INDIVIDUAL COMMUNICATION TO THE UNITED NATIONS HUMAN RIGHTS COMMITTEE

Submitted by: Ms Corinna Horvath (“**the Author**”)

Alleged victim: The Author

State party: Australia

International Covenant on Civil and Political Rights

Date of Submission: 19 August 2008

Claim: The author has suffered violations of her human rights under Articles 2, 7, 9, 10, and 17 of the International Covenant on Civil and Political Rights[1] (“**the ICCPR**”).

Application: To the United Nations Human Rights Committee (“**the Committee**”) under Article 1 of the First Optional Protocol to the ICCPR.

Residence: The Author is a resident of Australia and at all material times has been resident in Australia.

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State Party: Australia and through Article 50 of the ICCPR, the application of the Covenant in the State of Victoria.

[1] Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976, in accordance with Article 49.

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Part 1

1.1 Event Description

Summary

This matter concerns a police raid of residential premises that occurred on the evening of 9 March 1996, in the State of Victoria, Australia. The raid resulted in serious injuries to civilians present. The author, who was 21 years of age at the time, had her nose fractured during the incident and was hospitalised for five days. The judge which first considered this matter described the incident as "…a disgraceful and outrageous display of police force in a private house", characterised by "…excessive and unnecessary violence wrought out of unmeritorious motives of ill will".[2] This description was adopted by the Court of Appeal of the Supreme Court of Victoria in *State of Victoria v Horvath and Ors* (2002) 6 VR 326 ("**the Court of Appeal judgment**").

Nevertheless, because of the findings of the Court of Appeal, which turned on its interpretation of legislation enacted by the State Government of Victoria (s.123 of the *Police Regulation Act* 1958 (Vic)), and following the precedent of *Enever v The King (*1906) 3 CLR 969, the State Government has been found not to be liable for any of the damages awarded against the police officers involved in the incident. In addition, none of the police officers involved have been subject to any form of criminal or professional punishment for their conduct. The applicant has not received any form of compensation or damages for injuries sustained during the raid.

The applicant adopts the description of the factual basis of this matter contained in the Court of Appeal judgment.[3] In that judgment, Winneke P, Chernov and Vincent JJA describe what occurred as follows:

> *On the afternoon of the 9 March 1996 Corinna Horvath, Craig Love and a number of their friends, including David and Colleen Kniese and their respective children gathered at the Horvath premises for a barbecue. Police Officers Jenkin and Davison arrived at the Horvath premises at approximately 9.40 p.m. [….] Jenkin wished to inspect Horvath's vehicle for evidence that it had been recently driven, but Horvath would not permit him to remain and effectively ordered him and Davison to leave. [Judge Williams in the County Court of Victoria[4]], found that Horvath had*

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[2] *State of Victoria v Horvath and Ors* (2002) 6 VR 326, [15]. - Exhibit 1

[3] The applicant has only cited passages relevant to this application, and provided some expanded explanation of parts of the reasons for judgment noted by the use of square brackets.

[4] *Horvath & Ors v Christensen & Ors*, Judge Williams, County Court of Victoria, 21 February 2001- Exhibit 2

revoked any licence that the policemen may have had to be on the Horvath premises and that she and Love used no more force than was necessary to terminate the resultant trespass. During the incident, Jenkin's shirt and Davison's tie were torn. Eventually, they left the Horvath premises and radioed for reinforcements with the result that, during the next 40 minutes or so, eight police officers in five motor vehicles gathered at the corner of Coolart and Hodgins Roads, which is a short distance from the Horvath premises.

The police involved were Sergeant Ian Christensen ("Christensen"), who was the officer-in-charge, Sergeants Smith, Jenkin and Davison, and Constables Marc Stuart Saunders ("Saunders"), Whatmough, Read-Smith and Paxton ("Paxton"). Jenkin and Davison told Christensen what they sought to do at the Horvath premises and the circumstances in which they were assaulted there by Horvath and an unknown male (Love). Davison said that he had been kicked during the incident and Jenkin claimed that he suffered a sore shin and a tender back from the attack. According to Christensen, the two policemen were visibly shaken by their experience and he noted that Jenkin's shirt was ripped and Davison's tie was missing. Other than seeing two scratches on Jenkin's chest, however, he saw no apparent injuries on the two policemen. But he did form the view that the two policemen intended to return to the Horvath premises and that Jenkin was particularly keen to do so.

