

6. Officer D arrived while the dog was engaged. Officer D took hold of Mr X's lower left leg and crossed it over his right knee to stop him kicking out. Officers B and C managed to handcuff Mr X and Officer A instructed the dog to release Mr X's foot.
7. Mr X sustained a serious injury to his right foot, and officers provided first aid. Police called an ambulance, but it was going to be delayed, so they took him directly to hospital for medical treatment.
8. Mr X was upset about the way Police handled the situation, because:

"There [was] no attempt to achieve a nice arrest....

... when somebody's on their stomach with their hands behind their back [you don't] release a dog to attack somebody. You don't do that... there is no justification for that in my opinion."
9. Police notified the Authority of the incident, which the Authority independently investigated. This report sets out the results of that investigation and the Authority's findings.

POLICE INVESTIGATION

10. Police investigated Officer A's decision to use the Police dog and concluded it was appropriate and proportionate in the circumstances.
11. A senior sergeant provided expert advice in relation to the use of the dog. In his view, *"the arresting officers could not gain control of [Mr X] and the longer the process took, the likelihood of injury to the arresting officers increased."*

THE AUTHORITY'S INVESTIGATION

12. The Authority interviewed Officers A, B and C, and Mr X. The Authority also reviewed all the documentation provided by Police relating to the incident and the subsequent Police investigation. The Authority's investigator visited the scene and took photos. CCTV footage of the underground carpark had been available, but Police did not request it within 30 days and it was over-written.
13. The Authority identified and considered the following issues:
 - 1) Was the force used by Officers B and C lawful and reasonable in the circumstances?
 - 2) Was the force used by Officer A (use of the dog) lawful and reasonable in the circumstances?
 - 3) Did Police provide appropriate medical assistance to Mr X?

THE AUTHORITY'S FINDINGS

Issue 1: Was the force used by Officers B and C lawful and reasonable in the circumstances?

14. Under section 39 of the Crimes Act 1961,² when Police officers are executing a warrant or making an arrest, they are justified in using reasonable force to overcome any force being used to resist arrest, unless the process can be executed *“by reasonable means in a less violent manner”*. Likewise, under section 40 of the Crimes Act 1961, officers may use reasonable force to prevent the escape of a person who *“takes flight in order to avoid arrest”*.
15. When Officers B and C cornered Mr X in the underground carpark, Mr X was standing in a vacant parking space between two parked cars and had pushed himself up against a car.
16. Mr X told the Authority he realised he was running towards a dead end and was going to get caught. He said he stopped running, turned around, put his hands in the air and said, *“I give up”*, then:

“I was grabbed immediately... Both of them grabbed each side of me... a different side of me... They ran at me and grabbed me... I felt like a piece of spaghetti being pulled around... saying ‘don’t resist’ and pulling me down as it was happening...”
17. Officer B said Mr X had pushed his back against a car and had his hands up with his palms facing towards the officers. He told Mr X he was under arrest, but Mr X continued to move away from the officers. Officer B said:

“The movement he was doing wasn’t one that we’d be able to grab his hands nicely and put his handcuffs around his back. It was one that was kind of showing that he was gonna continue to resist in some way....”
18. Officers B and C grabbed one arm each to try to gain control of Mr X. Officer B said Mr X was moving *“quite violently”* and *“started moving his body round, shaking his arms around to prevent us from gaining control of him. Because he did this, it meant that he fell onto the ground.”*
19. Officer B said when Mr X was on the ground, *“both his arms were under his body around his waist and tummy area”*. Officer B was trying to get Mr X’s right arm out from underneath his body but was unable to do so because Mr X was *“tensing his whole body really tightly”*. Officer C said Mr X was holding his arms in towards his body and Officer C was trying to get Mr X’s left hand behind his back to apply a handcuff, but Mr X was *“actively avoiding”* placing his hand behind his back.
20. Officers B and C repeatedly told Mr X to stop resisting and to put his hands behind his back. They knelt near the upper part of his body while they continued to attempt to get his hands out to handcuff him.
21. Officer D confirmed that when he arrived, Mr X was lying on his front with his arms tucked up, actively preventing Officers B and C from handcuffing him.

² See paragraphs 54 to 57 for relevant law on the use of force.

