



IPCA

Independent Police
Conduct Authority

Mana Whanonga Pirihiimana Motuhake

Unjustified use of Police dog

Summary of the Incident

1. On 3 August 2021, a Police officer (Officer A) released her Police dog to catch two youth offenders, Mr X and Mr Y, who were fleeing from a car they had stolen.
2. Mr Y surrendered to Officer A; however, Mr X was bitten and suffered a serious injury to his leg. Mr X also said Officer A had stomped on his face. Police notified us of this incident as required by section 13 of the Independent Police Conduct Authority Act 1988.¹
3. We conducted an independent investigation into the incident. We spoke to Mr X and the Police staff involved. We could not locate Mr Y.

The Authority's Findings

Issue 1: Was the use of force lawful and reasonable?

The use of the Police dog by Officer A to bite Mr X was unjustified.

Officer A did not have any contact with Mr X's face.

Issue 2: Did Police use derogatory language towards Mr X?

Officer A likely used derogatory language towards Mr X.

Analysis of the Issues

ISSUE 1: WAS THE USE OF FORCE LAWFUL AND REASONABLE?

4. Officer A was parked on the side of the road in a marked Police car when a member of the public, Mr Z, stopped to tell her that his car had been stolen. Mr Z was enraged because the car had his

¹ Section 13 says: "Where a Police employee acting in the execution of his or her duty causes, or appears to have caused, death or serious bodily harm to any person, the Commissioner shall as soon as practicable give to the Authority a written notice setting out particulars of the incident in which the death or serious bodily harm was caused."

tools for work inside. While they were speaking, Mr Z spotted his stolen car a short distance away. He left Officer A and drove towards the stolen car (in another car he owned), shouting at the occupants to get out as they drove away.

5. Officer A saw the stolen car drive past them about 20 to 30 metres away. She saw from the light of a streetlight that there were two occupants. Officer A says that the driver of the stolen car was “*short in height*” and wearing a dark jersey, but she was not able to determine what the person in the passenger seat looked like.
6. Officer A got into her Police car and started to pursue the stolen car. After advising the Emergency Communications Centre (Comms) of the commencement of the pursuit, Officer A was instructed to abandon it by the dispatcher, who did not believe it was justified. Officer A complied with the instruction. Comms then put out a radio communication that other Police units could search for the stolen car, although they were not to engage in a pursuit if they found it.
7. A short time later, one of the searching Police units found the stolen car abandoned a short distance away in a residential area. They called Officer A to track the occupants of the car with her Police dog, which she did.
8. The other searching Police units were still in the area, and they set up cordons around the block of houses near the stolen car. As Officer A was tracking through the area, the audio recording of the communication between the units shows that they were telling each other their cordon locations.
9. Officer A states that “*the dog’s behaviour [during the track] told me that the scent was very fresh from the way she was tracking, she was very strong in her indications*”.
10. Officer A followed the track in and around several properties. She located a backpack which the dog indicated had been dropped by the offenders. Officer A then continued to follow the track and came across two people.
11. When Officer A saw who she thought to be the fleeing offenders, she says that she called out: “*Police dog handler stop or I’ll let the dog go*”, and that in response the two people “*both turned their heads, looked directly at me and said: “Ah fuck it’s the police dog,” and just absolutely bolted down the fence line.*”
12. Mr X agrees that when he and Mr Y saw Officer A, they continued to run. He could not specifically remember if Officer A told him to stop, as he was focused on getting away. However, he did know that both the Police officer and the dog were behind him and that they were following him because of the stolen car.
13. Officer A believed these two people were the same as the offenders in the stolen car because:
 - one was relatively short in height and was wearing a black jacket, which matched the description of the driver;

- the Police dog had a clear scent from the car and gave a positive indication that these were the people Officer A had been tracking;
 - Officer A had located property that the dog indicated was from the two people during the track; and
 - Officer A issued them a warning to stop, which they did not do despite acknowledging Officer A was from Police.
14. Officer A again called for the two people to stop, identifying herself as a Police officer with a Police dog. When they did not stop the second time, Officer A released the dog intending it to stop Mr X and Mr Y from fleeing.
15. The dog latched onto Mr X's lower leg. Mr Y continued to run away but turned back and surrendered to Officer A. Officer A arrested Mr Y and removed the dog from Mr X's leg. Two Police staff, Officers B and C, came to help Officer A with the arrests of Mr X and Mr Y. Mr X was taken immediately to hospital for treatment.

