

**REPORT OF THE POLICE COMPLAINTS AUTHORITY
ON THE FATAL SHOOTING OF HEMI PAORA KAWHARU RAHARUHI
AT AUCKLAND ON 21 SEPTEMBER 1996**

Introduction

At about 1909hrs on Saturday 21 September 1996 Jim Paul Raharuhi (46 years) (his Maori name is Hemi Paora Kawharu Raharuhi) (hereafter sometimes referred to as "the deceased") was fatally shot by a Police officer in a BP service station situated on the corner of Great South Road and Adam Street in the city of Auckland. The circumstances surrounding the shooting will be covered in detail hereafter.

The estranged wife of the deceased was employed at the service station as a shift supervisor and she had commenced her duties that day early in the afternoon on a shift that was due to end at 2300hrs. The background to the incident that ended in the tragic death is domestic related and that, of course, will need to be dealt with.

The deceased arrived at the service station, not entirely unexpectedly for his wife Shirley as will be described, shortly before 1900hrs with the intention of speaking to her in an endeavour to get her to change her mind and return to live with him again. At this point the couple had been separated for some years with the wife moving eventually to Auckland and the husband remaining in the far North area where they had previously lived together. The entreaties of the husband were rejected and with that he produced from under his shirt a cut-down .22 calibre semi-automatic rifle at which point his wife immediately fled from the forecourt of the station where this first exchange had taken place into the shop area of the service station to activate the panic switch which has the action of closing and locking the main door. She was pursued by her husband but the doors did not activate in time to prevent his entry. Once inside the shop area the deceased threatened another employee, and fired a shot into the plate glass window which was shattered.

The first call received by the Auckland Central Control Room was a 111 number which alerted Police to the incident that was unfolding at the service station. The first call out of the Control Room immediately after receipt of the 111 call was logged at 1905hrs. The call was to Constable A who was operating in the Eastern I (for Incident) Sergeant's car in that area. That car went immediately to the scene once the exact location was verified (this will be explained in due course). Between about 1905hrs and 1912hrs, a lapse of time of approximately 7 minutes, various activities and movements took place within the confines of the service station, concluding with the fatal shooting of the deceased by a Police officer. These times were electronically recorded by the Control Room tape. For reasons which will be explained later the correct times would be approximately three minutes earlier.

In this Report the full circumstances leading to the fatal shooting are examined and findings in respect of the death, and the actions of the Police, are reached.

The officers who attended the scene and who were involved in the incident with the deceased are respectively referred to as Constable A and Constable B, descriptions assigned to them at the outset by the officer in charge of the homicide investigation. These descriptions are not intended to indicate rank. Constable A at the time held the rank of Sergeant while Constable B was a Constable.

Report to Police Complaints Authority and Subsequent Action

It was reported to my predecessor, Sir John Jeffries, on Saturday 21 September 1996 that a male person had been fatally shot by a Police officer arising out of an incident at a BP service station situated on the Great South Road, Auckland. The details the Authority was given were not extensive, as might be expected, but Sir John was informed the shooting arose out of an attempt by the deceased to effect a reconciliation with his estranged wife who was employed at the service station. Sir John was informed that a Police dog handler (Constable B) had gone to the scene as had another Police officer (Constable A), and that it was the latter officer who had fired the single shot that caused the almost instantaneous death of the deceased. It was also reported to him that Mrs Raharuhi had been injured by dog bites and as a result herself had to be hospitalised. This aspect of the incident will be dealt with in detail hereafter.

Sir John immediately arranged for his Senior Investigating Officer, Mr J N Roberts, to go to Auckland next day, Sunday 22 September 1996, to liaise with Detective Inspector W W Bishop, who had been assigned by the Regional Commander, Assistant Commissioner Brion Duncan, to be the Police officer to carry out the PCA/Police aspect of the enquiry. Detective

Inspector Richard Higginson had been assigned by Mr Duncan to conduct the homicide investigation, which had the narrower focus on possible criminal liability of the officer who shot the deceased.

Mr Roberts did travel to Auckland the next day and conferred at length with Detective Inspector Bishop who briefed him on the results of the enquiry that had taken place to that point. The Authority was fully apprised of the results of that preliminary investigation.

The notification to the Authority was given pursuant to section 13 of the Police Complaints Authority Act which requires that the Commissioner advise the Authority of any serious bodily harm or death caused by a member in the course of the member's duty. In this particular instance it was necessary for the Commissioner to report to the Authority not only over the fatal shooting, but also on account of the injuries by dog bite suffered by Mrs Raharuhi in the course of the incident. The investigation carried out for and under the oversight of the PCA is an independent enquiry for the purpose of examining the Police procedures, practice, and if necessary, the policy, of its handling of an incident of this type.

At the conclusion of both separate investigations, as outlined above, all material assembled in the investigations was made available to the Authority for the preparation of this final Report for publication.

No complaint against the conduct of the Police arising out of this incident was made initially.

The enquiry conducted by Detective Inspector Bishop was completed early in 1997 but the Report of the Authority could not be completed and released until after the Inquest conducted by the Coroner. This Inquest was held in Auckland on 18 June 1997. An Auckland barrister, Ms Marie Dyhrberg, then represented some members of the family of the deceased (his mother and three sisters).

Following the Inquest and very shortly after I commenced my appointment as Police Complaints Authority on 1 July 1997 I wrote to Ms Dyhrberg indicating that I was in a position to complete the review but before I did so I asked whether Ms Dyhrberg had received any instructions in relation to matters within my jurisdiction.

By letter dated 22 July 1997 Ms Dyhrberg confirmed that she had received instructions from the mother and three sisters of the deceased to make a complaint against Constable A who was responsible for the shooting of the deceased. The details of the complaint were to be forwarded later. Details of the complaint were received on 1 August. I immediately directed

that the Police investigation by Detective Inspector Bishop conducted under my oversight be reopened.

Over the following months there was considerable contact between the barrister representing the complainants, Detective Inspector Bishop and the Authority. I visited Auckland on two occasions during which I visited the scene twice where I was able to speak to Shirley Raharuhi, I personally interviewed Constable A and, importantly, I met with the mother and two sisters of the deceased with their legal adviser. I had asked that a local kaumatua be present to facilitate this meeting and his presence was greatly valued.

That meeting I regarded as of considerable significance. Not only did I want to hear personally about the issues that needed to be addressed from the point of view of the complainants but I wanted the opportunity of conveying to them that the Authority recognised and acknowledged the grief suffered by the family as a result of this tragic shooting. The depth of love and respect which the deceased was afforded within his whanau was readily apparent and served to heighten my perception of the extent of the loss. Within this environment he carried considerable mana.

Following that meeting further contact between Ms Dyhrberg and Detective Inspector Bishop continued, addressing further issues that had been raised both before and during the meeting.

As a result of the homicide enquiry a decision had earlier been made, after advice from the Crown Prosecutor in Auckland, that no criminal charge would be brought against Constable A.

The Authority was not prepared to complete and release a report however if there remained a prospect that the family may consider initiating a private prosecution of Constable A. By letter dated 4 March 1998 Ms Dyhrberg recorded that she had received final instructions from her clients that there is no wish to pursue a private prosecution in relation to the death and that it would be appropriate for the report to be finalised.

Subsequently the final report of Detective Inspector Bishop was completed and forwarded to me for review.

This Report then seeks to address both the matters raised by an enquiry conducted under section 13 of the Police Complaints Authority Act and additional issues raised by the complainants.

Background Information Leading to the Event

This is a Report written for publication pursuant to the powers invested in the Authority and arises out of a tragic domestic incident that was conducted with violence spanning several minutes, and was only ended in extreme violence with the shooting dead of the deceased.

Because there had been a public shooting on a street in the City of Auckland before many members of the public who were in the immediate vicinity, and whose safety was a concern of the Police, something must be stated of the background leading to the violent ending. As a policy to protect the privacy of the deceased, and of the members of the family, the information mentioned here is kept to a minimum.