Planning police raid

> *"It seems that there was general consensus amongst the gathered police that Horvath and the unknown male (Love) should be arrested for assaulting Jenkin and Davison, but one matter which concerned them was whether they had the authority to go onto the premises for that purpose if entry was denied to them by its occupants. They did not have a warrant that would authorise entry under such circumstances. Consequently, discussion took place, principally between Christensen and Sergeant Smith, as to whether they could invoke s.459A of the Crimes Act 1958 for the purpose of effecting a lawful entry at the Horvath premises notwithstanding that they might not have the occupiers' permission to do so. So far as is relevant, the section permitted a police officer to enter and search premises for the purpose of arresting a person on the premises where the officer believed, on reasonable grounds, that the person had committed a "serious indictable offence" and was on the premises. In the end, Christensen was satisfied that a serious indictable offence had been committed for the purposes of the section by Horvath and the unknown male in respect of Jenkin and Davison and that, therefore, the police had authority to enter the Horvath premises and arrest the two offenders. Christensen then told the other policemen of his conclusion as to the operation of s.459A and it was agreed that they would all go to the Horvath premises and arrest Horvath and, after he was identified, the unknown male. If necessary they would use force to gain*

entry. The trial judge found Christensen's evidence concerning the planning and the raid to be prevaricated and containing clear lies.

The police raid

Consequently, at approximately 10.30 pm the eight policemen in their five vehicles proceeded to the Horvath premises. It was claimed by the police at the trial that, when they arrived there, Horvath was outside her house and when they told her that she was under arrest, she fled inside. The trial judge, however, rejected that evidence, concluding it was fabricated because the police were not confident that the earlier incident involving Jenkin and Davison would be accepted as constituting a serious indictable offence for the purposes of s.459A of the Crimes Act 1958.

Be that as it may, Christensen, Jenkin and Davison went to the front door of the premises, Saunders was placed at the corner of the house and Smith and Paxton went to the rear of it. It was intended, in broad terms, that Jenkin and Davison would only identify Love and that he would be arrested by Christensen. Christensen yelled for the inmates of the house to open the front door and told them that he intended to make an arrest. The occupants refused, stating that the police were not entitled to enter without a warrant to which Christensen responded that they did not need one to effect the proposed arrest. According to the learned trial judge, this exchange was conducted by Christensen in a loud and aggressive voice and lasted for only approximately 20 seconds. Jenkin then took it upon himself to kick the front door open "with great and sudden force" without first having received any instructions or authority from Christensen to do so. He did this notwithstanding that it would have been apparent to him that at least some of the occupants may have been milling around the other side of the door. His Honour found that, as the door was thus forcefully broken open, it struck David Kniese on the face, causing injury and constituted an assault ("the door assault").

Upon entering the house, Jenkin pursued David Kniese, brought him to the floor and, in the course of so doing, struck him on the right side of the head and hit him at least once with a baton across his lower back region. When Davison caught up with Jenkin and reminded him that David Kniese was not one of the people who was to be arrested, Jenkin moved away from Kniese who, together with Davison, then went to the rear of the house to see his two sons who were sleeping there.

Jenkin then proceeded to the loungeroom where he assaulted Horvath. The learned judge found that he pulled her to the floor and began "brutally and unnecessarily" to punch her in the face thereby fracturing her nose and rendering her senseless. In the result, Horvath had no recollection of Jenkin's assault on her. With the assistance of Saunders, Jenkin then rolled Horvath over and, despite her bleeding nose,

handcuffed her and then dragged her out to the van. Williams J rejected Jenkin's claim that he tackled Horvath and punched her because she threatened to assault him. As a result of Jenkin's conduct towards her, Horvath suffered a fractured nose and other facial injuries, including bruising and a chipped tooth. She also had some bruising, scratches and abrasions to other parts of her body. She attended Frankston Hospital on 9 or 10 March 1996 and after a week was re-admitted for five days in relation to her nose injury. After some months she recovered from her physical injuries and was left with some nose scars and possibly aggravation of hay fever. Besides suffering physical injuries, she also suffered from anxiety and depression in respect of which she received treatment.

When the police broke into the house, Colleen Kniese was in the loungeroom which was located across the hall from the front door. Paxton confronted her, pushed her to the floor and held her there, on her knees, with her torso arched towards the floor and her hands held behind her back. According to the trial judge, it was likely that Paxton had his knee in her back. His Honour rejected his claim that Colleen Kniese had approached him in an aggressive manner and that his action was no more than a response to that conduct. […..]

Proceedings by the four plaintiffs

By proceedings filed by each of Horvath and Love on 6 June 1997 and by each of David Kniese and Colleen Kniese on 5 August 1998 against Christensen, Davison, Jenkin, Saunders and the State of Victoria, the plaintiffs claimed damages, including aggravated and exemplary damages, for negligence against Christensen in respect of the planning, supervision and execution of the raid and, against all the police defendants jointly, for assault (and, in the case of Horvath and Love, also for trespass, false imprisonment against all police defendants and malicious prosecution against Jenkin and Davison respectively). All plaintiffs sought damages against the State of Victoria on the basis, inter alia….

[that the respective liabilities of the police defendants and/or other police officers involved in the raid were servants and agents of the State of Victoria acting in the course of their employment with the State of Victoria made liable under s.123 of the Crown Proceedings Act 1958 (Vic).

