

# Excessive force following arrest in Invercargill

## Summary of the Incident

1. On 18 October 2020, three men were forcefully arrested following a vehicle stop in Invercargill. On 20 October 2020, the driver complained to the Authority about what had happened. Police also notified the Authority about the incident, after an officer raised concerns that a dog handler had assaulted one of the passengers by stomping on his head. The Authority conducted an independent investigation.
2. At approximately 1.10am, Officers A and B, both relatively inexperienced officers, stopped a speeding car on Teviot Street. Officer C, a dog handler, came to assist. Police conducted breath testing procedures. The driver, Mr X, refused to co-operate with Police and would not get out of the vehicle. Officers attempted to communicate with Mr X but the two passengers yelled abuse making it difficult for Mr X and Officer A to communicate. Mr Z, the rear passenger, started locking the car doors. Officer A asked for other units to assist.
3. The front seat passenger, Mr Y, got out of the car and was warned for obstruction. He was arrested by Officers D and E when they arrived on scene.<sup>1</sup>
4. Officers B and F attempted to forcibly pull Mr X from the car, but he resisted and was verbally abusive. Officer C used his Police dog to remove Mr X from the car. He was taken to the ground and handcuffed.
5. Mr X alleges that he was bitten twice by the dog; once on the right forearm while he was in the car and again on the left bicep after he had been taken to the ground and handcuffed. He also alleges he was forcibly pushed to the ground causing his head to hit the concrete kerb.

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<sup>1</sup> Mr Y received a formal warning for obstructing Police.

6. Prior to Mr X's removal from the car, Mr Z opened the rear car door, spat at Officer C and his Police dog, then closed the door again.<sup>2</sup> Officers later removed Mr Z from the car, he was taken to the ground and handcuffed.
7. We are satisfied Police used reasonable force to arrest and handcuff Mr Z. However, Mr Z alleges that after he was handcuffed on the ground, he was kicked twice in the left side of his head, causing him to lose consciousness.
8. Mr Z received cuts and grazes to the left side of his jaw during the arrest process.
9. On 20 October 2020, Police commenced a criminal investigation into Officer C's actions and stood Officer C down from duties.
10. At the conclusion of the investigation, Officer C was charged with injuring with intent to injure for stomping on Mr Z's head.<sup>3</sup> In November 2021, the Dunedin Crown Solicitor decided to amend the charge to injuring by unlawful act.<sup>4</sup> Officer C pleaded guilty and was discharged without conviction. Officer C told the Court that he had intended to pin Mr Z's shoulder with his foot but had since realised he accidentally made contact with Mr Z's head in the process.
11. The Authority conducted its own investigation into the actions of Officer C before the court process concluded. We spoke to Officer C, Mr Z, Mr X and officers who witnessed events.
12. Officer C told us that he approached Mr Z while he was on the ground, handcuffed. Mr Z was struggling violently and was not under control. Officer C said he twice placed his foot on Mr Z's shoulder and applied pressure, telling Mr Z to stop moving.
13. Four officers told us that Mr Z was compliant once he had been handcuffed, and three officers told us that Officer C stomped on Mr Z's head twice, apparently rendering him unconscious.
14. We accepted the accounts of the officers that witnessed Officer C's actions and found that he stomped on Mr Z's head twice and this was unjustified. We agree that it was appropriate to charge Officer C. Bearing in mind Officer C's plea of guilty to the injuring charge, we will not further examine that aspect of the force used.

## Issues examined by the Authority

**Issue 1:** Was the level of force used to arrest Mr X justified?

## The Authority's Findings

15. The Authority found that:

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<sup>2</sup> Mr Z was arrested for obstruction, possession of cannabis and assaulting Officer C. He was not charged for the first two matters. The assault charge was dismissed after Mr Z completed diversion.

<sup>3</sup> Section 189(2) of the Crimes Act 1961.

<sup>4</sup> Section 190 of the Crimes Act 1961.

- 1) Officer C was unjustified in using the Police dog to remove Mr X from the car;
- 2) Officer C did not properly warn Mr X before deploying his Police dog;
- 3) Officer C should not have kicked Mr X's arm out from underneath him; and
- 4) Officer C kicked Mr X's side while he was on the ground, and this was excessive.