Mrs Shirley Raharuhi was at the time of this incident aged 38 years. She first met the deceased when she was 16. They formed a relationship and 4 children were born to the couple, one of whom died in infancy. The children are now teenagers or young adults. The early years of the relationship were mainly spent around the Auckland area. The couple were married on 1 May 1986. In 1980 the couple moved up to Tokerau Beach north-east of Kaitaia where Mrs Raharuhi said, they were happy for some years. About 1991 the couple moved to live on a family ancestral farm at Matai. In about 1992 Mrs Raharuhi wanted to leave the marriage, and moved back first to the Tokerau Beach address and later in 1995 she moved to Auckland commencing employment at the service station where this incident occurred. It seemed that the deceased accepted this for the next few years, but apparently became very disturbed at the separation from his wife, and in April 1996 he began to use threats and other tactics to get her to return to him. No useful purpose is fulfilled in detailing the events of this period, but they were characterised by threats of suicide if she did not return, and in her presence he seemed to make some determined efforts to accomplish this. His entreaties to her were of no avail as she held to her position not to return. The night before the incident leading to Raharuhi's death commencing shortly after midnight she spent many hours in his company and Mrs Raharuhi described him as drunk and angry. They returned to her residence and there he became very violent by smashing furniture and effects. He left and Mrs Raharuhi went to her sister's house. From there she contacted the New Lynn Police by telephone as she feared for her safety. Mrs Raharuhi said in her statement she was hopeful he would not harm her for up until then he had not really shown any violence to her. She phoned her employer to alert him of the sharply deteriorating situation. Mrs Raharuhi went to work on the Saturday 21 September and discussed strategies if her husband became violent there. The rest of the events leading up to his appearance at the service station at around 1900hrs are covered in the narrative of facts.

Detailed Narrative of Events

At 1315hrs Shirley Raharuhi commenced work at BP Boulevard service station where she is a shift supervisor. At the time she was working with two male forecourt attendants. At 1400hrs Shirley's employer arrived at the service station and a further discussion took place during which Shirley expressed concerns she had for her safety because of the events with her husband the night before.

At about 1500hrs Mr Raharuhi arrived at the home of his brother, Eric Raharuhi, in Tokerau Beach. Mr Raharuhi took an unknown number of live .22 calibre rifle cartridges from the glovebox of Eric's truck. No reason was given to Eric for wanting the bullets. He then drove to his home nearby where he changed his clothes. It is believed that he uplifted the cut-down .22 calibre Sterling semi-automatic rifle fitted with a 15 shot magazine which had been in his possession for at least four months. He got into his car and drove directly back to Auckland.

At 1853hrs Mr Raharuhi is recorded on the BP Boulevard service station video surveillance system entering the service station in his white Honda Accord motor vehicle. Shirley Raharuhi saw her husband arrive in the service station forecourt from her position inside the reception area. Shirley went over to her husband's vehicle and spoke to him through his open driver's window. He then moved his vehicle towards the north-eastern corner of the service station building where he stopped, facing now towards Adam Street, and he continued to speak with his wife. Mr Raharuhi told Shirley he came back to give her one last chance. She asked why he didn't just ring. Raharuhi said *"because I can't do what I am going to do over the phone"*. Raharuhi then took out the cut-down .22 rifle which he had concealed under his shirt.

Upon seeing the rifle Shirley Raharuhi ran into the office area and flicked the panic switch button to close and lock the forecourt doors. Raharuhi left his vehicle, leaving open the driver's door and was able to get into the service station building before the doors automatically closed and locked. This event is recorded on the surveillance video at 1900hrs.

One of the forecourt attendants was in the back office when Raharuhi entered and was able to escape through the rear door without being seen by him. The attendant ran to a nearby address and called the Police.

The second forecourt attendant was standing behind the service station shop counter as Raharuhi entered. Raharuhi stood in front of the counter, pointed the gun at him and told him

to “*get out*”. Raharuhi then turned the weapon to his right and fired one shot through the plate glass window of the service station in the direction of the forecourt. This act could only be interpreted as a clear intention to use violence. Raharuhi then held the gun about 10 centimetres from the attendant’s face and ushered him towards the exit doors which Shirley Raharuhi opened, allowing him to run from the premises. He then continued to observe activities in the service station from nearby.

Raharuhi commenced using the butt of the rifle to damage property in the shop. He said “*I am dead so I might as well make a good job of it*”. While he was distracted Shirley Raharuhi escaped through the rear emergency door which opened onto the Great South Road. She was chased outside by Raharuhi who yelled out that he was going to shoot her. She stopped. Raharuhi grabbed Shirley by the hair and forced her back inside the service station.

Raharuhi took Shirley into the office area. He put the gun to her forehead and said “*I could make a hole there for running out the back*”. He then aimed the gun in the direction of the storeroom and fired another shot. It was during this occurrence that Shirley noticed on the surveillance video monitor Constable B arrive on the service station forecourt. Raharuhi then continued to cause further damage within the premises.

At about 1904hrs Constable B, who was within a kilometre of the scene when he got the call from Control Room, arrived in his dog van. He parked his vehicle in the service station forecourt, got out and noticed Raharuhi who was still inside the building. He noted that Raharuhi had a firearm in his possession.

A third Police officer, Constable C, driving an unmarked vehicle, arrived at the service station immediately behind the dog van driven by Constable B. Shortly thereafter he moved his vehicle back into the south bound lane of Great South Road to stop traffic travelling past the service station. Constable C played no part in the subsequent interaction with Raharuhi.

At about 1905hrs Constable A arrived at the scene. He was in the company of his de facto partner who is referred to during this enquiry and in this Report as Witness XX. This matter is addressed hereafter. The officer was driving a marked Police vehicle authorised to transport firearms for rapid deployment to staff in the Eastern Area of the Auckland City District. This is the Eastern ‘I’ Sergeant’s car previously referred to. The carrying of guns is addressed hereafter. Constable A stopped his vehicle on the opposite side of Great South Road from the service station. His position was approximately 30 metres from the building in which Raharuhi had Shirley detained against her will.

At 1906hrs Constable A handed Constable B a loaded .38 Smith & Wesson standard Police issue pistol which he had been wearing. Constable B then took up a position behind the petrol pumps on the service station forecourt in order to observe activity in the office area. Constable A returned to his vehicle. He opened the steel arms safe and took out a box of ammunition and two Police issue .223 Remington rifles which in his words he loaded with “*three or four shells*” in each.

At 1908hrs Constable B, who was attempting to conceal himself behind petrol pumps 1 and 2, saw Shirley Raharuhi escape from the building through the same rear emergency door from which she had exited earlier. Raharuhi emerged from the building close behind Shirley and moved in the direction she had taken, which was towards the service station forecourt.

Raharuhi was seen to hold his gun in one hand and fire it in the direction of Constable B. The shot was fired at the same time Shirley Raharuhi ran around the corner of the building and onto the forecourt itself. It is the opinion of Constable B that the shot was fired either at himself or at Shirley Raharuhi. This was the third shot fired by Raharuhi within the time span of about six minutes.

It was clear from the behaviour of Raharuhi starting with his arrival at the service station, that the object of his attention was his wife Shirley. He had started the exchange with her in a violent manner by producing the loaded firearm, accompanied by a clearly stated verbal threat directed at her.

Raharuhi was immediately challenged by Constable B who pointed his revolver at him, telling him to drop the gun. Raharuhi was seen to step back against the wall and point the gun upwards and towards his throat. He was observed “*working the action*” of the rifle mechanism.

When the shot (referred to above) was fired by Raharuhi across the service station forecourt Constable B accidentally released his dog as he dived for cover. The Police dog attacked Shirley Raharuhi on the forecourt bringing her to the ground. The actions of the dog attacking Shirley and failing to obey a command to stop the attack prompted Constable B to go to her immediate assistance to pull the dog off. Constable B did not, as a consequence, see the further actions, or movements, of either Raharuhi or Constable A.

It should be recorded that statements taken from some witnesses raise the possibility that Raharuhi fired more than one shot once outside the building. A forensic report from a scientist employed by the Institute of Environmental Science and Research Ltd indicated that

only one fired cartridge was located in the area where Raharuhi had been outside the building.

Constable A, who was earlier loading the rifles, did not see Raharuhi emerge from the building. He states, in his interview, that it was not until he heard “*a shot or something*” (the scene reconstruction suggests this noise to be that of the steel emergency door slamming shut) that he looked up and saw Raharuhi standing with his back against the service station wall holding a firearm across his chest. Constable A states that he then saw Raharuhi take a step to his left and point the firearm towards the service station forecourt in the direction of Constable B and fire it. This was the shot (the third fired by Raharuhi) thought by Constable B to be aimed at either himself or Mrs Raharuhi.

Raharuhi was then seen to return with his back against the wall, holding the firearm up at face height for a brief period of time, apparently examining the weapon mechanism, prior to turning to his left and to walk away from the direction of the service station forecourt towards Adam Street where some members of the public were present. Witness XX makes comment in her statement that she was at this time concerned for the safety of these members of the public.

A reconstruction of events places upwards of seven members of the public at potential risk of death or serious bodily injury at the hands of Raharuhi at this point in time apart from the displayed object of his violence, his wife Shirley.

At this point Constable A rested the rifle on top of the Police vehicle roof. He states that he called out to Raharuhi “*Stop - armed Police - put the gun on the ground*”. When he received no response, he again shouted “*Stop - armed Police*”.

While the evidence of witnesses varies as to whether shouting was heard at this point a warning to put the gun down was heard by a civilian witness and Constable A’s evidence that he issued that warning twice is accepted by the Authority.

