

Report into inadequate use of force reporting at Eastern Goldfields Regional Prison in May 2017

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INTRODUCTION

- [1] Senior Prison Officer (SPO) Gary Victor Hawthorn is a prison officer with over 20 years' experience, including over 11 years with the Department of Justice (DoJ). He has worked at several State prisons.
- [2] In May 2017, he was nearing the end of a six month secondment at Eastern Goldfields Regional Prison (EGRP). This modern, sophisticated, 350 bed, state of the art prison with almost 400 cameras became fully operational in mid-2016.
- [3] On two occasions, 4 May and 20 May 2017, SPO Hawthorn used a weapon - a chemical agent - against two prisoners, prisoner A and prisoner B.¹ SPO Hawthorn maintains the use of force was justified. The Commission disagrees.
- [4] CCTV cameras caught what happened during each incident. The CCTV footage speaks for itself and forms part of this report.
- [5] However, the Commission's serious misconduct investigation was directed at the integrity of reporting on use of force incidents, rather than on the force used by SPO Hawthorn.
- [6] Reporting on use of force incidents is mandated and forms part of a prison officer's positive duties. It is fundamental to the security of the prison as well as the welfare and safe custody of prisoners.
- [7] Reports on use of force incidents are official records that may be relied upon in legal and disciplinary proceedings.
- [8] Despite SPO Hawthorn being the primary user of force, he had substantial control over the reporting process for each occasion. DoJ's procedures and practices permit and even expect this to occur.
- [9] SPO Hawthorn prepared critical documents for 'Head Office' in relation to his use of chemical agent against prisoner A. The reports perpetuated an implausible version of events in his Incident Description Reports (IDR) that minimised his use of force.
- [10] Any review of the reports would have been pointless in the absence of CCTV footage given SPO Hawthorn minimised his conduct in the reporting of the incident. The CCTV footage was not provided to Head Office despite a mandatory requirement to do so.
- [11] The investigation revealed the reviews conducted by Head Office in relation to use of force matters is wanting. The incident against

¹ All prisoner's names have been anonymised.

prisoner A was not subject to DoJ scrutiny until the Commission investigated the matter.

- [12] Sixteen days after using chemical agent against prisoner A, SPO Hawthorn deployed chemical agent against prisoner B, in circumstances which the Commission considers was excessive.
- [13] SPO Hawthorn controlled the reporting of the incident against prisoner B despite being the sole user of force.
- [14] SPO Hawthorn's IDR falsely described his use of chemical agent against prisoner B.
- [15] SPO Hawthorn stated that he deployed chemical agent against prisoner B when prisoner B came back at him to fight. The CCTV footage shows that prisoner B briskly took six steps into his cell and was at the rear of the cell when he turned around and had chemical agent sprayed at his face. SPO Hawthorn's second use of the chemical agent against prisoner B occurred while prisoner B was on the cell bed.
- [16] The officers under SPO Hawthorn's control and supervision submitted reports, strikingly similar and in parts identical, to each other. The reports of these officers justified SPO Hawthorn's use of chemical agent against prisoner B.
- [17] These officers were either on probation or had recently completed probation. Each was placed in an invidious position where their IDRs would be actioned by a senior officer who was the user of force. Two officers described SPO Hawthorn's use of force as follows:

he [prisoner B] would have struck Senior Officer Hawthorn had he not used chemical agent.²

[prisoner B was] leading towards physical action against Senior Officer Hawthorn had he not used the chemical agent.³
- [18] A clearer picture of what actually happened emerged when these officers were examined by the Commission. Their evidence, under oath, aligns with the true facts as depicted in the CCTV footage.
- [19] One of the officers did not complete his report independently. He copied critical parts of the other officer's report, a practice which he observed numerous times in his short time with DoJ. This initially gave rise to an inference of collusion.

² L Carter IDR (the names of some officers have been changed).

³ A King IDR.

- [20] DoJ's processes allowed SPO Hawthorn, as the senior prison officer, to endorse the reports. He did so even though there was evidence that indicated at least one and possibly two IDRs were not prepared independently.
- [21] Inaccuracies in the IDRs were perpetuated in several further important official records that SPO Hawthorn prepared, or had a significant role in assisting to prepare, aligned with his version.
- [22] SPO Hawthorn framed his reporting in a manner to minimise and conceal the force actually utilised against the prisoners. He exploited DoJ's reporting processes by:
- creating and approving false and inaccurate government records;
 - attempting to deflect a proper inquiry into his use of force against prisoners; and
 - neglecting his duties to ensure accurate reporting of use of force incidents.
- [23] The Commission gave SPO Hawthorn the opportunity to respond to a draft of the report before finalising its opinions. He provided a response and a further email.
- [24] In his response, SPO Hawthorn was adamant that his use of force on each occasion was justified. He strongly denied the opinion set out in paragraph 22. SPO Hawthorn did not supply information that was significantly different from his own evidence.
- [25] The Commission has considered his response in light of all the evidence. SPO Hawthorn had effective control over the reporting process. The extent to which his and other reports differed from the CCTV footage is evidence of the corrupt motive on his part to deflect any scrutiny of his role to his own advantage. The Commission has formed an opinion of serious misconduct in respect of SPO Hawthorn.⁴
- [26] The Commission also gave DoJ the opportunity to consider a draft report.
- [27] DoJ in its response accepts the report and recommendations.⁵
- [28] DoJ is currently progressing two disciplinary matters in relation to SPO Hawthorn.

⁴ *Corruption, Crime and Misconduct Act 2003* s 4(a). *Briginshaw v Briginshaw* (1938) 60 CLR 336.

⁵ Letter from Director General Adam Tomison to Commissioner, 25 May 2018, p2.

CHAPTER ONE

Relevance of use of force to the Commission investigations

- [29] Allegations and information received by the Commission led to a reasonable suspicion that officers and senior prison management may have been involved in serious misconduct by:
- making false or inaccurate statements in IDRs concerning use of force against prisoners;
 - colluding in reporting use of force incidents;
 - failing to discharge duties in relation to reporting use of force incidents;
 - attempting to improperly influence whether or not an investigation into a use of force incident was conducted;
 - deflecting investigators away from properly investigating excessive use of force incidents; and
 - perpetuating a culture that downplayed use of force incidents.
- [30] The accurate and factual reporting of use of force incidents is critical to the security, good order and management of a prison, and maintenance of integrity in a review process.
- [31] CCTV footage of SPO Hawthorn's use of force against prisoners was examined, reviewed and analysed against officers' IDRs. Other important DoJ records concerning the use of force incidents were scrutinised.
- [32] The Commission's review and analysis process indicated that several officers had completed IDRs materially at odds with the CCTV footage.
- [33] Investigation revealed inaccuracies were perpetuated in other important DoJ records concerning the use of force incidents.
- [34] Interviews were conducted by DoJ investigators and reviewed by the Commission.
- [35] DoJ's critical training documents, records and manuals were examined, analysed and considered, as were Policy Directives (PDs), Operational Instructions, and Adult Custodial Rules under the statutory scheme applying to prisons.

