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Independent Police Conduct Authority Report into the Shooting of Graeme Burton

February 2008



IPCA

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



February 2008

IPCA
Level 10
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

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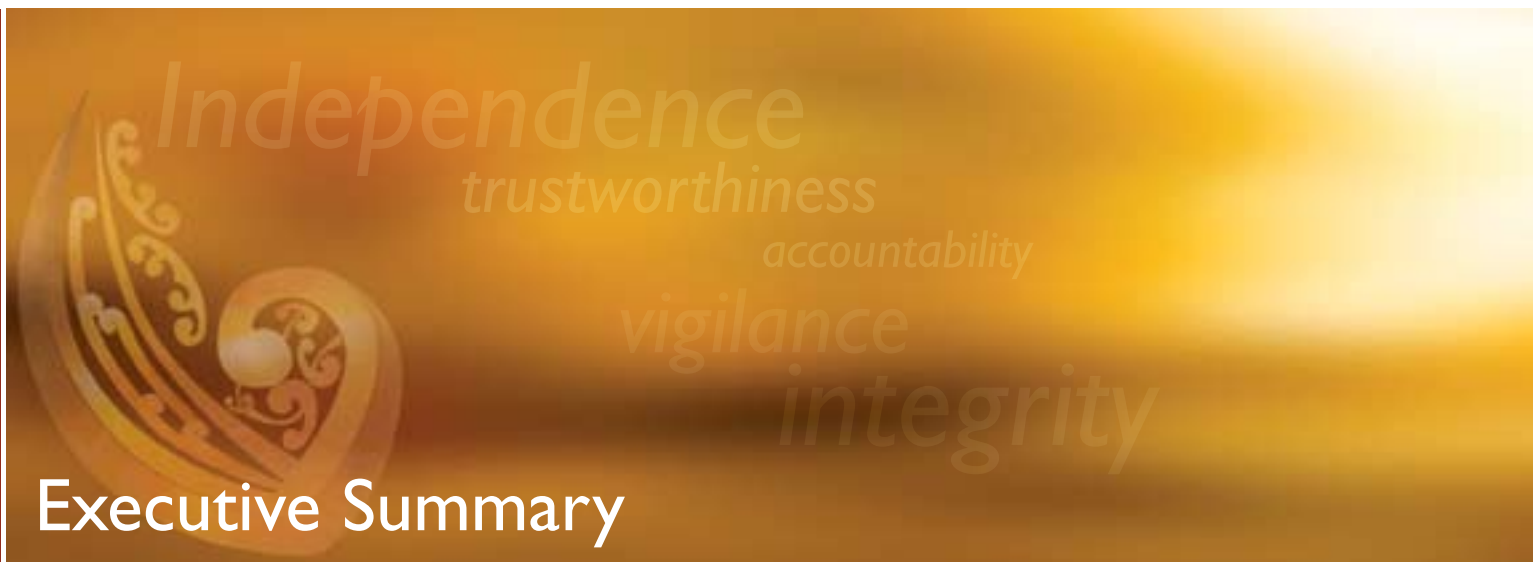
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INDEPENDENT POLICE CONDUCT AUTHORITY
REPORT INTO THE SHOOTING OF GRAEME BURTON

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1. BACKGROUND

- 1.1 On 10 July 2006, having served 14 years of a life sentence for murder, Graeme Burton was released on life parole. The Probation Service advised police in advance of Burton's release, as he was considered a high risk (HRX) offender.
- 1.2 Six months later, on the afternoon of 6 January 2007, having breached the conditions of his parole and been on the run from police, Burton shot four members of the public, and stabbed and killed one, Karl Kuchenbecker, before himself being shot and arrested by police.
- 1.3 As required under the Independent Police Conduct Authority Act 1988, the Commissioner of Police notified the Independent Police Conduct Authority (IPCA), which started its own independent investigation.
- 1.4 The IPCA investigation was divided into two phases:
 - i) Phase 1 – the shooting by police of Graeme Burton, and the events surrounding that; and
 - ii) Phase 2 – action by police from the day of Burton's release up to the day of his shooting.

2. PHASE 1: IPCA REVIEW OF THE POLICE INVESTIGATION INTO THE SHOOTING OF GRAEME BURTON

- 2.1 On the afternoon of 6 January 2007, an associate dropped Graeme Burton off to hide in a network of fire-breaks between Lower Hutt and Wainuiomata. Police were seeking him in relation to two warrants for his arrest, and an assault committed in Wellington on 3 January. Burton was heavily armed, with a sawn-off,

pump-action shotgun, a loaded revolver, a large hunting knife, a folding knife, and an extendable baton identical to that used by police.

- 2.2 At about 5pm, Burton confronted Karl Kuchenbecker, who was riding in the fire-break on his quad bike. Burton shot Kuchenbecker three times, and stabbed him with the hunting knife, puncturing his right lung and killing him. Over the brief period that followed, Burton also shot mountain bikers Jeremy Simpson, Karl Holmes and Kate Rea.
- 2.3 Police first heard of the shootings at about 5.30pm when the ambulance service passed on brief details from a 111 call made by Holmes. Based on the limited information available, and on available resources and manpower, a decision was made to send two uniformed officers (Officers A and B) to investigate. Though police had been searching for Burton in the general Lower Hutt area, at that stage there was no confirmation the offences involved him.
- 2.4 In line with a directive issued during the search for Burton, Officers A and B – along with other Lower Hutt officers on duty – wore body armour and carried Glock pistols. Officers A and B also had police Bushmaster rifles in the boot of their car.
- 2.5 Shortly after 5.47pm the officers arrived at the fire-break exit on Summit Road, Lower Hutt, to meet Holmes and Simpson. The officers then received additional information by radio suggesting that the shootings likely involved Burton. Officer A decided to establish a cordon and called police communications (Comms) to ask for officers to cover the other exit points. As he and officer B were retrieving their rifles from a locked container in the boot, Burton came out of the fire-break and confronted them, pointing his shotgun at Officer B. The officers initially retreated and called for backup, then returned with the intention of arresting Burton. As they approached the patrol car they saw Burton standing next to the boot holding the police rifles.

- 2.6 Officer A shouted *“Armed police”*. Burton raised and pointed his shotgun directly at Officer A, who then fired three times, one of the shots striking Burton in the upper right thigh, incapacitating him. The two officers approached Burton and placed him under arrest. Burton continued to struggle. The officers provided him with medical assistance until ambulance staff arrived a short time later.
- 2.7 The IPCA independently monitored and assessed the police investigation into Burton’s January 6 activities and police actions on the day of the shooting.

PHASE ONE: FINDINGS

- 2.8 **Was the police decision to send two uniformed officers to Summit Road a sound one in terms of officer and community safety, given the information police had at the time?**

FINDING

- 2.8.1 The initial police decision to send two uniformed officers to Summit Road to meet Holmes and Simpson was reasonable, justified, and in fact desirable given the information available at the time.

- 2.9 **Were the officers who were deployed to Summit Road, and other Lower Hutt officers in general, justifiably armed; and were the appropriate Police General Instructions complied with?**

FINDING

- 2.9.1 The police were justifiably armed given the threat posed by Graeme Burton to the community in general and to police officers. General Instruction F061 – which covers use of firearms by police – was fully complied with in this case.

- 2.10 **Were the initial actions of Officers A and B upon arriving at Summit Road appropriate given the information they possessed?**

FINDING

- 2.10.1 Given the information the officers had, and considering the speed with which events unfolded, the actions they were taking to arm themselves with rifles and establish a cordon point at the Summit Road location were reasonable and justified.

2.11 Was Officer A justified in using force to arrest Graeme Burton, and in the degree of force he used?

FINDING

2.11.1 In the circumstances as Officer A perceived them, the force that he used to effect Graeme Burton's arrest and to defend himself and others was reasonable and not excessive. Further, in light of the circumstances as Officers A and B believed them to be, in returning to confront Graeme Burton and attempt to arrest him they acted with considerable courage, as well as of adherence to duty.

2.12 Was all reasonable assistance rendered to Graeme Burton after the shooting?

FINDING

2.12.1 The medical treatment provided by Officers A and B to Burton after he was shot was found to be exceptional and may have saved his life.

2.13 Were less violent alternatives available or considered in this situation?

FINDING

2.13.1 The only available less violent alternatives were those used by Officers A and B. Others were considered and rejected by them before the shooting occurred. In the final analysis, given the circumstances and speed with which the level of threat escalated, Officer A ultimately resorted to the only viable option available to him at the time: his firearm.

2.14 Were there any breaches of Police General Instructions or District Orders or directives?

FINDING

2.14.1 There were no breaches of Police General Instructions or District Orders or directives.

2.15 Was the physical evidence consistent with officer and witness statements?

FINDING

2.15.1 All of the physical evidence in this case is consistent with the statements of the police officers directly involved. The civilian witnesses who saw various parts of the events offered accounts that also supported and were consistent with those of the officers involved.

FINDING CONT

The Comms recordings further support the officers' account of events and are consistent in terms of timing and Burton's actions.

2.16 Did the officers directly involved have current and appropriate training?

FINDING

2.16.1 The training records for the two officers involved were examined. These documents confirm that both Officers A and B were up-to-date in relation to first aid, Glock pistol and Bushmaster rifle training.

2.17 Was the subsequent police investigation professional and thorough?

FINDING

2.17.1 The subsequent police investigation was professional and thorough. All avenues were properly explored. Throughout the investigation there was full cooperation with the IPCA investigators and all relevant documentation was provided in a timely way.

**3. PHASE 2:
ACTION BY THE
POLICE FROM
GRAEME BURTON'S
RELEASE UNTIL THE
DAY OF HIS SHOOTING**

- 3.1 On 10 July 2006, Graeme Burton was released from prison on life parole. His parole was subject to several conditions. One was that he live at a specific Wellington address.
- 3.2 During November and December 2006, Burton and an associate committed a series of armed assaults on Wellington drug dealers, robbing or extorting money from them. Police heard of several of these attacks through informants. On one occasion, police found Burton in a car leaving the scene of an assault.
- 3.3 Police were also told by Probation that Burton was visiting strip clubs with another recently paroled murderer, and through an informant police heard that Burton was trying to start a drug empire and was using methamphetamine. One of Burton's associates, when confronted by police about their recent offending, said: *"We're doing you guys a favour... We're getting rid of a lot of gear from the streets. You guys should thank us."*
- 3.4 On 27 November, Probation told police they would take steps to recall Burton to prison at the first sign of any charges being laid – but without charges there was nothing they could do.

The following day, police assigned an officer to lead an operation (Operation Tax) to locate Burton and collect enough evidence to charge him.

- 3.5 On 30 November, Probation asked if police would be willing to put the information they had about Burton's recent offending in an affidavit, which Probation would then use to support an application to the Parole Board to recall Burton to prison. Police declined the request because of concern that the information would identify informants.
- 3.6 A week later, Police heard that Burton was moving out of his Wellington flat, despite it being a condition of parole that he live there.
- 3.7 In late December, two warrants were issued for Burton's arrest. The first was a warrant to arrest Burton for breaching the conditions of his parole. This was issued by the Wellington District Court on 22 December, following an application by Probation which had laid charges three days earlier. The second, issued by a NZ Parole Board panel convenor on 29 December, was a warrant to arrest and detain Burton, issued along with an interim order recalling Burton to prison.
- 3.8 The first warrant was not entered into the police computerised database (NIA) until 4 January, two weeks after it was issued. This is despite it being available at the court and through the courts' computer system from the day it was issued. Probation says it left a voice message with police to notify them that the warrant had been issued. The officer in charge of Burton's case says he did not receive this message.
- 3.9 The second warrant was faxed by the Parole Board to Wellington Central Police Station on 29 December. The shift commander found the fax but did not enter the warrant on the NIA system. Though incoming shifts were told about the warrant, efforts to locate Burton were not intensified until 1 January when another shift commander found the faxed copy of the 29 December warrant, advised CIB, placed an alert on the NIA system, and made arrangements to alert all Wellington staff that Burton was wanted. On 3 January, Burton and an associate committed another armed assault.

- 3.10** The IPCA's independent inquiry examined the police role in collecting information and intelligence on Burton in the period from his release on parole until the day of his shooting by police.

PHASE TWO: FINDINGS

- 3.11** Police have a memorandum of understanding (MOU) with the Department of Corrections, which contains guiding principles about sharing of information between the two agencies. There is also a local service level agreement covering information sharing between Police and Corrections in the Wellington district. Did police comply with the MOU and local service level agreement in terms of their interaction with Probation following Graeme Burton's release on 10 July 2006?

FINDING

3.11.1 Police responded well during the early stages of Graeme Burton's release on parole. Significant information was shared with Probation to assist them in their ongoing monitoring of Burton in the community. However, in December 2006, at a critical stage, communication became problematic.