The following extract is taken direct from the statement of Constable A and details in the Police officer’s own words what occurred next:

“By this time there was no traffic in the street. I brought my rifle up to my right shoulder and I sighted him and he stepped from the end of the building into black. That is into darkness. I was now in fear for the safety of other members of the public, this guy was getting away. I thought he had started to run because of his body movements swaying from side to

side. I lost my view of my rifle foresight, due to the black and I was fearful that he would run around the back of the service station building and come up behind Constable B in the garage forecourt, or shoot four people standing in Adam Street, who were about 20 metres ahead of him to his right. I know that three of the four at least were men because they came over to me later. I was of the opinion that the only way to stop this person was to shoot him, to prevent further injury or death to other people, using the rifle he was still carrying. I aimed at 'centre-mass' at the black shape - still not being able to see the foresight and fired once. I heard a cross between a plop and thud and the shape fell flat on his face on the footpath."

Raharuhi was then examined by both Constables A and B and found to be dead.

Police Management of the Incident

Once the first shot had been fired there were several 111 calls to the Central Control Room. There is discrepancy between the times now to be mentioned and those times as recorded on the service station video tape. The elapsed times to be detailed are correct but they probably do not correspond exactly with precise actual time. The difference would be approximately three minutes.

The system of tape back-up in the Control Room, as operated in September 1996, was based on a "Dictaphone 9000" reel to reel tape which operated its own 24 hour clock with the dictaphone system independent of any other time source. The method of recording the time on the tape was based on a digital time string which meant that when one reviewed the tape it was possible to view a clock on a VDU screen as one listened to the part of the tape that was of interest. The Authority was informed that the time recorded by the machine was not necessarily consistent with the actual time and could vary by up to 5 minutes.

The Authority has been further advised that the new CARD system tape, whilst still running on an independent clock for the recording system, is more accurate.

In the present matter it appears likely that the Control Room tape was running at a time in advance of the service station video tape by about three minutes and the latter tape is the more accurate.

As stated these times are from the Control Room tape. The first 111 call was received at a few seconds before 1905hrs. The call to say that the suspect had been shot was 1912.47hrs so the total time from start to finish of the involvement of Police (as distinct from attendance by officers at the service station) was about 7 minutes 47 seconds. The elapsed time is reduced when consideration is taken that the first officer there was Constable B who reported

his arrival at 1908.29hrs. A different location of the incident was first given but it was discovered and corrected within about a minute. Attendance by Police at the service station prior to the fatal shooting was therefore less than 5 minutes.

Two factors arise out of the times just mentioned which should be emphasised. First is that the involvement of Police with the incident, in the sharply abbreviated time span, left no opportunity for any advice or instructions on the handling of the incident to be given to the officers at the scene from Control Room, or from any other source. Secondly, the time frame the officers found themselves in after they responded to the incident gave them precious little opportunity to assess and respond to the events as they unfolded. There was no time to confer with each other, or with a senior officer.

The practical effect of the foregoing is that the management of the incident by the Police consisted in receiving calls in the Control Room, the caller dispatching officers and the actions of the officers who attended the scene. Their actions at the service station have already been detailed.

Results of Post Mortem Examination

A post mortem examination conducted by Dr Cluroe established that a single .223 calibre bullet had entered the deceased's brain, slightly to the rear of the left ear, midway between the ear and the top of the skull. The projectile had not exited the skull but had fragmented slightly while travelling around inside the brain before coming to rest against the front centre of the head. Numerous pinhead fragments of lead were located in the meninges membrane separating the brain from the skull.

Inquest Conducted by Coroner

An inquest into the death of the deceased was completed at the District Court in Auckland on 18 June 1997 by the Coroner, Mr M J P Frankovich, who issued the following certificate:

"FINDING OF CORONER UNDER CORONERS ACT 1988

I, Mate Felix Perich FRANKOVICH, Coroner at AUCKLAND hereby certify that at an inquest completed on the 18th day of June 1997, at the District Court, Auckland having enquired into the time, place, causes and circumstances of how Hemi Paora Kawharu RAHARUHI of Wairaharaho Road, R.D.3., Whatuwhiwhi, Kaitaia, landworker, died, I found that the deceased died at Adams Street, Greenlane, Auckland on the 21st September 1996 as a result of a gunshot wound to the head after being shot by a police officer, the deceased being in possession of a cut down firearm and was endangering the lives of the public.

Dated at Auckland this 18th day of June 1997.

_____ *(Signed)* _____ *Coroner*"

In issuing his findings the Coroner referred to the developing suicidal tendencies of the deceased. He referred also to an incident some months before the fatal shooting in which Raharuhi had rung his wife, Shirley. He fired a gun so it could be heard over the phone and said he was going to kill himself. The Police were called. The Coroner expressed surprise that Raharuhi was not then deprived of his firearm.

Subsequent media reporting of those comments led the Coroner to issue a press statement in which he expressed his concern that the reporting gave the impression that he was critical of Police. He went on to say:

"I am concerned that members of the public may be under the impression that the way the Police handled the earlier incident may have contributed to the actions of Mr Raharuhi on the day he died.

My comments about the earlier incident were not intended to be in any way critical of the Police and I am concerned that the attributed comments appear to have been reported without being verified with me. It is most unfortunate that the media have chosen to highlight a matter which is peripheral to the main issue.

I repeat my finding that Mr Raharuhi died at Adams Street, Greenlane, Auckland on 21 September 1996, as a result of a gunshot wound to the head after being shot by a police officer, the deceased being in possession of a cut down firearm and was endangering the lives of the public."

Examination of Firearm

The firearm that fired the shot that killed the deceased was examined by a Police armourer. Tests on the trigger mechanism proved that the firearm did not discharge accidentally. The firearm had a functional safety catch. Test firing found the firearm to operate normally. The armourer concluded that the firearm was mechanically safe. The second rifle loaded by Constable A was not tested.

Scene Lighting

On 24 September 1996 a lighting expert measured lighting levels in the vicinity at an equivalent time to the shooting.

Light is measured in lux units. Zero lux units represents absolute darkness and an extremely bright light will be measured at 200,000 lux units. Unobscured sunlight would measure about 100,000 lux units. The recommended level of electric lighting on the floor of a standard underground carpark is about 30 lux.

Measurements were taken to estimate the amount of available light in key positions. The light levels on the forecourt were measured at 130 lux. The light at the southern end of the building where Raharuhi emerged from the building was measured at 10 lux. The light at the position where Constable A fired the shot was measured at 52 lux. The light at the position where the deceased was at the point he was shot was measured at 8 lux. The light at the positions where civilians were standing in Adam Street at the time of the fatal shot was not measured.

Control Room Response

As at the date of this incident the Auckland Control Room operated as a centralised communications centre for all Police Districts, other than Northland, in Region 1. The Control Room was located on the top floor of the Auckland Central Police Station.

The Control Room was manned by a number of communicators, who answered the telephones in Control at random.

There were four dispatchers who operated on four different radio channels. They dispatched units to attend incidents and the dispatchers “control” the Police response to that incident. In other words, from the time of the first call until the Control Room relinquished “control” to a scene or incident commander, the Control Room retained responsibility for attendance at the particular incident. The following course of action was intended to be taken in respect of the initial response to an incident or crime:

1. Call received by communicator.
2. Communicator completes data entry for the incident.
3. Communicator prioritises incident.
4. Communicator sends data entry to the relevant dispatcher for the area/district where incident occurs.
5. Dispatcher tasks unit/s to attend.
6. Dispatcher retains initial control of the incident, sets boundaries and cordons, arranges specialist assistance etc.

From a Control Room perspective, the incident was initially reported on a 111 call to a communicator. Instead of completing the data entry on the computer screen in front of him, the communicator immediately called out to the Control dispatcher, over the top of his console, that there was an *“aggravated robbery BP Greenlane”*.

The dispatcher was labouring under the disadvantage that he was wearing headphones and did not hear the communicator clearly. The dispatcher heard the call as *“aggravated robbery GP Greenlane”* (note: “GP Greenlane” is “Police speak” for Georgie Pie at Greenlane).

The dispatcher put out a call to Constable A at 1905.02hrs (Control Room tape time) on the Central District radio channel to the effect that *“Ag robbery at Georgie Pie in Greenlane with a shotgun, over”*.

Constable B responded at 1905.15hrs that he was proceeding to the scene but sought more information.

At 1905.42hrs Constable B reported arriving at the carpark entrance to Georgie Pie.

At 1906.15hrs (1 minute 13 seconds after the original call) the Control Room reported to Constable B that *“it’s the BP garage on Great South Road, we have an offender inside the building, one shot fired, the offender inside the building, copy.”*

There remained some confusion about the location of the incident because there are two BP service stations on Great South Road.