- [36] In November and December 2017, the Commission examined several officers, including a Superintendent, members of the prison's senior management and prison officers.
- [37] To protect the security of some officers who continue to work in prisons and in respect of when an opinion of serious misconduct has not been formed, the Commission has anonymised their names. Superintendent (Supt) Hedges is the officer in charge of EGRP. He is therefore named but it is not suggested in this report that he did anything improper. For reasons of privacy, the Commission has not identified the prisoners.

CHAPTER TWO

OVERVIEW OF THE REGULATORY FRAMEWORK AND PROCEDURES

Oath of engagement

- [38] A prison officer's oath of engagement includes a commitment to:
- uphold the *Prisons Act 1981* (Prisons Act) and relevant subsidiary legislation;
 - deal with prisoners fairly and impartially; and
 - obey lawful orders of an officer in a supervisory capacity.⁶

The *Prisons Act 1981*

- [39] The Prisons Act sets out statutory duties and discretions of prison officers, which includes a duty to:

... report to the superintendent every matter coming to his notice which may jeopardise the security of the prison or the welfare or safe custody of prisoners⁷

and a discretion to:

... issue to a prisoner such orders as are necessary for the purposes of this Act, including the security, good order, or management of a prison, and may use such force as he believes on reasonable grounds to be necessary to ensure that his or other lawful orders are complied with.⁸

(Emphasis added)

- [40] The imposition of duties and discretionary powers is important to ensure prisons operate effectively.
- [41] A prison officer who perversely and without lawful excuse omits or refuses to do any act which is his or her duty to do by virtue of his or her employment risks committing a crime.⁹
- [42] A prison officer who makes an inaccurate report of a matter for corrupt purposes or otherwise aims to deflect an investigation may be subject to disciplinary or criminal proceedings.¹⁰

⁶ Prisons Act s 13(2); *Oaths, Affidavits and Statutory Declarations Act 2005* Pt 2.

⁷ Prisons Act s 12(b).

⁸ Ibid s 14.

⁹ *Criminal Code* s 173.

¹⁰ Ibid s 85.

Procedural framework - use of force and reporting: Policy Directives

- [43] Together with Operational Instructions and Adult Custodial Rules,¹¹ PDs assist DoJ to manage the overall system of prisons. PDs are derived from the Prisons Act.
- [44] Relevantly, a PD guides officers as to their obligations under the Prisons Act concerning use of force and reporting those incidents.
- [45] The following PDs are relevant:
- PD-41 - Reporting of Incidents and additional notification; and
 - PD-5 - Use of Force.
- [46] The express purpose of PD-41 is 'to establish clear standards and procedures for the reporting of incidents in a timely manner, **ensuring transparency, accuracy and accountability.**'
- (Emphasis added)
- [47] DoJ sets out the principles it expects of prison officers in relation to using force during the course of their duties.¹²

¹¹ Adult Custodial Rules are made under the Prisons Act s 35 by the Department head and require ministerial approval.

¹² *Policy Directive 5* section 3.

CHAPTER THREE

REPORTING USE OF FORCE IN PRISONS

Use of force

- [48] PD-5 defines use of force as 'The application of [DoJ] approved control, restraint and physical force techniques to maintain security and good order ...'.¹³
- [49] The use of chemical agent¹⁴ by a prison officer to establish control over a prisoner or to maintain security and good order, is an example of a use of force.
- [50] A prison officer must not use force unless the officer 'has successfully undergone a [DoJ] approved training programme'.¹⁵ It is mandatory for prison officers to refresh training annually in relation to chemical agent, escorts, restraints (batons) and use of force review.¹⁶
- [51] In any case in which the use of force by one person against another is lawful, the use of more force than is justified by law under the circumstances is unlawful.¹⁷ Use of force by an officer that is not authorised under the Prisons Act is unlawful.

The reporting process

- [52] Procedures under PD-41 are triggered when a prison officer uses force against a prisoner.
- [53] This PD strives towards ensuring compliance with the Prisons Act s 12 mandatory requirement to 'report to the Superintendent every matter coming to his notice which may jeopardise the security of the prison or the welfare or safe custody of prisoners'.
- [54] Where a prison officer during a use of force event uses a weapon, such as chemical agent,¹⁸ it is mandatory to categorise this as a critical

¹³ The term use of force does not extend to the application of approved control, restrain and physical force techniques where it is required to be used 'under an escort routine or as part of a written management regime which has been approved by the designated superintendent'.

¹⁴ Oleoresin Capsicum Spray (OC Spray).

¹⁵ *Policy Directive 5* [4.1.6].

¹⁶ *Ibid* [4.1.8].

¹⁷ *Criminal Code* s 260.

¹⁸ *Weapons Act 1999* ss 7, 10; *Weapons Regulations 1999* reg 10.

incident.¹⁹ Where injury is sustained by a prisoner and/or officer, the use of force event must be described as a critical incident.²⁰

[55] A critical incident is subject to more onerous and timely reporting requirements under PD-41. These requirements set out in Prison Order No 10/2016 are:

- prompt notification to the designated Superintendent of the prison;
- telephone notification to the Coordination Centre Duty Manager and compliance with any requirements made by him or her;
- the designated Superintendent notifying the Assistant Commissioner Custodial Operations;
- the Assistant Commissioner Custodial Operations notifying the Deputy Commissioner Adult Justice Services;
- a Critical Incident Briefing document (PD-41 Appendix 2A) be electronically communicated to the Coordination Centre at a specific email address;
- reporting any incident relating to suspected or actual staff misconduct to the Integrity (Investigations) Directorate; and
- the normal process for reporting a non-critical incident.

[56] PD-41 section 6 sets out the minimum Incident Report (IR) requirements. Critically, it states 'the Department places considerable emphasis on the need for accuracy and clarity in [Incident Report] preparation'.

[57] An IR is generated on DoJ's Total Offender Management Solution (TOMS) following a critical or non-critical incident and may be generated by any officer. One report is required for each incident. The IR comprises of:

- an IDR completed by all staff involved in an incident;
- if applicable, the report of a health services staff member who medically treated a person with all pertinent information; and
- Incident Minutes (IMs).

[58] PD-5 also requires the completion and submission of a Use of Force Designated Superintendent report (Appendix 3 form) as soon as practicable (but no later than 10 working days) to the Superintendent Operations for their review.

¹⁹ *Policy Directive 41*, Appendix 1B, Item 26.

²⁰ *Ibid.*

- [59] It is mandatory to include the following in the PD-5 report:
- an overview of events from the designated Superintendent;
 - copies of IDRs from all staff involved;
 - medical staff reports; and
 - all photographs and CCTV footage of the incident.²¹
- [60] The policy requires the Superintendent Operations to send their review back to the designated Superintendent (refer to Appendix 7 - Review of use of force reporting for guidelines on submitting Use of Force Designated Superintendent report).²²
- [61] If designated Superintendents or reviewing officers believe that further investigation is required, they must:
- ... refer the incident to the Manager of the Internal Investigations Unit (IIU) for investigation. The referral is to be noted in their report. When an incident has been referred for investigation all information at hand is to be collected and made available to the IIU investigator.*²³
- [62] DoJ's Internal Investigations Unit (IIU) must be advised when a prisoner alleges a complaint, irrespective of whether the prisoner wants the complaint dealt with by the WA Police Force or IIU.²⁴

Incident Description Reports

- [63] IDRs are statements of DoJ staff (primarily prison officers) which record evidence that may be used in court or disciplinary proceedings. IDRs are also official DoJ records.
- [64] It is mandatory for all staff members involved in an incident to complete an IDR 'independently and prior to the cessation of duty, unless otherwise approved by the superintendent'.²⁵
- [65] Staff members do not review CCTV footage of the incident prior to submitting their IDR.