- 3.12** Police declined a request from Probation to permit the inclusion of intelligence they had collected in an affidavit to support an application to recall Graeme Burton, on the basis that the intelligence was primarily informant based. Was this justified given the nature of the intelligence/information?

FINDING

3.12.1 Police investigators knew that Graeme Burton was a violent offender and some police officers felt he was capable of killing again. Police were asked to allow intelligence they had gathered to be used in an affidavit so that Probation could seek a recall order. Police declined this request without examining the possibility of allowing at least some of their information to be used, and without considering how it might be protected under the relevant legislation and by drawing on established procedure. Similarly, Probation seem not to have alerted police to the possible protection in Section 13(3) of the Parole Act.

FINDING CONT

3.12.2 The police decision was primarily made out of concern that the identities of informants might be revealed. The decision was made without developing a strategy with Probation as to how some of the information might be safely used to recall Burton at a time when he was presenting as “an undue risk to the community or to any person or class of persons” .

3.12.3 It is acknowledged that police have a responsibility to protect the identity of informants and the integrity of the overall human source programme. They have expressed concern that when they release sensitive informant-based information to other agencies they lose control of that information, and that has the potential to jeopardise both the informant personally and the human source programme generally. However, where such an inter-agency relationship exists, there must be a degree of trust and cooperation, a matter that the MOU and service level agreement seem designed to address.

3.13 Following the issue of warrants for Graeme Burton’s arrest on 22 and 29 December 2006, did police respond satisfactorily?

FINDING

3.13.1 Police did not respond satisfactorily. Though the first warrant to arrest Burton was available as early as 22 December, with a few exceptions police were not aware of its existence.

3.13.2 For routine arrest warrants, involving minor offences, this may not be an issue. In Burton’s case, however, police had serious concerns about his escalating offending. From at least 25 November 2006 they knew and were informing Probation of the violent nature and increased frequency of the offences he was committing and were pressing Probation to have Burton recalled. On 28 November police assigned a detective sergeant to lead an operation (Operation Tax) to locate Burton because they held genuine concerns for the safety of the public.

FINDING CONT

3.13.3 Although the recall order and warrant to arrest and detain Burton did not come into effect until 29 December 2006, the warrant to arrest him for breach of parole was in effect on 22 December 2006 and police could have acted on that warrant to actively commence looking for him. In fact, police had power to arrest Burton as early as 19 December 2006 under Section 73 of the Parole Act.

3.13.4 It would appear that although some police members knew that a warrant had been issued as early as 22 December and there was an operation in place to locate Burton, no one took an active interest in or ownership of the situation, which then resulted in an unreasonable delay. Had police processed the warrant and informed members of its existence in a more timely fashion, this would have intensified their efforts to locate Burton.

3.13.5 The notification the Parole Board gave to Wellington police of the interim recall order and warrant to arrest and detain Burton issued on 29 December lacked a clear indication of the urgency of the situation and this is also a concern, particularly when it involved a serious offender.

3.14 From 1 January 2007, when police realised that an interim recall order and warrant to arrest and detain Burton existed, did they respond satisfactorily?

FINDING

3.14.1 There was a genuine and concerted effort to locate and arrest Burton once the warrant to arrest and detain pending interim recall was found by a Wellington shift commander and entered into NIA case management system on 1 January 2007. There can be no criticism of the police actions and efforts to locate and arrest Graeme Burton from that date onward.

RECOMMENDATIONS

RECOMMENDATION

1. Police and the Department of Corrections/Probation review their memorandum of understanding and service level agreement to ascertain whether their collaborative relationship could be improved in relation to HRX offenders.

RECOMMENDATION

2. Police ensure that all staff are familiar with the relevant sections of the Parole Act in relation to their powers of arrest (without warrant) of parolees.

RECOMMENDATION

3. Police ensure that all staff are familiar with the provisions in the Parole Act for the protection of information used in such cases and reinforce police policy in this regard.

RECOMMENDATION

4. Police and Corrections review their memorandum of understanding in light of the recent amendments to the Parole Act to clearly establish how sensitive information is to be handled in the future and to establish acceptable rules and practices for the use of such information. In addition, police should re-examine their practices, policies and procedures for the provision of sensitive information to other agencies, bearing in mind the priorities in the Police Crime and Crash Reduction Policy.

RECOMMENDATION

5. Police review their management and handling of arrest warrants to avoid future delays in the collection and processing of warrants, with a particular emphasis on 'high risk' offenders.

RECOMMENDATION

6. Police strengthen their protocols with both Probation and the Parole Board for notification of warrants to arrest and detain high risk parolees pending recall.



Introduction to the IPCA Report into the Shooting of Graeme Burton

INDEPENDENT POLICE CONDUCT AUTHORITY
REPORT INTO THE SHOOTING OF GRAEME BURTON

February 2008

4. INTRODUCTION

- 4.1** On 10 July 2006, having served 14 years of a life sentence for murder, Graeme Burton was released on Life Parole. Police had already been advised of his release by Probation Services, as he had been classed as a 'high-risk' offender (HRX).
- 4.2** Six months later, in the late afternoon of 6 January 2007, having breached the conditions of his parole and been on the run from the police who were looking for him, Burton shot four members of the public, killing one of them, before being himself shot and arrested by police.
- 4.3** As required under the Independent Police Conduct Authority Act 1988, the Independent Police Conduct Authority (IPCA) was notified of the incident by the Commissioner of Police and commenced its own investigation into the matter. The IPCA's investigation was divided into two phases:
- i) PHASE 1 – the shooting by police of Graeme Burton and the events surrounding that; and
 - ii) PHASE 2 – action by the police from the day of Graeme Burton's release up until the day of his shooting.
- 4.4** The IPCA investigation focused on three principal issues:
- i) The shooting of Graeme Burton by an armed officer (Officer A) and the justification for this use of deadly force in the circumstances.

- ii) The police's role in the collection of information and intelligence and how that information was used/disseminated between the time of Burton's release from Rimutaka prison on life parole on 10 July 2006 and the issuing of an interim recall order and warrant to arrest and detain Burton, on 29 December 2006.

This second issue was examined as it involves critical areas of police policy, practice and procedure in relation to the gathering and sharing of sensitive information.

- iii) The third principal issue concerns police attempts to locate and arrest Graeme Burton between the issuing of a first warrant to arrest him on 22 December 2006 and the shooting incidents on 6 January 2007.



5. ISSUES REVIEWED

5.1 The following questions were considered during the IPCA's investigation of the shooting phase of this operation:

- i) Was the police decision to send two uniformed officers to Summit Road a sound one in terms of officer and community safety, given the information police had at the time?
- ii) Were the officers who were deployed to Summit Road and other Lower Hutt officers in general justifiably armed; and were the appropriate Police General Instructions complied with?
- iii) Were the initial actions of Officers A and B upon arriving at Summit Road appropriate given the information they possessed?
- iv) Was Officer A justified in using force to arrest Graeme Burton, and in the degree of force he used?
- v) Was all reasonable assistance rendered to Graeme Burton after the shooting?
- vi) Were there other less violent alternatives available or considered in this situation?
- vii) Were there any breaches of Police General Instructions or District Orders or directives?
- viii) Was the physical evidence consistent with officer and witness statements?

- ix) Did the officers directly involved have current and appropriate training?
- x) Was the subsequent police investigation professional and thorough?
- xi) Should officers involved in incidents of death or serious injury be routinely subjected to drug and alcohol testing?

6. LEAD-UP TO THE EVENT

- 6.1 The shooting of Graeme Burton arose directly as a consequence of a series of violent crimes committed in Lower Hutt at about 5.30pm on Saturday 6 January 2007.
- 6.2 However, in the days immediately preceding Saturday 6 January 2007, Graeme Burton had been the subject of a highly publicised police search centred in Wellington City. He had recently breached his conditions of parole and an interim recall order and warrant to arrest and detain him had been issued. Media had reported that Burton was also wanted in connection with a violent assault in Wellington on Wednesday 3 January 2007 and that he was believed to be armed and was considered dangerous.
- 6.3 As a result of the search, Burton had been dropped off by an associate earlier that Saturday afternoon to hide in a network of fire-breaks between Lower Hutt and Wainuiomata, in order to evade police. He had with him a loaded, sawn-off, pump-action Maverick shotgun, a loaded Smith & Wesson revolver, a large hunting knife strapped to his leg, a folding knife and an ASP extendable baton identical to that used by police. He was also wearing a Kevlar stab and shrapnel resistant vest.
- 6.4 The Maverick shotgun had been modified: the barrel had been cut down and a portion of the trigger guard removed. It was capable of holding five shotgun cartridges, each of which contained nine lead pellets of approximately 9mm in diameter. Each pellet had the potential to inflict fatal injury. Burton also had additional shotgun ammunition.

7. THE MURDER OF KARL KUCHENBECKER

- 7.1 At approximately 3.30pm on Saturday 6 January, Karl Kuchenbecker left his home in Wainuiomata on his quad bike. He was expected back at 5.30pm. It is believed that Kuchenbecker

rode the main fire-break that runs along the top of the hills between Wainuiomata and the Hutt Valley.

7.2 About 5pm Burton was seen at the top of the Te Whiti fire-break. Shortly after this sighting, Karl Kuchenbecker encountered Burton on the main fire-break track.

7.3 Kuchenbecker was wearing typical motorcycle clothing and a full-faced crash helmet. As Kuchenbecker rounded a corner on his bike he was confronted by Burton brandishing his loaded shotgun. Burton fired one round from the shotgun at Kuchenbecker causing him to fall from his bike. As Kuchenbecker lay on the ground Burton fired two further shots at him at very close range. The shotgun blast struck Kuchenbecker's right hand, and his left palm and forearm, causing injuries consistent with Kuchenbecker trying to defend himself against Burton's attack. The injuries indicate Burton was firing at point blank range. Despite this, Kuchenbecker managed to get to his feet.

7.4 Burton then took a large hunting knife and stabbed Kuchenbecker a number of times. A deep penetrating wound punctured his right lung, causing him to fall to the ground. As he lay on his back, unable to defend himself, Burton stabbed him in the upper centre of his chest. This wound was inflicted with such force that the knife passed through Kuchenbecker's chest cavity and again punctured his right lung before penetrating his spine. The pathologist concluded that this wound was the last and ultimately led to Kuchenbecker's death.

7.5 Karl Kuchenbecker died where he lay. It was about 5.20pm.

8. THE SHOOTING OF JEREMY SIMPSON AND KARL HOLMES

8.1 Within minutes, two mountain bikers, Jeremy Alan Simpson aged 34 and Karl Steven Holmes aged 33, came round a corner of the track leading to the scene of Kuchenbecker's murder. As Simpson rounded the corner, with Holmes a few metres further back, he came across Burton standing over the quad bike. Simpson glanced sideways at Burton as he rode past him and noticed Burton had a firearm strapped across his back. Nothing was said but he recognised Burton as the man

described in recent media stories who was wanted by police. Simpson then saw Karl Kuchenbecker's motionless body a short distance further along the track.

- 8.2 Burton raised his shotgun taking aim at Simpson's back. Realising he was about to be shot, Simpson accelerated, attempting to round a corner on the track to get out of the line of fire. The mountain biker was approximately 20 metres from Burton when he fired. The pellets from the shotgun blast struck Simpson in the left elbow but he managed to continue round the corner before falling from his bike to the ground, unable to use his left arm.
- 8.3 Karl Holmes, who was riding behind Simpson, saw Burton remove the shotgun from across his back and take aim at Simpson. He reached Burton at the precise moment that Burton, almost within arm's reach, fired, shooting his friend.
- 8.4 Holmes heard Burton work the action of the shotgun to reload it as he went on past. Believing that he was also about to be shot, and fearing for his life, he rode as fast as he could. Burton fired his shotgun again, striking Holmes in the left arm and left side. Holmes also was approximately 20 metres from Burton when he was shot.
- 8.5 Holmes managed to stay on his bike and on rounding the corner came across Simpson getting to his feet. Holmes continued a short distance further along the track before stopping and waiting for him. Simpson, unable to ride with his wounded arm, abandoned his mountain bike and ran along the track to catch up with Holmes. They then ran on for several more minutes before stopping to see whether Burton had followed them.
- 8.6 It is believed that at this stage Burton racked a live round into the chamber of the shotgun.

9. THE CONFRONTATION WITH NICHOLAS REA AND SHOOTING OF KATE REA

- 9.1 As Simpson and Holmes were fleeing, two further mountain bikers were on the track approaching Burton. Nicholas Rea aged 50 and his daughter Kate Rea, 18, had come from Wainuiomata Hill, the same direction as Simpson and Holmes, having been overtaken by the two men only a few minutes before.