After it was confirmed that the location was “BP Greenlane” Constable B reported to the Control Room at 1908.29hrs (Control Room tape time) that he had arrived at the incident and had observed *“movement in the shop, a male with a firearm”*.

The Control tapes indicate that the Control dispatcher was hampered in the initial stages of this incident by unusual atmospheric conditions that resulted in him trying to listen to information coming in from communicators in the Control Room, listen to and respond to units on his control channel, and cope with the confusion of a dispatcher from New Plymouth dealing with an incident in that city.

At no time during the incident did Control Room staff offer any advice or issue any instructions and this was largely due to the short duration of the incident. The Control dispatcher alerted staff to an emergency and the staff in the field, namely Constable A, Constable B and

Constable C, responded to that emergency call. The initial location error was unfortunate but this occurred as a result of the difficult circumstances just referred to.

No misconduct or neglect of duty is disclosed on the part of any member from the Control Room.

Firearms Used by Police (General)

The statutory authority entitling Police to use force is to be found in sections 39, 40 and 48 of the Crimes Act 1961. Those sections are the primary authority. If there is time for a formal Armed Offenders Squad call out then the detailed scope of that sort of operation is dealt with by the General Instructions and the Manual of Best Practice Vol.1 which has a special chapter on armed offender operations and sets out the broader planning for such operations. The Manual contains procedures for the use of dogs in armed offender operations, but there was no time for an AOS call out with dogs.

The policy, practice and procedures of the New Zealand Police relating to the carriage of a firearm by an officer are governed by General Instructions. Firearms are available to the Police under a controlled regime when the use of firearms is deemed necessary, or as a precaution. NZ Police officers, unlike many other Police forces in the world, do not as a regular practice carry firearms.

Carrying of Firearms by Police

General Instruction F60 governs carrying of firearms by Police. GI F60(1) states:

“Firearms are not to be carried as a matter of general practice in the normal course of duty. Where there are reasonable grounds to believe that firearms may be required for use within the law and policy, their availability may be authorised by a Region or District Commander, or by commissioned officers or NCOs specifically authorised to do so. Selected NCOs should be given the discretion to carry firearms where and when circumstances dictate the necessity for this action.”

In this particular case firearms were being carried in the vehicle used by Constable A who was on duty in the Eastern Area Sergeant’s ‘I’ car. It was not necessary for him to have firearms issued to him in this case. The carrying of firearms in Police vehicles is covered by GI F60(4)(a) which states that firearms should not be carried in Police vehicles as a matter of general practice. The instruction is qualified by specific circumstances of which the appropriate one is when there is specific authorisation by a Region or District Commander. In

this particular case Region Orders F1 and F2 provide for the carriage of firearms within the Region 1 area. Region Order F1.4 reads as follows:

“On the 1st of January each year the Region Commander will authorise specific NCO and other positions nominated by the District Commanders (as in Appendix 14) to carry firearms which shall be at all times carried in a vehicle in accordance with Region Order F2 and General Instruction F60(5).”

Appendix 14 provides:

“The following positions throughout Region One are authorised to carry firearms:

Auckland City District

*Duty Inspector, Auckland Central;
Team Policing Inspector or NCO in charge of Team Policing
in his absence;
'I' Car Sergeant Auckland Central;
'I' Car Sergeant Eastern Area
'I' Car Sergeant Western Area;
Supervising Crime Co-ordinator;
Crime Cars (Newmarket, Central and Avondale);
Constable, Waiheke Island;
Constable, Great Barrier Island*

It follows that Constable A as the 'I' car Sergeant Eastern Area was authorised to carry a firearm.

Further Region Order F2A.1 provides, in part:

“F2A CARRIAGE OF FIREARMS IN VEHICLES - NCOS & INSPECTORS

F2A.1 Authorised NCO and Inspector vehicles have rifle and pistol cabinets fitted in the boots of their cars (see Appendix 14(A)).

The purpose of this measure is to provide ready access of firearms to all field staff at the scene of major incidents.

Specific positions authorised to carry firearms in vehicles will be designated by 1 January of each year by the Region Commander.”

Appendix 14A to Region Order F2A.1 provides:

“CARRIAGE OF FIREARMS IN VEHICLES (NCOs & INSPECTORS)

The following vehicles will hold a Firearms Security Cabinet containing .38 Revolvers and .223 Remington Rifles:

Auckland City District

<i>Duty Inspector</i>	<i>6 Revolvers</i>	<i>2 Rifles</i>
<i>Crime Co-Ordinator</i>	<i>6 Revolvers</i>	<i>2 Rifles</i>
<i>'I' Car Sergeant, Central City</i>	<i>6 Revolvers</i>	<i>2 Rifles</i>
<i>'I' Car Sergeant, Western Area</i>	<i>6 Revolvers</i>	<i>2 Rifles</i>
<i>'I' Car Sergeant, Eastern Area</i>	<i>6 Revolvers</i>	<i>2 Rifles"</i>

As the 'I' Car Sergeant, Eastern Area Constable A was authorised to and held a firearms security cabinet containing 6 revolvers and 2 rifles.

Use of Firearms by Police

When firearms are carried by Police, General Instruction F61 stresses in paragraph 1 that members must always be aware of their personal responsibilities in the use of firearms. GI F61 then provides that 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, and Police should not use a firearm unless it can be done without endangering other persons. There then follow the circumstances in which a firearm may be used. In the circumstances of this case F61(2)(a) and (b) are the controlling General Instructions. They are as follows:

“(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 arrest;

AND

the arrest cannot be reasonably effected in a less violent manner;

AND

the arrest cannot be delayed without danger to other persons.”

GI F59(11)(a) makes provision for a supervising officer, on issuing a firearm, to remind the receiving member of firearms instructions and obligations in the following terms:

“(11)(a) Brief instructions on the use of a firearm by Police in an emergency are printed on the inside cover of all Police issue notebooks. These notes are intended only as an aide memoire and in no way negate the responsibility of each staff member to have a detailed knowledge of the use of firearms by Police in accordance with General Instruction F61

and ss 39, 40, 41, 48 and 62 of the Crimes Act 1961. On every occasion a firearm is issued, the supervising staff member is to draw to the attention of the receiving staff member the information printed in the aide memoire."

Police Response to Family

Members of the family have expressed concern about aspects of the contact between them and the Police following the shooting. Those concerns related to denial of access to the body of the deceased at the scene and at the mortuary, the length of time the deceased's body was left lying in situ, the delay in contacting family members, the unfamiliarity with details of the incident by the first officer to contact family members, and the degree of support generally in the period following the incident.

Both the officer in charge of the homicide investigation and the appointed senior Iwi Liaison Officer who dealt with the family believe these matters were handled appropriately.

The body of the deceased was moved from the scene to the mortuary in the early hours of Sunday 22 September 1996, less than 10 hours after the incident. The body was released to the family, with the assistance of the senior Iwi Liaison Officer at 1610hrs the same day.

The first contact with family members represented by Ms Dyhrberg was at 0850hrs on 22 September by a Constable who had been assigned to the task 10 minutes earlier. That Constable visited family members 25 minutes later and it appears that through no fault of his own his knowledge of details of the incident was not substantial. At that meeting concern was expressed about the time taken by Police to make contact.

An Iwi Liaison Officer was appointed at 0900hrs on 22 September. Although this was 14 hours after the shooting, officers concerned in the enquiry had focused through the night on the identity of the deceased and his immediate family. Those enquiries, focused in the far North through a local constable, took some time to identify who should be spoken to. During the night that Constable did speak to some members of the deceased's family who were living in that area. The Iwi Liaison Officer approached the family through the deceased's mother at 1430hrs on 22 September, some 19 hours after the death. The Iwi Liaison Officer did all she could to assist the family following the notification of her responsibilities.

Further contact was made with the family to the extent that the family wished it.

On 2 October 1996, Superintendent Rangihika and the Iwi Liaison Officer met with the family when the events surrounding the shooting were outlined and the whanau was given the opportunity to convey questions and concerns which could be addressed by the Police.

Police response to the whanau appears to have been adequate but not ideal. This case highlights a need to ensure that in deaths involving sensitive ethnic issues those issues are dealt with promptly, understandingly and sensitively by all staff. It must be anticipated that early access to the body of a deceased may be of considerable importance to family members. It is recognised that this objective must be balanced against the need to ensure that the integrity of the homicide investigation is not compromised. In situations like the present matter Police must anticipate and be alert to family aspirations and wishes and respond to them appropriately and sensitively. Here, the Police should have appointed an Iwi Liaison Officer or officers at an earlier point in time, preferably the previous evening.

Constable A

Constable A was a sectional Sergeant responsible to the Area Controller, Eastern Area, of the Auckland City District.

In his two most recent performance appraisals he had been satisfactorily reported on as being in the overall competent range for his performance with no particular weakness identified.