Legal justification for the decision to use the dog in these circumstances

16. The law allows Police to use "such force as may be necessary" to:
- overcome any force used in resisting an arrest or the execution of any sentence, warrant, or process; and
 - prevent the escape of someone who takes to flight to avoid arrest.
17. In the initial documentation, Officer A told us that she released the dog to both prevent Mr X and Mr Y from avoiding arrest and to overcome force they were both using to resist arrest.
18. We do not consider that Mr X and Mr Y were using any force against Officer A to resist her. However, we have analysed the legal requirements to determine whether Officer A was justified in using the dog to prevent Mr X avoiding arrest.

Was Officer A legally justified in deciding to use the dog to bite Mr X to prevent his escape?

19. The proportionality of Officer A using the dog is assessed against three factors:
- i. the seriousness of the offence which Mr X was reasonably suspected to have committed;
 - ii. the likelihood that the absence of immediate apprehension would have impeded or prevented Mr X being brought to justice; and
 - iii. the likelihood and degree of risk Mr X posed if his escape was not prevented.

Did Officer A believe on reasonable grounds that Mr X was fleeing to avoid arrest?

20. Officer A says that at the time she believed that Mr X was fleeing to avoid arrest for the following reasons:

- Officer A thought that Mr X and Mr Y had been in a stolen car, which gave them reason to want to flee Police;
- the fleeing offenders had failed to stop for Officer A when she turned on her lights and sirens to pursue them;
- Mr X and Mr Y had entered properties to avoid Police; and
- Mr X and Mr Y had not stopped for either of Officer A's warnings.

21. Based on these factors, it was reasonable for Officer A to believe Mr X was trying to avoid arrest.

Was Officer A's use of the Police dog to bite Mr X to prevent his escape reasonable and proportionate?

22. Officer A told us that she was concerned that:

- the stolen car was Mr Z's work vehicle with his tools inside, and Mr Z was very upset about the theft;
- Mr X and Mr Y might be armed, as there was no evidence that they were not;
- the area in which they were might have included gang members, and people who were potentially "hostile" to Police;
- Mr X and Mr Y might be experienced offenders attempting to evade Police due to the complex path they had taken (they had doubled back and split up at one point); and
- if Mr X and Mr Y escaped from Officer A, they might go on to steal more cars which would create further victims within the community.

23. The offence that the driver of the car may have been responsible for was unlawfully taking a motor vehicle, which Police had successfully recovered. While this crime has a maximum penalty of seven years' imprisonment, this penalty is only available for the worst hypothetical class or case of that type and is therefore of limited utility in assessing the relative seriousness of a particular offence.

24. In terms of average sentence, unlawfully taking a motor vehicle is towards the lower end of the scale. This is because the offence generally entails "joy riding", rather than intent to permanently steal the car. Even if it does involve an intent to permanently deprive the owner of possession of their car, thus constituting theft, both the offender's culpability and the degree of harm is significantly lower than it would be for offences such as injuring with intent, burglary, or fraud.

25. On the facts available to Officer A at the time, she did not know how the car had been taken or the role (if any) of each of the occupants in the car's taking. It was possible that only one person was responsible for taking the car (rather than the driver receiving the assistance of the passenger to break into or start the car). The passenger may therefore have been innocent of

any offending or may have only been responsible for unlawfully entering a stolen car, which is a less serious offence with a maximum penalty of two years imprisonment.

26. In this instance, the Authority considers that it was appropriate for Officer A to track the offenders to identify their location and apprehend them for the offence of unlawfully taking a motor vehicle. However, the decision to release the Police dog, with the inevitable consequence that one of the offenders was bitten, was disproportionate for the following reasons:
- Officer A had tracked the offenders from the stolen car, and therefore knew it had been recovered for Mr Z. The direct harm resulting from the offence had therefore already been remedied.
 - Because Officer A did not know who she was tracking, she did not know whether this was a repeat offender, or whether there was a risk that other cars would be taken. To the extent that she factored these possibilities into her decision-making, they were based on speculation.
 - When the Police dog was released, there was potential for it not to apprehend the driver, but instead the passenger, who would at most have been guilty of an even less serious offence, and perhaps innocent of any offending. Fortuitously the dog apprehended the driver.
 - Other options, such as Police cordons, could potentially have been used to contain or arrest the offenders. Although the officers discussed the fact that these were in place, there appears to have been no further consideration of their existence and whether this reduced the need for them to use force to effect immediate apprehension.
27. Although Officer A did not know the identities of the people she was tracking, she says that she thought she was tracking people who were potentially dangerous and armed. However, the information available to her at the time did not warrant this conclusion, and there were no other reasonable grounds for believing that they posed a danger to the present or future safety of the public or Police staff. Therefore, we do not believe that Officer A had sufficient basis for assessing that Mr X and Mr Y posed a threat to them and others (apart from the fact that they had taken a car which had been recovered).
28. We put to Officer A that she had applied a 'worst case' scenario mentality to the situation because it was the middle of the night, and she had no idea who she was tracking. Officer A agreed that she used the "*better safe than sorry approach*". We acknowledge that Officer A works in a dangerous job and is right to be cautious when she is in a situation such as this. However, in this instance, Officer A's approach unduly inflated the risk that Mr X and Mr Y may have posed a threat to her and others.
29. Officer A also considered the impact that not apprehending the offenders might have on public trust and confidence in Police. Officer A felt that Mr Z should be able to expect that Police always do their best to apprehend offenders. She said that she considered that Mr Z was upset by the offence and understandably wanted the offender brought to justice. Officer A told Police