- 9.2 Nicholas and Kate Rea rounded a corner and came across Burton attempting to start Karl Kuchenbecker's quad bike. He had turned it around so it was facing downhill in an apparent attempt to pursue Simpson and Holmes. As Nicholas Rea passed Burton he saw Karl Kuchenbecker lying motionless on the side of the track, about 20 metres in front of him. He stopped beside Kuchenbecker's body intending to administer first aid. Kate Rea stopped on the track halfway between Burton and where Kuchenbecker lay.
- 9.3 Nicholas Rea asked Burton what happened. Burton replied, *"There has been an accident."* Nicholas Rea pulled out his cell phone to call emergency services but Burton went up to him, said, *"No cell phones,"* and punched him in the face. Burton then told him, with some menace, that he had a knife and produced the hunting knife he had used to murder Kuchenbecker. Fearing for his daughter's life and also for his own, Nicholas Rea handed his cell phone to Burton who threw it into the surrounding bush.
- 9.4 Burton then ordered Nicholas Rea to start the quad bike. Nicholas Rea said he knew nothing about quad bikes and did not know how to start it, to which Burton responded, *"Your life depends on it."* Still afraid of what Burton would do, Nicholas Rea got onto the quad bike to try and start it. Meanwhile, Burton ordered Kate Rea to hand over her cell phone. She said she didn't have one and gave him her backpack. He then demanded Nicholas Rea's backpack and placed both inside his own bag.
- 9.5 Burton told the Reas that he had a gun and took his sawn-off shotgun from his carry bag. He was holding it, pointing it in the general direction of the Reas, when it discharged, firing a round into the ground about three metres in front of Kate Rea. Several of the shotgun pellets ricocheted off the ground, striking her. Burton immediately apologised, saying it was an accident and that he had failed to apply the safety catch.
- 9.6 While Nicholas Rea continued his attempts to start the quad bike, without success, Burton remained aggressive and intimidating, warning him that *"it looks as though someone*

has already died; we had better make sure it doesn't happen to anybody else".

- 9.7 Eventually Nicholas Rea told Burton he could not start the bike. Burton got him to remove the bike leads in order to disable it and to throw his daughter's mountain bike into the bush, which he did. Burton then took Nicholas Rea's mountain bike and rode north along the track in the same direction Simpson and Holmes had gone.
- 9.8 Nicholas and Kate Rea, terrified, ran in the opposite direction to find help. They reached Wainuiomata Road about 3.1 kilometres away where they managed to flag down a motorist who contacted emergency services.

10. FIRST CONTACT WITH EMERGENCY SERVICES

- 10.1 As Burton was confronting the Reas, Simpson and Holmes were still making their way along the fire-break towards the Summit Road access point. As they ran, Holmes dialled 111 and contacted the ambulance service. That call was made at 5.28pm. After obtaining some basic information, Holmes was told to hang up so police could call him directly. The ambulance dispatcher then called police communications (Comms) and provided police with Holmes' cell phone number. The Comms dispatcher then called Lower Hutt area commander Inspector Bruce Dunstan at 5.35pm and provided him with brief details of the event.
- 10.2 At this point Holmes and Simpson looked back along the winding track and could see Burton some 200 metres away, heading towards them on a mountain bike. Realising they could not out-run the cycling Burton and still believing their lives in danger, they leapt 30 metres down a steep bank at the side of the track, crashing through the undergrowth, and hid amongst some gorse bushes.
- 10.3 Not wanting to let Burton know where they were, Holmes turned his cell phone onto 'silent' so Burton could not hear it ringing when police called back. They watched as he rode down the Summit Road fire-break, past them and out of sight. They were then contacted by police. Holmes told them that the person who had shot him was *"the guy police have been*

looking for". He described the gun as a pump-action shot gun and said he had seen another person on the track who looked dead. That call was logged at 5.43pm.

10.4 Holmes and Simpson remained concealed in the gorse bushes until police reached them at 6.29pm.

10.5 The Reas' first calls were received by police at 5.48pm. Kate Rea told them of being confronted by an armed man whilst another man was on the ground covered in blood.

11. THE INITIAL POLICE RESPONSE

11.1 Officer A and Officer B are uniformed police officers and were stationed at Lower Hutt on 6 January 2007. Through briefings and police duties over the previous three days, both were aware that police were seeking Graeme Burton. They came on duty that afternoon at 4pm. A briefing at the beginning of the shift informed them that Burton was believed to be in the Lower Hutt area, to be armed with a silver revolver, and to be aggressive and dangerous. Officer A was aware that Burton had previously been convicted of murder, had escaped from prison in the past, and that in recent days police had recovered a number of firearms said to belong to him. Based on that information, he considered Burton to be an extreme risk to both public and police.

11.2 At 4pm Officer A informed staff that they were to be armed in accordance with directions from Inspector Dunstan. Officer A supervised the issuing of body armour and Glock pistols to various shift members, including Officer B, and issued General Instruction (GI) F061 Fire Orders to members. (Fire Orders are instructions on the circumstances in which members of police may use firearms and which are detailed in GI F061 – Use of Firearms by Police.) Officer A also took possession of a Glock pistol and ammunition.

11.3 Officer A had passed all his firearm qualifications and was fully qualified and confident in the use of both the Glock pistol and the semi-automatic Bushmaster rifle. He also had current First Aid certification.

- 11.4** Officer B also had current training in the Glock and Bushmaster firearms and first aid certification on the day of the shooting, and was Officer A's most experienced member of staff on the shift that afternoon.
- 11.5** Shortly after 5.35pm, Inspector Dunstan instructed these two officers to go to Summit Road in Lower Hutt to meet with the two shooting victims. There were very few details available but he told the officers that two mountain bikers were making their way down from the foothills, where they had been shot by a man fitting the description of Burton. Officers A and B's instructions were to glean as much detail as possible from the victims and report back to Inspector Dunstan. Both officers departed wearing body armour and carrying fully loaded Glock Pistols and with two Bushmaster Rifles in a secure cabinet in the boot of their patrol car.
- 11.6** Just after 5.47pm, Officers A and B arrived in Summit Road and parked at the end, next to the gateway at the start of the fire-break trails. From police radio traffic they learned that the shooting incidents being relayed by emergency services to police Comms in all likelihood involved Graeme Burton. Comms also told them that the two injured men were hiding in the bush near the top of the track, too afraid to come down to meet them.
- 11.7** Officer A reassessed his options. He decided to establish a cordon and called Comms and asked them to send uniformed police to the other exit points to the Wainuiomata hills to set up additional cordon points. As the latest emergency calls were coming from Wainuiomata he thought Burton might now be heading towards Stokes Valley, away from them. He told Officer B that the circumstances had changed and they would get the Bushmasters out and loaded and move the patrol car out of sight. They would then hide up in the bush on either side of the gates to the fire-break trail.
- 11.8** The two officers went round to the boot of the car to remove and load their Bushmaster rifles to be prepared in case Burton appeared.

11.9 What happened next took place in quick succession. Officer A was at the rear of the car with the boot open, stooped over trying to attach an ammunition holder to the duty belt of Officer B. Officer B was standing upright beside the car on the driver's side, facing toward the boot and watching Officer A when he heard the sound of a bicycle coming to a halt at the Summit Road gateway about 10 metres away.

11.10 Officer B looked up and saw Burton approaching the gate from the fire-break side. Drawing his Glock pistol, he took aim at Burton and shouted, *"Stop, armed police."* As he raised his pistol, Burton raised his shotgun and levelled it at the officer.

12. THE SHOOTING OF GRAEME BURTON

12.1 Officer B said he had a clear view of Graeme Burton: *"As he raised the shotgun, Burton smirked at me. He was looking directly at me, as he had been since I first saw him. ...I thought he was going to kill me."*

12.2 Believing that Burton was about to shoot, Officer B readied to fire when Officer A grabbed his shoulder and told him to run. Given their exposed position, threatened with superior firepower and with their own rifles unloaded and still in the boot of the patrol car, this was the only feasible response. The two officers retreated at speed down Summit Road for approximately 50 metres until they were out of Burton's direct line of fire. Once they realised Burton was not following, they took cover and radioed for assistance. They then reassessed their situation.

12.3 They were in a residential area and, as well as the two shooting victims in the fire-breaks, they knew there would be other members of the public in the general area. Officer A said:

"Because of Burton's behaviour and because of what I believed had happened on the hillside, i.e. he had shot somebody, I considered he continued to pose a threat of death or serious injury to other persons in the vicinity."

Officer A knew Burton had the shotgun and that there was every probability he had other weapons, including the pistol he had been reported to be carrying the previous day.

- 12.4 Officer A then made decisions at this point, based on his fear that Burton was about to take possession of the police's Bushmaster rifles and ammunition as well. He decided to go forward, challenge Burton, stop him taking the police rifles, force him to surrender, and detain and arrest him.
- 12.5 Officer A moved up the roadway towards Burton using the roadside bush for cover. He was followed at a short distance by Officer B. Both had drawn their Glock pistols. As they approached the patrol car they saw Burton standing next to the boot holding the two Bushmaster rifles.
- 12.6 Officer A shouted, "*Armed police.*" Burton turned to face him, the Bushmaster rifles in his left hand and his loaded shotgun in his right. He raised and pointed the shotgun directly at Officer A. The officer estimated he was about 30 metres from Burton with no obstructions between them. He fired at Burton who stepped sideways as the rear window of the patrol car shattered. Burton did not drop his weapon or surrender.
- 12.7 Officer A then fired twice in close succession, one of the shots striking Burton in the upper thigh of his right leg and incapacitating him. Burton dropped his weapons and fell to the ground. The distance between Officer A and Burton at this point was approximately 21 metres.
- 12.8 The two officers approached Burton and placed him under arrest. While they were attempting to restrain him and assess his medical condition Burton continued to struggle against them. The sawn off shotgun he had been carrying was found to be fully loaded. So was his revolver. The time was 6pm.
- 12.9 The officers then gave medical assistance to Burton until ambulance staff arrived a short time later.

13. THE POLICE
INVESTIGATION INTO
THE SHOOTING OF
GRAEME BURTON

- 13.1 On 6 January 2007 a homicide investigation was launched by the Lower Hutt Criminal Investigation Branch (CIB). There were several aspects to this investigation, as Graeme Burton had been responsible for numerous serious offences that day, including the murder of Karl Kuchenbecker. The police shooting of Graeme Burton was one phase of that overall enquiry.

- 13.2 In relation to the shooting phase, the police investigation included a scene examination, a door-to-door canvass of residents in the area, interviews with witnesses and with Officers A and B, and analysis of the audio recordings from emergency services and Comms.
- 13.3 Police investigators also attempted to interview Burton but he declined to be interviewed formally. However, he did make some verbal admissions about the shooting of Karl Kuchenbecker, but did not offer anything in terms of the police shooting of himself.
- 13.4 A thorough scene examination was conducted. The 9mm police Glock pistol, the three spent shell casings and the recovered bullet were forwarded for analysis. Two of the projectiles were never located.
- 13.5 The investigation confirmed that three rounds had been fired from Officer A's Glock. Although all of the rounds were aimed at Burton, the first round shattered the rear window of the police vehicle; another round missed and the projectile has not been found. The third round hit Graeme Burton in the upper right thigh and that projectile was never located.
- 13.6 All three 9mm rounds were fired from the same location and their trajectory was similar. The available ballistic evidence is consistent with the officers' statements and the evidence. A total of three 9mm casings found on the road surface are also consistent with where Officer A says he was standing when he fired the shots.
- 13.7 All other relevant exhibits were seized and the scene extensively searched, mapped and photographed. The examination established the evidence as consistent with the sequence of events as described by Officers A and B and by all available witnesses.
- 13.8 The investigation included interviews with all police officers involved and civilian witnesses who were able to provide background information about the actions of Officers A and B prior to and after the shooting. The statements of Officers A and B also detailed their actions throughout.

13.9 All officers involved in the various phases of the enquiry produced police reports, copies of which are held on the IPCA files.

13.10 The police investigation also considered the question of whether any criminal liability attached to Officer A's actions. That particular aspect of the investigation included a reconstruction of events with Officer A at the scene. This assisted in confirming his shooting position, Burton's position at the time, the trajectory of the shots fired and the distances involved.

14. IPCA REVIEW
OF THE POLICE
INVESTIGATION INTO
THE SHOOTING OF
GRAEME BURTON

14.1 The police investigation was monitored by the IPCA, both during the initial phase and in the weeks and months of follow-up inquiries. A thorough review of the contents of the police file was conducted to identify other potential avenues for investigation and to confirm that all necessary documents were included. All of the material obtained from police was examined in detail by an IPCA investigator.

14.2 Police made initial contact with Judge Ian Borrin, the then Police Complaints Authority, at 6.15pm on 6 January 2007 and brief details of the incident were provided as it was unfolding. A second call to the IPCA at 6.45pm confirmed that police had shot Burton once in the leg and that he had been taken to hospital.