In 1992 he successfully completed a course of instruction for supervisors and managers at the Royal NZ Police College. Firearms training was part of that course and he satisfactorily passed in the rifle and revolver classifications and was reported by the Firearms Instructor as “confident and competent of operating rifle/revolver in the field”.

Since that time and up to the time of this incident Constable A attended programmed firearms training on six separate occasions. During this training he received training on at least three occasions involving decision making scenarios and twice on low light shooting including identifying the offender in low light.

Response of Constable A to the Incident

On the night of this incident Constable A was working a rostered late shift ie. 1500 to 2300hrs. As the late shift Sergeant or ‘I’ (Incident) car Sergeant for the Eastern Area, working from the Mt Wellington Police Station just off the Ellerslie/Panmure Highway, he was the most senior person working in the Eastern Area where this incident took place. He was familiar with the Greenlane area and knew the exact location of the service station.

The Control log confirms that Constable A was the first unit to be dispatched to this incident. The late shift Sergeant was ordinarily a one man patrol and on this occasion Constable A was the sole Police occupant as one might expect, however he was accompanied by his de facto partner, Witness XX.

Constable A's unit would expect to be tasked to attend this type of incident and as the 'I' car supervisor for the area would be expected to take charge and all staff would be aware that Constable A's vehicle would have a rifle and pistol cabinet.

The authority for Constable A to carry a firearm and to hold a firearms security cabinet containing 6 revolvers and 2 rifles is outlined earlier in this report.

Attendance at Scene by Constable A

Earlier in the shift Constable A had taken control of an incident at Glen Innes and at approximately 1830hrs after a short briefing he and other staff, including Constable B, went to an address where they located and arrested the offender. Constable A had armed himself with a .38 Smith & Wesson revolver from his pistol security cabinet on the floor of his vehicle.

With the offender arrested from the Glen Innes incident Constable A departed the scene without further incident and drove towards the Mt Wellington base accompanied by Witness XX. On the way he drove into the drive-thru area of Burger King where he intended to purchase a meal and return to Mt Wellington base to eat it. He recognised that he still had the holster on his person and accordingly chose to use the drive-thru facility, intending to return the revolver to the security cabinet on arrival at the Mt Wellington base. However he did not have a chance to make his purchase as he was called to the incident at the service station as he went through the drive-thru area of Burger King.

In retaining the revolver on his person for a short time after attending the Glen Innes arrest Constable A contravened an Auckland City District Order on firearms referring to the carriage of firearms on person which is as follows:

"Carriage on Person

The authority for certain position holders to carry firearms in vehicles is not a general authority for those members to carry firearms on their person. The authority to carry firearms on their person is restricted to occasions when the circumstances outlined in General Instruction F60(2) apply."

As it transpired this breach facilitated the transfer of a firearm to Constable B at the service station in circumstances which will be described.

On his arrival at the service station Constable A parked his vehicle on the opposite side of Great South Road facing north. He could see Constable B crouching on the forecourt of the service station in front of his dog van parked at an angle on the forecourt. He ran diagonally across the road toward Constable B's position but Constable B shouted at him to get back, warning him that the person inside the service station had a gun. The tone and choice of language left Constable A in no doubt that he should take cover at that point by not approaching the service station. In addition Witness XX had also started to run across the road but both Constable A and Witness XX returned and took shelter behind Constable A's vehicle and at that point they could not see any other activity at the service station. At that time Constable A called for the Great South Road to be blocked off at Greenlane Road and Harp of Erin.

Constable A then recalled Constable B calling out that he did not have a gun. Constable A told Constable B to approach him to get a firearm if he could do so safely. Both men ran toward each other and Constable A handed Constable B the fully loaded revolver that he had retained on his person since the earlier Glen Innes arrest.

Given the urgency of the situation no Fire Orders in terms of F59 were given by Constable A to Constable B. Constable B with his dog on a leash returned to the forecourt and Constable A returned to the far side of his vehicle and joined Witness XX. Now unarmed, Constable A opened the back left door of his vehicle and opened the firearms cabinet. He removed a Remington .223 rifle and loaded it with 4 rounds. He worked the bolt, pushed a round in the chamber, applied the safety catch and handed the weapon to Witness XX to hold. He acknowledged that he did not give Witness XX any instructions or advice as to why she was to hold the weapon but has stated that it was his intention that he load the second rifle, put it on the back seat of the vehicle until a "backup" officer arrived and take back the first rifle from Witness XX. Constable A loaded the second rifle with 3 or 4 rounds and, in his words, "put one up the spout".

What then happened is described by Constable A in his statement in the following way:

"I heard 2 or 3 cracks of something or someone shooting and I looked up and there was a guy dressed in black standing against the wall of the Service Station building that is closest to the Great South Road. This guy was a big guy - dark skinned - he was black - all black, I couldn't see any white skin or anything light in colour. He was a black shape although

he was lit-up by the street lights and I could see his body movements. It registered in my mind that he was a Maori.

He was holding something in his two hands in front of him and at chest height. When he turned I saw that it was brown in colour and I thought "Fuck it's a gun". I don't know where he had come from before I saw him first in this position, because I had been concentrating on loading the empty rifles.

I didn't make an assessment of his height or weight or age at this point, but he was an adult male - dark skinned with a big frame.

I realised that this man was the offender when I saw that he was holding a gun. When I first saw him he had his back against the wall, looking to his right - which meant that he was looking in the direction of Constable B, who was hiding behind the first petrol pump. The guy was holding the gun in "Port" position - that is holding the gun flat to his chest at a 45 degree angle with the left hand uppermost and the right lower at waist level - in other words he was holding the gun in the way in which a right handed person would use it - using the right hand to pull the trigger.

After one or two seconds, he turned to his right - which is when I knew that what he was holding was a gun - and still holding the gun in both hands, raised it and extended his arms forward and fired once - possibly two times - I recall hearing a crack sound of a gun being fired - he was firing in the direction I last saw Constable B. After firing the gun he turned to his left holding the gun extended but with the barrel up - I didn't think he was pointing it at me. He walked a normal walking speed along the wall from my left to my right. I put the rifle onto the roof of the car and I called out to him "Stop - armed Police - put the gun on the ground". He made no response. I shouted again "Stop - armed Police". By this time there was no traffic in the street. I brought my rifle up to my right shoulder and I sighted him and he stepped from the end of the building into black. That is into darkness. I was now in fear for the safety of other members of the public, this guy was getting away. I thought he had started to run because of his body movements swaying from side to side. I lost my view of my rifle foresight, due to the black and I was fearful that he would run around the back of the service station building and come up behind Constable B in the garage forecourt, or shoot four people standing in Adam Street, who were about 20 metres ahead of him to his right. I know that three of the four at least were men because they came over to me later. I was of the opinion that the only way to stop this person was to shoot him, to prevent further injury or death to other people, using the rifle he was still carrying. I aimed at 'centre-mass' at the black shape - still not being able to see the foresight and fired once. I heard a cross between a plop and a thud and the shape fell flat on his face on the footpath."

Presence of Witness XX

Constable A acknowledged that he did not have permission to have Witness XX accompany him in the vehicle or at work. He did explain that his shift Inspector had given permission on previous occasions for Witness XX to accompany him on duty and contended that it was only the third or fourth occasion on which that had happened.

General Instruction D54 deals with the “Purpose and Use of Police Vehicles”.

D54(3) states:

“Police vehicles shall not be used for private journeys or for the carriage of unauthorised passengers or private goods; nor are material deviations from routes to be made in police vehicles in the course of authorised journeys.”

D54(4) states:

“The following persons may be carried as passengers in police vehicles:

- (a) Any person (whether or not a Government employee) being conveyed on official business.*
- (b) Any person who at the time and to some material degree is associated in official duties with the driver or an official passenger and to whom the driver or official passenger is as a result under some obligation to offer a “lift”.*
- (c) Any person whose vehicle has broken down away from ready means of obtaining help and who needs transport to the nearest telephone or township.*
- (d) Any person involved in an accident and in need of conveyance to a doctor, hospital or public transport.”*

D54(6) states:

“Commissioned Officers above the rank of Inspector may authorise members under their control to take family members and friends with them in the course of a duty trip in a Police motor car, subject to the circumstances and conditions in clause (5) hereof. The authority must be in writing and must be specific as to the persons who may be carried.”

D54(8) states:

“Members who use Police vehicles contrary to the provisions of clause (3) hereof may be subject to disciplinary action under the Police Act and Regulations. Also, any member who makes use of a Police vehicle for a private journey or who in the course of an official journey diverts a Police vehicle for a private purpose may be prosecuted for unlawful conversion of the vehicle.”

In having Witness XX accompany him without the permission in writing of a commissioned officer above the rank of Inspector, Constable A committed a clear breach of D54(3).

There are two other aspects about the presence and involvement of Witness XX that are of concern to the Authority.