*The State of Victoria denied vicarious liability on the basis that the police were acting pursuant to an independent discretion conferred upon them and therefore were not acting as servants or agents of the State, relying on the High Court authority of Enever v The King (1906) 3 CLR 969 ("**Enever**"). The Plaintiffs pleaded in the alternative that any liability visited on the defendants was transferred to the State of Victoria pursuant to s.123 of the Police Regulation Act 1958 which*

transferred liability from the police to the State in particular circumstances.]

The police defendants denied all claims made against them by the plaintiffs and alleged that the raid, including the forced entry and subsequent police action inside the house, was lawful and justified in the circumstances. They also filed counterclaims, but they were not pursued. The State of Victoria denied any liability to the plaintiffs and relevantly denied the applicability of s.123 of the Act to the circumstances of the case and in any event, to any award of exemplary damages that might be made against the police defendants.

The trial

The trial arising out of the four proceedings occupied some 40 sitting days in the course of which his Honour heard a substantial amount of evidence from a large number of witnesses, including the plaintiffs and the four police defendants. Essentially, his Honour regarded the police evidence as to the planning, supervision and execution of the raid as lacking credit. The trial judge highlighted in his reasons for judgment many inconsistencies in the evidence of each of the police defendants in relation to many of the events in question and found that they told lies on matters of major significance. More particularly, his Honour concluded that Christensen "clearly lied and prevaricated about his instructions (at the briefing of the raid) concerning who was to do the arresting" and that he also equivocated regarding the manner of the forced entry.

Judge's findings

[The Judge found that, pursuant to Enever, the State was not vicariously liable for the torts of the police officers. This was not contested at trial as the Court was bound by Enever.] His Honour found that Christensen alone owed the plaintiffs a duty to take reasonable care for their safety in the planning, supervision and execution of the raid and that he breached that duty and that, in the circumstances, was "manifestly" negligent in a number of ways concerning the raid. It is not necessary to list here all of his Honour's findings as to Christensen's negligence, but it is appropriate to refer to some of them. Before dealing with them, it is convenient to mention that his Honour rejected Christensen's claim that there were reasonable grounds for holding a belief that a serious indictable offence had been committed against Jenkin and Davison during their earlier visit to the Horvath premises and found that the entry by the police on to the Horvath premises was unlawful.

The important consequence of this finding was that everything done by them inside the house was also unlawful and, therefore, their actions

constituted trespass, assault and false imprisonment.

His Honour found that, not only had Christensen failed to obtain full information from Jenkin and Davison concerning the events which occurred at the Horvath premises earlier that evening and to properly assess the information that he did obtain from them, but also, he made a serious error of judgment in allowing Jenkin to participate in the raid in a major way. His Honour observed that Jenkin was a relatively junior member at the time and had no experience in forced entry raids, Jenkin was, as Christensen said, visibly shaken and upset at what had occurred at the Horvath premises. According to the judge, Christensen failed to consider what his Honour regarded as the high probability that Jenkin must have been very annoyed and hostile towards Horvath having regard to her driving of her Torana motor car contrary to his direction and the law and to her abusive attitude to him. The judge also considered that Christensen failed to give those under his command or supervision, and in particular to "the excitable Jenkin", clear instructions as to what were to be their respective roles in the raid. Further, it was his Honour's view that Christensen's aggressive actions at the door inflamed the situation and did not allow for a reasonable chance of avoiding the confrontation with the occupants of the house. Moreover, once Christensen entered the house, he did nothing to supervise the situation or otherwise guide the others, but immediately chased Love into the curtained-off bedroom and assaulted him as has been described. In short, the judge considered that Christensen had abrogated his responsibility for supervising the raid and acted with contumelious disregard for the plaintiffs' rights.

"His Honour was, as is apparent from what has been said so far, very critical of the conduct of the police, and of Christensen in particular, in relation to the plaintiffs. He recognised that the violation of a person's house and privacy by forced entry is a significant infringement of rights which, other than in very unusual circumstances, constitutes a serious breach of the law. If such an act is carried out by the police, his Honour considered, it should be done only where the seriousness of the situation demands it and only after the most careful and reasoned consideration of all the circumstances. On no view, said the judge, could the circumstances which the police claimed justified their forceful entry into the house be described as dangerous or as one calling for emergency action, as might be the case if the house contained a murderer or kidnapper or drugged, or armed, offenders. As his Honour concluded, "This ... was a fairly run of the mill traffic matter with (at worst) a superimposed relatively insignificant assault ...". His Honour went on to express his concern that the planning and implementation of the raid had an unnecessary sense of urgency about it and was, in reality, predetermined before the rendezvous took place. As his Honour postulated, those at the gathering would have regarded some form of retaliatory action as an appropriate means of showing loyalty to "the boys" so that the participants would have sensed a degree of anticlimax if the raid had been called off. In an overview of the raid, his Honour said

this:

> *"Overall it was a disgraceful and outrageous display of police force in a private house, and I consider Christensen did indeed show a contumelious disregard for the rights of the plaintiffs in planning and executing the raid as he did and I find that Jenkin in his conduct showed a most high handed approach accompanied by excessive and unnecessary violence wrought out of unmeritorious motives of ill will and desire to get even. ..."*

"The trial judge found that the plaintiffs' claims in negligence against Christensen had been made out as were their respective cases in assault, unlawful arrest, false imprisonment and malicious prosecution. [He also found that the police told lies on matters of major significance[5]]."