14.3 On 7 January, two IPCA investigators met with the officer assigned to act as the liaison for the enquiry. He provided the IPCA investigators with some background information on Graeme Burton's breach of parole and the police efforts to locate and arrest him prior to the shooting.

14.4 The IPCA investigators also examined the scene at Summit Road. The detective there processing the scene walked them through it, pointing out significant locations and providing a description of events. Back at the Lower Hutt Police Station the IPCA investigators met with the Officer in Charge of the homicide investigation and obtained additional information about all of the events of the afternoon of the shooting.

14.5 Officers A and B were both interviewed on 7 January by police investigators and copies of their interviews immediately made

available to the IPCA. The training records of both officers were also reviewed by the IPCA.

14.6 The Comms recordings and transcripts were secured and IPCA support staff transcribed these recordings as part of the IPCA's investigation. The recordings and transcripts included:

- i) The conversation between the ambulance dispatcher and the police Comms dispatcher reporting the initial information about the shooting;
- ii) The first telephone conversation between the police Comms dispatcher and Inspector Dunstan;
- iii) Six Comms radio transmissions before, during and after the shooting.

14.7 It is acknowledged that the IPCA investigators received full cooperation and support from the police throughout their investigation. Relevant documents were provided in a timely manner. In addition, the IPCA investigators were given access to the entire police investigation file, which was electronically stored and allowed 'real time' disclosure of documents as they were being uploaded to the system.

14.8 Police also delivered copies of the photographs of the Summit Road scene, as well as still photographs and a video recorded by a civilian witness shortly after the shooting occurred. Regular meetings were held between the IPCA and police, at which time issues were discussed and the IPCA's requirements addressed.

**15. IPCA CONCLUSIONS
ON THE POLICE
INVESTIGATION INTO
THE SHOOTING OF
GRAEME BURTON**

15.1 All material relevant to the police investigation supplied by police to the Independent Police Conduct Authority has been completely reviewed and the following conclusions were reached:

- i) The shooting of Graeme Burton was thoroughly and professionally investigated by the police and the police file was found to be complete;
- ii) The police investigation correctly examined events leading up to the shooting, including the actions of the

officers who initially attended and the justification for those two officers to be armed;

iii) The statement obtained from Officer A was found to be consistent with the known facts and police did not believe it necessary to obtain a legal opinion regarding any criminal liability of either officer involved;

iv) Burton's criminal history and his activities in the days and hours prior to the shooting were examined in detail.

16. IPCA FINDINGS
ON ISSUES CONSIDERED
IN THE SHOOTING OF
GRAEME BURTON

16.1 Was the police decision to send two uniformed officers to Summit Road a sound one in terms of officer and community safety, given the information police had at the time?

16.1.1 The decision to send general duty uniformed members to the Summit Road location was made by Inspector Dunstan, based on the information he had available to him at the time. Officer A made the decision to attend at the location and elected to take Officer B with him. This decision was based on available resources and manpower and the need to respond quickly.

16.1.2 At 5.30pm the ambulance dispatch called Comms to tell them that they had just received a call from a man saying that he and a friend had been shot in the hills above Lower Hutt. Comms dispatch immediately called Inspector Dunstan, providing details. Inspector Dunstan later reported:

"She [Comms dispatch] indicated that the details were very sketchy but what they could ascertain was that someone had rung and indicated that he had been shot in the shoulder. The caller indicated that they were in the hills above Te Whiti Park, exact location unknown. He hadn't given a name or much detail before hanging up."

"I was then told that they had attempted to ring the caller back but they hung up. All in all, the call was very vague and with limited information. The fact that the informant wasn't identifying himself and had hung

up was suspicious and raised concerns about how genuine the call was.”

“From the information received to date I wasn’t convinced at this stage that it was a genuine call but it certainly needed to be checked out. The only positive information was the fact that the victim or caller was making their way to Summit Road.”

- 16.1.3 Comms ended the call by advising they had the men’s mobile number and would try to contact them to find out more.
- 16.1.4 Based on this limited information, Inspector Dunstan made what he believed was a reasonable decision to send general duty members to meet up with the two victims. He felt he had reason to question the authenticity of the call and there was no confirmation that Graeme Burton was involved. There was nothing to suggest that an offender would be present or even heading in the direction of Summit Road.
- 16.1.5 Thus Officers A and B were dispatched to Summit Road to meet with the two men and obtain more information so that further decisions could be made about whether any further response was necessary. It was not until these officers arrived at the top of Summit Road that they received the additional information and the circumstances changed.
- 16.1.6 This was a fluid situation with events unfolding rapidly. Police received a number of calls about Burton’s activities over a very short period of time. By the time police had pieced together the information provided by victims and witnesses, and realised that Burton may be heading in the direction of Summit Road, it was too late to alert Officers A and B to the potential danger.

FINDING

16.1.7 The initial police decision to send two uniformed officers to Summit Road to meet Holmes and Simpson was reasonable, justified, and in fact desirable given the information available at that time.

16.2 Were the officers who were deployed to Summit Road, and other Lower Hutt officers in general, justifiably armed; and were the appropriate General Instructions complied with?

16.2.1 Inspector Pete Cowan is the Area Commander for Wellington City. At the time of the shooting, Inspector Cowan was also acting as Wellington District Commander. From 3 January 2007, he had been briefed about Graeme Burton's recent violent offending. During that time police had obtained information suggesting that Burton was armed and responsible for several violent attacks within the district. On 4 January, out of concern for the safety of the public and police, Inspector Cowan directed all Wellington City police officers to be armed and be issued with body armour until further notice.

16.2.2 Inspector Cowan specifically referred to General Instructions (GI) F060 (6) as his authority for arming staff. GI F060 (6) states that members may carry firearms on their person when there is clear and specific evidence that a risk of encountering any of the circumstances referred to in GI F061 exists. Carriage is to be authorised by a commissioned officer or NCO when practical to do so.

16.2.3 He gave further justification for his actions:

"It was very clear to me that Burton posed a very real and present threat to members of the public and police officers and therefore it was only common sense to have these officers armed at all times until Burton's capture."

"On Saturday 6 January 2007 I was the acting District Commander. Around midday I was advised by Inspector Dunstan, Lower Hutt Area Commander, that AOS [Armed Offenders Squad] and Lower Hutt staff were conducting a series of search warrants in the Hutt Valley looking for Burton."

"I told Inspector Dunstan of my concerns about Burton and the fact that I had advised my duty staff to remain armed until Burton had been captured. I am aware that Inspector Dunstan also issued similar orders to Lower Hutt staff at the time."

16.2.4 When asked to justify his arming of staff, Inspector Dunstan said:

"At 0900 hours on 6 January 2007, I was contacted by Detective Senior Sergeant Levy who informed me of a home invasion committed by Graeme Burton and one other. During the course of the day I accompanied AOS who executed a number of search warrants about Lower Hutt looking for Burton."

"Also during the course of the day I had discussions with Inspector Cowan the acting District Commander. He gave me further background information with respect to Burton and the aggravated assault in Wellington."

"We discussed safety for general duty staff while Burton remained on the loose. He advised me that he had issued a directive authorising Wellington staff to be armed and to wear body armour as part of routine patrols."

"I had also discussed with the OC [officer commanding] AOS the possibility of armed makeshift patrols again as protection for police staff."

"I was of the belief that there was a generic risk to police staff caused by the presence of Burton. I made the decision to authorise staff to wear armour and carry firearms."

"Initially I conveyed this instruction to [Officer A] who was the rostered late shift [supervisor]. This was in the Lower Hutt Senior Sergeant's office shortly before his commencement of duty. I informed him for the duration of the time that Burton remained at

large general duty staff were to wear body armour, and carry Glocks and Bushmasters at all times. I asked him to pass that instruction on to incoming shifts and I had intended to put out a written instruction but events overtook me."

- 16.2.5** Although GI F060 (6) states that members may carry firearms when approved, it does not specifically address what could be termed a general 'call to arms'. However, although not specific and therefore open to interpretation, the policy does appear to cover police for this type of widespread arming of its members.
- 16.2.6** GI F059 (9) requires that whenever a firearm is issued, the details must be recorded in the firearms register.
- 16.2.7** Both officers complied with the established policy. All of the weapons and body armour were signed out and recorded in the firearms register.
- 16.2.8** GI F062 states:
- Every sworn member of Police who is issued with a firearm in the course of duty is personally responsible for ensuring that he or she is thoroughly conversant with relevant law, particularly Sections 39, 40, 41, 48 and 62 of the Crimes Act, and policy as outlined in General Instructions F061.
- 16.2.9** GI F061 (Fire Orders) reminds members of police that they must always be aware of their personal responsibilities in the use of firearms. It reminds them of the relevant sections under the Crimes Act and sets out the circumstances in which the use of lethal force is justified. GI F061 will be referred to again in the discussion on self-defence.
- 16.2.10** It also requires that 'fire orders' be given "if time and circumstances permit". Officer A, as a very experienced operational police officer and as the rostered supervisor for that shift, was responsible for issuing firearms to his staff. In his statement he made reference to the issuing of the weapons and fire orders:

"As soon as the briefing was concluded, I became involved in issuing body armour and firearms to the officers. I watched the load procedures. I issued General Instruction F61 by directing them to read the fire orders which are on the wall."

"Early shift staff began to return to the station and I carried out the receiving of firearms and monitoring of the unloading procedures as well as completing the firearms register. It was at this stage I issued myself with a Glock serial number 030. I carried out the load procedures and holstered in the low-slung thigh position. A round was chambered which is known as the 'action state'."

"Each magazine for the Glock contains 15 rounds. The magazine I placed in the magazine pouch which is attached to the Glock holster contained 15 rounds. Having chambered one round from the magazine which I inserted into the Glock, the magazine on that weapon would now contain 14. I had 30 rounds in total."

"I told Constable C to complete the firearms register as the authorising officer for my firearm. I also familiarised myself again with F61 which is on a printout on the wall above the firearms register."

16.2.11 Officer B included in his statement:

"I drew a Glock pistol and two magazines which I believed contained 17 rounds per magazine. I read General Instruction F61 again from the poster that was on the armoury wall."

FINDING

16.2.12 The police were justifiably armed given the threat posed by Graeme Burton to the community in general and to police officers. General Instruction F061 – which covers use of firearms by police – was fully complied with in this case.

16.3 Were the initial actions of Officers A and B upon arriving at Summit Road appropriate given the information they possessed?

16.3.1 When the two officers left the Lower Hutt office and drove to the top of Summit Road they had very little information. They knew that a man had contacted the ambulance dispatch reporting that he and a friend had been shot. They knew that the victims were making their way down a fire-break in the direction of Summit Road. They had been dispatched to meet the men, assess the authenticity of the complaint and obtain additional information so that police could respond appropriately. Both were armed with Glock pistols and body armour because of the threat posed by Burton, who was believed to be in the general Lower Hutt area.

16.3.2 When they arrived at the gate at the bottom of the fire-break trail they parked their marked police vehicle directly in front of it. They were there to meet the complainants/victims and therefore wanted to be as visible as possible. They notified Comms of their arrival and asked for an update.

16.3.3 Officer A's statement is critical to understanding his responses. The following are significant excerpts from his statement:

"Each call should be treated on its own merits and therefore my task to meet up with the victims at the top of Summit Road to gain more information prior to any major police deployment was not unusual. I was also told by Inspector Dunstan that when I spoke to these people, if there was any suspicion that it was Burton, it was to be an AOS call."

"We drove there at normal speed and Inspector Dunstan advised Comms that we were on our way. When we arrived I expected to see two people at the bottom of the fire-break which is situated at the top of Summit Road, but the road was empty. [Officer B] drove

the patrol vehicle up to the gates which blocked access to the fire-break."

"I advised police communications that we were there and I wanted to know where the victims were. I was advised by Comms that they were hiding in the bush up the track. I advised Comms to tell them that we were there and they should make their way down the fire-break to our location. Police Comms told me that these victims were too scared to come out of the bush. I asked Comms how far up they were and from the response I received, I gained the impression they were near the top of the fire-break which I understood to be a long way."

"I then thought that as these victims couldn't come to us we were going to have to go to them and wondered how we were going to achieve this. In the back of my mind I was concerned that Burton was in the Lower Hutt [area]. However at this time we were dealing with one call and nothing had been said to confirm that this was in fact an incident involving Burton."

"At this stage I reassessed my options in relation to the victims at which point police communications called out that they had received multiple calls in relation to this incident. I asked Comms, 'What's the nature of the calls?' They advised me that the description matched Burton. At this point, because of the information and due to the multiple calls, I considered that it was highly likely Graeme Burton was involved."