## Analysis of the Issues

### ISSUE 1: WAS THE LEVEL OF FORCE USED TO ARREST MR X JUSTIFIED?

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#### Circumstances leading up to Mr X's arrest

16. Mr X failed the roadside breath screening tests and Officer A required him to accompany her to the Police station for evidential breath test procedures.
17. Officer A was joined by Officers B and C. Officer C, an experienced dog handler with sergeant and advanced tactical training, advised Officer A first to remove the car keys. Officer C put his hand through the open window, turned the ignition off and removed the keys.
18. At this point, Mr Y and Mr Z become verbally abusive, swearing, and shouting at the officers. Officer A says: *"The abuse was constant, it never stopped... and it was loud."* She says they called them *"fucking white c\*\*\*s"* and barked like dogs. They told Police they did not recognise the authority of New Zealand's laws. Officer B says the abuse made it difficult to concentrate on Mr X.
19. Mr Y and Mr Z admit they were yelling at Police, and Mr Z admits barking at Police. Mr Y describes things as becoming *"tense"* and Mr Z says he was *"going nuts."*
20. Officers A, B and C say they were trying to communicate with Mr X and explain to him that he was required to go to the Police station for evidential breath test procedures, but Mr X refused. They repeatedly warned him if he did not comply then he would be arrested but he continued to refuse to cooperate.
21. Officer A arrested Mr X. Mr X says he has no recollection of being told he was under arrest. Officers A, B and C all say Mr X was told multiple times throughout the incident that he was under arrest and needed to come with them.
22. Officer C advised Officer A to ask for back up as it became clear to him it was not safe to act without the assistance of more officers. At 1.19am, Officer A called for more units to assist. At 1.20am she made a further request for urgent assistance.
23. When Mr Z screamed a gang slogan, Officer C removed his Police dog from the car and returned to stand near to the driver's door. Officers A and C say that on seeing the Police dog, Mr Z opened the rear passenger door (having previously locked the rear car doors), shouted further abuse, and spat at the Police dog and Officer C, hitting both. Officer B has no recollection of Mr Z spitting

at Police, and Mr X, Mr Y and Mr Z did not refer to spitting when they later spoke to Police about the incident.

24. Officer C, other officers and witnesses told the Authority that the men yelled gang slogans, barked and used racist abuse continuously. Officer C says he believed this was a tactic to intimidate Police and get them to back off. It also made him wary that the men were gang members or associates, which made it likely in his view that the car contained weapons that could be used against Police. He described Mr Z's behaviour as "*psychotic*" and thought he could be affected by drugs.
25. We asked Officer C if he felt intimidated and if Mr Z's actions affected how he reacted. He explained that he did not feel intimidated and has considerable experience dealing with angry and aggressive people who are trying to assert dominance. He has developed a technique to keep himself calm and focused in such situations. He felt disgusted and angry at Mr Z's behaviour, particularly due to the risk of infection during the pandemic, but he understood that Mr Z was "*acting out his anger.*"
26. Mr Y got out from the front passenger seat and positioned himself between the bonnet of the car and the driver's door. Officer C says Mr Y took up an aggressive stance, and he suspected Mr Y would physically intervene if they tried to forcefully remove Mr X from the car. Officer C directed Officers D and E, who had since arrived, to move Mr Y away.
27. Officers D and E attempted to communicate with Mr Y, but he responded by yelling and swearing. He was warned he would be arrested for obstruction, but he grabbed Officer E's forearm.
28. Officer D arrested Mr Y and the officers attempted to escort him away from the area. Mr Y struggled. They took him to the ground, handcuffed him and drove him to Invercargill Police Station at their sergeant (Officer F's) direction.

### Mr X's removal from the car

#### *What does Officer C say happened?*

29. Officer C says his response to the situation was initially "*reactionary... if needed I would intervene, but we were just gonna stop and sit and wait for backup and continue to appeal to the driver.*" This went on for 10 to 15 minutes.
30. After more officers arrived and Mr Y was removed from the area, Officer C spoke to Officer F, who had just arrived. Officers C and F work together on the Armed Offenders Squad (AOS). Officer C is a team leader on the AOS, and therefore senior to Officer F in that context.
31. Officer C says he explained the situation and asked Officer F to "*appeal to [Mr X] ... tell him once more to get out of the car. If not, try and physically get him out of the car. Any resistance whatsoever, step back... and I'll use my dog.*" He recalls Officer F agreeing with this plan.

