotic episode and that he might have been psychotic when he had taken the car earlier in the afternoon, a view which Senior Constable Laing had formed when he had first encountered Mr Falwasser.
33. Mr Falwasser was left alone for a period to calm down, before his brother returned to the holding cell with an officer who had known Mr Falwasser at high school. The officer explained to Mr Falwasser that fingerprinting and signing the form were standard procedures and, at about 4.45pm, Mr Falwasser consented to be fingerprinted and to sign the form so long as he could cross out the word 'prisoner'.
34. At about 6.30pm the Police doctor was able to re-examine Mr Falwasser and treat his injuries. Mr Falwasser told the doctor he had smoked a cannabis cigarette that morning but had taken no other drugs.
35. On the direction of Sergeant Parsons, Mr Falwasser was charged with assaults with intent to obstruct Sergeants Parsons and Busby. However these charges were later withdrawn when an investigation into the actions of the officers was commenced.
36. A constable, who had not been directly involved with Mr Falwasser but was responsible for releasing him, told the health professionals that he would not do so out of concern for public safety, unless Mr Falwasser was medicated and in a controlled environment. Mr Falwasser's family agreed to him being medicated and Mr Falwasser was then released on bail into his family's care.
37. Once Mr Falwasser was home, his father took photographs of his injuries.
38. The following day, Mr Falwasser's family took him to see their family doctor. The doctor noted bruises and lacerations on his forearms and hands, and a 6cm laceration on his scalp.

RAWIRI FALWASSER

39. Rawiri Falwasser was born in Whakatane on 17 August 1980. At the time of this incident he was unemployed. He is a large man, 1.94m tall. He had no criminal record and no history of mental illness.
40. The only previous incident in which he had encountered Police was a traffic violation. On that occasion, the officer is recorded as having found him unhelpful and formed the view that he was “*anti-Police*”.
41. There is no doubt that the behaviour that led to Mr Falwasser’s arrest was bizarre, he posed a potential threat to the officers, and he resisted their efforts to carry out standard post-arrest procedures in the cell area, becoming quite uncooperative. He has acknowledged being a regular user of cannabis and had done so in the days prior to his arrest. He was also a user of party pills. It cannot be said with certainty whether Mr Falwasser was under the influence of any drug at the time of this event.
42. As well as suffering the wounds described above, for several weeks after 23 October 2006 Mr Falwasser suffered from headaches and dizziness. He was seen by a medical practitioner and then was assessed by a clinical psychologist prior to the trial of the four officers in the Tauranga District Court (see paragraphs 52-54). The psychologist concluded that Mr Falwasser was suffering from a stress disorder as a result of his experience in the cells and needed ongoing counselling treatment.

POLICE INVESTIGATION INTO THE OFFICERS’ ACTIONS

43. On 26 October 2006, Mr Falwasser’s father spoke with the officer in charge of the Whakatane Police Station. The Area Commander and Police National Headquarters were notified and, on 1 November, a Police investigation into the actions of the officers commenced. The Police investigation considered both criminal and disciplinary matters. The officer in charge of the investigation was a detective senior sergeant from Auckland and he was assisted by three other Auckland-based detectives.
44. The inquiry was based at Whakatane Police Station and included interviews with members of the Falwasser family, Police officers and other witnesses; consideration of CCTV footage; a scene examination; and a reconstruction using inert OC spray.
45. An Environmental Science and Research (ESR) examination found OC spray residue still present in the holding cell although it had been commercially cleaned since the incident. In the reconstruction, carried out to determine how much spray would enter the cell when sprayed through the vents, a heavy concentration was found.

46. In summary, in their interviews with Police investigators:

- Sergeant Parsons stated that he had initially used OC spray and his baton in self defence. He said he had used the spray because he believed Mr Falwasser was “*shaping to come at me*”, and he had used his baton to defend himself from that risk. He said the decision to use shields to subdue Mr Falwasser had been necessary because Mr Falwasser needed treatment for his injury and had not been properly searched.
- Sergeant Busby stated that he had used his baton because he believed that Sergeant Parsons was in immediate danger from Mr Falwasser. He said the decision to subdue Mr Falwasser with shields and OC spray was justified because officers were concerned that Mr Falwasser was a danger to himself as well as to Police officers. Sergeant Busby also explained that he did not believe it was practical to use a number of staff to restrain Mr Falwasser, as that would have created a risk of injury.
- Constable Mills said OC spray could be used in self defence and Mr Falwasser was a perceived threat. He also said that for the sake of Mr Falwasser’s own wellbeing he could not be left alone, and there was concern about the amount of blood he was losing.
- Senior Constable Laing said that, if he were measuring the level of threat on a scale of 1 to 10, Mr Falwasser had been a 10. He believed the level of force used was reasonable in the circumstances.