"I told Comms that I didn't have a map and asked them to put some cordons out. I said, 'I'm staying here. Can you set cordons out?' It was at this point I told [Officer B] that we would get the Bushmasters out and loaded and then move the patrol vehicle out of sight from the fire-break because the circumstances have changed. By this I meant we had gone from waiting to provide a visible police presence for the

victims who we expected to meet at the bottom of the track, to a concealed police cordon. The reason for wanting the Bushmasters is that the range of this weapon is far greater than the Glock. I advised [Officer B] that we would then hide up in the Bush at the gate line, indicating he go to the right and me to the left."

16.3.4 The two officers went to the rear of the police vehicle, unlocked the secure box containing the two Bushmaster rifles and ammunition and began to prepare the weapons. It was then that Graeme Burton arrived and surprised the officers.

FINDING

16.3.5 Given the information the officers had, and considering the speed with which events unfolded, the actions they were taking to arm themselves with the rifles and establish a cordon point at the Summit Road location were reasonable and justified.

16.4 Was Officer A justified in using force to arrest Graeme Burton, and in the degree of force he used?

16.4.1 The situation Officer A faced when he returned to confront Burton at the police car immediately raises the issue of self defence, or defence of another.

16.4.2 The relevant law is in Section 48 of the Crimes Act 1961:

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.

16.4.3 The application of the defence of self defence, or the defence of another, to any given case requires a three step approach. The starting point is to consider what Officer A believed the circumstances to be from his subjective point of view at the time he shot Graeme Burton. The second consideration is whether, bearing in mind Officer A's belief about what was happening, he acted in self defence or in the defence of another by shooting Graeme Burton. This is again to be considered from his point of view. The third step is to ask whether, given Officer A's belief, the force he

used in self defence, or in the defence of another, was reasonable. In other words, whether the degree of force he used was proportionate to the level of the threat as he perceived it. The essential balancing requirement is for both the subjective and the objective elements of the test to be assessed in light of the circumstances as the person responding to the threat saw them.

- 16.4.4** Officer A's decision to return and attempt to arrest Burton¹ was made in the public interest and driven by the circumstances as he believed them to be: namely, that Burton was armed and dangerous, that he had a history of lethal violence, that he was reported to have shortly before shot at someone, and most significantly that he was now in possession of the two police Bushmaster rifles, as well as a shotgun which officer A had every reason to believe was loaded. In his statement, made shortly afterwards, Officer A said of his decision to return:

"... my mind was cast to the risk to other members of the public, particularly the two victims who were still somewhere further up the fire-break. I also knew there were other people up the fire-break because of the multiple calls and I was also aware we were in a residential area with a lot of people around. Because of Burton's behaviour and because of what I believed had happened on the hillside, i.e. he had shot somebody, I considered he continued to pose a threat of death or serious injury to other persons in the vicinity."

"... as police officers we were duty bound to act in the defence and protection of the public. It is part of the oath we took, it is what we do and it is our job."

1 There were existing legal grounds for Graeme Burton's arrest at the time: either pursuant to the two outstanding warrants for his arrest: or in consequence of the serious offences Burton had just committed, including presenting a firearm at Officers A and B. The circumstances clearly justified the use of a firearm to effect his arrest.

I decided that I was going to use concealment to make my way back to the patrol vehicle because I wanted to protect the public against an armed and dangerous individual who had already shot somebody and had threatened to shoot me and my partner."

"My intention to go forward was to challenge Burton to prevent him from continuing his actions, to cause him to surrender and to detain and arrest him."

- 16.4.5 When officer A stepped from his concealed position and confronted Burton, challenging and warning him at the same time, he was immediately met with a threat of lethal force, by Burton raising his shotgun and levelling it at the officer. Officer A said:

"...Burton turned toward me. As he did this, I saw that he had the other weapon which he had pointed at us earlier, in his right hand. He pointed the weapon in my direction. He was holding the weapon in a different way than he had been holding it earlier on but in a way that I deemed to be similar to the way you would hold a sawn-off shotgun with the stock cut off, like a pistol grip shotgun."

"I believe that Burton was capable of firing [his shotgun] in the position he was holding it in and the way he was pointing it at me."

"I considered Burton to be an immediate threat. I considered it to be a life-threatening situation and I believe that I had no other option but to discharge the police firearm without shouting any further warnings."

- 16.4.6 Officer A's immediate response, in firing his Glock pistol at Burton, was entirely proportionate and a reasonable response to the level of threat posed by Burton in the circumstances as officer A perceived them. His action was not a pre-emptive strike but an instinctive response to protect himself and, in the wider context, to protect others from the likely risk of death or grievous bodily harm.

- 16.4.7** To have remained in retreat and not to have returned to confront Graeme Burton would have exposed members of the public and eventually other police officers to serious and unacceptable risk.²
- 16.4.8** Officer A's perception of the circumstances at the time, is supported by the physical evidence and by the various civilian witnesses' accounts, and by the statement of Officer B. The Comms recordings further support both officers' accounts of events and are consistent in terms of both timing and Burton's actions. Thus the totality of the evidence supports a finding that Officer A was acting lawfully in the execution of his duty in attempting to arrest Graeme Burton and in using potentially lethal force to do so; it also supports a finding that the force he used was reasonable in the circumstances and was not excessive.³
- 16.4.9** Sections 39 and 62 of the Crimes Act, and Police General Instruction FO61, are relevant here. Section 39 Crimes Act provides that where any person is justified, or protected from criminal responsibility, in executing or assisting to execute any warrant or make any arrest, that justification or protection extends to the use by him of such reasonable force as may be necessary to overcome resistance.
- 16.4.10** Section 39 is qualified by Section 62 Crimes Act which provides that everyone who is authorised by law to use force is nevertheless criminally responsible for any excessive use of force, according to the nature and quality of the act that constitutes the excess.

2 It is a question of fact whether returning to a situation of threat, when retreat remains an option, is reasonable in the circumstances: see for example *R v Nicholls* CA 96/96, 20 July 1998; *R v Karaitiana* CA 201/06, 6 March 2007

3 Section 62 Crimes Act and General Instruction F061

16.4.11 Section 62 Crimes Act has been incorporated into GI FO61, which has particular relevance to the situation in this case. GI FO61 expressly provides:

- (1) Members must always be aware of their personal responsibilities in the use of firearms. Under Section 62 of the Crimes Act 1961 a member is criminally liable for excess force. An overriding requirement in law is that minimum force must be applied to effect the purpose. Police should not use a firearm unless it can be done without endangering other persons.
- (2) Police members shall not use a firearm except in the following circumstances.
 - (a) To defend themselves or others (Section 48 Crimes Act 1961) if they fear death or grievous bodily harm to themselves or others, and they cannot reasonably protect themselves, or others, in a less violent manner.
 - (b) To arrest an offender (Section 39 Crimes Act 1961) if they believe on reasonable grounds that the offender poses a threat of death or grievous bodily harm in resisting his or her arrest and the arrest cannot be reasonably effected in a less violent manner and the arrest cannot be delayed without danger to other persons.
- (3) In any case an offender is not to be shot:
 - (a) Until he or she has first been called upon to surrender, unless in the circumstances it is impracticable and unsafe to do so.
 - (b) It is clear that he or she cannot be disarmed or arrested without first being shot.
 - (c) In the circumstances further delay in apprehending him or her would be dangerous or impracticable.

FINDING

16.4.12 In the circumstances as Officer A perceived them, the force that he used to effect Graeme Burton's arrest and to defend himself and others was reasonable and not excessive. Further, in light of the circumstances as Officers A and B believed them to be, their actions in returning to confront Graeme Burton and attempt to arrest him were acts of considerable courage, as well as of adherence to duty.

16.5 Was all reasonable assistance rendered to Graeme Burton after the shooting?

FINDING

16.5.1 The medical treatment provided by Officers A and B to Burton after he was shot was found to be exceptional and may have saved his life.

16.6 Were less violent alternatives available or considered in this situation?

16.6.1 It is necessary to consider what alternatives were available to Officer A, what alternatives he actually considered, and what other alternatives are available to police in general. Less violent options that can be considered by police when dealing with a potentially violent offender include:

- **cordon and containment;**
- **call to surrender/verbal commands;**
- **retreat; delaying an arrest;**
- **Oleoresin Capsicum (OC) spray;**
- **ASP extendable baton; and**
- **the use of a police dog.**

16.6.2 The information available to Officer A first suggested there may be an armed offender involved in a shooting in the bush above Summit Road. On arriving at the Summit Road fire-break entrance and learning that Graeme Burton was possibly the offender involved, Officer A first considered **cordon and containment** as a safe and viable option until reinforcements could arrive.

- 16.6.3 Because of the uncertainty as to where the offender was at that point, establishing a cordon at the Summit Road fire-break entrance and at other locations giving access to the hills, would contain the offender until the Armed Offenders Squad could arrive. In the event, however, Officers A and B did not have sufficient time to establish a cordon point before Burton appeared.
- 16.6.4 Once Burton appeared at the bottom of the fire-break, the option of cordon and containment was no longer viable, so instead the two police officers retreated to a safe position.
- 16.6.5 The **call to surrender** option was used by the officers on two occasions but with no effect.
- 16.6.6 It was used first during their initial encounter with Burton, when he suddenly appeared from the fire-break, and the officers were taken by surprise. Officer B was the first to see Burton and drew his pistol, calling on him to surrender. Burton immediately raised his shotgun and pointed it directly at the officer. In essence, that brief encounter was an armed standoff in which Burton possessed the more deadly short-range weapon. This initial call to surrender was clear but ignored by Burton and the decision made at that point to retreat.
- 16.6.7 During the re-engagement phase, Officer A again called out to Burton. Once again there was no attempt by Burton to surrender.
- 16.6.8 The officers initially used the **retreat** option to put much needed distance between them and the immediate threat to their lives. The evidence suggests they had the option to continue to retreat, or to at least maintain their safe position, but they decided that the risk to the public was too great.

16.6.9 Retreat therefore was a successful option in terms of securing their immediate protection but not a viable longer term option. The officers correctly and courageously made the decision to re-engage Burton, out of concern for the safety of the public at large and other police officers.

16.6.10 Officers A and B were not in a position to **delay the arrest**. To have done so would have exposed both themselves, other officers and members of the public to an unacceptable risk of death or grievous bodily harm.

16.6.11 Of the other available options, neither **OC spray** nor the use of **batons** were viable options, given that Burton was armed with a shotgun and given the distances involved.

16.6.12 A **police dog** was not immediately available. Had police been in a position to contain Burton and wait for a dog and handler there may have been some consideration given to the use of the dog. However, in the circumstances, with Burton heavily armed, it would have been unwise to deploy a dog at all. In any event, this option was not immediately available and waiting or delaying the arrest would have exposed the public to extreme danger.

FINDING

16.6.13 The only available less violent alternatives were those used by Officers A and B. Others were considered and rejected by them before the shooting occurred. In the final analysis, given the circumstances and speed with which the level of threat escalated, Officer A ultimately resorted to the only viable option available to him at the time: his firearm.

16.7 Were there any breaches of Police General Instructions or District Orders or directives?

FINDING

16.7.1 There were no breaches of Police General Instructions or District Orders or directives.

16.8 Was the physical evidence consistent with officer and witness statements?

FINDING

16.8.1 All of the physical evidence in this case is consistent with the statements of the police officers directly involved. The civilian witnesses who saw various parts of the events offered accounts that also supported and were consistent with those of the officers involved. The Comms recordings further support the officers' account of events and are consistent in terms of timing and Burton's actions.

16.9 Did the officers directly involved have current and appropriate training?

FINDING

16.9.1 The training records for the two officers involved were examined. These documents confirm that both Officers A and B were up-to-date in relation to first aid, Glock pistol and Bushmaster rifle training.

16.10 Was the subsequent police investigation professional and thorough?

FINDING

16.10.1 The subsequent police investigation was professional and thorough. All avenues were properly explored. Throughout the investigation there was full co-operation with the IPCA investigators and all relevant documentation was provided in a timely way.

16.11 Should officers involved in incidents of death or serious injury be routinely subject to drug and alcohol testing?

16.11.1 There is no suggestion that any of the officers involved in the police operation to arrest Graeme Burton on 6 January 2007 were in any way impaired by alcohol or drugs. However, the issue of alcohol and drug testing of officers involved in 'critical incidents' such as police pursuits, shootings and alleged serious assaults has been the subject of consideration by the IPCA, the Police and by coroners over some time. Police practice is currently variable.

16.11.2 In this case, Officer A was not tested. Detective Inspector Harry Quinn advised that he made the decision not to test Officer A, after discussing the issue with Inspector Dunstan, as there was no evidence or suggestion of impairment, testing is not required by police policy, and the issue is sensitive.

16.11.3 Nonetheless, it could be argued that routine testing of officers involved in such 'critical incidents' would be of benefit to Police in a number of respects. Certainly it would indicate a willingness on the part of Police to police its own ranks. It would also protect police officers involved in such incidents from malicious or unfounded allegations of substance abuse.