22. Mr X told the Authority he could not recall exactly where his arms were when he went to the ground, but said the officers had pulled his arms behind his back before the dog bit him. Mr X said he was not resisting, but he was “*definitely mouthy*” at the time.
23. The officers said that, after Officer A arrived and his dog took hold of Mr X’s foot, they brought Mr X’s arms to his back and placed him fully in handcuffs. As soon as this was done, Officer A instructed the dog to release Mr X’s foot.
24. Given the nature of the struggle and the positions of those involved, the Authority prefers the evidence of the officers as to the location of Mr X’s arms relative to the timing of Officer A’s deployment of the dog.
25. Officer C said he regarded Mr X to be ‘actively resisting’ before the dog arrived.³ He considered using pepper spray but he “*was happy to let it play out and try and get [Mr X’s] arms without using that force.*” Officer C also said that, although he and Officer B did not yet have control of Mr X, he felt they had control of what was happening.
26. Officer B, on the other hand, had earlier discussed the risks posed by Mr X with Officer D. Officer B said, based on Mr X’s ‘previous flags’ and the fact he had been on the run from Police for a month, he placed him as ‘assaultive’ on the Tactical Options Framework.⁴
27. Regarding the arrest, Officer B said:
- “I believe that I was justified at the time to use my Taser or my baton to effect arrest... I did consider my Taser but because both me and [Officer C] were there I believed after a struggle we would be able to gain control of him... I believed he had the intent to assault me....”*
28. Officer B said that his main concern when he was attempting to place handcuffs on Mr X, was that Mr X’s right arm was still under his body and he could not see what it was doing. He said: “*I didn’t know whether that was because [Mr X] wanted me to stop the application of the handcuffs or whether there was something there he wanted to get.*”
29. The Authority does not agree with Officer B’s view that Mr X was “*assaultive*” at the time of his arrest. When assessing the risk posed by an offender, it is important to consider the person’s history, but officers must also consider the actual behaviour that is taking place.⁵ In this case:
- a) Mr X tried to move away from the officers, rather than showing intent to harm them.
 - b) Neither Officer B or Officer C said Mr X tried to hurt them, such as by hitting or kicking them. In fact, Officer B described Mr X as having his hands up with his palms out, facing the officers.

³ ‘Actively resisting’ is defined as “*Pulls away, pushes away, or runs away,*” in Police policy.

⁴ ‘Assaultive’ is defined as “*Intent to cause harm, expressed verbally and/or through body language and/or physical action,*” in Police policy.

⁵ See paragraphs 58 to 62 for Police policy on use of force.

- c) Nor did the officers say Mr X had verbally threatened them (when interviewed they could not recall what Mr X was saying).
 - d) The officers had seen that Mr X was not holding anything when they approached him in the car park.
30. However, the officers were having difficulty applying handcuffs to Mr X and, based on Mr X's behaviour at the time, rightly perceived that, although he was not "assaultive", he was 'actively resisting'. They were therefore justified in using force under section 39. They both decided that using a weapon was not necessary and used only 'empty hand' tactics to restrain Mr X.⁶ This was a proportionate response to his resistance.

FINDING ON ISSUE 1

The force Officers B and C used to physically restrain Mr X was lawful and reasonable in the circumstances, as Mr X was not complying with the officers' instructions and was actively resisting arrest.

Issue 2: Was the use of force by Officer A lawful and reasonable in the circumstances?

31. Officer A, pursuing on foot with the dog on a lead, was about 20-30 metres away when Officers B and C and Mr X went to the ground. He thought they were on the ground for about 10 seconds before he arrived. Officer A recalled that Mr X was "physically struggling" with Officers B and C, his arms were at the front of his body, and he was not following Police instructions to put his hands behind his back.
32. Officer B did not recall when Officer A and the dog arrived but estimated he had been struggling with Mr X for "up to 15 seconds" before he noticed the dog. Officer C estimated that the time spent struggling with Mr X prior to hearing Officer A was "not long, maybe 30 seconds, maybe less". Officer A said he watched for about 20 seconds before instructing the dog to bite Mr X's foot.
33. Officer A said:

"There was a need to act at the time otherwise [Mr X] may escape custody and continue to be a threat to the victims of his crimes as well as other members of the public. If he was not safely restrained he may be able to carry out the threat that I believed he posed towards us."

34. Mr X said that before the dog bit him:

"I was on the ground on my stomach with my hands behind my back. I was detained.... My face is on the concrete.... There was no reason they needed to use that dog... I had my arms behind my back and pressure put on my back so I couldn't get up if I tried."

⁶ 'Empty hand' refers to a weaponless use of force, such as grabbing hold of, pushing, or punching a person.

35. Mr X also said: *“I got bit because I was a cheeky c**t.”*

Was Officer A legally justified in using force to defend himself or others?