47. Before deciding to charge the officers, the Police investigators sought the views of an officer who is an expert in defensive tactics. That officer expressed the view that:

- The incident did not meet the criteria required for the use of OC spray, which, according to the General Instructions in place in 2006, was that its use was permitted only in cases of “*active resistance*”.¹
- Directing OC spray through the grille of the holding cell was contrary to Police training in that it limited the officers’ options. They would not be able to enter the cell without contaminating themselves.
- Sergeants Parsons and Busby struck Mr Falwasser with their ASP batons after he had retreated into the cell. This was contrary to policy – which allows the baton to be used only in response to active hostile behaviour.

¹ The wording in the relevant General Instruction was “OC spray must not be used against people offering passive resistance”.

- The use of riot shields by untrained staff (Sergeant Parsons) created a risk to the officers under the Health and Safety in Employment Act – which requires employees to receive training for any equipment they use.
 - The best option for dealing with a prisoner who is agitated is to leave the prisoner in the cell until they have had time to reflect on their situation and calm down.
48. This expert's evidence was severely challenged at the officers' trial and they have made the point that at that time of the incident there was no training relating to the use of OC spray in cells; and have disputed that batons were used after Mr Falwasser had retreated into the cell. In the Authority's view the CCTV coverage clearly supports Mr Falwasser's version of this as it shows officers using batons in the area of the cell doorway after Mr Falwasser had responded aggressively to the use of OC spray – both while he was in the cell and when advancing on the officers.
49. Following the investigation and after receiving advice from the Crown Solicitor, the Police laid charges of assault with a weapon (the weapons being batons and OC spray) against Sergeants Parsons and Busby, Constable Mills, and Senior Constable Laing.
50. The Police also considered, but decided against charging the officers under section 3 of the Crimes of Torture Act 1989 (which prohibits acts of torture) on the basis that the officers' actions did not constitute an intention to torture Mr Falwasser.
51. In addition to the criminal charges, the Police laid internal disciplinary charges of using unnecessary force against the officers. Constable Mills was also charged with failing to submit a Use of Spray report.

AT TAURANGA DISTRICT COURT

52. The assault charges against Sergeants Parsons and Busby, Constable Mills and Senior Constable Laing, were heard before a jury at the Tauranga District Court. None of the officers gave evidence.
53. In broad terms, the defences were that the force used by the officers was necessary to overcome the force used by Mr Falwasser in resisting them in the execution of their duties, or alternatively, that in the circumstances as the officers reasonably believed them to be, the force used was reasonable.
54. On Wednesday 25 June 2008 the jury found the officers not guilty on all charges.

DISCIPLINARY CHARGES

55. Following the District Court trial it was the Police intention to proceed with the internal disciplinary charges against the officers. This would have resulted in them facing a Police Disciplinary Tribunal. Through counsel, the officers objected to this course and applied to the High Court for a judicial review of the decision to proceed with disciplinary charges (this application is referred to again in paragraphs 96 to 102). In the period between the initial decision to bring disciplinary charges and the completion of the criminal trial, the New Zealand Police introduced a new performance management and disciplinary system for Police employees. The transitional arrangements between the old and new systems provided for an officer to elect whether to be dealt with under the new process or have his or her case heard by a Tribunal.
56. Following protracted legal and employment processes, the disciplinary outcomes in the Falwasser case were as follows:
- Sergeant Parsons resigned before proceedings were initiated.
 - Sergeant Busby elected to be dealt with under the new process. He was demoted to senior constable, his duties changed and he was the subject of a written warning and a reintegration/rehabilitation plan.
 - Constable Mills elected to be dealt with under the new process. He received a written warning and was the subject of a reintegration/rehabilitation plan.
 - Senior Constable Laing elected to be dealt with under the old process. He appeared before a Police Disciplinary Tribunal charged as follows:
 - 1) Misconduct or Neglect of Duty – *“On 23 October 2006 at Whakatane being a sworn member of Police committed an offence of misconduct in that you used unnecessary force against Rawiri Maui Falwasser with a weapon namely Oleoresin Capsicum Spray (OC Spray).”* – Police Regulations 1992, Regulation 9 (5).
 - 2) Misconduct or Neglect of Duty – *“On 23 October 2006 at Whakatane being a sworn member of Police committed an offence of misconduct in that you wilfully violated the provisions of General Instruction A270 in that you sprayed Rawiri Maui Falwasser with a weapon namely Oleoresin Capsicum Spray (OC Spray).”* – Police Regulations 1992, Regulation 9 (41).