Constable A was aware from the Control Room that he had been called to attend the scene of what was described as an aggravated robbery involving a shotgun which had been fired once. In my view he should in those circumstances have left Witness XX at a place of safety before proceeding to the service station. Constable A has said that was not a matter he gave thought to. Taking her to the scene where he knew a firearm had been discharged placed Witness XX at unnecessary risk and indicates a significant error of judgment by Constable A.

Having taken her to the scene Constable A again, in my view, made an error of judgment in involving Witness XX in the handling of a loaded firearm. Constable A loaded two firearms, apparently intending to use one and have the second available for use by any other Police officer who may have come to the scene. In handing the first rifle to Witness XX he did not express that intention. Rather he merely instructed her to hold the firearm. There was no need to involve Witness XX in the handling of the loaded firearm and it should not have occurred. It led, following the shot fired by Constable A, to her placing the rifle on the metal lid of the firearms safe in the car while it was still loaded, shutting the door and leaving the rifle there before she went to a nearby car yard.

In the various respects outlined above as to the presence and involvement of Witness XX Constable A is liable for disciplinary action on the part of the Police Commissioner.

Constable A's Compliance with Firearms Instructions

Apart from the involvement of Witness XX Constable A generally complied with the General Instructions covering the use and carriage of firearms. However, as the supervising officer present, he did fail to issue Fire Orders in terms of F59 when handing a loaded revolver to Constable B. That failure was understandable in the circumstances, given the danger that existed to both members and the immediate danger that they believed members of the public faced inside the service station. There was also a minor breach of an Auckland City District Order in keeping a pistol on his person after attending the earlier incident.

In loading the firearms Constable A inserted a cartridge in the breech. This is not a position of complete safety. However in the context in which he was operating, where the firearms may have needed to be used immediately from the position he was already in, this action cannot be criticised.

Criminal Responsibility of Constable A

After the shooting a Police homicide investigation was commenced under the direction of Detective Inspector Higginson.

That investigation concluded that from the actions and words spoken by the deceased over a six month period prior to his death he had been displaying indications that he was suffering from depression and was clearly suicidal.

In that state he armed himself with a loaded cut-down semi-automatic rifle and took that firearm to the service station intending to confront his wife with it. In doing so he placed the lives of members of the public and of the Police in actual and real danger of death or grievous bodily harm.

An opinion was sought from the Crown Prosecutor in Auckland, Mr Simon Moore, as to the criminal liability, if any, of Constable A.

After reciting the factual situation he addressed the issue of whether Constable A was justified, in the circumstances, in committing culpable homicide. He gave consideration to section 48 of the Crimes Act which provides:

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

The opinion of the Crown Solicitor is then recorded as follows:

“It is the obligation of the prosecution, once the defence of self defence is raised, to negative that defence beyond reasonable doubt. There is no onus whatsoever on an accused person to prove this defence. Therefore, for present purposes, if there is no available evidence upon which the prosecution could disprove such a defence then it would be idle and misconceived to prosecute in the first instance.

Having reviewed the facts and having applied them to the requisite elements of Section 48 I have no hesitation whatsoever in concluding that not only is there a wholly credible narrative in support of such a defence but there is no available evidence to negative the account (even in part). It follows therefore that the defence must succeed and I cannot recommend a prosecution.

My reasons are as follows:

(a) *Belief in the Circumstances*

This is a subjective requirement. It necessitates an inquiry into the belief of the potential offender at the time of the incident under inquiry. The belief may be a mistaken belief based on an erroneous apprehension or understanding of the facts or events surrounding the incident.

However, the belief must be an honest belief as to the circumstances.

In the present case Constable A's apprehension of the circumstances led him to conclude that the deceased, if permitted to continue down Adams Street, would pose a mortal risk to others in the vicinity.

The grounds justifying his belief are as follows:

1. *The first Control radio message disclosed that shots had been fired in an incident believed at that time to be an aggravated robbery at Georgie Pie.*
2. *En route to the incident the radio message recorded that the incident was domestic related and that the male offender was armed with a gun.*
3. *On arrival at the scene Constable A was told by Constable B to retreat because the offender had a gun.*
4. *When loading rifle hears a bang (this may, in fact, have been the metal side door closing rather than a gun shot).*
5. *Sees deceased standing against side wall of service station holding the firearm in the "port" position ready for use.*
6. *Constable B is in an unprotected position*
7. *Sees deceased point firearm in direction of Constable B and fire a shot.*
8. *Hears Constable B shouting at deceased to drop his gun. Direction ignored by deceased. Sees deceased with barrel of firearm up apparently examining or checking it.*
9. *Sees deceased turn and walk towards Adams Street.*
10. *Calls to deceased and demands that he stops and puts gun on ground. Deceased ignores this direction twice.*
11. *Deceased starts to run down Adams Street.*
12. *Constable A conscious of the following:*
 - (a) *Private homes and residential area in direction deceased is running.*
 - (b) *Deceased would have access to his car, abandoned in the forecourt near the Adams Street exit with the dangerous potential that once mobile many more members of the public would be in peril.*
 - (c) *There were members of the public in and around the forecourt area as well as in Adams Street, adjacent car yards etc watching the scene.*

- (d) *Constable B and Victim 2 (known to be the object of the deceased's attentions) were in the forecourt area which could be accessed from the area the deceased was running to.*
13. *Constable A believed that the deceased had already fired several shots, including one at Constable B.*
14. *The deceased had steadfastly refused to accede to the Police demands to lay down his arms (from both Constable B and Constable A).*

Therefore, in summary, Constable A believed that there was a highly dangerous, armed man moving quickly in a direction where other members of the public and the Police would be exposed to further mortal danger.

B. *Was Constable A Acting in the Protection of Others?*

Clearly he was (as discussed above).

C. *Was the Force Used Reasonable in the Circumstances?*

Constable A was firing a rifle at the "body mass" of the retreating deceased. He knew, or must have known, that there was a real chance that in doing so he could fatally wound the deceased.

The use of that force needs to be equated with the gravity of the threat which he perceived others would be exposed to. In this case, the deceased was armed with a loaded firearm which, only seconds before, had been discharged at a Police Officer.

It seems to me that an appropriate test to be applied in this case is to ask oneself what alternative options Constable A had available to him. In my view he had but one course to adopt and that was to stop the deceased immediately (if necessary by seriously wounding or killing him).

In my view it is irrelevant for the purposes of considering this defence, the fact that the shot was fatal or that it struck the deceased's head rather than any other part of his body.

Alternative Defences

I have considered the provisions of sections 38, 39 and 40 of the Crimes Act 1961 which provide for justification in using force to effect an arrest during flight or in executing any criminal process or arrest.

In my view, while perhaps applicable in the present case, none requires discussion having regard to my firm view that section 48 provides such a complete and comprehensive defence.

Conclusion

Having considered all of the material provided to me in some detail, I conclude that Constable A was, indeed, justified in the circumstances in shooting, and thereby fatally wounding, the deceased.

It follows therefore that I recommend that no criminal proceedings be brought against Constable A.”

The opinion of the Crown Solicitor that the action of Constable A does not attract criminal liability is accepted by this Authority. As noted earlier counsel for the family, Ms Dyhrberg, confirmed recently in writing that the family has no wish to bring a private prosecution with regard to the death.

Constable B

Constable B is an operational dog handler at Auckland who, in his last two performance appraisals prior to this incident, had received an average overall rating in the upper level of “commendable” range. On both his last two performance appraisals the member was rated as an “excellent dog handler”.

In the period of five years up to the time of the shooting he attended successfully six firearms training days. In addition Constable B had undergone personal training with a firearms training officer on numerous days as well as participation in regular Armed Offenders Squad training.

He was the first officer to attend the incident and appears well qualified to take the initial action.

Constable B’s Response to the Incident

As recorded earlier Constable B responded immediately to the Control dispatcher’s general call for attendance at this incident. The Constable and his dog were patrolling alone in a Police dog van and were only a few hundred metres away from where the incident took place when Control first called.

Constable B did not hesitate to become involved and, after clarification of the venue of the incident, drove onto the forecourt of the service station in order to take up a position where he could observe and assess the situation.

On arrival he noted that Raharuhi was still present and was armed. Constable B was not armed at that point and advised Control that he needed a firearm.

Constable A arrived shortly after Constable B and had stopped across the road. The two officers ran towards each other out of sight of Raharuhi and Constable A gave Constable B a loaded pistol. Constable B had assumed de facto control of the situation and had made it plain to Constable A that he should remain near his vehicle on the other side of the road.

After collecting the pistol Constable B returned to the shelter of his dog van alongside the petrol pumps on the forecourt. At all times he was accompanied by his dog, including the time when he had crossed the road to collect the pistol.

On returning to the area of the petrol pumps Constable B was unable to see or locate Raharuhi. He had his dog under control ready to deploy him should Raharuhi come into view.