16.11.4 As recently as 31 March 2005, Auckland Coroner, Sarn Herdson, raised the issue of alcohol testing of police drivers in a coronial report following an inquest into a fatal pursuit. Ms Herdson pointed out that the Police General Instructions require drivers of "all" vehicles involved in a fatal or potentially fatal crash to be breath or blood tested. Considering the nature of police pursuits and the role of police officers she suggested this policy might be extended to include police drivers, as they too could be viewed as "involved drivers" in such cases. If that were to be the interpretation, police drivers in pursuits would have to be routinely tested.

16.11.5 Ms Herdson said:

"This is a matter of Police practice and procedures that should be considered by appropriate senior personnel within the Police, perhaps under direction from the Office of the Commissioner and in conjunction with the Professional Standards division."

16.11.6 The IPCA is unaware whether Ms Herdson's remarks have yet been actively considered by Police. If not, the IPCA would see merit in consideration being given to:

- i) whether routine testing ought to be implemented and if so whether such testing should be confined to driving incidents, or should apply to all 'critical incidents'; or
- ii) whether the testing of police officers involved in 'critical incidents' ought to remain a matter of discretion for the officer in charge.

16.11.7 In the IPCA's view, police should consider whether their practice in relation to the drug and alcohol testing of officers involved in 'critical incidents' should be standardised.

POSTSCRIPT

Graeme Burton pleaded guilty to 11 charges relating to incidents on the afternoon of 6 January 2007 – one charge of murder, two of attempted murder, two of aggravated robbery, two of kidnapping, two of using a firearm against a law enforcement officer, aggravated injury and injuring with reckless disregard. He has since been sentenced to life imprisonment for a minimum of 26 years for the murder of Karl Kuchenbecker and to preventive detention with a minimum of 26 years on the other charges, to be served concurrently.

Independence trustworthiness accountability vigilance integrity

Phase 2 – Action by the Police from Graeme Burton's Release until the Day of his Shooting

INDEPENDENT POLICE CONDUCT AUTHORITY
REPORT INTO THE SHOOTING OF GRAEME BURTON

February 2008

17. INTRODUCTION

17.1 The second phase of the IPCA's inquiry examined the police role in the collection of information and in intelligence gathering between the time of Graeme Burton's release from Rimutaka prison on life parole on 10 July 2006 and the day of his shooting by police.

18. BURTON'S PAROLE CONDITIONS

18.1 Life parole means Graeme Burton could be recalled to continue serving his life sentence at any time. During his parole period, Graeme Burton was reporting to a probation officer at the Wellington Service Centre and was subject to special conditions of parole until 9 July 2008. Those conditions were:

- i) to reside at a designated address in Berhampore, Wellington, or at an address approved by the probation officer;
- ii) for his mother to reside at the address for the first month at least, as part of his reintegration process. Any breach of this condition could result in Graeme Burton's recall to prison;
- iii) not to leave the Wellington region without the prior written approval of his probation officer;
- iv) to take up employment or employment related training as directed by his probation officer, but not in the tattoo business without the prior written approval of his probation officer;

- v) to undertake a psychological assessment, and any treatment recommended as a result, as directed by his probation officer;
- vi) under the direction of his probation officer, to attend a maintenance group run by Intervention Services for a criminogenic programme he had already completed;
- vii) to attend any other counselling or programmes aimed at reducing his risk of reoffending in the community, if so directed by his probation officer;
- viii) not to associate with anyone nominated in writing by his probation officer;
- ix) not to make contact with the victims' families, either directly or indirectly, unless with the prior written approval of his probation officer.

19. ISSUES REVIEWED

19.1 The following are the issues considered during the review of police actions prior to the shooting on 6 January 2007:

- i) Police have a memorandum of understanding (MOU) with the Department of Corrections, which contains principles about sharing of information between the two agencies. There is also a local service level agreement covering information sharing between Police and Corrections in the Wellington district. Did police comply with the MOU and local service level agreement in terms of their interaction with Probation following Graeme Burton's release on 10 July 2006?
- ii) Police declined a request from Probation to permit the inclusion of intelligence they had gathered in an affidavit to support an application to recall Graeme Burton, on the basis that the intelligence was primarily informant based. Was this a considered decision and justified given the nature of the intelligence/information?
- iii) Following the issue of warrants for Burton's arrest on 22 and 29 December 2006, did police respond satisfactorily?
- iv) From 1 January 2007, when police realised there was an interim recall order and warrant to arrest and detain Burton in existence, did they respond satisfactorily?

20. INTELLIGENCE AND ACTIVITY TIME LINE

- 20.1** The following timeline details what information/intelligence the police had and their activity from the time of Graeme Burton's release until 4 January 2007.
- 20.2 19 May 2006:** Probation advised police that Burton was due to go before the Parole Board on 6 June 2006 and was likely to get parole. It was agreed that a first meeting with Burton would be held at the Community Probation Service office and conducted within the framework of the High Risk Offender Programme. This Programme was an informal joint initiative between Police and Probation to identify and monitor high risk individuals being released back into the community.
- 20.3 29 June 2006:** Probation advised police that Burton had been granted parole and was due to be released on 10 July 2006. He was to live at a specified address and would attend the planned prisoner release visit at Probation's offices, with Burton entitled to have a support person present.
- 20.4 10 July 2006:** Graeme Burton was released on parole from Rimutaka Prison.
- 20.5 25 July 2006:** the prisoner release meeting with Burton and his mother was held at Community Probation Service to discuss his reintegration back into the community.
- 20.6 14 November 2006:** Graeme Burton and an associate carried out an assault on a local drug dealer to extort money. At the time Burton and his associate were wearing stab-resistant vests and had a firearm. Police heard about the attack from a police informant on 22 November 2006.
- 20.7 19 November 2006:** Burton and an associate attacked a local Wellington methamphetamine dealer. A knife and gun were used during this assault and robbery. Police did not learn of this assault until 3 January 2007.
- 20.8 21 November 2006:** Burton and an associate, armed with a knife and firearm, attacked a small time methamphetamine dealer in Wellington. The victim was knocked unconscious and suffered broken ribs. Police were told of the attack by a police informant.

- 20.9 22 November 2006:** Burton and an associate were responsible for another attack to extort money from a local drug supplier using violence and weapons. Police were notified of the attack by way of a police informant on 29 November 2006.
- 20.10 23 November 2006:** Burton and an associate robbed a small group of local methamphetamine dealers. Both wore balaclavas during the attack. Police were notified of the attack by a police informant on 5 December 2006.
- 20.11 24 November 2006:** Community Probation notified police that they had received an anonymous telephone call saying that Burton was associating with another recently paroled murderer and that the two were regularly visiting strip clubs.
- 20.12** On the same day, police were called to an address in Happy Valley Road, in response to a report that three men were assaulting another person in a ‘stand over’ attack. Police staff encountered the three men in a vehicle as they were leaving the area. Graeme Burton was one of the passengers in the vehicle. Woollen balaclavas and a large hunting knife were found during a search of the vehicle. One of Burton’s associates, with him at the time, claimed ownership of the items and was subsequently prosecuted for possession of the knife.
- 20.13** A police officer spoke to one of Graeme Burton’s associates and told him that police knew they were extorting money and drugs from local dealers in Wellington. Burton’s associate’s response was reported as:

“Who [expletive deleted] cares about them? They’re drug dealers. We’re not scared of anyone. We don’t care if they’re connected or not. Who cares? We can look after ourselves. I don’t give a [expletive deleted] whose toes we step on. We’re doing you guys a favour. Since we’ve been around I’m sure all your serious [expletive deleted] has been sorted. We’re taking care of all your serious drug dealers. We pick our targets well and we do our homework. I don’t know what you guys are worried about. It doesn’t involve you guys. I mean you guys can keep the drugs we find, we’ll just keep

the money. Crime rates must have been dropping because of us, especially over the last two weeks. We've been getting rid of a lot of gear off the streets. You guys should thank us."

20.14 25 November 2006: police provided Probation with details of the Happy Valley incident and further advised that police had received additional information that Burton was taxing low level drug dealers and assaulting them so they would not make formal complaints.

20.15 27 November 2006: police sent Probation an electronic copy of their most recent intelligence report detailing Burton's current criminal activities. Probation replied that day with an email that read in part:

"I have a bad feeling about all of this.... Without charges we will not be able to recall. At the first sign of any charges being laid we will make an application for an immediate recall."

20.16 Later that same day, Probation informed police that they had received information that Burton had been getting methamphetamine from local drug dealers in the Hutt Valley and when asked to pay he refused and used threats of violence. The Probation staff member commented: *"It just keeps getting worse doesn't it?"*

20.17 28 November 2006: Probation served Burton with two non-association orders against two known offenders, following concerns from an anonymous caller and the police.

20.18 Also on **28 November**, the police established a formal operation, named Operation Tax, for the purpose of collecting sufficient evidence to charge Graeme Burton with offences and get his parole revoked. The police officer in charge of the operation began by arranging for search warrants for the addresses of Burton and a known criminal associate of his. The applications for the search warrants were based on the information collected by police on Burton's taxing of drug dealers.

- 20.19** Police provided the IPCA with some of the documentation from the Operation Tax file during its investigation. However, police reported that the original file was missing and it could not be produced in full.
- 20.20 29 November 2006:** police received information from an informant that Graeme Burton and an associate were trying to start a “drug empire” for themselves in Wellington and that both were using methamphetamine.
- 20.21 30 November 2006:** police executed a search warrant at Graeme Burton’s residence in Wellington as planned. He was not there. A second search was carried out at the home of Burton’s associate. Police then contacted Graeme Burton’s probation officer, told her about the searches and reinforced their desire to see Graeme Burton’s parole revoked. Probation was advised that police had been receiving information suggesting both Burton and his associate were setting up a criminal “taxing enterprise” involving the extortion and beating of drug dealers in and around Wellington. Police had been told of at least three occasions when Burton and his associate had targeted drug dealers and then beat and robbed them of drugs and cash.
- 20.22** Police also informed Probation that information had been received that Burton was armed with a pistol and body armour and that during one stand-over and taxing there had been approximately six people present. On that occasion Burton was reported to have announced that he would shoot everyone present so there would be no witnesses. Police contend that they expressed concern to Probation at that time, that if Burton’s parole was not revoked and he remained in the community, he could potentially kill again.
- 20.23** Probation told police there was nothing they could do unless Burton was charged with an offence. They said a non-association order had been served on Burton two days earlier (28 Nov 2006). That order prevented him from having

any contact with one known offender and limited his contact with another.

20.24 An internal Probation report into their handling of Burton recorded the following excerpt from this same conversation between police and the probation officer concerned:

"On 30 November 2006, a Detective from the Wellington police made contact with the Probation Officer to inform her that the Armed Offender Squad had executed a search warrant at [the stipulated address] that morning in search of a firearm following an alleged attack on a drug dealer. Graeme BURTON was not present at the address. No firearms were located and therefore, no charges were laid."

"At this time, the Wellington police informed the Probation Officer that Graeme BURTON'S employer was charged with Possessing an Offensive Weapon following the earlier incident. This raised questions about whether the employment was suitable on an ongoing basis. The Probation Officer intended to discuss this issue with BURTON at his next report in. This was an appropriate course of action to take."

"During this discussion, the Detective expressed concern that Graeme BURTON was in possession of a firearm and assaulting people. He then asked the Probation Officer if CPS was going to recall him. The Detective did not implicitly or explicitly make comment or reference to any risk or likelihood of Graeme BURTON killing anyone in the community if not recalled to prison. The Probation Officer explained the legislative grounds that must be satisfied for a recall application and the special conditions that were imposed on Graeme BURTON, with which, at that time, he was complying. The police questioned what it means to reside at an address as he was concerned Graeme BURTON was not present when the search warrant was executed at 5:30am that morning. The Probation Officer explained that BURTON had no conditions controlling or disallowing any temporary absences from the address and there were no conditions around curfew or restriction of movement."

An offender is considered to reside at an address if there is evidence of living there, including food in the fridge, personal belongings and mail being delivered to the address. The police gave no indication at this time that the residence appeared vacated."

- 20.25** Also on **30 November**, Probation sent police an email asking if police would agree to the use of the recent intelligence gathered about Burton in an affidavit to support an application to recall Burton on the basis that he posed a significant risk. The message read:

"With regards to the Burton Intel that we have received this week, would the police be willing to put their info into an affidavit? If we had this I believe we would have grounds to make an application for recall. We would do this on the grounds of Section 61(a) of the Parole Act 2002, which states the offender poses an undue risk to the safety of the community or any person or class of persons."

"If not that is fine, just thought that I would clarify."