Senior Constable Laing pleaded ‘not guilty’ to both charges but was found guilty by the Tribunal on 7th December 2009. He has resigned from the New Zealand Police.

CIVIL ACTION

57. Following the trial of the four officers, Mr Falwasser brought an action against the Attorney General (sued on behalf of New Zealand Police), seeking damages in tort and under the New Zealand Bill of Rights Act 1990. The case was heard by Justice Stevens in the High Court at Rotorua in February 2010. (The officers were not parties to the action.)
58. In his judgment issued on 19 March 2010, Justice Stevens found that the nature of the conduct by the Police officers constituted a breach of section 23(5) of the Bill of Rights Act. His Honour then considered what an effective remedy should be in light of the approach taken by the Supreme Court in *Taunoa v Attorney-General* [2008] 1 NZLR 429 (SC). He found:

“ ... in view of the serious nature of the s 23(5) BORA breach in this case and its effects on Mr Falwasser, an award of damages is required to meet the goals of vindication and denunciation mentioned in Taunoa. With regard to deterrence, I am satisfied that an incident such as this is unlikely to occur in the future, absent aberrant conduct by individual Police officers. There is no doubt on the evidence that the Police will have learned salutary lessons from the flawed strategy employed by the Police officers concerned during the incident. But a declaration, together with the other remedial steps taken by the Police, is not in my judgment sufficient. There must be an award to cement the Court’s and society’s denunciation of the conduct in this case. Mr Falwasser is also entitled to have the breach of his civil right vindicated.”

59. Mr Falwasser was awarded \$30,000 for the s 23(5) breach “because of the seriousness of the breach and to meet the Taunoa goals of vindication and denunciation.” The judgment concluded with the following declaration, as settled by the parties:

“The treatment of the plaintiff by Police at the Whakatane Police Station on 23 October 2006, which included the use against him of Police batons and pepper spray, was excessive and unnecessary and an abuse of power on part of the Police officers involved. As a consequence it amounted to a failure to treat the plaintiff with humanity and with respect for the inherent dignity of his person and accordingly breached his rights under s 23(5) of the New Zealand Bill of Rights Act 1990.”



The Authority's Investigation

INDEPENDENT POLICE CONDUCT AUTHORITY

THE AUTHORITY'S ROLE

60. Pursuant to the Independent Police Conduct Authority Act 1988, the Authority's role, on being notified by the Police of Mr Falwasser's complaint, was to investigate the allegations of misconduct on the part of the officers involved; whether there had been compliance with relevant policies and standards of best practice; and to also examine any related Police practices, policies and procedures.
61. On completing its investigation, the Authority is required to form an opinion whether or not Police actions were contrary to law, unreasonable, unjustified, unfair, or undesirable.
62. The Authority does not have jurisdiction to review due process in the criminal justice system and thus no mandate to review the verdict of the Tauranga District Court or the Police disciplinary process. Rather, it is the Authority's role to consider wider questions of Police conduct, including compliance with relevant policies and standards of best practice.
63. Following the enactment of amendments to the Crimes of Torture Act 1989, New Zealand ratified the Optional Protocol to the Convention against Torture ('OPCAT') on 14 March 2007 and the Authority became one of four designated National Preventative Mechanisms ('NPMs') in New Zealand, with a specific mandate to monitor and report on conditions of Police detention and the treatment of persons detained by Police. Through the Central NPM, the Human Rights Commission, the Authority provides an annual report on its statutory functions and its findings.
64. The Crimes of Torture Act 1989 does not contain an express jurisdictional provision with respect to cases that pre-date New Zealand's ratification of OPCAT. For this reason the issues raised in Mr Falwasser's case will not form part of the data required to be reported to the Central NPM by the Authority. Notwithstanding, the issues raised are of general importance to the proper treatment of detainees in New Zealand and, as such, form part of wider recommendations as part of the Authority's reporting process.