[5] *Horvath & Ors v Christensen & Ors*, Williams J, County Court of Victoria, 21 February 2001, p 19. Exhibit 2

1.2 Event Chronology

Date	Event
9 March 1996	"**Initial Incident**" - Police attended twice at 213 Coolart Rd, Summerville, in the State of Victoria, Australia. During the second incident, police including Constables Jenkin, Davison, Whatmough, Read-Smith, Paxton, Saunders and Sergeants Christensen and Smith broke and entered into author's property without warrant or invitation, inflicted serious injury on the author by repeatedly punching her on the face and other parts of her body and handcuffed and imprisoned the author without lawful excuse.[6] At all relevant times Christensen was in charge of the operation. As a result of the incident, the author suffered a fractured nose, facial injuries, bruising, scratches, abrasions to her face and other parts of her body and a chipped tooth. The author was hospitalised for five days. The author also experienced anxiety, depression, loss of confidence, stress, interference with her relationship, poor memory and concentration, and fear of police.[7] Other civilians were also injured during the incident.
9 March 1996	"**Complaint to the Ethical Standards Department**" - A witness and fellow victim, David Kniese, reported the police assault to the Ethical Standards Department ("**ESD**") of the Victoria Police shortly after the police left the premises with Ms Horvath and Mr Love.
9 November 1996	"**Magistrates Court Decision**" - Magistrate Spooner, at the Magistrates' Court in Frankston, dismissed all 11 charges brought by Constable Jenkin against the author for assaults against police and traffic infringements.[8]
February 1997	"**ESD Investigation Findings**" The ESD investigation found that the forced entry allegation

6 *Horvath & Ors v Christensen & Ors*, Williams J, County Court of Victoria, 21 February 2001, p 87 - Exhibit 2

7 Ibid at 89, 90.

8 See Frankston Court Bench Sheets – Exhibit 3

Date	Event
	was unable to be determined. ESD substantiated the assault allegation against Jenkin and recommended a disciplinary charge against him.[9]
6 June 1997	The author filed proceedings in the County Court of Victoria for damages against police.
8 July 1997	Police defendants, Christensen, Jenkins, Saunders and Davidson joined the State of Victoria as second defendant to the civil action.
September 1997	Victoria Police served a notice of a disciplinary charge on Jenkin.
July 1998	At the Police disciplinary hearing, the charge against Jenkin was discontinued. No civilian witnesses were called to this hearing. No other disciplinary action was taken in relation to any members of the Police.
11 October 1999	The author amends her civil claim to name the State of Victoria as a second defendant. The application to amend the Statement of Claim was unsuccessfully opposed by the State of Victoria.
2 April 2000	Section 123 of the *Police Regulations Act 1958* comes into force.[10]
23 February 2001	**"County Court Decision"** Judge Williams of the County Court of Victoria finds the police defendants or some of them liable in trespass, assaults, wrongful arrest, false imprisonment, malicious prosecution and negligence against the author and ordered both Jenkin and the State of Victoria (due to the negligence of Christensen in planning the raid) to pay the author $120,000 and $150,000 respectively in damages.[11]There were orders made against all named police defendants.

[9] A Fairer Disciplinary System 2007 OPI report- Exhibit 4
[10] Section 123 of the Police Regulations Act 1958 -Exhibit 5
[11] Exhibit 2

Date	Event
9 April 2001	State of Victoria files an appeal against Judge Williams' decision as to its liability for damages.The named police defendants did not appeal the findings and substantive orders.
7 November 2002	**"Court of Appeal Decision"** - The Court of Appeal overturns Judge Williams' decision that the State is liable to pay for damages arising from the intentional actions of Jenkin and Christensen. It found, in effect, that the negligence of Christensen was not a cause of the injuries to the Plaintiffs but rather they were caused by intentional actions that in effect severed the causal chain of liability of Christiansen. As a consequence, the whole claim against the State of Victoria was overturned.[12]
	All plaintiffs sought damages against the State of Victoria on the basis, inter alia, that the respective liabilities of the police defendants and/or other police officers involved in the raid were servants and agents of the State of Victoria acting in the course of their employment with the State of Victoria made liable under section 23 of the *Crown Proceedings Act* 1958 (Vic).[13]
	The State of Victoria denied vicarious liability on the basis that the police were acting pursuant to an independent discretion conferred upon them and therefore were not acting as servants or agents of the State, relying on the High Court authority of *Enever v The King* (1906) 3 CLR 969. The Plaintiffs pleaded in the alternative that any liability visited on the defendants was transferred to the State of Victoria pursuant to s.123 of the *Police Regulation Act 1958*. That section transfers liability from police members to the State in circumstances where the actions of Police are deemed "necessarily or reasonably done or omitted to be done in good faith" in the course of their duty.