- 20.26** The internal Probation report into their handling of the Burton issue recorded the following excerpt commenting on that request:

"In an attempt to gather the supporting information for recall action, the Upper Hutt Service Manager in consultation with the Wellington Service Manager contacted the Wellington police on 30 November 2006 via email and requested an affidavit from the police to support a recall application on the grounds that Graeme BURTON posed an undue risk to the community. The affidavit provided the opportunity for the police to communicate what they wanted to say in their own words directly to the New Zealand Parole Board."

"It was considered that CPS did not have the substantiated evidence needed to pursue a recall application without further supporting information from the police."

- 20.27** **1 December 2006:** police responded to the request in an e-mail:

"Sorry I don't think we can assist as I understand that the majority of this information is informer based (is that your understanding?) And we would have to be very specific if we were going to put this before the courts and that could lead to the identity of the source which of course is not an option."

- 20.28** The police email message concluded with a line inviting Probation to contact the police officer in charge of the Burton operation saying: *"You may wish to contact him directly for an update."* Probation treated this as confirmation that their request was declined because police had concerns that use of the information may lead to the identification of informants.
- 20.29** The police position is that refusing the request was appropriate because once intelligence is provided to an 'outside agency' police lose control of it and there are no safeguards in place to protect such information once released.
- 20.30** However, Section 13 of the Parole Act 2002, which deals with the general rules about information to be given to offenders is relevant and does provide appropriate protection in Section 13(3). Section 13(3) provides that "in exceptional circumstances" the Board can deny an offender access to information when it may endanger the safety of any person, e.g. police informants. Therefore if the police formed the view that it was unsafe to commit their intelligence to an affidavit for fear that the information could be passed to Burton by way of disclosure, Section 13(3) could have been invoked to protect it.
- 20.31** Also on **1 December**, the Wellington Area Intelligence Unit published an intelligence bulletin for police staff detailing the activities of Burton and his criminal associate in their taxing of low level drug dealers using a pistol and wearing body armour. The bulletin referred to the *"desire of police and Wellington Community Probation Office to revoke Burton's parole"*.
- 20.32** **7 December 2006:** Probation received information that Burton and an associate had been seen together at a local

Wellington fitness gym. The conditions of their parole forbade their association.

20.33 8 December 2006: police received information that Burton was moving out of his residence that day. Police went to the address but did not find Burton. Residing at that location was another condition of his parole.

20.34 Sometime in the week prior to **12 December** Burton pulled a handgun on a man and threatened to kill him. Burton also had a shotgun. The information suggested that Burton was constantly using methamphetamine. Police were told of the attack by a police informant on 19 December 2006.

20.35 19 December 2006: the first of two applications for the arrest of Graeme Burton was applied for at the Wellington District Court. In this first application an officer of the Department of Corrections alleged Burton had twice breached the Parole Act 2002 by “failing to comply with conditions of release”. The alleged breaches were his failure to report on 12 December and moving from his specified residence without permission as discovered on 19 December. Once the charges were laid, a probation officer reportedly called Wellington police to inform the officer overseeing the Burton operation that these two charges of breach of parole would be heard in the Wellington District Court on **22 December 2006** and that an arrest warrant would be sought. Probation reported that they could not make contact with the officer and left a voice message with the details. The police officer concerned contends that he did not receive such a voice message.

20.36 Section 73 of the Parole Act is of relevance here in that it provides police with powers of arrest without warrant on reasonable grounds of belief that an offender has breached any of his release conditions. Probation has suggested that police had the authority to arrest Burton under Section 73 as early as 19 December, once Probation had laid the informations for breach of parole conditions in the Wellington District Court. Although no warrants for Burton’s arrest had yet been signed, the fact that the informations had been laid provided police with the reasonable grounds required under the section.

20.37 At the time, the Wellington District Court was the duty court for the region, and had a multi-jurisdictional team available on all days aside from statutory holidays.

20.38 22 December 2006: the Wellington District Court issued a warrant for Graeme Burton's arrest in lieu of summons on two charges of failing to comply with his conditions of release at Wellington on 12 and 19 December. The IPCA investigation confirmed that this warrant was issued at 10am that day and placed in the 'warrant book' in the court registry that same day for police to pick up. The police general practice is apparently to operate from hard copies of warrants and it is the police responsibility to regularly clear the warrant book of any hard copies. Court records show that a police court orderly attended court on 22 December and collected at least one unrelated warrant. However, for some unexplained reason, the Burton warrant was not collected.

20.39 The Court's computerised case management filing system is interfaced with the police computer system (NIA). The Wellington District Court advised the IPCA that their case management system interfaces immediately with NIA and in the case of the Burton warrant, that it was 'in the system' on 22 December and therefore visible to police at that stage.

20.40 Also on **22 December**, following the issue of the arrest warrant, Probation claim they again called Wellington police to inform them of that. Probation report that once again they could not make contact with the police officer overseeing the Burton operation and therefore left another voice message advising that the arrest warrant had been issued. That police officer concerned has confirmed that he was on shift on 22 December but said he did not receive a voice message from Probation. He said he had no knowledge of a warrant having been issued for Burton until his return from holiday on 4 January 2007.

- 20.41** At 12:30pm on **22 December**, several police officers in Wellington held an impromptu meeting at which several topics were discussed, including Graeme Burton. One of the attending police officers has stated that the issue of a warrant that day for Burton's arrest was mentioned during the meeting.
- 20.42** **27 December 2006:** a police court orderly picked up the arrest warrant for Burton issued on 22 December from the Wellington District Court bail room and delivered the warrant to the inward tray at Prosecutions Section at Wellington Central Police Station later that day. He had no special instructions about the Burton warrant and had no prior information of its existence. No one had alerted him to the fact that the warrant would be issued, or had put in any special request to have it picked up. As already noted, Court records disclose that the same police orderly had been in attendance at court on 22 December (the day the warrant was issued) and had collected at least one other unrelated warrant.
- 20.43** **28 December 2006:** a police officer checked Burton's name on NIA. He had been present during the impromptu meeting on 22 December 2006 and had been left with the impression that an arrest warrant had been issued for Burton. His check revealed that the warrant was in existence. It had been entered by the Court on the 'Justice side' of the case management system but there was no alert or entry by police on the 'Police side' of the system. This suggested that the Court had issued the arrest warrant but the original had not yet been collected by police. He took no further action.
- 20.44** **29 December 2006:** Corrections made the second application for the arrest of Graeme Burton. This was effected by the New Zealand Parole Board sending a fax message to the Panel Convenor of the Parole Board enclosing an application for an interim recall order, together with a draft interim recall order and a warrant to arrest and detain Graeme Burton for signing. The application for recall was based on and supported by an affidavit prepared by Probation that same day. It contained the following two references to information obtained from police:

"That on 24 November 2006 the supervising probation officer was advised that Graeme William Burton was the subject of police interest and allegations of being involved in criminal activity."

"That on 30 November 2006 the supervising probation officer was contacted by a Wellington police officer who advised that following further allegations of criminal offending, the armed offenders squad had executed a search at an address in Wellington. Graeme William Burton was not at home."

- 20.45 At 6:36pm the same day, the Panel Convenor of the Parole Board faxed the signed copies of the interim recall order and accompanying warrant to arrest and detain Burton back to the Parole Board. A Parole Board staff member then faxed the interim recall order and warrant to Wellington Central Police Station, together with a handwritten covering note. The note was not addressed to anyone in particular and read:

"To follow an interim recall order & Wnt to arrest Graeme W Burton. If there are any issues I can be contacted" [a telephone number was provided].

- 20.46 The fax was dated and timed 29 December 06, at 19:16 hours.
- 20.47 A police shift commander found the fax from the Parole Board on the fax machine. The police officer believed that it had been sent for information only, therefore did not enter Burton as wanted on the NIA system, but did advise staff on shift about the warrant for Burton during a briefing. The oncoming night shift commander was notified of the warrant for Burton and the warrant was placed in the custody supervisor's 'in tray' for the information of the other shifts.

20.48 To summarise events to this point: two warrants had been issued for Graeme Burton's arrest. The first was the warrant issued on 22 December in relation to the two charges of breach of parole, made on application by Burton's probation officer. This was the warrant the police court orderly did not pick up from the Court until 27 December.

20.49 The second was the warrant to arrest and detain Graeme Burton issued by the Parole Board on 29 December together with an interim recall order. This warrant was faxed directly to police that same day, 29 December. Although the warrant was seen by some members of police, it was not properly processed until 1 January 2007.

20.50 With a few exceptions, police members were not aware until 1 January that any warrants existed for Graeme Burton's arrest. Although it cannot be said with any certainty what effect, if any, this had on the ability of police to apprehend Burton during the intervening period, there is the possibility there may have been missed opportunities.

20.51 It is also clear that the processing of the warrant issued by the Wellington District Court on 22 December was delayed by police and was not entered by them into the NIA system until 4 January 2007, a total of 14 days from the date of issue.

20.52 This raises the question of how warrants are transferred from the Court and dealt with once in the possession of police. This case, which concerned a dangerous offender and demanded some urgency, has highlighted failings in the system.

20.53 The following events then occurred, following the interim recall order and warrant being sent to police on 29 December 2006:

20.54 **1 January 2007:** a Wellington police shift commander returned to work on the late shift following his days off and found a copy of the Parole Board warrant to arrest, the interim recall order and the attached Parole Board covering note in the custody supervisor's 'in tray'. The warrant did not appear to have been 'actioned' by previous shift supervisors. The shift commander checked the NIA system to determine whether Burton had been located and whether the warrant had been entered on the system.

- 20.55** Finding that the warrant was not on the NIA system, the officer advised the CIB duty shift of the existence of the interim recall order and warrant and they discussed steps to be taken to locate Burton. Burton was then entered into the NIA database, including an 'information alert' showing him as wanted on the warrant issued following the interim recall order. Arrangements were then made to have all police staff in the Wellington area briefed on 1, 2 and 3 January about Burton and the existence of the warrant, and police began actively looking for Burton.
- 20.56** **3 January 2007:** Burton and an associate forced their way into an apartment in Wellington and seriously assaulted the occupant with a side-handle baton. Burton and his associate were also carrying a small silver pistol and a shotgun and Burton held the pistol to the victim's head and threatened to kill him. Police were called but Burton and his associate fled before they arrived.
- 20.57** Also on **3 January 2007** one of two clerks in the Wellington Prosecution Section returned to work following the holiday break and found the warrant for Burton's arrest issued on 22 December in the 'in tray'. The warrant was then moved to the outward mail tray to be forwarded to Records Office, where it remained until the following morning, when it was collected and delivered to Records.
- 20.58** **4 January 2007:** the 22 December arrest warrant for Graeme Burton on two counts of breach of parole was finally entered on the NIA system at approximately 11.50am.
- 20.59** As part of the subsequent police enquiry, an employee of the Wellington Central Police Station Records Office prepared a report on the way in which warrants for arrest are entered in the NIA system and confirmed that the arrest warrant for Burton was entered on the police computer on that date at that approximate time. In the report she said:

"When a WTA arrives in the office, we check the details and that the WTA is still active on the court details page in NIA. We then print out the page to show that the WTA is still active. We do this as it sometimes takes up to three weeks for a WTA to arrive at records for entering."

21. IPCA
FINDINGS AND
RECOMMENDATIONS
ON POLICE ACTIONS
FROM GRAEME
BURTON'S RELEASE
UNTIL THE DAY OF
HIS SHOOTING

21.1 First issue: Police have a memorandum of understanding (MOU) with the Department of Corrections, which contains guiding principles about sharing of information between the two agencies. There is also a local service level agreement covering information sharing between Police and Corrections in the Wellington district. Did police comply with the MOU and local service level agreement in terms of their interaction with Probation following Graeme Burton's release on 10 July 2006?

21.1.1 A memorandum of understanding (MOU) between New Zealand Police and Department of Corrections contains basic guiding principles in relation to the sharing of information by the two agencies. The relevant paragraphs state:

- i) The principal objective of this MOU is to create an environment of cooperation between the two agencies that is established to enhance community safety by reducing the incidence and effects of crime, to contribute to safer communities by protecting the public and reducing re-offending and to maintain law and order by:
 - a) enhancing the agencies' collaborative relationship with each other;
 - b) encouraging cooperation and co-operative working methods amongst staff.
- ii) In relation to the sharing of information, the MOU provides that the agencies will seek to develop strategies to share information, in order for either or both agencies to enhance community safety by reducing the incidence and effects of crime, and to maintain law and order. Such strategies should seek to take advantage of new technology.
- iii) Of particular importance is the identification of information that will enhance the safety of officers and victims, and both agencies should explore opportunities to share such information at a national and local level.

21.1.2 In February of 2004, police in Wellington also established a service level agreement on information sharing between Police and Department of Corrections. The relevant passages of that agreement provide:

- i) Police are to receive notification of HRX (high risk offenders) released from prison.