²¹ Policy Directive 5 [4.2.4].

²² Ibid [4.2.2].

²³ Policy Directive 5 Appendix 7 [1.14].

²⁴ Ibid [1.15].

²⁵ Policy Directive 41 [6.4].

- [66] A prison officer was examined by the Commission and asked about his understanding of what an IDR should include. He said:

To write exactly what you've seen and heard to be exact, also it starts with the date, the date of birth, where you're positioned, how many hours you work. At the end of it, it says submit it for your information and action. The part in between is to do with witnesses, involved parties and actually what happened. That's also to be done by yourself, not in collusion with other people.

...

... you are not to collude on the report, and you're to do the report as quickly as possible so it's still fresh in your memory, and just to write exactly what you saw and what happened.²⁶

- [67] DoJ's policies, processes and accepted practice allow a senior officer who is a unit manager to review and action the IDRs of other witnesses before finalising and submitting the IDR. This occurs even where the senior officer is the primary user of force against a prisoner. The senior officer also actions his or her own report.

- [68] There is an ability in TOMS for staff to access IDRs relating to an incident in which they were involved, prior to submitting their own IDR for the same incident.²⁷ One officer said:

There is an ability to read what someone has already posted because it saves into the system. If you've read it and tried to copy and paste it, it would be at your own detriment, because that's just straight-out collusion.²⁸

- [69] Prison staff are concerned about confidentiality of matters they report. One prison officer said:

Most, if not all instances where an officer has raised concerns regarding another officer or manager ... that officer has become a target within minutes of raising the issue.²⁹

- [70] Any prison officer may readily review the IDR of other officers. This is a serious disincentive for officers to report accurately matters that may be adverse to a colleague (particularly a senior colleague to whom they report).³⁰

- [71] DoJ's processes and accepted practice require senior officers to review and action IDRs of prison officers under their control and supervision.

²⁶ A King transcript, private examination, 6 November 2017, p 3.

²⁷ J L Hedges transcript, private examination, 1 December 2017, p 61.

²⁸ A King transcript, private examination, 6 November 2017, p 7.

²⁹ J Holland transcript, private examination, 30 November 2017, p 38.

³⁰ J L Hedges transcript, private examination, 1 December 2017, p 61.

Incident Minutes

- [72] The designated Superintendent must ensure that officers' IDRs are finalised and that IMs are submitted.³¹ The process for completing IMs was described by the designated Superintendent at EGRP:

*Senior officers in charge write their incident minutes, and then the principal officer or an assistant superintendent level would also add their minutes. Once the incident description is entered, I'm pretty sure that the whole TOMS incident report or folio is locked, and nothing can be changed or edited ...*³²

- [73] IMs also provide an opportunity for the senior officer or principal officer to consider what occurred and make recommendations.
- [74] If a senior prison officer is the primary user of force, the practice allows him or her to control the reporting of the incident through at least reviewing and actioning of IDRs of other officers, preparing the IMs and submitting the IR.

Mandatory reporting of suspected misconduct and/or potential criminal activity by staff

- [75] PD-41 imposes a mandatory requirement to report '[a]ny incident relating to suspected or actual staff misconduct, whether on duty or off duty' to the Investigations Directorate. This includes assaults, misuse of force options, and falsification of records.
- [76] This PD requires the report to be made 'as soon as practicable after becoming aware of the suspected misconduct or potential criminal activity of staff'.
- [77] The mechanisms to report suspected misconduct and/or potential criminal activity of staff are set out in the PD.

³¹ *Policy Directive 41* [6.12].

³² J L Hedges transcript, private examination, 1 December 2017, p 32.

CHAPTER FOUR

Senior Prison Officer Hawthorn's reports on his critical use of force against prisoners

[78] SPO Hawthorn has worked at several prisons, including Hakea Prison, EGRP and Casuarina Prison.

[79] Between December 2016 and May 2017, he was seconded to EGRP.

[80] The current EGRP facility is relatively new. It became fully operational on 8 August 2016. Supt Hedges:

*We've transitioned into a modern, sophisticated, 350-bed, state-of-the-art gaol with ... nearly 400 cameras in the system. ... at December [2017] we'll have 80-odd per cent of staff with less than 12 months' experience. The senior officer group who are really my middle managers that I rely on in all of these cases of which Mr Hawthorn was one, I think out of the 18 positions I've only got six substantive positions, the rest are all acting up, very inexperienced.*³³

[81] SPO Hawthorn has been an officer with DoJ for almost 11 years. As a senior officer, he manages units of prisoners and supervises other prison officers.

[82] SPO Hawthorn did not evince a genuine commitment to the use of force principles espoused by DoJ in relation to his use of force against prisoner A and prisoner B. The Commission's investigation revealed that SPO Hawthorn:

- prepared reports about his use of force against prisoners which contained statements that did not align with the facts and were inconsistent with CCTV footage of the incident;
- controlled the reporting processes in relation to incidents where he is the primary user of force in a manner that made the incident less susceptible to independent review;
- considered he was entitled to use chemical agent against a prisoner as soon as a prisoner signifies non-compliance;
- used force incompetently and contrary to training manuals;
- used force as a first option rather than as a last resort;
- used unnecessary force in a manner that placed the security and good order of the prison at risk; and

³³ J L Hedges transcript, private examination, 1 December 2017, p 5.

- used force even when it was unnecessary and a perceived threat has vanished.

[83] SPO Hawthorn was in a position of power and influence at EGRP, by virtue of his position, experience and the Superintendent's reliance upon him and other senior officers. One officer described SPO Hawthorn's position vis-à-vis those he supervised, "To them he was a senior officer that came from Hakea, one of our biggest prisons, so he would know everything and what he does is correct".³⁴

[84] Supt Hedges is the designated Superintendent at EGRP. He acted in the role for about two months before being appointed to the substantive role in January 2017.

[85] SPO Hawthorn perceived he had greater reign to use chemical agent at EGRP against prisoners under Supt Hedges' watch:

*... there was a senior management out there [at EGRP], the superintendent, stated that he would charge officers if they use their chemical agent. But that changed when John Hedges, who's the superintendent now, went out there.*³⁵

[86] Supt Hedges made new officers aware of their ability to use force to generate compliance by prisoners.

³⁴ J Holland transcript, private examination, 30 November 2017, p 30.

³⁵ G V Hawthorn transcript, private examination, 6 November 2017, p 7.