THE AUTHORITY'S INVESTIGATION

65. On being notified by Police on 31 October 2006 of the complaint made by Mr Falwasser's father, Authority investigators travelled to Whakatane, where they met with the Police investigators, viewed and analysed the CCTV footage, viewed the scene, and met with Mr Falwasser and his parents. Following that, the Authority maintained independent oversight over the Police investigation and reviewed all statements, medical reports, photographs and other documents.
66. On 20 December 2006, New Zealand Police advised the Authority that charges were being laid against Sergeants Parsons and Busby, and against Constable Mills and Senior Constable Laing. Thereupon, the Authority suspended active investigations while the case was before the Courts and subsequently resumed its investigations following the officers' acquittals in June 2008.
67. The Authority's resumed investigation included analysis of the Court transcripts, interviews with Police and members of the Whakatane community, a further meeting with Mr Falwasser and his family, and analysis of the relevant law and Police policies.

Matters considered

68. In conducting its investigation, the Authority specifically considered the following matters:
 - Were the officers justified under relevant policies in using force, and in particular the types of force used against Rawiri Falwasser; and, if so, were they justified in the level of the force used?
 - Was the Police investigation, which resulted in both criminal and disciplinary charges being laid against the four officers, conducted thoroughly and appropriately?
 - Were the decisions to lay both criminal and disciplinary charges justified?



The Authority's Findings

INDEPENDENT POLICE CONDUCT AUTHORITY

USE OF FORCE

Issue 1: Were the Police justified under relevant policies in using force, and the particular type of force, against Rawiri Falwasser; and, if so, were they justified in using the level of force they used?

Relevant laws and policies

Use of force by law enforcement officers

69. Section 39 of the Crimes Act provides for law enforcement officers to use reasonable force in the execution of their duties, such as in making arrests and in the enforcement of warrants. Specifically, it provides for officers to use “*such force as may be necessary*” to overcome any force used in resisting the law enforcement process *unless* the process “*can be carried out by reasonable means in a less violent manner*”.
70. Section 62 of the Crimes Act renders officers criminally responsible for any excessive use of force.

Use of force for self defence

71. Section 48 of the Crimes Act states: “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.”

Taking of fingerprints

72. Under section 57(1) of the Police Act 1958, which was in force at the time, the Police had the authority to take the fingerprints of a person in custody at a Police station and were empowered to use “*such reasonable force as may be necessary*” to do so. This legislation has since been replaced by the Policing Act 2008, section 32 of which states that a constable “*may only use reasonable force that may be necessary to secure the person’s identifying particulars*”.

Search of person in custody

73. Under section 57A(1) of the Police Act 1958, Police officers had the power to search anyone who was in lawful Police custody and who was to be locked up in Police custody, and to take from that person all money and property in his or her possession. The section allowed Police to use *“such reasonable force as may be necessary”* to conduct the search. Section 37 of the Policing Act 2008 now empowers a constable *“to use or cause to be used any reasonable force necessary to conduct a search or take any money or property.”*

Police General Instructions on use of oleoresin capsicum (OC) spray

74. OC spray is used to subdue people. It is painful, causes a severe stinging sensation and generally, but not always, renders people compliant – inhibiting further aggressive behaviour.
75. At the time, Police General Instructions A268 to A284 applied to the carriage and use of OC spray. General Instruction A269 stated that OC spray was a restricted weapon and that *“the use of OC spray is a use of force and must be reasonable under the circumstances”*.
76. General Instruction A270 stated that Police members may use OC spray *“to defend themselves or others if they fear physical injury to themselves and others, and they cannot reasonably protect themselves or others less forcefully”*. The instruction also permitted OC spray to be used *“to resolve an incident where a person is acting in a manner likely to seriously injure themselves and the incident cannot reasonably be resolved less forcefully”*.
77. The General Instruction also stated: *“OC spray must not be used against people offering passive resistance.”*
78. General Instruction A272 required that, before capsicum spray was used on a person, a verbal warning was to be given.
79. General Instructions A268 to A284 have, since this incident, been replaced by new General Instruction A268, which, among other things, explicitly prohibits the use of OC spray on persons in custody unless there are exceptional circumstances. Those exceptional circumstances include:
- the person cannot be controlled by less forceful means;
 - timely assistance is not available;
 - there is a risk of injury to the person or another person;
 - the prisoner is in possession of a previously unknown weapon; or
 - immediate action is needed to resolve a situation or prevent a situation continuing.