[12] Exhibit 1
[13] Exhibit 6

Date	Event
On 18 June 2004	**"High Court Decision"** The author sought leave to appeal against the judgment of the Court of Appeal in the High Court of Australia in respect of the claim against the State of Victoria. Leave to appeal was refused.[14]

[14] *Horvath & Ors v State of Victoria & Ors* [2004] HCATrans 215 (18 June 2004)- Exhibit 7

1.3 Current situation

The current situation in respect of compensation for the author is as follows:

(a) The author has not received any damages from the individual police officers;

(b) The author has not received costs to pay her legal team; and

(c) The State of Victoria continues to maintain a legal landscape that absolves its liability to compensate victims of intentional human rights abuses.

The current situation in respect of disciplinary matters is as follows:

(a) All or most police involved in the incident remain employed by the State of Victoria with no disciplinary or criminal action having been successfully taken against any of them. This contrasts sharply with the strong findings of serious misconduct by Judge Williams , on the same civil standard of proof, None of the occupants of the house were spoken to by police investigators from Ethical Standards, including an independent witness who had an uninterrupted view of the assault on Ms Horvath from close by; and

(b) The State of Victoria fails to maintain a system that ensures effective discipline or prosecution of police engaged in human rights abuses.

This communication now turns to consider how this state of affairs violates the human rights of the author under intentional law.

1.4 Summary of Alleged Breaches of ICCPR

The author alleges that the State party has violated the following rights contained within the ICCPR:

Article 2

The State has not provided the author with an effective remedy for breaches of her human rights. She has received no compensation, nor has there been any disciplinary actions taken by the perpetrators of the assault. The State failed to provide adequate remedies by failing to prosecute officials who committed criminal offences against the author who then maliciously prosecuted the author.

Article 7

The author has suffered cruel, inhuman and degrading treatment despite its absolute and non-derogable prohibition under this Article.[15] Furthermore the treatment has occurred through the acts and failures of State officials – members of the Victoria Police force. The State has failed to effectively investigate, prosecute and bring to account police offenders. The State has permitted the officers involved to continue to be employed in positions where their unacceptable behaviour could be repeated.

Article 9

The author has been subjected to arbitrary arrest and detention. The State has not granted the author an enforceable right to compensation for her unlawful arrest and detention.

Article 10

Following the detention of the author, officers brutally assaulted her and then handcuffed her preventing her from reducing the pain and suffering she was experiencing as a result of her fractured nose. This constituted inhumane treatment during the deprivation of her liberty, and in disregard for her dignity and suffering. The State failed to obtain immediate medical treatment for the author. The author was left screaming in pain in the police cells at Hastings and it was only the intervention of a police doctor, who contacted the Author's parents, which led to her being taken to hospital.[16]

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[15] See General Comment No. 2 on the Implementation of Article 2 under the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, para 1, Exhibit 8

[16] This information is contained in the Transcript of the County Court proceedings. The Transcript is in the hands of the Victoria Police. The author applied under the Freedom of Information Act for a copy. Her request was rejected on the grounds that it was voluminous and its production (along with production of the disciplinary files) would divert too many resources from the State.

Article 17

The State, through its police force, has subjected the Author to the arbitrary and unlawful interference of her privacy, family and home as well as maliciously attacking her honour and reputation by prosecuting her.

Part 2

2.1 Admissibility of Claim to the UN Human Rights Committee

The Author submits that the claim is admissible for determination by the UNHRC pursuant to the criteria provided by Rule 96 of the Rules of Procedure of the Human Rights Committee.

1. *The communication must allege a violation of a human right which is contained in the ICCPR.*

   See the above summary and the submissions on the merits below.

2. *The communication must be in writing.*

   Submission: The criteria is established.

3. *The communication must come from an individual or his or her authorised representative.*

   Submission: The criteria is established.

4. *The communication must not be an "abuse of rights of submission" (that is, it must have something in fact or law to support it).*

   It is submitted that this not an abuse of rights submission.

5. *The communication must not be anonymous.*

   Submission: The criteria is established

   6. *The violation referred to in the communication must not be under examination by* another *international investigation or settlement procedure.*

   Submission: The criteria is established.

7. *All "effective and available" domestic remedies must be exhausted before making a communication.*

   Domestic remedies available to victims of human rights abuses in Victoria are:

   a) Civil Proceedings;

   b) Victims of Crime Compensation Application; and

c) Complaints to the relevant police complaint investigation authority.