36. Officer A told the Authority his primary reason for using the dog was to defend himself and Officers B and C. Section 48 of the Crimes Act 1961 states:

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

37. To rely on this justification for his use of force, Officer A’s actions must be assessed on the following three questions:

- 1) What did Officer A believe the circumstances to be at the time he instructed the Police dog to bite Mr X?
- 2) In light of that belief, was Officer A’s use of the dog for the purpose of defending himself or the other officers?
- 3) If it was, was the force used reasonable in the circumstances as Officer A believed them to be?

What did Officer A believe the circumstances to be at the time he instructed the Police dog to bite Mr X?

38. Officer A had considerable knowledge of Mr X prior to the arrest, which he used when conducting his risk assessment. He was aware that:

- a) Police had been trying to locate Mr X for offences relating to violence and the use of a weapon.
- b) Mr X’s previous offences included convictions for violence, kidnapping, threats to kill, assault with a weapon, wounding with intent, and assaulting and resisting Police.
- c) Mr X had previously used a blood-filled syringe against Police. Officer A also believed Mr X was Hepatitis C positive.⁷

39. In his Tactical Options Report, Officer A said that immediately before instructing the dog to bite, he assessed Mr X as ‘assaultive’, believing that he intended to cause harm. Officer A said:

“There was a real and reasonable threat that [Mr X] was attempting to remove a weapon or needle from his person and that he would use it against Police. If this was to happen there was a serious chance that staff would contract Hep C which would have lifelong affects.”

⁷ Officer A told the Authority he recalled seeing this information in a Police alert and possibly in relation to the incident for which Mr X was being arrested. The Authority has not found any reference to it in records.

40. Officer A said he believed Mr X had Hepatitis C. However, when he decided to instruct the dog to bite Mr X, he did not consider the possibility that a dog bite would expose the officers to Mr X's blood. In hindsight, he indicated that his choice in getting the dog to bite the foot would have limited the risk to the other officers as it was *"well away"* from their faces.
41. When Officer A arrived, Officers B and C were already using some force to try to apprehend Mr X. Officer A believed he needed to do something to assist them as they were not overpowering Mr X and *"weren't able to negate the threat"*. Officer A was concerned Mr X was trying to get a knife or a needle from his pocket, based on *"[Mr X's] previous behaviour, the information alerts about him, the pattern of offending that he'd shown"*. Officer A said it was quite feasible to him that Mr X would be able to get his hands into his pocket and *"remove something and use it against them."* Officer A had not been on the scene at the time Mr X was apprehended by Officers B and C, and therefore would not have known that Mr X was empty handed immediately before the struggle.
42. Officer A said he also considered Mr X was a threat to him. It does not appear to the Authority that Officer A was in imminent danger of being exposed to any real threat himself at that time, since he was standing with his dog while Mr X was lying on his stomach with both arms held.
43. Even so, having interviewed Officer A, the Authority accepts he did genuinely believe Mr X was a threat to the other officers. This belief was supported by Officer A's knowledge of Mr X's offending history, his thorough risk assessment, and the fact that Mr X had one of his hands under his body.

Was Officer A's use of the dog for the purpose of defending himself or the other officers?

44. In light of Officer A's view of the circumstances, the Authority accepts that when Officer A instructed the dog to bite his primary aim was to defend the other officers.

Was the force used reasonable in the circumstances as Officer A believed them to be?

45. Officer A said he considered several options at the time. He could hear Officers B and C instructing Mr X, but verbal communication was having no effect. Officer A told the Authority he warned Mr X that he and the dog were there:

"The same challenge that I always give is, 'Police dog handler.' Instead of saying 'Stop, stay there, I'll let my dog go', I've obviously said, you know, 'You're under arrest, put your hands behind your back.' Just to make him aware that I was there... and the dog was there..."

46. Officer A said his dog was barking, and Mr X was *"kind of screaming"* and did not react to the warning.
47. Officer A said assisting Officers B and C with restraining Mr X using his hands, or using a Taser to 'contact stun' him, were not options available to him because of the need to keep control of his dog.⁸ He considered using pepper spray, but decided there was a high chance of it affecting the

⁸ A 'contact stun' involves using the Taser close-up, directly applying it to the subject's body. This method uses pain compliance.

other officers which “*definitely would’ve reduced the ability to overpower (Mr X) and mitigate the threat that he posed.*” He also considered firing his Taser at Mr X but said it would have been difficult to clearly target Mr X with both probes. The Authority is satisfied that these tactical options were not appropriate in the circumstances.