CHAPTER FIVE

The lead up to the incident involving prisoner A

- [87] By 4 May 2017, EGRP's senior management team was dissatisfied with senior prison officers' efforts to prevent prisoners hoarding linen in their cells. Hoarding of linen increases a variety of risks, including prison escapes.
- [88] SPO Hawthorn was the senior prison officer in charge of Unit 2 on 4 May 2017. Along with other units, the prisoners' cells in Unit 2 were stripped of excess linen as instructed by the senior management team.
- [89] Principal Prison Officer (PPO) Jake Holland had responsibility for all uniformed staff, including matters concerning standards and compliance. On 4 May 2017, he was assisting with managing these issues and risks in Unit 2.
- [90] PPO Holland located five or six bars of soap in the cell of prisoner A. Prisoner A was a 51 year old minimum security prisoner.
- [91] PPO Holland wrongly assumed it was prison issued soap and confiscated it. However prisoner A had legitimately purchased soap from the prison canteen.

Senior Prison Officer Hawthorn's use of force against prisoner A

- [92] PPO Holland addressed the prisoners about the removal of excess linen and other items in the cells after the clean-up occurred.
- [93] When PPO Holland concluded his address to prisoners, prisoner A was not happy. He directed his agitation towards PPO Holland.
- [94] What happened next was recorded on CCTV footage.
- [95] SPO Hawthorn and other prison officers intervened and moved prisoner A away from PPO Holland. Prisoner A provided some resistance to SPO Hawthorn and another officer. Prisoner A held the handle of a door and would not let go, despite SPO Hawthorn's efforts to remove his hands.
- [96] Within nine seconds of the prisoner holding the door handle, SPO Hawthorn requested chemical agent from his colleague. Once SPO Hawthorn obtained the chemical, he used it almost immediately (within about three seconds). This was not apparent in the subsequent report.

- [97] SPO Hawthorn's use of chemical agent against prisoner A was not in line with DoJ's Chemical Agent manual. SPO Hawthorn's close proximity to prisoner A when he discharged chemical agent towards prisoner A's facial area is contrary to positioning and engagement range standards and DoJ training. It exposed prisoner A to an unacceptable risk of hydraulic eye damage.
- [98] SPO Hawthorn's report did not explain why he deployed chemical agent in this manner, nor provided justification for doing so.
- [99] The manner SPO Hawthorn deployed the chemical agent against prisoner A placed his colleagues at a heightened risk of contamination and enhanced the risk of cross-contamination. These risks eventuated.

Senior Prison Officer Hawthorn's unnecessary use of force

- [100] SPO Hawthorn's use of chemical agent against the prisoner was unnecessary. The Commission received evidence from other officers that indicated:
- the prisoner presented no threat;
 - SPO Hawthorn made no attempts to deescalate the situation;
 - SPO Hawthorn used force as a first option rather than a last option;
 - SPO Hawthorn's use of chemical agent was unnecessary and excessive; and
 - SPO Hawthorn's deployment of chemical agent was dangerous.

Senior Prison Officer Hawthorn's control over the reporting process

- [101] SPO Hawthorn had influence over the use of force and critical incident reporting process, despite being the primary user of force. He:
- reviewed and actioned other officers' IDRs;
 - prepared and actioned his own IDR;
 - prepared minutes for the IDR;
 - submitted the IDR; and
 - prepared PD-41 for the Superintendent.

- [102] DoJ's processes allow for a unit manager (senior officer) to oversee the reporting and minuting of the incident, even where that senior prison officer is the primary user of force.
- [103] SPO Hawthorn made a finding/recommendation that the prisoner be referred for formal charge in the IMs. This highlights the significance reporting has on the prosecution of prison offences.

Senior Prison Officer Hawthorn's Incident Description Report

- [104] SPO Hawthorn states in his IDR:

The writer requested Chemical Agent from [FERGUSON, David] [...] the writer then gave [prisoner A] a formal warning that if he continued to be non-compliant Chemical Agent would be used. He continued to resist and the writer deployed the Chemical Agent giving him a warning.

- [105] CCTV shows that SPO Hawthorn possessed the canister of chemical agent for about three seconds before he deployed it.
- [106] It is implausible that SPO Hawthorn issued a warning in the manner he described, between the time of requesting the chemical agent and deploying it. Moreover he did not allow prisoner A a reasonable time to comply with any warning.
- [107] PD-5 sets out what is required before a prison officer may deploy chemical agent:

4. Warning

4.1 Before the use of chemical agents, a prison officer shall, where it is practicable in the circumstances to do so:

4.1.1 issue such orders to a prisoner(s) as are considered necessary to restore or ensure the good order and security of the prison; [and]

4.1.2 instruct the prisoner(s) that if he/she does not comply with the order, then chemical agent will be used.

4.2 The name of the prison officer using the warning shall be recorded in subsequent reports of the incident.³⁶

- [108] PPO Holland described the incident as follows:

... I was addressing the prisoners in the unit and telling them that I'd be back in an hour because it was a pigsty and fix it and so on and so forth, he got agitated and [prisoner A] was asking, 'Where's my soap?' He was up on the top landing. He came down the stairs and he started spruiking off at me and I said, 'What's your

³⁶ Policy Directive 5 Appendix 10 [4].

problem?' He said, 'You took my soap,' ... I said, 'Look, if I took your soap, it's in the block office, you'll get it back. Now, just settle down.' But with [prisoner A], he's got a very quick flashpoint and it takes him a while to calm down. Gary Hawthorn in this instance, when [prisoner A] wasn't listening to me, Gary and two or three officers, I honestly can't recall, grabbed him to move him away. He resisted and he's a big boy, and he managed to get into the corner where the block office, there's a wall here, there's a door there which leads into a secure bolthole prisoners don't have access to and he'd managed to wedge himself in and he either had hold of the door handle or one of the little nail box type things that were set into the wall, and they couldn't break his grip because he's a big lad and he was hanging on; and then I saw them move him away and then I started tasting the chem[ical] agent ...³⁷

Use of force reporting - Senior Prison Officer Hawthorn's role in Policy Directive 41 process

[109] SPO Hawthorn's use of chemical agent against prisoner A was a critical incident that triggered reporting requirements PD-41 under Prison Order No 10/2016.

[110] Despite SPO Hawthorn being the primary user of force, he took control of the reporting process with the approval of Supt Hedges. The PD supports this process.³⁸

[111] Supt Hedges clarified relevant processes:

*What about if the unit managers are involved in the use-of-force incident - - -?---
Yeah.*

- - - are they allowed to be preparing the relevant report documentations and the PD41 or PD5?---Are they allowed to?

Yes. Do you allow - - -?---I think the department's expectation is that the unit manager will do the PD41 document.

If they're involved in a use-of-force incident?---Yes, yes, yes. I think the expectation generally is that those who are involved in the use of force do generate the documents, yes.

In terms of the - even preparing your PD5, appendix 3, designated superintendent's report?---Yes. I personally don't see an issue with them starting off and generating the original shell of that document.