32. Despite Officer F being the only sergeant at the scene, Officer C says, *“I guess in terms of seniority I am above [Officer F] in AOS... he was happy to take direction from me as to how we were gonna do things.”*
33. Officer C says at this stage he perceived Mr X’s behaviour as approaching active resistant level:<sup>5</sup> *“...he’s resistant, not quite active resistant, nothing physical has taken place yet but he’s clearly not compliant with us...”* But he also felt the situation was escalating.
34. He considered which tactical options he had available to him based on the situation and his experience. He told us he discounted Taser and Oleoresin Capsicum (pepper) spray because this would still require the use of hands-on force to get the occupants out of the enclosed car. He thought being hands-on would expose officers to risk, as they would be in a vulnerable position, and it was very likely there were weapons inside the car that would be used against Police. Also, any spray residue could affect officers and compromise their ability to safely extract the driver.
35. He concluded: *“The only option that I was prepared to use outside of [Mr X] being compliant with a little bit of physical encouragement was a dog.”*
36. When asked if Officer C was aware of any weapons in the car, he said: *“I hadn’t seen weapons but... I wasn’t prepared to take that chance with, with colleagues in mind.”* He explained that there had been an increase in gang activity in the area and based on his experience, it was likely that weapons or items that could be used as weapons were secreted on the floor or in the centre console. At that stage, Mr Z was still in the rear seat, extremely agitated and moving around in the cabin of the car. This heightened the risks in Officer C’s mind.
37. When asked about threats of violence, Officer C said:
- “They hadn’t, hadn’t specifically said “oh we’re gonna fuck you up” or “we’re gonna stab you or shoot you” or anything like that... but certainly I was assaulted by the back seat passenger... it was an unreasonable risk to, to take to not keep that in the back of your mind that potentially there was something in there.”*
38. The assault was being spat upon.
39. Despite Officer C telling the Authority that he did not want officers to engage in a physical struggle, he still told Officer F to attempt to pull Mr X from the car. When questioned about this, Officer C said he wanted to give Mr X every opportunity to get out of the car himself. He also explained that he is used to working with Officer F, knows that he has AOS training and he was confident that Officer F could handle himself and would pull back if he perceived a threat.
40. Officer C describes Officer F grabbing Mr X by the top and bottom of his right arm and trying to pull him from the car. He says Mr X reacted by swinging his arms up, pulling back and pushing Officer F away.

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<sup>5</sup> Police use a matrix to continually assess an incident based on information known about the situation and the subject’s behaviour. There are five categories in the matrix – cooperative, passive resistance, active resistance, assaultive, grievous bodily harm (GBH) or death. According to Police policy, ‘active resistance’ includes physical actions such as pulling, pushing or running away, that is, *“more than verbal defiance”*.

41. Officer C describes Mr X as resisting violently when he pushed Officer F's arms off him and says this went on for three or four seconds. This was long enough for him to judge that Mr X's actions and demeanour had moved from active resistant to assaultive.<sup>6</sup>
42. Officer C commented that it was a *"bad situation"* and planned to challenge Mr X with his dog. He told Officer F to get out of the way because he did not want Officer F exposed to the threat posed by Mr X.

#### *What does Officer F say happened?*

43. Officer F says when he heard Officer A's two radio calls for assistance, he believed he had to get to the scene urgently. On arrival, he was told that Mr X had been arrested for refusing to accompany Police following the evidential breath test procedure. At least one passenger was out of the car and *"circling around behind officers."* He recalls telling Officers D and E to deal with him, as he posed a risk to the officers concentrating on the driver.
44. Officer F says his assessment of the scene on arrival was that it had reached a certain level, as Officer C had his dog out. Communication was not working, and the presence of the Police dog was not encouraging the driver to comply.
45. He stepped in to talk to Mr X and told him he was under arrest. He commented that sometimes when a person deals with a new officer it allows them to comply without losing face. Officer F then went to physically pull Mr X from the car by taking hold of his wrist and upper arm. Officer F describes his use of force as *"gentle, [like] trying to escort someone out from a vehicle"* but Mr X *"violently resisted."* Officer F also says he saw a crescent wrench and a bottle in the front passenger area of the car, which could be used as weapons. It is not clear that he informed other officers about this.
46. Officer F describes Mr X's actions as *"violent"* and *"quite aggressive."* Rather than just pulling his arm away, he *"thrust his fist out towards me in a violent manner and then pulled it away."*
47. Officer F says: *"I don't believe he was trying to deliberately hit me, but he certainly wasn't concerned if he had hit me."* However, he believed that if they tried to physically remove him again, Mr X would assault Police.
48. Officer F says he does not believe the assistance of multiple officers would have helped in this situation. There was limited space to access the driver's seat with the door open, and staff would not have been able to access Mr X from the other (passenger) side.
49. Officer F also says he considered the use of Taser and pepper spray but discounted both as impractical. In the case of pepper spray, the pepper spray would affect the rear passenger and also the officers who would then have to extract both car occupants.