- ii) Police are to provide information on contact that they have with these offenders.
- iii) The building of a robust business relationship around intelligence led policing will be enhanced by these provisions which build on the MOU and schedules of services with community Probation and public prisons.
- iv) Police are to provide community Probation service with information:
 - a) when there is suspicion that an HRX (high risk offender) is involved in further offending.
 - b) if the police are concerned with regard to gang links/ criminal associations.

21.1.3 Whilst the MOU and service level agreement do not expressly address the issue of sensitive information received from informants, that is inferentially within the stated aim of “develop[ing] strategies to share information... to enhance community safety by reducing the incidence and effects of crime, and to maintain law and order” as expressed in relation to sharing information in the MOU; and in the service level agreement that police will provide Probation with information about further offending by HRX offenders.

21.1.4 Prior to Burton’s release on parole on 10 July 2006 and up until his capture on 6 January 2007, there was regular interaction and information sharing between police and Probation. Where such information was collected by police it was shared with Probation services by telephone and email.

21.1.5 The evidence therefore suggests there was an appropriate exchange of information between the agencies. However, the police were reluctant to permit the detail of the information they had to be included in a formal affidavit, as it was primarily informant based and they were concerned about protecting the identity of those sources. How this human source information might have been protected under existing law is discussed in more detail below.

- 21.1.6 Communications between the two agencies appear to have broken down around 22 December, at which time Probation went ahead and laid the two informations in Court alleging breaches of parole conditions by Burton on 12 and 19 December. Although Probation maintain they contacted police and left phone messages in relation to the issue of this arrest warrant, police maintain these messages were never received.
- 21.1.7 There is some evidence to suggest that some police officers knew that an arrest warrant had been issued on 22 December but there was no effective communication between the two agencies.
- 21.1.8 Despite the fact there is both a MOU and service level agreement in place promoting cooperation between the agencies to enhance community safety, the cooperation between these agencies did not prove effective.
- 21.1.9 During the IPCA investigation, some police expressed the view that parolees in violation of their parole and the recall of parolees was primarily a Probation and Corrections responsibility rather than a policing issue.

FINDING

21.1.10 Police responded well during the early stages of Graeme Burton's release on parole. Significant information was shared with Probation to assist them in their ongoing monitoring of Burton in the community. However, in December 2006, at a critical stage, communication became problematic.

RECOMMENDATION

21.1.11 Police and the Department of Corrections/Probation review their memorandum of understanding and service level agreement to ascertain whether their collaborative relationship could be improved in relation to HRX offenders.

21.2 Second issue: Police declined a request from Probation to permit the inclusion of intelligence they had collected in an affidavit to support an application to recall Graeme Burton, on the basis that the intelligence was primarily informant based. Was this justified given the nature of the intelligence/information?

21.2.1 As stated above, although the MOU and service level agreement do not expressly address the issue of sensitive information received from human sources (informants) there is scope for interpreting the ambit of the MOU and agreement as providing for that very contingency. The MOU specifically states that: "The agencies will seek to develop strategies to share information in order for either or both agencies to enhance community safety by reducing the incidence and effects of crime, and to maintain law and order." And the service level agreement specifically states: "Police are to provide Community Probation Service with information when there is suspicion that an HRX is involved in further offending and/or police are concerned with regard to criminal associations."

21.2.2 This 'guiding principle' is reflected in the Police Crime and Crash reduction model/policy which very clearly sets out community safety as their priority.

21.2.3 Police directly involved in the decision not to share the intelligence with Probation for use in an affidavit maintain this was the correct decision, giving the following reasons:

"On 1 December 2006, the Organised Crime Unit Commander rejected the request by Probation for police to detail in an Affidavit the intelligence held on Burton. It was considered that the detail in the Affidavit would expose the identity of the police informers to Burton because the Affidavit would be disclosed to Burton during the Parole recall hearing."

- 21.2.4** Police have however acknowledged to the IPCA and in evidence during the Coroner's inquest that portions of the intelligence could have been used and provided to Probation in redacted form. They also agree that a generic affidavit could have been presented to Probation but opine that the lack of detail and substance in such an affidavit would have greatly undermined its usefulness. In arriving at their decision not to share the information with Probation in a more formal way, these officers appear not to have made a sufficiently considered decision about whether parts or all of that information could have been used if appropriately protected.
- 21.2.5** Although rejecting the request from Probation, police demonstrated no such concerns about using the same information in their own application for the two search warrants executed four days earlier at Burton's and an associate's residences, and had relied on the protections provided by law for such sensitive information and what they considered to be tighter control of the information. However, they seemed unaware of, or were unwilling to rely on, a potential protection in the Parole Act or on established practice in relation to informant material when making their decision not to permit inclusion of the information in a supporting affidavit for Probation. Likewise, Probation do not appear to have considered the question of how such sensitive information might have been protected under the existing provisions of the Parole Act or of advising the police of the possible protection contained in that Act.
- 21.2.6** Section 13 of the Parole Act is concerned with the general rules about information to be given to offenders. Section 13(3), in force at the time, provides that "in exceptional circumstances" the Parole Board may order that any information not be made available to an offender if, in the opinion of the relevant panel convener, it would "endanger the safety of any person". This exception to the general rule that the Board must make available to an offender any information on which it will make any release

decision is in addition to the express requirement that no information is to be given to an offender that discloses the address or contact details of a victim. The term “in exceptional circumstances” is always to be given a contextual interpretation on a case by case basis, according to the particular circumstances of a case. In the case of Graeme Burton, an application could have been made by police or through the probation officer concerned for an order that the sensitive information and its source(s) not be disclosed to Burton on the basis of its endangering the safety of the informants concerned. It is likely such an application would have received serious and favourable consideration from the panel convener and would have been construed as within the meaning of “exceptional circumstances”. This has subsequently been clarified by the amendment to Section 13.

21.2.7 This protection under the Parole Act appears not to have been considered by police: nor did they seek legal advice regarding the practical application of Section 13(3) and how it might have been used to protect the information they held. In practical terms, the expedient of providing the parolee with an edited version of the supporting affidavit is the obvious and sensible course. This is the method generally adopted for search warrant applications which contain sensitive informant material. This approach was endorsed by the Court of Appeal in *R v Williams and ors* [2007] NZCA 52 (CA372-382/05).

21.2.8 Following the Burton case, amendments to the Parole Act were introduced and came into force on 1 October 2007. These empower the Parole Board to make confidentiality orders in relation to information concerning an offender, when disclosure of that information may endanger the safety of the person who is the source of the information, putting beyond doubt the exceptional nature of informant information. It also confirms the application of section 6(c) Official Information Act 1982 to such situations. Under Sections 13AA and AB, the Commissioner of Police

is entitled to apply for a confidentiality order. There is also power for the Commissioner of Police to apply for the recall of a parolee to prison in defined circumstances (Section 60(2)A); and power for the Parole Board to summon witnesses (Section 118A).

FINDING

21.2.9 Police investigators knew that Graeme Burton was a violent offender and some police officers felt he was capable of killing again. Police were asked to allow intelligence they had gathered to be used in an affidavit so that Probation could seek a recall order. Police declined this request without examining the possibility of allowing at least some of their information to be used, and without considering how it might be protected under the relevant legislation and by drawing on established procedure. Similarly, Probation seem not to have alerted police to the possible protection in Section 13(3) of the Parole Act.

21.2.10 The police decision was primarily made out of concern that the identities of informants might be revealed. The decision was made without developing a strategy with Probation as to how some of the information might be safely used to recall Burton at a time when he was presenting as “an undue risk to the community or to any person or class of persons”⁴.

21.2.11 It is acknowledged that police have a responsibility to protect the identity of informants and the integrity of the overall human source programme. They have expressed concern that when they release sensitive informant-based information, to other agencies, they lose control of that information and that has the potential to jeopardise both the informant personally and the human source programme generally. However, where such an inter-agency relationship exists, there must be a degree of trust and cooperation, a matter that the MOU and service level agreement seem designed to address.

RECOMMENDATION

21.2.12 Police ensure that all staff are familiar with the relevant sections of the Parole Act in relation to their powers of arrest (without warrant) of parolees.

RECOMMENDATION

21.2.13 Police ensure that all staff are familiar with the provisions in the Parole Act for the protection of information used in such cases and reinforce police policy in this regard.

RECOMMENDATION

21.2.14 Police and Corrections review their memorandum of understanding in light of the recent amendments to the Parole Act to clearly establish how sensitive information is to be handled in the future and to establish acceptable rules and practices for the use of such information. In addition, police should re-examine their practices, policies and procedures for the provision of sensitive information to other agencies, bearing in mind the priorities in the Police Crime and Crash Reduction Policy.

21.3 Third issue: Following the issue of warrants for Graeme Burton's arrest on 22 and 29 December 2006, did police respond satisfactorily?

21.3.1 In addition to the arrest warrant issued by the District Court on 22 December, Probation made application to revoke Burton's parole and on 29 December 2006, the Panel Convenor of the Parole Board issued an interim recall order and a warrant to arrest and detain him. That same day the Parole Board faxed the interim recall order and warrant to Wellington Central Police Station with a handwritten covering note. Although the fax was collected, the information was not entered on the NIA system, but staff on each incoming shift were advised of the warrant for Burton's arrest.

FINDING

- 21.3.2 Police did not respond satisfactorily. Though the first warrant to arrest Burton was available as early as 22 December, with a few exceptions police were not aware of its existence.
- 21.3.3 For routine arrest warrants, involving minor offences, this may not be an issue. In Burton's case, however, police had serious concerns about his escalating offending. From at least 25 November 2006 they knew and were informing Probation of the violent nature and increased frequency of the offences he was committing and were pressing Probation to have Burton recalled. On 28 November police assigned a detective sergeant to lead an operation (Operation Tax) to locate Burton because they held genuine concerns for the safety of the public.
- 21.3.4 Although the recall order and warrant to arrest and detain Burton did not come into effect until 29 December 2006, the warrant to arrest him for breach of parole was in effect on 22 December 2006 and police could have acted on that warrant to actively commence looking for him. In fact, police had power to arrest Burton as early as 19 December 2006 under Section 73 of the Parole Act.
- 21.3.5 It would appear that although some police members knew that a warrant had been issued as early as 22 December and there was an operation in place to locate Burton, no one took an active interest in or ownership of the situation, which then resulted in unreasonable delay. Had police processed the warrant and informed members of its existence in a more timely fashion, this would have intensified their efforts to locate Burton.
- 21.3.6 The notification the Parole Board gave to Wellington police of the interim recall order and warrant to arrest and detain Burton issued on 29 December lacked a clear indication of the urgency of the situation and this is also a concern, particularly when it involved a serious offender.

RECOMMENDATION

21.3.7 Police review their management and handling of arrest warrants to avoid future delays in the collection and processing of warrants, with a particular emphasis on 'high risk' offenders.

RECOMMENDATION

21.3.8 Police strengthen their protocols with both Probation and the Parole Board for notification of warrants to arrest and detain high risk parolees pending recall.

21.4 Fourth issue: From 1 January 2007, when police realised that an interim recall order and warrant to arrest and detain Graeme Burton existed, did they respond satisfactorily?

FINDING

21.4.1 There was a genuine and concerted effort to locate and arrest Burton once the warrant to arrest and detain pending interim recall was found by Wellington shift commander and entered into NIA case management system on 1 January 2007. There can be no criticism of the police actions and efforts to locate and arrest Graeme Burton from that date onward.



February 2008

RECOMMENDATION

1. Police and the Department of Corrections/Probation review their memorandum of understanding and service level agreement to ascertain whether their collaborative relationship could be improved in relation to HRX offenders.

RECOMMENDATION

2. Police ensure that all staff are familiar with the relevant sections of the Parole Act in relation to their powers of arrest (without warrant) of parolees.

RECOMMENDATION

3. Police ensure that all staff are familiar with the provisions in the Parole Act for the protection of information used in such cases and reinforce police policy in this regard.

RECOMMENDATION

4. Police and Corrections review their memorandum of understanding in light of the recent amendments to the Parole Act to clearly establish how sensitive information is to be handled in the future and to establish acceptable rules and practices for the use of such information. In addition, police should re-examine their practices, policies and procedures for the provision of sensitive information to other agencies, bearing in mind the priorities in the Police Crime and Crash Reduction Policy.

RECOMMENDATION

5. Police review their management and handling of arrest warrants to avoid future delays in the collection and processing of warrants, with a particular emphasis on 'high risk' offenders.

RECOMMENDATION

6. Police strengthen their protocols with both Probation and the Parole Board for notification of warrants to arrest and detain high-risk parolees pending recall.

POSTSCRIPT

At the time of issue of this report an aspect of the police investigation remains ongoing and is being monitored by the IPCA. When that investigation is completed it may be the subject of a separate report.



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IPCA
Level 10
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