And then that document as a matter of course now goes to who after that?---Back to the management team, either the principal officer or the senior – or Mr [Dixon], the security manager, and myself.³⁹

³⁷ J Holland transcript, private examination, 30 November 2017, p 36.

³⁸ *Policy Directive 41* [6.12].

³⁹ J L Hedges transcript, private examination, 1 December 2017, pp 17-18.

- [112] The IDRs of other witnesses were actioned subsequent to SPO Hawthorn's summary of the incident being completed.
- [113] SPO Hawthorn's summary of the incident was set out in the PD-41 report on 4 May 2015 at 5.15 pm. This was almost identical to his own IDR which he created on 4 May 2017 at 4.01 pm and actioned himself eight minutes later. The final IDRs of all other witnesses, with the possible exception of one, were not considered in the incident summary.
- [114] SPO Hawthorn prepared PD-41 for Supt Hedge's endorsement. The document evidences that:
- the designated Superintendent was notified by telephone at 3.20 pm on 4 May 2017;
 - the Superintendent Administration was notified at 4.43 pm on 4 May 2017;
 - the prisoner involved was prisoner A;
 - the incident was summarised by SPO Hawthorn in the section 'Summary of the incident' at 5.15 pm on 4 May 2017;
 - the incident was recorded on closed circuit television and downloaded;
 - the incident was reviewed by the senior management team at EGRP, at an unknown time after 5.15 pm on 4 May 2017 but before 8 May 2017 at 10.15 am; and
 - the Critical Incident Brief prepared by SPO Hawthorn was endorsed by Supt Hedges under the section 'Superintendent's comments' on 8 May at 10.15 am.⁴⁰
- [115] The summary omitted details of several other prison officers involved in the critical incident. Relevantly, the following was set out in the summary:
- ... on reaching the corner where [prisoner A] grabbed hold of the control corridor door handle with both hands and refused to comply, using his full strength to resist. As [prisoner A] refused to comply we were unable to apply handcuffs at that point.*
- The writer then requested Chemical Agent from [FERGUSON, David] [...] the writer then gave [prisoner A] a formal warning stating that if he continued to be non-compliant Chemical Agent will be used. He continued to resist and the writer deployed the Chemical Agent giving him a second warning.⁴¹*

⁴⁰ There was a previous requirement under PD-41 that the Critical Incident Brief be submitted within 1 hour of acknowledging a critical incident occurred. Prison Order No 10/2016 modified this requirement to be 'as soon as practicable'. This Order has been in force since 23 December 2016.

⁴¹ G V Hawthorn, Critical Incident Brief, summary of incident p 2.

[116] CCTV footage, when seen in the context of this information, shows the following:

Recording 0:18: prisoner grabs hold of the door handle.

Recording 0:27: SPO Hawthorn requests chemical agent from PO David Ferguson.

Recording 0:30: SPO Hawthorn takes possession of the chemical agent from PO Ferguson.

Recording 0:33: SPO Hawthorn deploys the chemical agent against prisoner A.

[117] SPO Hawthorn's summary of the incident, in so far as this aspect is concerned, is inconsistent with the CCTV footage and is implausible.

[118] If any warning was given, he did not provide prisoner A with a reasonable opportunity to comply with any such warning.

[119] The way in which SPO Hawthorn reported the matter justified his use of force, rather than accurately reporting a critical incident. The effect may be to deflect attention away from his questionable use of force.

Policy Directive 5 - Designated Superintendent's report

[120] The Commission received evidence from the Security Manager, Mr John Dixon, which tends to indicate he completed the PD-5 report for the incident involving prisoner A. The PD-5 report perpetuates SPO Hawthorn's version of events and gave great weight to what he stated (and omitted to state).

Resolution of the incident involving prisoner A

[121] The incident involving prisoner A was supposedly dealt with locally at EGRP.⁴² As Supt Hedges said in an email some months later on 28 September 2017 to a DoJ Principal Assessment Officer:

All I can find is the required PD41 and PD5 documents we completed and submitted to HO (Use of Force committee) at the time.

At the time we considered the matter to be a 'lessons learnt' for staff and ourselves.

⁴² J Dixon transcript, private examination, 30 November 2017, p 37.

- [122] Supt Hedges apparently had no dealings with the Committee about this incident. He could not describe what the Committee did or who was on the Committee, other than mentioning one Committee member.
- [123] Whether SPO Hawthorn and others actually learned any lessons from the incident is questionable in light of what happened on 20 May 2017.
- [124] DoJ records show that SPO Hawthorn did not have up to date chemical agent training as at May 2017, a mandatory requirement and pre-requisite for this use of force option.
- [125] The PD-5 for the prisoner A incident did not state whether his chemical agent training was up to date. Rather it recorded: 'Satellite Trainer not available at time of completing this form, will obtain records at earliest convenience.'
- [126] SPO Hawthorn told the Commission DoJ records were not complete as at November 2017. He said that he attended Mark 9 training delivered at the Special Operations Group headquarters on an unknown date in 2016. SPO Hawthorn indicated this involved training for a bigger disturbance using a larger deployment agent. This vague information and the manner he deployed chemical agent against prisoner A has not persuaded the Commission he had up to date chemical agent training in May 2017.
- [127] The reports in respect of the prisoner A incident were not accompanied by CCTV footage when submitted in line with PDs. This is despite a mandatory requirement to include CCTV footage recordings of the incident.
- [128] A review of the critical use of force incident concerning prisoner A, in the absence of CCTV footage, was pointless given SPO Hawthorn's control over the reporting process.

CHAPTER SIX

Reporting on the critical use of force incident involving prisoner B

- [129] SPO Hawthorn was Unit Manager of EGRP's Crisis Care Unit (CCU) on Saturday 20 May 2017. This unit is reserved for prisoners at risk, including those at risk of self-harm, who have a mental illness, or both.

Senior Prison Officer Hawthorn's control of prison officers

- [130] SPO Hawthorn was responsible for supervising and controlling prison officers in the CCU on 20 May 2017.⁴³ These included Prison Officer (PO) Lacey Carter and Probationary Officer Adam King, who commenced employment with DoJ in July and August 2016, respectively.
- [131] PO Carter brought about 20 years of police force experience to DoJ. In her 20 year police career, she observed chemical agent used about two or three times by other police officers. She said she had had to draw chemical agent as a weapon during police duties but had never deployed it.⁴⁴
- [132] Probationary Officer King brought three years of experience as a transport officer for a company contracted to DoJ. He conveyed prisoners from gaols to courts and hospitals on behalf of DoJ in his role. Probationary Officer King carried chemical agent in his previous role but never used it. He said "management just disliked the use of [chemical agent] because of the repercussions of it as a contractor to the Department".⁴⁵
- [133] Both appreciated that IDRs could be used for court or disciplinary proceedings.⁴⁶

Prisoner B in the Crisis Care Unit

- [134] On 20 May 2017, prisoner B was taken into custody at EGRP for a suspected breach of a bail undertaking. He was placed in the CCU.

⁴³ Prisons Act s 14(1)(c).

⁴⁴ L Carter transcript, private examination, 6 November 2017, pp 2-3.