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<sup>6</sup> According to Police policy, 'assaultive' means someone who displays intent to cause harm, through body language or physical action.

50. In the case of Taser, it would be difficult to achieve effective neuro-muscular incapacitation (NMI) due to his side-on seated position in the car.<sup>7</sup> Even then, NMI is only effective for five seconds, and Police would need to enter the car and pull him out within that time. Likely, the Taser would end up being used as a pain compliance tool (a contact stun) which again would not have actually removed Mr X from the car.<sup>8</sup> Officer F concludes the Taser was not worthwhile, and the Police dog was a useful tool to remove Mr X in the circumstances.

### *Other officers' accounts*

51. The other officers' accounts are relatively consistent with each other, although the time estimates vary.
52. Officer H was on the passenger side of the car trying to speak with Mr Z while he was still sitting in the back of the car. At this point, Mr X was still in the driver's seat. Officer H says he saw the driver's door open and Officer F attempt to speak with Mr X. He says this went on for about two minutes.
53. Officer B says he assisted Officer F try to pull Mr X from the car. He says they both grabbed Mr X's arms and tried to pull him out but *"the more we tried to pull [Mr X], the more he tried to pull himself back in."* This went on for about a minute before Officer C told them to *"get back."*
54. Officer A also says Officers B and F attempted to pull Mr X from the car while Mr X was yelling, and he was not going to get out. Following this, Officer A says Officer C told Mr X that *"if he didn't get out of the car then he would return to his Police car and get his dog."* This was not said in a threatening way, rather it was an option if Mr X did not comply with instructions. Officer A says Mr X responded: *"You can't get your dog onto us."*
55. The accounts of both Officer A and Officer B are inconsistent with that of Officer F who does not recall Officer B assisting him to extract Mr X and had specifically discounted using the assistance of others. Mr X corroborates the account of Officers A and B (see paragraph 58).
56. Officer I says Mr X was bracing himself, kicking out with his feet, trying not to be pulled from the car. This went on for about 30 seconds to a minute before they stepped back.

### **Use of the Police dog**

#### *What does Mr X say happened?*

57. Mr X says Officer A told him: *"We require you to come to the station for further requirements or blood tests or something like that and [Mr Y and Mr Z] were saying you're not taking him anywhere until you do another test."*
58. From this point on, Mr X says other officers were coming round his car door and he felt like he was surrounded. Officer A was *"still saying that phrase about accompanying her to the Police*

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<sup>7</sup> Neuro-muscular incapacitation is when the nervous system and muscles are temporarily not able to permit movement.

<sup>8</sup> Activating the Taser while the device is directly applied to the body of the subject is referred to as a contact stun.

*station and I was saying I didn't understand, this went on for two or three minutes and that was when two or three officers grabbed me."*

59. Mr X describes an officer grabbing his right bicep and upper forearm and another officer reaching over the top of the door and grabbing his right forearm. He says he was holding his hands into his chest, and it felt like the officers were pulling in different directions. This went on for about five seconds.
60. He then noticed the officers' hands pull away and a split second after that, the Police dog was there.
61. Mr X says the dog bit down on his right forearm a couple of times before latching on. He was in shock: *"I remember thinking holy shit, I didn't care what the situation was I just wanted to get the dog off me, I was screaming I will comply just get your fucking dog off me."*
62. He was told to get out of the car, which he did with the dog still attached. He was dragged to the boot of the car and told to get on his knees. While on his knees, the dog was removed, and Mr X then felt a boot to his lower back and a hand pushing the back of his head. He fell forward and his head hit the concrete.
63. Mr X says he then felt the dog bite his left bicep for 15 to 20 seconds while he was in handcuffs.