Police General Instructions on use of batons

80. Police General Instructions state that batons are provided primarily as a means of defence *“and should be used only when other reasonable means would be ineffective”*. The instructions state that long batons, such as the PR24, are designed to provide offensive and defensive capabilities, to provide a capability for restraining holds on violent and struggling offenders, and to positively repel an assault which is likely to cause grievous bodily harm to a member of Police.

Treatment of prisoners

81. General Instruction P099, Treatment and Rights of Prisoners, states that prisoners should be treated *“with the most humane consideration that their situation and the safety of persons dealing with them will permit”*. The General Instruction also states that any force used must be reasonable under the circumstances.

OPCAT and Crimes of Torture Act 1989 provisions

82. The preamble to OPCAT (paragraph 63) affirms that torture and other cruel, inhuman or degrading treatment or punishment are prohibited and constitute serious violations of human rights. It recognises that States have the primary responsibility for implementing the articles of the Convention, that strengthening the protection of people deprived of their liberty and the full respect for their human rights is a common responsibility shared by all, and that international implementing bodies complement and strengthen national measures.
83. In addition to torture, the use of force is also regulated by various international human rights law instruments. They recognise that force must only be used legitimately, as a last resort and to the minimum extent possible, in strict accordance with principles of necessity and proportionality. Any force must be exercised within clearly prescribed procedures and be properly documented, reported, and reviewed. Individuals should be provided medical examination and treatment whenever force is used and instruments of restraint are only to be used legitimately. They may not be used for longer periods than necessary and never as punishment.²

² See United Nations, *Standard Minimum Rules for the Treatment of Prisoners*, 30 August 1955, at 33-34, 54; UN General Assembly, *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment: Resolution adopted by the General Assembly*, 9 December 1988, A/RES/43/173, at 9, 15, 16; UN General Assembly, *Code of conduct for law enforcement officials*, 5 February 1980, A/RES/34/169, at 3; UN General Assembly, *United Nations Rules for the Protection of Juveniles Deprived of Their Liberty: Resolution adopted by the General Assembly.*, 14 December 1990, A/RES/45/113, at 64.

Best practice on use of force

84. The Police Manual of Best Practice in effect at the time advised staff to “*remember that physical action taken too early may precipitate an even more violent situation*”. The manual otherwise reflected the provisions of the Crimes Act, stating: “*The general rule is that the force used must be reasonable given all the circumstances. Except in the case of self-defence, reasonableness must be assessed objectively; that is, by the standards of the person on the street, and not the person using the force.*”

The Authority’s view

85. The officers who used force against Mr Falwasser justified their actions as a combination of self defence, the use of reasonable force to move Mr Falwasser to another cell, the need to have his head injury treated, and the fact that he had not been properly searched for a concealed weapon.
86. The essential element in the use of force in self defence, or to search or take fingerprints from a person in custody, and for the use of OC spray, is, in every case, the *reasonableness* of the force used in the circumstances. The actions of the officers must be viewed in that context and take account of alternatives available to them.
87. Mr Falwasser had been subjected to a limited search on being taken into custody. At the time he was agitated and was thought to have possibly taken drugs, but in the cells, until he was OC sprayed, his resistance had been passive. Throughout the incident, even when he was acting aggressively, there was no indication that he might have a weapon.
88. There was no urgent need to move Mr Falwasser. He could and should have been left in the Perspex-sided holding cell and monitored until he calmed and agreed to provide his fingerprints passively. Sergeant Parsons told Police investigators that, in hindsight, he would have done that. Given Mr Falwasser’s agitated state and the duty of the officers to ensure prisoners are treated humanely, that was the only sensible approach and consistent with best practice.
89. Adopting the tactic of using OC spray exacerbated the situation, and the officers then resorted to batons, shields, and an escalating and inordinate use of OC spray.
90. The officers’ argument that they were using reasonable force, when Mr Falwasser could have been left in the cell to calm down, is not tenable.

FINDING

Force of the type used by Police was unnecessary and unreasonable, and its application was not justified in the circumstances.