48. Officer A’s assessment of the circumstances led him to believe that Mr X was assaultive and posed a genuine threat of retrieving and using a weapon such as a knife or needle. In that case the use of his dog was an appropriate option, as significant force was required to quickly overpower Mr X and eliminate the risk of serious injury to Officers B and C.
49. The Authority accepts that the use of the Police dog by Officer A was justified in terms of section 48 of the Crimes Act 1961.

Was Officer A’s perception of the circumstances reasonable?

50. The Authority has found that Officer A genuinely believed Mr X was ‘assaultive’ and posed an imminent threat. The Authority must also consider whether it was reasonable for Officer A to believe this.
51. As explained in paragraph 28, the Authority did not consider it was reasonable for Officer B to assess Mr X’s behaviour as ‘assaultive’.
52. However, unlike Officers B and C, Officer A had not seen what happened immediately before Mr X went to ground, when Mr X showed his empty palms and the officers could see he was not holding a weapon. Nor was Officer A close enough in pursuit to see whether or not Mr X had been able to reach into his pockets to access a weapon as he was running away, or after he had gone to the ground.
53. Therefore, the Authority finds that it was reasonable for Officer A to perceive that Mr X was assaultive and to act accordingly.

Did Officer A provide sufficient warning before instructing his dog to bite Mr X?

54. Before instructing a dog to bite someone, dog handlers must warn or challenge offenders to surrender.⁹ According to Police policy, they must say, loudly enough for the offender to hear, that they work for the Police, they have a Police dog, and the dog will bite them if they do not surrender. The officer must then give the offender a reasonable amount of time to comply to avoid being bitten.
55. In this case, while Mr X knew the dog was there, Officer A did not specifically warn Mr X that the dog would bite him if he did not stop resisting (see paragraph 45). Officer A explained that he had watched the struggle for approximately 20 seconds before commanding his dog. The Authority considers that he had plenty of time to give a warning and should have done so before instructing the dog to bite but accepts that it is unlikely to have made a difference considering Mr X’s behaviour at the time.

⁹ See paragraphs 63 to 67 for Police policy on the use of Police dogs.

FINDINGS ON ISSUE 2

Officer A's use of the dog was legally justified under section 48 of the Crimes Act.

Officer A should have specifically warned Mr X that he would use the Police dog if Mr X did not stop resisting arrest.

Issue 3: Did Police provide appropriate medical assistance to Mr X?

56. According to Police policy, people bitten or injured by Police dogs must be given appropriate medical care as soon as practical. Police must provide immediate first aid and call for medical support if necessary.
57. Mr X was taken to the patrol car, where Officer A administered first aid by removing Mr X's shoe and sock, flushing the wound out with saline, and applying gauze and a bandage around his foot to help prevent infection. Officer A could see tearing on Mr X's foot, so requested an ambulance. There was going to be a delay of 40 minutes, so Police decided to take him directly to the Hutt Hospital Emergency Department for treatment.
58. At hospital, Mr X was admitted and had plastic surgery on his foot. He was discharged and transferred to the Police's custody unit the next day.

FINDING ON ISSUE 3

Police provided appropriate medical assistance to Mr X.

CONCLUSIONS

59. The Authority has found that:

- 1) The force Officers B and C used to physically restrain Mr X was lawful and reasonable in the circumstances, as Mr X was not complying with the officers' instructions and was actively resisting arrest.
- 2) Officer A's use of the dog was legally justified under section 48 of the Crimes Act.
- 3) Officer A should have specifically warned Mr X that he would use the Police dog if Mr X did not stop resisting arrest.
- 4) Police provided appropriate medical assistance to Mr X.



Judge Colin Doherty

Chair
Independent Police Conduct Authority

31 October 2019

IPCA: 18-0381

Law on the use of force

60. Section 39 of the Crimes Act 1961 provides for law enforcement officers to use reasonable force in the execution of their duties such as arrests and enforcements of warrants. Specifically, it provides that officers may use *“such force as may be necessary”* to overcome any force used in resisting the law enforcement process unless the process *“can be carried out by reasonable means in a less violent manner.”*
61. Section 40 of the Crimes Act 1961 allows for law enforcement officers to apply necessary and reasonable force when someone is attempting to avoid arrest by escaping or fleeing.
62. Section 48 of the Crimes Act 1961 states: *“Everyone is justified in using, in the defence of himself or herself or another, such force as, in the circumstances as he or she believes them to be, it is reasonable to use.”*
63. Under section 62 of the Act, anyone who is authorised by law to use force is criminally responsible for any excessive use of force.