⁴⁵ A King transcript, private examination, 6 November 2017, pp 2-4.

⁴⁶ L Carter transcript, private examination, 6 November 2017, p 9; A King transcript, private examination, 6 November 2017, p 3.

[135] SPO Hawthorn said that he did not know why prisoner B was in the CCU.⁴⁷ He described this unit as being "for people in crisis; you know, suicidal, suicidal thought, self-harm thought, not coping".⁴⁸

[136] Prisoner B was taken to the CCU as a temporary measure as it was believed he would obtain a surety and be granted bail promptly. Prisoner B told DOJ investigators:

... court was, yeah, Saturday morning. I was locked up. Yeah, they put me into the cell over here because they didn't have enough room up in the units. They said, 'Well, sleep here; shouldn't be a couple of hours, waiting for surety.' But the court's given my old surety papers and not the new ones ... So there was like a mix up.⁴⁹

[137] As with any prisoner on remand, Prisoner B "is entitled to free phone calls to ensure or access bail and surety".⁵⁰ Unit managers are to assist the prisoner with this process.⁵¹ Supt Hedges said:

He's entitled to have his phone account, and senior officers are empowered to activate phone accounts for prisoners there and then on the spot. He should have had his phone account activated and then bail surety is up to him, staff don't even have to worry about it ...⁵²

[138] Prisoner B said that he had been given a phone call in relation to his surety earlier in the day when he arrived at EGRP. He said he asked for other calls throughout the day so he could find out about the status and progress of his surety.⁵³ He described what was happening throughout the day:

I was asking like [for] another one [telephone call] and then it was like "Nuh" and then, "In a minute. In a minute" and then when it comes, night-time, I think it was, about five-ish, maybe, I mean towards lockup ...⁵⁴

[139] Probationary Officer King allowed prisoner B out of his cell to get some dinner at about 5.00 pm. He described prisoner B as being agitated and wanting to get his bail when he let prisoner B out of his cell.

[140] Conjecture surrounded the status and progress of prisoner B's proposed surety.

[141] Prisoner B spoke with SPO Hawthorn and PO Carter about wanting a telephone call to make arrangements regarding his surety. These

⁴⁷ G V Hawthorn transcript, private examination, 6 November 2017, pp 15-16.

⁴⁸ Ibid p 16.

⁴⁹ DOJ interview with prisoner B, 21 August 2017, p 3.

⁵⁰ J L Hedges transcript, private examination, 1 December 2017, p 40.

⁵¹ *Policy Directive 85* [3.74].

⁵² J L Hedges transcript, private examination, 1 December 2017, p 40.

⁵³ DOJ interview with prisoner B, 21 August 2017 p 3.

⁵⁴ Ibid p 5.

discussions took place at about 5.10 pm while prisoner B was standing in the CCU day room next to the prison officer's post.

- [142] SPO Hawthorn described his initial discussion with prisoner B at the officer's post to the Commission:

... at first I was talking to him and he was quite calm and, you know, listening, responsive to what I was saying. He had good eye contact. He didn't you know, shy away. He kept saying he wanted a phone call and I was specifically told he's not to get a phone call to phone his surety because as it turned out, the JP [Justice of the Peace] refused the surety because he - he knew that the person was being stood over and threatened by him in the community.⁵⁵

- [143] SPO Hawthorn's IDR gave a different impression:

... on being let out he [prisoner B] made a straight line towards the writer asking about his surety. I informed him that if was [sic] all in hand that that person on the outside was sorting it out but it would not be completed until tomorrow morning as per information received from the Gate Senior Officer. He would not accept the answer and continued to demand phone calls and that it was up to us to arrange his surety for him tonight, [prisoner B] was belligerent and argumentative throughout the conversation.⁵⁶

- [144] Prisoner B was not given a telephone call after his approximate four minute discussion with SPO Hawthorn at about 5:15 pm. SPO Hawthorn said "There's no point in putting the phone on ... your surety has been arranged. It's happening not today, tomorrow morning." Prisoner B became visibly agitated after the discussion. Prisoner B acknowledged he was confrontational and used expletives.

- [145] SPO Hawthorn told prisoner B to return to his cell and he initially refused to comply with the order.

Senior Prison Officer Hawthorn's use of chemical agent against prisoner B

- [146] What happened next is recorded on three CCTV cameras and form part of this report.

- [147] During examination, SPO Hawthorn said that when prisoner B picked up the chair, he had the right to use chemical agent. He also said each time he pushed prisoner B, he had the right to use chemical agent against him. He said he chose not to at those points in time.⁵⁷

⁵⁵ G V Hawthorn transcript, private examination, 6 November 2017, p 13.

⁵⁶ G V Hawthorn IDR.

⁵⁷ G V Hawthorn transcript, private examination, 6 November 2017, p 22.

[148] SPO Hawthorn's understanding of when he was able to utilise force or chemical agent did not align with DoJ's policy and the general principles on use of force. SPO Hawthorn's belief that he had an automatic right to use chemical agent when a prisoner did not comply with an order failed to have regard to the following:

- The initial response by a prison officer shall involve the use of negotiation and conflict resolution techniques.
- Force shall only be used when all other avenues have been exhausted or are considered impractical.
- Staff should seek to deescalate the situation and reduce the level of force used as soon as possible.
- The amount of force used shall be the minimum required to control the situation or behaviour and maintain security and good order.
- Force shall cease when the level of perceived threat can be managed without applying force.
- Force shall not be applied by a prison officer unless that officer has successfully undergone a DoJ approved training programme.

[149] Prisoner B arrived at his cell door 44 seconds after SPO Hawthorn first aimed the chemical agent canister towards his face. In that time SPO Hawthorn escorted him from the CCU day room, down a corridor to his cell.

Reporting on the critical use of force incident - chemical agent

[150] Despite being the primary user of force, SPO Hawthorn was again in a position to influence the reporting of this critical use of force incident, due to DoJ processes. He:

- prepared and actioned his own IDR;
- reviewed and actioned the IDRs of PO Carter, Probationary Officer King and others;
- prepared the IMs; and
- prepared and submitted the IR (including an incident summary).

[151] SPO Hawthorn's incident summary stated that 'Prisoner took a fighting stance and threatened to assault staff. Chemical Agent Used'.

[152] SPO Hawthorn's IDR states:

*It was when he reached his cell did he turn and made a gesture that he was going to continue to fight, I gave him a push into his cell **it was then he went to come back at me so I deployed the Chemical Agent.***

Due to his aggression the cell door was secured.⁵⁸

(Emphasis added)

[153] SPO Hawthorn prepared minutes that reiterated the IDR.

[154] SPO Hawthorn's recording of what happened at prisoner B's cell door is false. It is inconsistent with the CCTV footage and the evidence of others.