Civil Proceedings

The Author commenced civil proceedings against the police and in 2001 was successful. In 2002, the State was effectively released from liability and responsibility for police action on its appeal against the judgment of the Trial Judge to the Court of Appeal of the Supreme Court of Victoria. The Author applied for special leave to appeal this decision in the High Court of Australia (the ultimate domestic appellate jurisdiction). That application was refused. The Author has exhausted all domestic remedies in attempting to claim damages from the State of Victoria.

There is a bankruptcy proceeding relating to one police officer, but this proceeding does not remedy the State's obligation to provide compensation for the Author. Furthermore in documentation viewed by the author's legal representative it is quite apparent that the individual police officers against whom judgment was entered have not the resources to pay the judgment amount and costs or any substantial portion thereof.

Compensation through Victims of Crime Compensation Tribunal ("VOCAT")

Non-criminal acts that constitute human rights abuses such as negligence, humiliating and degrading treatment, failure to obtain medical assistance and ill-treatment are not necessarily criminal offences and are thus non-compensable through this scheme. Accordingly, the existence of such a scheme does not provide a real and effective remedy to the human rights abuses suffered by the Author. Further the amount of compensation awarded is limited and would be much less than the amount of damages and/or costs awarded by Judge Williams. In addition there is no actionable adverse findings made pursuant to this legislation.

Complaints to relevant police complaint investigation body

A complaint was made to the relevant body and four complaint files generated. A disciplinary proceeding was commenced and

dismissed, despite the strong findings of fact made against police during the court proceedings outlined at the beginning of this communication.

The ESD investigation did not result in:

(a) Prosecution of perpetrators or any of them;

(b) Successful disciplinary proceedings against perpetrators or any of them; or

(c) Any employment consequences for the perpetrators or any of them.

The Author had no standing in the matter, and was not called as a witness in any disciplinary investigation or proceeding.

The Author contends that all viable domestic remedies have been exhausted and this communication is the final avenue available for the Author to seek remedies.

Part 3

3.1 Merit and submissions on law

It is submitted that the State of Victoria is obliged to protect human rights pursuant to Article 50 of the *International Covenant on Civil and Political Rights*, ("the ICCPR") signed on 18 December 1972 and ratified on 13 August 1980.[17]

(a) Article 2

> 1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
>
> 2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.
>
> 3. Each State Party to the present Covenant undertakes:
>
> (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
>
> (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
>
> (c) To ensure that the competent authorities shall enforce such remedies when granted.

Article 2 of the ICCPR requires a State party to ensure effective remedies for human rights abuses and enforcement of these remedies. The Committee noted the following in its General Comment 31:

> Article 2, paragraph 3, requires that States Parties make reparation to individuals whose Covenant rights have been violated. Without

[17] See, for example, *Toonan v Australia Communication No. 488/1992: Australia. 04/04/94.*

> reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of article 2, paragraph 3, is not discharged. In addition to the explicit reparation required by articles 9, paragraph 5, and 14, paragraph 6, the Committee considers that the Covenant generally entails appropriate compensation. The Committee notes that, where appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.[18]

Compensation

The common law of Australia as set out in *Enever v The King* (1906) 3 CLR 969 ("Enever") obviates the State of Victoria from responsibility for human rights violations perpetrated by police officers. In that judgment, the High Court of Australia held that "[a] peace officer is himself responsible for unjustifiable acts done in the intended exercise of his lawful authority; but the responsibility for his acts does not extend to the person or body whereby he was appointed to his office". That principle was taken to include immunising the State from liability for a tortious act of a constable undertaken in the mistaken belief that he or she is performing a statutory duty.[19]

It is submitted that *Enever* is inconsistent with Article 2. It is at variance with the general principle of vicarious liability at common law that an employer or principal is liable for the wrongful acts or omissions of a servant or agent, provided that the act or omission is within the scope of the employment or agency; *Kensington and Chelsea and Westminster Area Health Authority v Wettern Composites Ltd* [1985] 1 All ER 346.

Evener is also inconsistent with the movement in international human rights law towards a broader responsibility of the State for the acts and omissions of police officers and the recognition of the importance for the provision of an adequate and effective remedy to victims of human rights violations perpetrated by police; *Keegan v The United Kingdom (28867/03)* ECHR 18 July 2006*; Osman v The United Kingdom (23452/94) [1998] ECHR 101 (28 October 1998).*

As demonstrated by this matter, s.123 of the *Police Regulations Act* 1958 provides no effective remedy for victims of police abuse, even where that abuse occurs through misconduct occurring during police operations and procedures. Accordingly, in Victoria victims of police abuse are reliant on damages being paid by the individual police perpetrators of that abuse. This is problematic, because police officers

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[18] General Comment No. 31 [80] Nature of the General Legal Obligation Imposed on States Parties to the Covenant : . 26/05/2004.*CCPR/C/21/Rev.1/Add.13. (General Comments*)

[19] At 989 per Barton J. -Exhibit 9

are able to organise their assets in ways that shields them from potential liability to civil actions. In cases where the individual police officer has no capacity to pay (or has no assets in their name), the victim goes uncompensated. This is neither an effective compensation scheme, nor does it provide any incentive to the State of Victoria, or more specifically, the Victorian Police Force, to prevent further abuses by police officers.