afterwards that, if she did not apprehend such offenders, “Police would be allowing members of the public to be re-victimised if an attempt was not made to apprehend these offenders”.

30. However, the views of the individual victim are of only marginal relevance to the assessment that officers must make in this situation. The real issue is the extent to which the *public* interest in apprehending the offender and bringing them to justice justifies the use of force and the consequent risk of serious injury arising from releasing a Police dog. That is a quite different question, and (as is evident from the test in paragraph 19 above) involves weighing up on the one hand the seriousness of the offence and the likelihood that the offender will evade justice if not immediately apprehended and on the other hand the degree of force being used to effect apprehension and the likely harm that may arise from that.
31. We accept that, without the use of the Police dog and if the Police cordon had been ineffective, there was a relatively low prospect of future apprehension of Mr X and Mr Y. However, their offending was only of moderate seriousness and their risk to the safety of the Police and the public was minimal. We have therefore concluded that the use of the Police dog to apprehend them, with the attendant risk of significant injury, was not justified and constituted excessive force.

Did Officer A use excessive force to Mr X’s head?

32. During our interview, Mr X told us that when Officer A reached him, she “stomped” on his face.² This occurred at a similar time to the allegation of derogatory language (as discussed in paragraph 38).
33. Officer A states that, when she reached Mr X to pull the dog off him, she was standing at his feet, and therefore could not have stomped on his face, even accidentally, as she was not near his upper body. Officer A says that she was also trying to move away from Mr X to create space between him and the dog to avoid the dog re-engaging him.
34. Officer A states it was possible that either Officer B or C may have knocked Mr X’s face area with their boot as they ran in, but they did not see anyone come into contact with Mr X’s face.
35. Officer B corroborates what Officer A had said about standing back from Mr X with the dog. Officer B says that they did not knock Mr X’s face with their boot as they ran in, nor did they see Officer C do the same.
36. Mr X’s medical records do not indicate any form of injury to suggest that he had been intentionally stomped on.
37. We do not believe Officer A had any contact with Mr X’s face.

FINDINGS ON ISSUE 1

The use of the Police dog to bite Mr X was unjustified.

Officer A did not have any contact with Mr X’s face.

² This allegation was not raised in the notification from Police as Mr X had not disclosed it to them.

ISSUE 2: DID POLICE USE DEROGATORY LANGUAGE TOWARDS MR X?

38. Mr X says that when Officer A reached him, she called him “*a fucking little c**t*”. During this time, Mr Y was being arrested by another officer, and Officers B and C were rushing in to help Officer A with arresting Mr X (as she also needed to control the dog).
39. This allegation was put to Officer A. In response, Officer A told us that she could not remember what she said to Mr X, but that it is possible she swore at him. Officer A does not believe she called Mr X that exact phrase but cannot be sure, as she cannot remember if she did or did not swear at him.
40. We attempted to speak to Mr Y to see if he could recall any derogatory language being used but were unable to contact him.
41. On balance, we think it is likely that Officer A did swear at Mr X, given that she said it is possible that it occurred, and Mr X recalls it happening in specific language (part of which is corroborated by what we know about his size).

FINDING ON ISSUE 2

Officer A likely used derogatory language towards Mr X.



Judge Colin Doherty

Chair
Independent Police Conduct Authority

23 August 2022

IPCA: 21-8547

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.

We are not part of the Police – the law requires us 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. We do not answer to the Police, the Government or anyone else over those findings. In this way, our 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 and may choose to investigate:

- complaints alleging misconduct or neglect of duty by Police;
- complaints about Police practices, policies and procedures affecting the complainant in a personal capacity;
- notifications of incidents in which Police actions have caused or appear to have caused death or serious bodily harm; and
- referrals by Police under a Memorandum of Understanding between the Authority and Police, which covers instances of potential reputational risk to Police (including serious offending by a Police officer or Police actions that may have an element of corruption).

The Authority's investigation may include visiting the scene of the incident, interviewing the officers involved and any witnesses, and reviewing evidence from the Police's investigation.

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. 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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