[155] The same applies to the IDRs of PO Carter and Probationary Officer King which were reviewed and actioned by SPO Hawthorn. In their respective IDRs, they relevantly stated:

*PO Carter: When he was almost at his cell, [prisoner B] removed the t-shirt from his face, and I believe that **he would have struck Senior Officer HAWTHORN had he not used chemical agent.***⁵⁹

*Probationary Officer King: When he was almost at his cell, [prisoner B] removed the t-shirt from his face, and continued in a manner that was highly aggressive and **leading towards physical action against Senior Officer HAWTHORN had he not used chemical agent.***⁶⁰

(Emphasis added)

[156] From a review of the IDRs of PO Carter and Probationary Officer King which SPO Hawthorn reviewed and actioned, it can be inferred they were not prepared independently.

[157] PO Carter and Probationary Officer King's IDRs were identical in critical areas, including matters that were not accurate and inconsistent with the CCTV footage. Initially, the Commission drew an inference of collusion.

[158] Probationary Officer King accepted that copying and pasting would be at a prison officer's own detriment "because that's just straight out collusion". However his counsel was given an opportunity to ask questions. The following exchange took place:

How does your understanding of a concept of two officers collaborating to produce a report, how does that relate to your cutting and pasting the contents of somebody else's report into your own?---I don't think they do relate, because we weren't working together.⁶¹

⁵⁸ G V Hawthorn IDR.

⁵⁹ L Carter IDR.

⁶⁰ A King IDR.

⁶¹ A King, transcript, private examination, 8 November 2017, p 4.

- [159] After being pressed by the Commission, Probationary Officer King acknowledged that he has seen officers, on numerous occasions, copy and paste other officers' IDRs.
- [160] Probationary Officer King accepted that he reviewed PO Carter's IDR and copied it. This is apparent comparing the two reports. The weight which can be attributed to Probationary Officer King's IDR is diminished and he neglected his duties with respect to truthfully reporting on the critical use of force.
- [161] SPO Hawthorn, as the person actioning these IDRs, actioned the reports in this state. In doing this he neglected his duties. SPO Hawthorn said, "if they copied each other, that's up to the principal officer to do that, chase it up, not me".⁶²

Prison officers under the control of Senior Prison Officer Hawthorn

- [162] PO Carter and Probationary Officer King were junior prison officers. They had either just completed their probation or were about to complete their probation. They were in an invidious position.
- [163] Each was required to report on a critical use of force incident in circumstances where they knew their reports would be reviewed and actioned by SPO Hawthorn, the primary user of force in circumstances that were, at least, questionable and in the Commission's view, excessive.
- [164] These prison officers were in a dilemma. Their options were to:
- report the matters as they saw them, to align with their oath and statutory duties under the Prisons Act ss 12 and 13;
 - report matters in a way that places into question a senior officer's use of force against a prisoner, despite their duty to obey lawful orders of that senior officer under whose supervision or control they were placed; or
 - report matters in a manner that justified the use of force.
- [165] Initially, PO Carter and Probationary Officer King chose to justify SPO Hawthorn's use of chemical agent against prisoner B in their IDRs. However, to their credit, when they were both questioned by DoJ and then the Commission, a clearer picture emerged as to what really happened.

⁶² G V Hawthorn transcript, private examination, 6 November 2017, p 36.

[166] PO Carter said to DoJ investigators that if she was in SPO Hawthorn's situation, she "would have shut the cell door and locked it".⁶³ She acknowledged that it would have been reasonable for the door to have just been shut.⁶⁴

[167] When questioned by the Commission, PO Carter reiterated these points. She accepted the door could have just been shut.⁶⁵ She expanded on what she meant in her incident description when she said prisoner B would have struck SPO Hawthorn. She said she "believed that there would have been violence towards Senior Officer Hawthorn" if the situation continued and the door was not shut. However, she acknowledged SPO Hawthorn could have closed the cell door which is something she would have done.

[168] Probationary Officer King informed DoJ investigators that "the cell door could've just been closed".⁶⁶ He described SPO Hawthorn's use of chemical agent as follows:

*We get to the cell door; all three of us [Mr Hawthorn, Ms Carter and Mr King] are near the cell door and he [prisoner B] gets one more final shove [from Mr Hawthorn] **which he [prisoner B] goes onto his bed, and then Mr Hawthorn deploys the OC Spray.***⁶⁷

(Emphasis added)

[169] Probationary Officer King was questioned by the Commission on his IDR:

Yes, can you read that out, please?

---When he was almost in – at his cell [prisoner B] removed the T-shirt from his face and continued in a manner that was highly aggressive and leaning towards physical action against a senior officer, had he not used a chemical agent.

You have had the benefit of seeing the video?---Yes.

Did you wish to reflect on that statement that you've made?---Yeah, I do. The video footage doesn't show that, no. He has his T-shirt removed at the door.

And - - -?---And he wasn't – he almost went into the cell, back to the cell of his volition. He wasn't - - -

So hadn't he complied with the order or direction that - - -?---In the end - - -

- - - Gary Hawthorn gave? He [prisoner B] went in himself?---Yes, correct

That's the only direction that Mr Hawthorn ever gave, isn't it?---Yes, sir.

⁶³ DoJ interview with L Carter, 14 July 2017, p 10.

⁶⁴ Ibid p 13.

⁶⁵ L Carter transcript, private examination, 6 November 2017, p 24.

⁶⁶ DoJ interview with A King, 21 August 2017, p 10.

⁶⁷ Ibid p 8.

...

Could he have shut the door?---Yes, sir.

Could have you and Ms [Carter] shut the door at that particular point in time?---If we had got Mr Hawthorn out of the way, yes.⁶⁸

- [170] The CCTV footage of the incident does not show prisoner B coming back at SPO Hawthorn before deployment of chemical agent. It shows prisoner B briskly taking six steps into his cell, turning around and having chemical agent sprayed at his facial area.
- [171] At this stage, and during SPO Hawthorn's first deployment of the chemical agent, prisoner B goes on to the bed and places blankets and sheets over his face in an attempt to avoid it going into his eyes. SPO Hawthorn's second use of the chemical agent is discharged while prisoner B is lying on his bed with blankets and sheets over his face.
- [172] SPO Hawthorn says he was aware there was a camera in prisoner B's cell.⁶⁹ Supt Hedges expressed doubt about SPO Hawthorn's awareness of the camera in the cell.⁷⁰
- [173] The CCTV footage captures the circumstances which led to SPO Hawthorn deploying chemical agent against prisoner B. SPO Hawthorn's IDR does not accord with what the CCTV footage shows in so far as he states prisoner B went to come back at him.
- [174] Supt Hedges was questioned about the CCTV footage and made the following observations:
- You said some use-of-force incidents are not worth discussing or protecting?---[prisoner B]. That it doesn't matter what anyone says, written or otherwise, the videotape clearly says, or shows, that that was totally unnecessary use of force; not even excessive use of force, it was just totally unnecessary. It was in that context that that's not worth discussing, bundle it up as a package, write it up, go up to head office and see you later to the person who used that use of force. It was in that context that I mean; it's just what I mean is that doesn't even need analysing, it's just clear.⁷¹*
- [175] The PD-41 completed by Night Senior Officer (NSO) Elliott Willis perpetuates inaccuracies in SPO Hawthorn, PO Carter and Probationary Officer King's IDRs.
- [176] The PD-41 Brief was submitted promptly after the incident (within about two hours). NSO Willis ought to be able to rely upon the prison officers'

⁶⁸ A King transcript, private examination, 6 November 2017, p 16.