In *Christopher Hapimana Ben Mark Taunoa and Ors v The Attorney General and Anor* [2007] NZSC 70 (31 August 2007) the Supreme Court of New Zealand observed:

> Under the Covenant on Civil and Political Rights it is the responsibility of the States Parties to provide in their domestic legal systems an "effective remedy" for breaches of rights. In the New Zealand legal system it is the responsibility of the courts to provide appropriate remedies to those whose rights and interests recognised by law have been infringed. Without such vindication, the rights affirmed for all people in the New Zealand Bill of Rights Act would be hollow. It is for that reason that the Court of Appeal in Baigent's Case, undeterred by the absence of any express provision in the Act about remedies, held that an action for damages can be brought where such damages are appropriate to remedy breaches of the Act.

At paragraph 262 and 263 the Court stated:

> The infliction or condoning by the State of cruel or degrading or severely disproportionate treatment, something which society regards as outrageous, must be marked by an order that the State pay the victim a sum which will provide a public acknowledgement, by a judicial officer, of the wrongfulness of what has been done as well as solace for injured feelings. The sum awarded should of course reflect any intention behind the conduct which gave rise to the breach and the duration of the breach.
>
> The level of the monetary sum should also reflect the other ways in which the State has acknowledged the wrongdoing: whether, and with what speed, it has brought to an end the wrongful conduct and put in place measures to prevent reoccurrence; and whether it has publicly apologised to the victim in appropriate terms.

It is submitted that the State of Victoria does not have a statutory scheme that provides adequate compensation for human rights abuses. [20]

Bars to compensation include:

- The common law as articulated in *Enever* holds that the State is not responsible for police conduct because when police act on

[20] The recently enacted *Charter of Human Rights and Responsibilities Act* 2006 (Vic) does not improve this state of affairs for the Author. It is non-retroactive in operation (s.49) and expressly excludes the award of damages for a breach of Charter rights (s.39(3)). These sections at attached as Exhibit 10.

the basis of a power under law, they act independently and not as agents of the State;[21]

- Section 123 of the *Police Regulations Act* 1958 (Vic) only partially remedies this situation by holding the State liable only where police act reasonably in good faith. The consequence of this is that victims who have been intentionally mistreated and who have suffered human rights abuses by police officers are denied damages from the State. Moreover, the *Police Regulations Act* creates an exceptionally narrow class of State liability for actions or omissions of Police officers. In order for the State to be liable, the actions of the police must be negligent, yet also the police must be acting in good faith, and the act or omission must be "necessarily or reasonably done" in the course of their duty. It is very difficult to imagine a class of case that satisfies such criteria.

  In this matter, the Trial Judge was satisfied that the negligent planning and supervision of the raid by Christiansen was such an example as a reasonable yet negligent action done in good faith, and that the abuse suffered by the Author flowed from that negligence (through, *inter alia*, a failure to adequately plan or supervise, and by allowing Jenkin to be present during the raid despite his animosity to the Author). However, the Court of Appeal overturned this analysis, holding that the actions of Police during the raid effectively severed the causal chain. To that end, it is notable that the Court of Appeal found that there was a "common design" agreed between the officers to commit intentional torts that overtook any negligence of Christiansen in planning the raid [70]. This finding was directly at odds with that of the Trial Judge, who (with the benefit of seeing all witnesses give evidence) expressly did not find that there was a plan to utilise excessive violence, but rather it was only contemplated that "a reasonable or proportional degree of violence may have to be used". Notably, that finding of the Trial Judge was cited but not distinguished in the very paragraph where the Court of Appeal found that the causal chain had been severed by the intervening actions of the officers present [70].

The above deficiencies means that currently the State is not liable for the vast majority of human rights violations perpetrated by police.

Under the ECHR, States have been held to be strictly liable even when their agents are acting ultra vires or contrary to instructions. See, for example, *Ireland v United Kingdom* 18 January 1978 Series A No. 25 P64.

All wrongful acts or omissions intended to cause harm to a person in Victoria by members of Victoria Police are potentially human rights

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21 *Enever v The King* (1906) 3 CLR 969 Exhibit 9

violations. The State is required under the Covenant to take responsibility to ensure effective remedies for these abuses and to compensate victims. This of fundamental importance in order to provide the State with a greater incentive to ensure human rights violations are not perpetrated by police.

Four States in Australia ensure State compensation for victims of police tort, even when police actions are intentional or in bad faith. In two States, the State will pay for punitive damages awarded against officers. It is submitted that these States comply with the compensation requirements of the ICCPR (see Schedule 1 for further details).

The failure of the State Party to directly compensate the Author for violations to her human rights by police officers amounts to a violation under Article 2.