Raharuhi had at this point detained Shirley Raharuhi at gunpoint in the storeroom of the service station. The wall of the service station facing onto Great South Road is featureless with no windows and with a single, flush, emergency door in the middle of the wall.

As Constable B was observing from the petrol pumps on the forecourt there was a sudden commotion and appearance of both Raharuhi and Shirley Raharuhi out of the single flush door.

Shirley Raharuhi broke away from Raharuhi as they came through the door and ran towards Constable B and the service station forecourt. Raharuhi was close behind her.

Raharuhi was then observed to raise his firearm, point it in the direction of Constable B and the fleeing Shirley Raharuhi and fire a shot.

When this shot was fired in the direction of Constable B it is his recollection that he dived for cover, accidentally releasing his dog. On release the dog attacked Shirley Raharuhi bringing her to the ground.

While the quality of video "stills" taken from the service station video are not good, they tend to reinforce the view that Constable B's dog was under control prior to the attack on Shirley Raharuhi. It appears that in the intensity of the situation that existed Constable B's dog was not given the command to attack but rather chose to attack of his own volition. It is also clear that Constable B could not get his dog to respond to the command to desist from his attack on Shirley Raharuhi and he had to physically intervene to stop the dog continuing that attack.

The dog should not have attacked of its own volition and once engaged should have responded immediately to the command to stop the attack. This did not happen and while Shirley Raharuhi had no complaint to make, she was badly bitten by the dog and was hospitalised for a few days.

At the point that Shirley Raharuhi was attacked by the dog Constable B pointed his pistol at Raharuhi and called, several times, for Raharuhi to drop his weapon. He was forceful in his choice of language but in the heat of the moment the language was perhaps appropriate to the circumstances, albeit not very professional. It should have been however abundantly clear to Raharuhi what Constable B wanted him to do.

Raharuhi did not put his weapon down. Rather he turned and moved quickly toward the rear of the service station. As he moved out of Constable B's line of sight Constable B turned to assist Shirley Raharuhi who was lying on the ground partially under the rear of a car, being attacked by the dog. Once Constable B turned his attention to Shirley Raharuhi he did not participate further in the attempt to apprehend Raharuhi.

Having regard to the very brief time frame available, and the fact that a Police dog would be any incident commander's first choice to be utilised to disarm/apprehend an armed and dangerous person, it was obvious that any immediate action to disarm/apprehend Raharuhi should have been the role of Constable B and his dog.

However once the option of utilising the dog had been lost with the attack on Shirley Raharuhi there came a clear shift in responsibility to Constable A to disarm/apprehend Raharuhi.

Conclusion in Respect of Constable B

Constable B had undergone appropriate training to deal with an incident such as this and had advanced levels of skills involving firearms.

The position description for a dog handler at Auckland describes, among others, two attributes that are needed and valued for general purpose dog handlers. They are:

1. Able to demonstrate ability to retain self control in potentially stressful, violent or frustrating situations.
2. Able to demonstrate a high degree of self motivation, decision making and self sufficiency.

Constable B appears to have fulfilled those requirements in dealing with this incident and it was appropriate that he retained initial responsibility for disarming/apprehending Raharuhi by utilising his Police dog.

However he lost control of his dog when a shot was fired at him or in his direction by Raharuhi and that loss of control resulted in the dog launching an attack on Shirley Raharuhi without being commanded to do so.

Once the dog had attacked Shirley Raharuhi and continued to attack her Constable B could not exercise control by voice over the dog.

The end result was that the chance of apprehending Raharuhi with the Police dog was lost when it failed to respond to Constable B's verbal command and furthermore Shirley Raharuhi suffered significant injuries from the dog bites.

Although it is apparent that Constable B has not committed any disciplinary or criminal offences the failure to maintain control over his dog after the dog had launched an attack on Shirley Raharuhi is a matter for the Police Commissioner to address as a training issue.

Further Issues

I turn now to deal with further matters that were raised by the complainants in correspondence, in my meeting with them, and in other meetings between Detective Inspector Bishop and Ms Dyhrberg.

Was it Constable A who fired the fatal shot?

Up to and including the Coroner's hearing the evidence that Constable A fired the fatal shot was not challenged. It was during the investigation of the complaints made after that hearing that the complainants asked the Authority whether I was satisfied that Constable A had fired the fatal shot or whether it was possible for Witness XX to have fired that shot.

In her written submissions presented to the Coroner on behalf of the family Ms Dyhrberg accepted that the deceased was shot by Constable A. When this issue was raised at a later date Detective Inspector Bishop discussed the matter at some length with Ms Dyhrberg and it is reported to me that there was then an acceptance by her that Constable A did fire the fatal shot and that Witness XX did not and could not have.

Nevertheless, because the issue was raised it is appropriate that some evidence, additional to that already contained in this Report, be referred to which confirms a conclusion that Constable A not Witness XX fired the fatal shot.

One shot only from a Remington .223 Police issue rifle was fired at the deceased and that single shot killed him instantly. The .223 Remington rifle used by Constable A had a five round magazine. Constable A claims to have loaded this rifle and one other with "three or four" rounds of ammunition. When the rifle that Constable A had fired was examined, one live round was found in the magazine and one in the chamber. This is consistent with three rounds being loaded by Constable A into that rifle.

All .223 ammunition on issue to Constable A that evening was accounted for and only one .223 round, namely the shot fired, had been used. Four live rounds were recovered from the rifle loaded by Constable A and handed to Witness XX.

In his statement Constable A acknowledges shooting the deceased and that immediately prior to firing the fatal shot he took up a position where he pointed his rifle across the roof of his vehicle. Although there is no independent witness who can actually attest to seeing Constable A firing the shot, Constable A's taking up of a posture leaning across the roof of the vehicle was confirmed by an independent witness.

Constable A's actions after the shooting appear entirely consistent with his having fired the fatal shot. Immediately after the deceased fell to the ground he approached with the rifle that had fired the single fatal shot in his hands and he was shortly thereafter seen to drop to the ground near the body in a very distressed state.

The rifle which Constable A used and which he was still carrying as he approached the deceased was examined as was the fired cartridge case located near the rear and on the footpath side of Constable A's car parked on Great South Road. The rifle was test fired and a comparison made of the firing pin impression of the test-fired cartridge case with the firing pin impression on the fired case recovered near Constable A's car. The forensic scientist found "*an overwhelming correspondence of microscopic features in the firing pin impression*" and he was satisfied that the cartridge case had been fired from the rifle used by Constable A.

There is no doubt that Constable A had loaded a .223 Remington rifle with four rounds and given it to Witness XX to hold. At that time no advice, instruction or comment was made by either party other than Constable A telling Witness XX to hold the rifle. He says that it was his intention that the rifle be available for any other Police member who might arrive to assist.

Witness XX, after taking possession of the rifle, has stated that she crouched down behind the Police vehicle and looked through the side windows of the Police vehicle at the scene as it unfolded. Her evidence, which tends to confirm the firing of the shot by Constable A, was that after crouching down behind the Police vehicle "*I heard a big bang from beside and above me ... I didn't know what had happened. I saw the shape go to ground on Adam Street*"

In considering this question attention was also given to the forensic report that indicated that the trajectory of the bullet that entered the head of the deceased, assuming his head was in a

normal upright position, was “slightly upwards and from directly behind the head”. The issue was whether any conclusion could be drawn from that as to the trajectory of the bullet from the rifle to the deceased. The difficulty however with any analysis is the unknown factor of the position of the head of the deceased immediately prior to impact. If the head was leaning forward the trajectory noted in the forensic report could have resulted from a trajectory in flight at or near the horizontal. This issue is inconclusive.

Having regard to all the evidence I am entirely satisfied that Witness XX did not fire the rifle she was holding and that it was Constable A who fired the fatal shot.

Did Constable A intend to kill the Deceased?

This question was posed by the complainants during the investigation. In addressing this question it is necessary to examine Constable A’s own description of the events leading immediately to the shooting and how he took aim at the body of the deceased.

It is contained in the extract set out earlier in this Report at pages 22 and 23.

The shot fired by Constable A could not be said to have been aimed as a deliberate attempt to hit the deceased in the head. The lighting conditions referred to by Constable A did not allow for any degree of accuracy other than to fire at the “centre mass”. Constable A described not being able to see his foresight when attempting to aim at the deceased as he started to move down Adam Street. The movement of the deceased saw him shift from a lit area into a darker or very shadowy area. The situation was aggravated further by the deceased’s black clothing. The obliteration of the view of the foresight while still being able to see the broad target area of the retreating figure is credible. While the firing of the rifle at the “centre mass” in the conditions described could reasonably have been anticipated to cause death or serious injury, I am not persuaded that Constable A aimed and fired the rifle with an intent to kill. The justification for his actions has been discussed earlier.