‘Use of Force’ policy

64. The Police’s ‘Use of Force’ policy provides guidance to Police officers about the use of force. The policy sets out the options available to Police officers when responding to a situation. Police officers have a range of tactical options available to them to help de-escalate a situation, retrain a person, effect an arrest, or otherwise carry out lawful duties. These include communication, mechanical restraints, empty hand techniques (such as physical restraint holds and arm strikes), OC spray, batons, Police dogs, tasers and firearms.
65. Police policy provides a Tactical Options Framework (TOF) for officers to assess, reassess, manage and respond to use of force situations, ensuring the response (use of force) is necessary and proportionate given the level of threat and risk to themselves and the public. Police refer to this assessment as the TENR (Threat, Exposure, Necessity and Response).
66. Police officers must also constantly assess an incident based on information they know about the situation and the behaviour of the people involved; and the potential for de-escalation or escalation. The officer must choose the most reasonable option (use of force), given all the circumstances known to them at the time. This may include information on: the incident type, location and time; the officer and subject’s abilities; emotional state, the influence of drugs and alcohol, and the presence or proximity of weapons; similar previous experiences; and environmental conditions. Police refer to this assessment as an officer’s Perceived Cumulative Assessment (PCA).
67. A key part of an officer’s decision to decide when, how, and at what level to use force depends on the actions of, or potential actions of, the people involved, and depends on whether they are; cooperative; passively resisting (refuses verbally or with physical inactivity); actively resisting (pulls, pushes or runs away); assaultive (showing an intent to cause harm, expressed

verbally or through body language or physical action); or presenting a threat of grievous bodily harm or death to any person. Ultimately, the legal authority to use force is derived from the law and not from Police policy.

68. The policy states that any force must be considered, timely, proportionate and appropriate given the circumstances known at the time. Victim, public, and Police safety always take precedence, and every effort must be taken to minimise harm and maximise safety.

'Use of force with Police dogs' policy

69. Dog handlers are personally responsible for the amount of force used by the dog. The law sees little difference between dogs, when used as a means of force, and other methods and implement used by Police, such as firearms, Taser and batons. Dog handlers must believe that the use of force is justified, and that the forced used is as minimal as possible in the circumstances.
70. A Police dog should only be used if the offender cannot be apprehended by other means. Dog handlers must consider all tactical options when considering the use of force. Just because the handler has a Police dog with them, does not mean they should use the dog as a means of force instead of a more appropriate option. According to the Tactical Options Framework, Police dogs can be used if the suspect is considered Assaultive.
71. According to policy, dog handlers must issue a warning before instructing a dog to bite a person:

"The person must be warned or challenged to surrender, unless it is unsafe or impracticable to do so. The challenge must:

- *identify you as a Police employee*
- *identify that you have a Police dog*
- *identify that a dog will be used to bite the suspect if s/he does not surrender to Police*
- *be of such a volume that it is reasonable to expect the person to hear it.*

... Once challenged the person must be given reasonable time to comply, taking the particular circumstances into account."

Police dog handlers must have control of their dog at all times during deployment. Control means that the dog is under immediate physical or voice control and the dog responds to that control. The extent of the force used by the dog must be kept to the minimum possible in the circumstances.

72. When a dog handler uses a dog on any person, they are required to submit a Tactical Options Report (TOR), explaining why they chose to use the dog in the circumstances.
73. Policy dictates that all people bitten by Police dogs are to receive appropriate medical treatment.

ABOUT THE AUTHORITY

Who is the Independent Police Conduct Authority?

The Independent Police Conduct Authority is an independent body set up by Parliament to provide civilian oversight of Police conduct.

It is not part of the Police – the law requires it to be fully independent. The Authority is overseen by a Board, which is chaired by Judge Colin Doherty.

Being independent means that the Authority makes its own findings based on the facts and the law. It does not answer to the Police, the Government or anyone else over those findings. In this way, its independence is similar to that of a Court.

The Authority employs highly experienced staff who have worked in a range of law enforcement and related roles in New Zealand and overseas.

What are the Authority's functions?

Under the Independent Police Conduct Authority Act 1988, the Authority:

- receives complaints alleging misconduct or neglect of duty by Police, or complaints about Police practices, policies and procedures affecting the complainant in a personal capacity;
- investigates, where there are reasonable grounds in the public interest, incidents in which Police actions have caused or appear to have caused death or serious bodily harm.

On completion of an investigation, the Authority must form an opinion about the Police conduct, policy, practice or procedure which was the subject of the complaint. The Authority may make recommendations to the Commissioner.

This report

This report is the result of the work of a multi-disciplinary team of investigators, report writers and managers. At significant points in the investigation itself and in the preparation of the report, the Authority conducted audits of both process and content.



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