⁶⁹ G V Hawthorn transcript, private examination, 6 November 2017, p 27.

⁷⁰ J L Hedges transcript, private examination, 1 December 2017, pp 16-17.

⁷¹ Ibid p 40.

reports to be accurate when promptly transmitting information to the Coordination Centre. However, the reports, at least, in so far as they concerned circumstances surrounding the deployment of chemical agent, were not accurate.

- [177] The PD-41 report relevantly stated prisoner B "then became more aggressive and started to move towards the Officers and therefore Chemical Agent ... was deployed". Moreover, NSO Willis set out in a comment section on the minutes 'Good work by Officers noted' which had the effect of minimising SPO Hawthorn's excessive use of force.
- [178] The IMs included comments from members of EGRP's senior management team that raised concerns about various issues, including the deployment of chemical agent, adherence to DoJ policy, and the validity of IDRs.
- [179] The PD-5 was finalised six days later and was more neutral. The summary of the event in the PD-5 report was inadequate and did not enable one to appreciate the excessive use of force by SPO Hawthorn against prisoner B.
- [180] EGRP's 'Lessons Learned' document identified three areas from which to learn:
 - telephone calls to arrange surety;
 - possession of chemical agent by officers other than recovery officers; and
 - deployment of chemical agent against a prisoner in their cell.
- [181] The Lessons Learned did not deal with a significant issue - reporting of the critical use of force incident - particularly where critical aspects of the reports were inconsistent with CCTV footage. This was despite this issue being raised by a member of the senior management team.
- [182] The accuracy of the reports is relied upon by DoJ for, amongst other things, disciplinary and court proceedings. In the absence of CCTV footage, the integrity of officers and the importance and truthfulness of accurate reporting is critical.
- [183] SPO Hawthorn responded to allegations made by DoJ on 1 September 2017. For the first time he said he directed prisoner B to enter his cell and lay face-down on his bed with his feet pointing towards the door.

[184] This important feature was not included in SPO Hawthorn's contemporaneous IDR, nor the minutes he prepared. No other prison officer recorded ever hearing SPO Hawthorn give this direction. Prisoner B did not record hearing this direction. The evidence supports that the only direction issued to prisoner B was to go into his cell. Prisoner B ultimately complied with this direction.

[185] The Commission questioned SPO Hawthorn about his letter in response to DoJ 's allegations concerning his use of chemical against prisoner B:

Did you write the response yourself?---Majority of it, yes.

Were the other parts written by someone else? Who are they?---I put down a draft form and then I went away and got a lot of the legislation that supported it, supported exactly what I did and then a [Rory Robinson] from the Prison Officers' Union wrote it and then submitted it for me.⁷²

[186] There is no evidence, other than SPO Hawthorn's non-contemporaneous self-serving statement, that establishes such a specific order was given.

Conclusion

[187] When investigating SPO Hawthorn's involvement in both critical use of force incidents, the evidence revealed that he framed reports inaccurately or falsely in order to minimise and conceal his questionable use of chemical agent. SPO Hawthorn's conduct constitutes serious misconduct.

[188] He exploited DoJ 's reporting processes by:

- creating and approving false and inaccurate government records;
- attempting to deflect a proper inquiry into his use of force against prisoners; and
- neglecting his duties to ensure accurate reporting of use of force incidents.

[189] DoJ's systems allowed him to control the reporting process to bring about his desired effect which advanced his own interests, rather than advancing the security of the prison or the welfare or safe custody of prisoners.⁷³

⁷² G V Hawthorn transcript, private examination, 6 November 2017, p 25.

⁷³ Prisons Act s 12(b).

- [190] His attempts to justify his use of force through official records was an abuse of his position and constitutes a dereliction of duties as a senior prison officer.
- [191] The Commission has formed an opinion of serious misconduct in respect of SPO Hawthorn's actions in his reports.
- [192] There is a broader concern which relates to the actions of the junior officers.
- [193] When a senior officer commits an act of misconduct in their presence, a junior officer is confronted with a terrible choice. Do they report the misconduct truthfully or, in perverted loyalty do they support and justify the actions and explanations of the senior officer?
- [194] The risks of truthful reporting may be acute in a closed environment where officers have to depend on each other from time to time for their own safety.
- [195] Against that however is the age old aphorism of Edmund Burke: "The only thing necessary for the triumph of evil is for good people to do nothing."

CHAPTER SEVEN

Recommendations

- [196] In order to reduce the likelihood of serious misconduct occurring at DoJ in relation to reporting use of force incidents, the Commission recommends DoJ, Superintendents and the senior management teams at prisons:
- a) Modify DoJ's processes and practices to ensure a separation of use of force reporting duties, including:
 - i) prohibit the primary user of force from reviewing or actioning the Incident Description Reports of other prison officers who witnessed, or were involved in the incident;
 - ii) remove the ability for the primary user of force to prepare or be involved in the preparation of DoJ records concerning the use of force, save for their own Incident Description Report; and
 - iii) highlight mechanisms for staff to confidentially report officers who are suspected, on reasonable grounds, of not completing Incident Description Reports independently.
 - b) Support and regularly promote awareness of confidential mechanisms for staff to report potential criminal activity and misconduct concerning prison officers using force against prisoners.
 - c) Conduct mandatory training for prison officers in relation to independent, accurate and factual reporting of use of force incidents that includes:
 - i) the use which can be made of a prison officer's reports in legal, administrative, disciplinary and prison offence proceedings;
 - ii) the consequences of colluding, making false or inaccurate statements or omitting material matters; and
 - iii) the interrelation between reporting on use of force incidents and a prison officer's duties and oath under the Prisons Act.
 - d) Take action against prison officers who make inaccurate statements or material omissions from Incident Description Reports, or who do not submit an Incident Description Report when required to do so. Maintain a register of the action taken.

- e) Update Policy Directives to provide clarity on who receives notifications about use of force incidents, what responsibilities must be discharged and how DoJ records the notification process.
- f) Update Policy Directives to provide clarity on the independent review of use of force incidents by DoJ personnel outside of the prison facility where the incident occurred. The policy should:
 - i) identify a position that is responsible for the review process;
 - ii) identify who will conduct reviews;
 - iii) establish a framework for conducting reviews (including a mandatory requirement to review CCTV footage of the incident, where available);
 - iv) provide mechanisms to convey the review results to designated Superintendents; and
 - v) outline the designated Superintendent's responsibilities when he or she receives the review results.
- g) Update, monitor and audit systems (including TOMS), processes and physical spaces to reduce the opportunity for prison officers to collude about their IDRs or otherwise view or copy the Incident Description Reports of others.
- h) Take action against prison officers who use force against prisoners in circumstances where they have not completed a DoJ approved training programme or have not discharged mandatory requirements to refresh their annual training.
- i) Consider introducing stricter controls over the storage, issue, possession and use of chemical agent, a controlled weapon.

[197] The Commission proposes to report on the implementation of these recommendations in one year.