Was Constable A a fit person to have use of the firearm?

This question posed by the complainants has been substantially addressed at pages 16, 17, 20 & 25 of this Report.

It seems clear that Constable A was appropriately in possession of firearms on the night of the incident and prior to this evening there were no apparent shortcomings in Constable A’s training, performance and background that would suggest that he was not fit to have the use of a firearm.

However the question asked by family members appeared to arise because of concerns that they had about Constable A's judgment arising from aspects of his behaviour on that night. From those concerns arose the question about Constable A's fitness to have the use of a Police firearm.

The judgment issues which gave rise to the family's concerns were essentially:

- being accompanied by a female civilian whilst on duty and without permission;
- apparently permitting that civilian to participate in Police operations;
- driving into a drive-thru restaurant in a marked Police vehicle with a pistol in a holster on his hip;
- that he fired at Raharuhi without, apparently, being able to clearly see him.

I share the concerns of the family about the presence of Witness XX without permission and her involvement, albeit in a minor way, at the scene of the incident. Those particular actions understandably raised doubts in the minds of family members as to the professionalism of Constable A.

However the first three concerns are matters that are peripheral to the issue of Constable A's fitness to have use of the firearm on this night. The fourth matter is addressed elsewhere in this Report. In addressing the issue of Constable A's fitness to have the use of a firearm the appropriate focus should be first on the level of training, qualification and authority to possess and use firearms and secondly on the manner of use of the firearm during the incident and whether such use could be justified.

Earlier in this report Constable A's training and authority to be in possession of and use firearms has been outlined and the justification for the use of the firearms on the night of this incident has been addressed in the conclusion of the homicide investigation with the Crown Prosecutor's opinion which I have accepted and which is quoted at pages 26 to 28.

Was there a less violent means of stopping the Deceased available to the Police?

It is entirely understandable that members of the deceased's family should express concern that there might have been a less violent means of apprehending the deceased such that loss of life would not have been the outcome.

The preferable situation would have been to have Constable B's dog apprehend the deceased but as described earlier that opportunity was lost when the deceased fired in the direction of Constable B who, in diving for cover, accidentally released the dog. The dog then attacked Shirley Raharuhi and it did not respond to the command of Constable B to stop that attack. The apprehension of the deceased was clearly then the responsibility of Constable A and his justification for taking the action he did was carefully examined in the homicide investigation and by the Crown Prosecutor as referred to earlier.

Although it is not possible to determine exactly, it is obvious that the elapsed time from the moment Constable B felt able to go safely to the assistance of Shirley Raharuhi to the time that the deceased moved into the darker area behind the service station was very short.

In view of the fact that the deceased was armed with a loaded firearm and had fired shots it would not have been possible to physically overpower and disarm him without placing the lives of Police officers at risk.

As to the possibility of maintaining the status quo, at the time Raharuhi was mobile on foot in Adam Street he was moving towards members of the public while armed with a weapon which he had already discharged on several occasions. A Police officer and Shirley Raharuhi were in the service station forecourt and unaware of the offender moving around to the rear of the building via Adam Street and there were members of the public in Adam Street. The potential for a number of people to have been shot by Raharuhi was real, imminent, and serious.

The necessity was to stop Raharuhi immediately. It is therefore unrealistic to expect that Constable A could have achieved this successfully by aiming at another part of the body where injury rather than death may have been the consequence. To aim with accuracy in the conditions was difficult in the extreme. He followed a practice of shooting at the centre of the visible mass. To do otherwise may not have removed the danger and indeed may have escalated it.

The Crown Prosecutor at Auckland in his opinion referred to earlier, in considering whether the force used was reasonable in the circumstances, said:

"It seems to me that an appropriate test to be applied in this case is to ask oneself what alternative options Constable A had available to him. In my view he had but one course to adopt and that was to stop the deceased immediately (if necessary by seriously wounding or killing him)."

Other options available to the Police in armed offenders situations can involve the deployment of the Armed Offenders Squad and/or the use of hostage negotiators. However this incident was over in a very short space of time and even if the Armed Offenders Squad had been available they would not have been able to be deployed in sufficient time. There were no trained hostage negotiators immediately available and the incident was of such a type that negotiation with Raharuhi would in any event have not been possible.

I conclude that in the time frame and circumstances of this case there was no alternative, less violent means, of apprehending/stopping the deceased other than that taken by Constable A. The potential ongoing situation was very dangerous and Constable A would have faced severe censure if inaction on his part had led to serious injury or loss of life inflicted by Raharuhi.

Was the Deceased left-handed? If so what effect does this have on the evidence that the Deceased was holding the firearm as if he was right-handed

The complainants maintained that the deceased was left-handed and that this may impact on the credibility of witnesses who described the deceased holding the firearm as if he was right-handed.

The deceased's estranged wife, Shirley Raharuhi, confirmed that the deceased was indeed left-handed but she told Detective Inspector Bishop that the deceased was suffering from gout in his left hand and wrist approximately a week before this incident. He had complained of severe pain and restricted mobility in his left hand and wrist.

The pathologist was not aware of this and did not make any comment, in respect to swelling in the hands or other symptoms, in her post mortem report. However if the deceased was suffering severe pain and restricted mobility in his left hand and wrist there is an understandable reason why he adopted what appeared to be a right-handed stance when handling and firing the rifle in his possession.

Timing of the Incident

The complainants then asked whether there was any issue in relation to the timing of the incident when the Control Room tapes suggest 7 minutes 45 seconds elapsed between certain events while the service station video tape suggests just over 9 minutes.

This is explained by the fact that the Control Room tape and service station surveillance video measured the passage of time referred to in the question between different events.

The Control tape shows Control broadcasting the "ag robbery" at 1905:02hrs and the report of the shooting to Control at 1912:47hrs, an elapsed time of 7 minutes 45 seconds.

The surveillance video records Raharuhi entering the shop at 1900:02hrs and Constable B moving from behind the pumps towards Great South Road with the dog at 1909:11-14hrs, an elapsed time of just over 9 minutes.

While there is a difference between the elapsed times the start and end points are not of the same events.

What is apparent is the difficulty of reconciling the actual times recorded on the Control Room tape with those on the surveillance videos. The cause of this problem has been referred to earlier in this Report and relates to the inaccuracy of the clock within the dictaphone system operated at that time in the Control Room.

Did the Police ask a Kaumatua to approach family members to withdraw their complaints?

At the meeting which I had with the family some concern was expressed that an approach had been made by the Police to a well known kaumatua, who was named, asking him to approach family members to withdraw the complaints. It was acknowledged that no member of the family had been approached in this way. Detective Inspector Bishop spoke personally to the kaumatua who was adamant that no such approach had been made.

Conclusion

In reviewing a tragic incident such as this, one cannot help but feel an overwhelming sense of sympathy for all those who have been involved in this violent incident and who are left to cope with the aftermath of it.

The Police officers showed commendable courage in attending the scene and involving themselves with it but will continue to carry with them the knowledge that their actions led eventually to the death of the deceased.

The trauma inflicted on Shirley Raharuhi who was the focus of the presence of the deceased at the service station was without doubt profound.

Then there are the members of the whanau of the deceased, some of whom were complainants to this Authority, who continue to grieve at the loss of a much loved and greatly respected family member and to whom this Authority extends sincere condolences.

The focus of the Authority's investigation however must be on the Police activity in and response to the incident.

In that regard the Authority has referred in this Report to the need to ensure that in deaths involving sensitive ethnic issues, those issues are dealt with promptly and understandingly by Police officers.

No fault has been detected in the response of the Control Room.

Constable B did not discharge a firearm but was appropriately qualified to be in possession of the pistol handed to him by Constable A. The loss of control of the dog when Raharuhi fired in Constable B's direction occurred when Constable B understandably dived for cover.

The failure of the dog to respond to the command to stop his attack on Shirley Raharuhi and which necessitated Constable B going to her assistance, thereby not having further involvement in the stopping of Raharuhi, is a matter to be addressed by the Police Commissioner as a training issue. Constable B did not commit any disciplinary or criminal offence.

Constable A committed a breach of General Instruction D54 in having his de facto partner accompany him without permission and displayed significant errors of judgment in taking her to the scene of an aggravated robbery and handing her a loaded firearm. He failed to issue Fire Orders to Constable B when handing him a pistol but that was understandable in the circumstances.

Constable A was appropriately in possession of firearms in his car, but in retaining a revolver on his person for a short time after attending an earlier incident he contravened, albeit in a minor way, an Auckland City District Order relating to the carriage of firearms on person.

The appropriate disciplinary action is the prerogative of the Police Commissioner.

For reasons outlined in this Report the Authority is satisfied that no criminal liability should attach to Constable A for his shooting of the deceased.

Judge N C Jaine
POLICE COMPLAINTS AUTHORITY
14 May 1998