#### *What does Officer C say happened?*

64. Officer C told the Authority, *"I was hoping that the threat of my dog alone would be enough for him to, to just get out the car."* He told Officer F and another officer to move out of the way so he could move forward with the dog.
65. Officer C initially recalled that he warned Mr X at this point by saying, *"Driver, Police dog handler, you're under arrest, get out of the car now or I will release my dog."* Mr X responded, *"Nah, what are you gonna do."* Officer C says he believed this response was a challenge rather than a question, so he decided to command his dog to bite Mr X.
66. Having had the opportunity to view footage of the incident (see paragraphs 84-91), Officer C now believes he issued a full warning to Mr X that the Police dog would bite him if he did not comply before Officer F tried to pull him out of the car. He then issued a partial warning to Mr X after Officer F unsuccessfully attempted to pull Mr X from the car.
67. Officer C was questioned about his use of the warning as some other officers could not recall it being given to Mr X. He says that he must have issued the warning because his Police dog will not bite without hearing both the warning as well as the command to bite ('rouse').
68. Officer C says his Police dog entered the car and put his two paws on Mr X's right leg. Mr X reacted by swinging his arms out of the way and as a result his Police dog bit Mr X on the left bicep. Officer C says he still had full control of his dog by having hold of the chain with one hand and the dog's vest with his other hand.



69. Officer C gave instructions to Mr X to get out of the car while his dog was biting. Officer C says he was pulling the dog while the dog was biting.
70. Mr X got out of the car and *“didn’t resist at that point.”*
71. When out of the car, Officer C instructed Mr X to lie on the ground. Officer C says he was not going to remove the dog from Mr X until he was on the ground and under control.
72. Mr X got down on to his hands and knees and Officer C wanted him to lie flat on his stomach, so kicked his right arm out from under him. Officer C does not believe that Mr X’s face hit the ground because of this use of force.
73. Officer C says that this was the only option available to him at this time as he was controlling his Police dog and could not use his hands. He says his dog was still attached to Mr X’s arm and Mr X was screaming: *“Okay mister, okay mister, please get your dog off, please get your dog off.”* At this point, Officer C commanded his dog to stop biting, to which his dog responded.
74. Officer C says no-one else assisted until Mr X was on the ground, spread-eagle. From here, he describes people taking control of Mr X’s arms and legs, so he stepped back from the situation.
75. Officer C believes that his dog was attached to Mr X for a total of 10 to 15 seconds.

#### *What do the officers say happened?*

76. Officer A did not see the Police dog enter the car as she had gone back to her Police car to store several items she was holding, including car keys, her work phone, and the breath tester and tubes. When Officer A returned, she saw Mr X on the ground, still resisting and not putting his hands behind his back. The Police dog was attached to Mr X’s left bicep and was removed once Mr X was handcuffed by the officers, about 30 seconds to a minute later.
77. Officer B says Mr X was warned about the Police dog and told *“if he didn’t get out the vehicle then the dog would get him out the vehicle.”* The dog went in the car and put its paws on Mr X’s lap. Officer B saw another officer reach in and try to pull Mr X from the car. Officer B says there were sufficient officers dealing with Mr X now, so he focused his attention on Mr Z.
78. Officer D, who was restraining Mr Y on the ground in front of the car, says he heard Officer C warn someone he would let the dog go if he did not get out of the car.
79. Officer F was not aware if Mr X got out of the car because the dog pulled him out or because he did not like the dog being there. However, once out of the car, Officer F says Mr X was still a threat.
80. Officer G says communication went on for about two minutes before he saw the dog enter the car, so he stepped back. He did not witness any physical attempts to remove Mr X before that. The only warning Officer G heard was something along the lines of *“get back”* from Officer C but says *“it was all rather quick”* and Mr X would probably not have had any indication that the dog was going to be released.

81. Officer H heard Officer C say something along the lines of *“move aside,”* followed shortly afterwards by the command to bite. He then saw the Police dog enter the driver’s seat and bite Mr X’s upper arm, possibly on the right side. From here, Officer H focused his attention on Mr Z who got out of the car.
82. Officer I says it was *“seconds”* after Police tried to remove Mr X when Officer C put his dog in the car. She saw the dog bite Mr X on the right arm.

### *Mobile phone footage*

83. Two members of the public recorded part of the incident on their mobile phones. The footage is described below.

### Footage A

84. This footage is 47 seconds long and was filmed from the driver’s side but is some distance from the car. The footage is out of focus at times.
85. The first 6 seconds shows Mr X being pulled from the car. There are five or six officers around the driver’s door obstructing the view of Mr X himself. Officer C can be identified as he is the officer not wearing a high visibility jacket.
86. The officers pulling Mr X stand back, and at about 8 seconds Mr X starts yelling *“woah!”* repetitively. At 12 seconds Mr X starts screaming. It is not possible to clearly see on the footage at which point the Police dog enters the car as officers are blocking the view. At 18 seconds an officer (not Officer C) shouts: *“Get out of the fucking car you idiot!”* This is followed by more screams and Mr X says something along the lines of: *“I’ll get out the car.”*
87. From here, Mr X gets out and Officer C and another officer have hold of him and walk him towards the back of the car. The Police dog is biting Mr X’s left arm. Mr X shouts: *“Just get your dog off me.”*
88. The footage does not show Mr X being taken to the ground as the view is obstructed by cars at the scene.