CONDUCT OF THE POLICE INVESTIGATION

Issue 2: Was the Police investigation, which resulted in criminal and disciplinary charges being laid against the four officers, conducted thoroughly and appropriately?

91. The Police investigation into the complaint by the Falwasser family was conducted by officers from outside the Bay of Plenty District, in accordance with Police policy and best practice. In most respects, it was carried out rigorously and to a high standard of professionalism.
92. In determining whether to lay charges, the inquiry team looked at the acts of each officer in the incident. The act of spraying Mr Falwasser with OC spray and striking Mr Falwasser with batons were considered. Once satisfied that the statutory authority to carry and use OC spray and batons did not impact upon the criminal charges contemplated, the Police then sought advice from the Crown Solicitor before laying charges against four officers.
93. It was undesirable to base the investigation at Whakatane Police Station. This had the potential to create the perception that it was not, in fact, independent; and to cause unnecessary stress to local (uninvolved) officers.
94. Some of the subject officers were not questioned in detail regarding their understanding of the General Instructions relating to the use of OC spray.
95. The Authority is satisfied that these departures from best practice did not compromise the sound basis upon which criminal and disciplinary charges were laid against the officers.

FINDING

The Police investigation which led to criminal and disciplinary charges being laid against the four officers was thorough and professional.

Issue 3: Was the decision to lay both criminal charges and disciplinary charges justified?

96. The Police decision to lay both criminal and disciplinary charges against the officers was made following a thorough investigation and after obtaining an opinion from the Crown Solicitor.
97. The criminal charges related to the use of batons and OC spray against Mr Falwasser. The Police formed the view that there was *prima facie* evidence of criminal offending, in that this use of force was unnecessary and unreasonable and amounted to assaults with weapons – and the officers should therefore be prosecuted in the District Court.

98. The disciplinary charges arose from the same evidence but were based on the view that there had been breaches of Police General Instructions arising from the unreasonable use of force and the use of OC spray.
99. In the Authority's view, the Police decision to lay both criminal and disciplinary charges was appropriate.
100. Following the District Court acquittals, counsel for the officers argued that they should not then face disciplinary charges. In his judgment, delivered following an unsuccessful judicial review proceeding in the High Court, Justice Clifford said:

"...I am not satisfied that there is (or was at the relevant time) a general principle or practice whereby an acquittal of criminal charges would necessarily result in internal disciplinary charges relating to the same incident being withdrawn.

I am also persuaded that an implied representation or practice as contended by [the officers] would conflict with the principles of Police accountability inherent in General Instructions and legislative regime and that it would be an undue fetter on the Commissioner's statutory duties in terms of the disciplinary process."

101. For these reasons, Justice Clifford found that the decision to pursue the disciplinary charges, notwithstanding the officers' acquittal on the criminal charges, was not in breach of a legitimate expectation of the officers and the decision should not be interfered with on judicial review.
102. The officers were therefore unsuccessful in having the disciplinary process halted.

FINDING

The decision to lay both criminal and disciplinary charges was justified.

Conclusions

Independence
trustworthiness
accountability
vigilance
integrity

INDEPENDENT POLICE CONDUCT AUTHORITY

103. In accordance with section 27 of the Independent Police Conduct Authority Act 1988, in my opinion:

- the conduct of the Police officers who dealt with Mr Falwasser on 23 October 2006, and who were subsequently charged, was unnecessary, unreasonable and unjustified;
- the Authority concurs with the findings of the Police Disciplinary Tribunal that the actions amounted to misconduct in respect of the officer who elected to be dealt with under that option;
- the subsequent Police investigation was professional and thorough, and independent advice was properly obtained from the Crown Solicitor;
- the Police decision to lay criminal and disciplinary charges against the officers was justified and appropriate;
- the submission of Counsel for the Attorney General in the civil action brought by Mr Falwasser that *“the New Zealand Police had done everything within its power to investigate, acknowledge, condemn and ensure accountability for those officers involved in the use of excessive force against Mr Falwasser”* is endorsed.



Hon Justice L P Goddard

Chair

Independent Police Conduct Authority

6 August 2010



IPCA

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

PO Box 5025, Wellington 6145

Freephone 0800 503 728

www.ipca.govt.nz





IPCA
Level 8
342 Lambton Quay
PO Box 5025,
Wellington 6145
Aotearoa New Zealand
0800 503 728
P +64 4 499 2050
F +64 4 499 2053
www.ipca.govt.nz