### Footage B

89. This footage is comprised of 11 short clips. It was filmed from the passenger’s side of the car and again, from some distance away. It shows about six officers on the driver’s side and what appears to be Officer F try to pull Mr X from the driver’s seat.
90. During clip 10 (which is 15 seconds long), Officer F steps back from Mr X at approximately 8 seconds, and at 10 seconds Officer C says: *“Get out of the car, rouse, rouse!”* This is delivered as a continuous phrase. Immediately, Mr X starts yelling *“woah, woah, woah!”* repetitively. Officer C gives the command *“rouse”* again. The footage ends.
91. At the start of clip 11 (which is 12 seconds long), Mr X is screaming. At 6 seconds into the footage, an officer shouts: *“Get out of the fucking car you idiot!”* Mr X continues screaming and the footage ends.

### Were officers justified in using force to remove Mr X from the car?

92. Section 39 of the Crimes Act 1961 allows for officers to use *“such force as may be necessary to overcome any force used”* by a person who is resisting arrest, unless the arrest can be made *“by reasonable means in a less violent manner.”*<sup>9</sup>
93. Officers B and F made the first physical contact with Mr X and attempted to pull him from the car. We accept that communication had broken down by this point and that officers were justified in using force to pull Mr X from the car.
94. However, this tactical option failed so Police moved to use a Police dog to extract Mr X from the car.
95. Officers C and F describe Mr X as *“resisting violently”* when Officer F tried to pull him from the car by pushing off the officers’ arms as they try to physically pull him from the car.
96. We accept that Mr X resisted the officers trying to remove him. Therefore, the officers were justified in using force to overcome Mr X’s resistance to arrest him.
97. Officer C says Mr X was assaultive because he pushed away officers who tried to pull him from the car. Officer F said Mr X *“thrust his fist out towards me in a violent manner and then pulled it away,”* and while he thought the action was more about resisting Police than harming Officer F, Mr X was ambivalent if that was the outcome. He also thought that if Police persisted, Mr X was prepared to assault them.
98. Officer I says he saw Mr X bracing himself in the car and kicking out at Police.
99. We accept that Mr X was making strong efforts to resist being removed from the car, using both his hands and feet in an attempt to prevent officers from approaching and forcing him out, but we do not agree that he was ‘violent’ or assaultive in the sense of attacking any officer.

### Was the use of the Police dog proportionate and reasonable in the circumstances?

100. Mr X complains that he was bitten twice, once while sitting in the car on his right forearm, and then after he had been removed from the car and taken to the ground, on his left bicep. Conversely, Officer C says the dog bit Mr X once on the left bicep, and the dog remained on Mr X’s arm until he was taken to the ground. Officers H and I think that the dog bit Mr X on the upper right arm.
101. Footage of the incident shows the Police dog biting Mr X’s left arm while being removed from the car (see paragraph 87). Mr X’s medical records note that he was bitten on his left arm and do not refer to bites on his right arm. Police photographs of Mr X’s injuries taken immediately after the incident show long scratches and bruising on his right forearm, which could have occurred when the Police dog first entered the car (see paragraph 68).

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<sup>9</sup> Section 39 of the Crimes Act 1961 is set out in paragraph 130.

102. On balance, there is insufficient evidence to indicate that Mr X was bitten on two separate occasions, on different arms. We conclude that he was bitten once on the left bicep and was dragged out of the car and onto the ground. The Police dog did not bite him again.
103. Officer C says he was aware of about seven or eight officers being at the scene, but two of these were dealing with Mr Y. Officer F and another officer had attempted to get Mr X from the car, and he says the other officers were outside his peripheral vision, behind him somewhere. He did not think that the use of more officers would have helped in this situation because there was limited space to access the driver while he was in the car.
104. Officer C says he perceived several threats at the time:
- It was a gang vehicle and Officer C told the Authority: *“I’ve never, ever, ever stopped a gang car that hasn’t had a weapon in it, whether it be a gun, a knife, an axe, a piece of wood with a nail in the end...” These weapons are often on the floor of the car, or in side pockets – therefore out of sight.*
  - Mr X was assaultive, loud, and of large build. Officer C commented: *“Who knows what skills he has, who knows what potential weapons he has.”*
  - Mr Z was moving freely around the car, was unpredictable and aggressive and could also have a weapon on or near him. Mr X had already assaulted him by spitting on him.
  - Mr Y had also demonstrated aggressive and assaultive behaviour while he was being arrested, which spoke to the general behaviour of the group.
105. We asked Officer C if there was an opportunity to step back and reassess the situation. He told us:
- “The other thing you have to consider is the, the effect it’s having... on the environment around you... We were in a residential area, the back seat passenger’s screaming... flashing lights and sirens, dogs barking, people everywhere... we’re disturbing the peace, we’re disturbing peoples’ domestic lives.”*
106. Officer C describes the risk of getting into a physical altercation with Mr X and the potential weapons inside the car. However, we do not agree that these were likely threats. Officer C had not seen any weapons, Officer F had not told him that he had seen weapons of opportunity, and none of the car’s occupants had threatened or presented weapons. Mr X was certainly angry, but he was pushing officers away from him, rather than attacking them.
107. We consider there was more opportunity to negotiate with Mr X, and that this was more likely to be successful if Mr Z was removed from the car first. Mr X would be more likely to submit to Police if he was able to do so away from his associates. While more time spent negotiating with Mr X would be disruptive to residents, it was preferable to using a Police dog capable of inflicting serious injuries.

108. After Officer F attempted to pull Mr X from the car, Officer C did not take the time to review the situation or consider his other options. The mobile phone footage shows that only a few seconds passed between Officer F stepping back from the car door and Officer C commanding the dog to bite.
109. Ultimately, Mr X was sitting inside a car with the engine turned off and Police were in control of the keys. Mr X had been pulled over for speeding and was found to have excess breath alcohol. With his car immobilised he was not a threat to the public and he could not escape from Police. There were already sufficient officers on scene to deal with the situation.
110. We find that the use of the Police dog to extract Mr X from the car was not reasonable or proportionate. Police should have considered other tactical options. Pepper spray was a viable, less forceful option in the circumstances if negotiations were ultimately unsuccessful. A Taser could be considered if Mr X became assaultive.

### **Was Mr X warned about the Police dog?**

111. Police have policy about the use of force with Police dogs.<sup>10</sup>
112. Police dog handlers are required to issue a challenge to a person and give them reasonable time to comply. The officer must identify himself or herself as a Police dog handler and state that they have a Police dog which will be used to bite the person if they do not comply with instructions.
113. Officer C has provided two accounts of how and when he issued his challenge. He told us that he issued a full challenge after Officer F moved back from pulling Mr X from the car, and that he gave Mr X time to comply with the challenge.
114. He has also said that he gave Mr X a shortened challenge prior to commanding the dog to bite, having already provided a full challenge before Officer F tried to pull Mr X from the car.
115. Officers A, B and D recall hearing Officer C issue a challenge before using the Police dog. Officer A's recollection is incongruous as she recalls the dog was still in the Police dog van when it was issued (see paragraph 54).
116. However, as described in paragraph 90, Officer C can be heard on the video recording instructing Mr X to get out of the car, but then immediately commanding the dog to bite. This was not a full challenge as required by policy and did not give Mr X adequate time to comply to avoid being bitten.
117. It is unclear whether Officer C issued a full challenge at an earlier point, prior to Officer F attempting to pull Mr X from the car. Irrespective, had he done so, this was not sufficient to comply with policy requirements. Police then went on to use empty hand tactics to try and pull Mr X from the car, distracting Mr X from any challenge issued and demonstrating that Police in fact did not intend to use the dog. The empty hand tactics having failed, Officer C should have

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<sup>10</sup> See paragraphs 131-137 for Police policy on the use of dogs.

issued a new, full challenge and given Mr X sufficient time to comply before commanding the dog to bite.

118. We conclude that Officer C did not issue the challenge as required by policy.

### Use of force when Mr X was taken to the ground

119. Officer C says Mr X was on his hands and knees and he used his left foot to kick Mr X's right arm to get him flat on the ground. He says he did this because he wanted Mr X flat on the ground so he could be secured and the dog removed quickly. It was not safe to remove the dog until Mr X was flat on the ground and he would not follow Officer C's instructions to lie flat. He was not aware of other officers nearby. Officer C does not think that his actions caused Mr X's face to hit the ground. He denies kicking Mr X in his side.

### What do officers say happened?

120. Officer A says she was controlling Mr X's legs. Officer C was standing on Mr X's left side. She "saw [Officer C] kick [Mr X] a couple of times in [Mr X's] side...under his ribs" while telling him to stop resisting. She describes the kicks as "just another attempt at trying to get him to comply... there was no malice behind it, it was just a 'stop resisting.'" The Police dog was still biting Mr X's bicep.

121. Officer G says he saw Mr X get out of the car with the dog attached to one arm and he stepped in to help pull Mr X out by the other arm. Mr X ended up on the ground near the back of the car. Officer G could not recall exactly how but says: "We didn't need to pull him down or anything like that." Mr X was resisting Officer G by refusing to remove his arm from underneath him but once this was free, the Police dog was released.

122. Officer G does not recall seeing any officers having to use physical force on Mr X. He says Mr X's injuries may have occurred from bumping his head when he came down.

123. Officer F says he helped to move Mr X towards the rear of the car and took control of his front and head. He believes Mr X "stumbled" and fell to the ground. He believes Mr X's facial injury was caused when his face hit the ground, possibly on his left side, and he saw Mr X's injury straight away when Mr X rolled over.

### What did other people see?

124. Mr V witnessed Police pull Mr X from the car with the Police dog latched onto his arm. He says Mr X was pulled straight down to the ground and the dog was "set on him again." He also saw an officer kick Mr X on the left-hand side of his thigh.

125. Mr W provided a statement to Police. He says he saw the Police dog attached to Mr X's arm then when Mr X was on the ground, he saw an officer kick him in the ribs.

*Was the force used when detaining Mr X on the ground excessive?*

126. We do not believe it was necessary for Officer C to kick Mr X's arm from under him. Other officers, including Officers A and F were present to assist with restraining Mr X, and if Officer C did not see them, he should have been more aware of the officers around him.
127. Mr X had significant cuts and grazes to the right side of his face, above and below his eye, following this incident. However, this may have happened at any point during the arrest process, and we cannot say it is more likely than not a consequence of Mr X's head hitting the ground after Officer C kicked his arm from under him.
128. The mobile phone footage does not show what happened when Mr X was taken to the ground. None of the officers admit to the level of force as described by Mr X in paragraph 62. However, there are two independent witness accounts that corroborate Officer A's account that she saw Officer C kick Mr X on the side of his body. Officer A was controlling Mr X's feet at the time so she was in a position to have had a good view of what happened. Mr X also sent us some photographs of his injuries, which show a bruise and grazes above his left hip.
129. Based on the independent witness accounts which corroborate the observations of Officer A, we conclude that Officer C kicked Mr X while on the ground and this was excessive.

**FINDINGS ON ISSUE 1**

Officer C was not justified in using his Police dog to remove Mr X from the car.

Officer C did not properly warn Mr X prior to him deploying his Police dog.

Officer C should not have kicked Mr X's arm out from underneath him.

Officer C kicked Mr X's side while he was on the ground, and this was excessive.



**Judge Colin Doherty**

Chair  
Independent Police Conduct Authority

**25 August 2022**

**IPCA: 20-5257**

## Appendix – Laws and Policies

### LAW

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130. 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 enforcement 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.”*

### POLICY

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#### **‘Use of force with Police dogs’ policy**

131. 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 implements used by Police, such as firearms, Taser and batons. Dog handlers must believe that the use of force is justified, and that the force used is as minimal as possible in the circumstances. Dog handlers must stop their dog from biting the person as soon as possible.
132. 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.
133. Before using their dog, handlers should ask themselves:
- *“Are there already sufficient members present and available to affect the arrest safely?”*
  - *Is there significant risk of injury to innocent bystanders which, in the circumstances, outweighs the need to use the dog?”*
134. Before instructing a dog to bite a person, dog handlers must warn or challenge the person to surrender *“unless it is unsafe or impracticable to do so.”* The person must then be given reasonable time to comply. The challenge must include that the officer is a Police employee who has a Police dog present which will be used to bite the suspect if they do not surrender to Police. The challenge must be loud enough to reasonably expect the suspect can hear it.
135. Dog handlers must consider the proximity of the dog to any person. They *“must be alert to circumstances that could cause a Police dog to contact or bite person when not intended.”*
136. Police dog handlers must have control of their dog at all times during deployment, whether that be using immediate physical or voice control.
137. 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?

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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?

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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

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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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