<u>Article 14 CAT</u>

> 1. Each party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.
>
> 2. Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law.

The issue of whether the Author's claim meets the threshold for torture or cruel and inhumane treatment will be discussed under the heading "Article 7" below.

In *Dzemajl et al v Yugoslavia* (CAT 161/00) the Committee Against Torture states:

> Concerning the alleged violation of article 14 of the Convention, the Committee notes that the scope of application of the said provision only refers to torture in the sense of article 1 of the Convention and does not cover other forms of ill-treatment. Moreover, article 16[22],

[22] Article 16- Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture or references to other forms of cruel, inhuman or degrading treatment or punishment.

The provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibit cruel, inhuman or degrading treatment or punishment or which relate to extradition or expulsion.

> paragraph 1, of the Convention while specifically referring to articles 10,11,12 and 13 does not mention 14 of the Convention. Nevertheless, article 14 of the Convention does not mean that the State party is not obliged to grant redress and fair and adequate compensation to the victim of an act in breach of article 16 of the Convention. The positive obligations that flow from the first sentence of article 16 of the Convention include an obligation to grant redress and compensate victims of an act in breach of that provision. The Committee is therefore of the view that the State party has failed to observe its obligations under article 16 of the Convention by failing to enable the complaints to obtain redress and to provide them with fair and adequate compensation.

Articles 7 and 10 of the ICCPR and the Convention on Torture address similar concerns. CAT jurisprudence offers a guide to understanding the nature and obligations of the corresponding rights under the ICCPR. The Author submits that the State's obligation to provide redress and compensation set out in Article 14 of CAT extends to her circumstances.

<u>Bringing to Justice the Perpetrators of Human Rights Abuses</u>

Another remedy that is required under Article 2 is action by the State Party to punish, remove from duty and rehabilitate the offender. This second remedy is partly discussed here but also under the discussion relating to Article 7.

The State has failed to ensure that the Author's perpetrators, like other perpetrators of criminal assaults, battery and kidnapping in the company of others are tried before a criminal Court.

Criminal penalties are intended to operate in several ways that are relevant to human rights protections:

- To send a message that such behaviour is unacceptable;
- To provide specific and general deterrence against future behaviour;
- To protect the community from the offender; and
- To enable rehabilitation of the offender.

Failure to prosecute police officers who have engaged in human rights abuses that are criminal offences undermines any potential deterrent effect to police who engage in human rights breaches such as those rights violated against the Author. It also undermines the promise of Article 26 that all people shall be equal before the courts and tribunals and rights to protections from arbitrary and unlawful interferences and attacks on a person's home and privacy. In the Author's situation the Police as a result of their status as police officers where not brought

before the Courts as another other perpetrators of such abuse would have been.

Failure to prosecute police officers engaged in criminal offences undermines human rights protections guaranteed under the ICCPR. In *M.C v Bulgaria Application no. 39272/98)* (4 December 2003), the European Court found that the state had an obligation to provide an effective legal framework by enacting criminal-law provisions to effectively investigate and punish rape. A similar obligation on the state exists to provide an effective and impartial framework to investigate and punish police officers who engage in criminal offences.

The Committee Against Torture noted,

> "Since the failure of the State to exercise due diligence to intervene to stop, sanction and provide remedies to victims of torture facilitates and enables non-State actors to commit acts impermissible under the Convention with impunity, the State's indifference or inaction provides a form of encouragement and/or defacto permission."[23]

(b) Article 7

> No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

Article 7 is concerned with the obligation to prevent people from being subject to ill-treatment. It is non-derogable.

The Author submits that the treatment she received by police falls squarely within the scope of Article 7. The raid involved the assault of herself, her partner Craig Love and others for legitimately refusing to allow police onto the property. The police where not acting in accordance with law, but engaged in unlawful activity. The Author was the subject of cruel inhuman and degrading treatment during the raid. This degradation was only enhanced by her being handcuffed and taken into custody and later charged. The act of arresting her was cruel and unjustified.

In *Istratii and Others v. Moldova* 8721/05 [2007] *ECHR* 229 (27 March 2007) the European Court of Human Rights in interpreting Article 3, which is the equivalent provision under the European Charter to Article 7 of the ICCPR, stated *inter alia*:

> 46. The Court recalls that, according to its case-law, ill-treatment must attain a minimum level of severity if it is to fall within the scope of

[23] http://www2.ohchr.org/english/bodies/cat/docs/CAT.C.GC.2.CRP.1.Rev.4_en.pdf [para 18]

Article 3. The assessment of this minimum level is, in the nature of things, relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim (see Kudła v. Poland [GC], no. 30210/96, § 91, ECHR 2000-XI, and Sarban, cited above, §§ 75 et seq.). Although the purpose of such treatment is a factor to be taken into account, in particular whether it was intended to humiliate or debase the victim, the absence of any such purpose does not inevitably lead to a finding that there has been no violation of Article 3 (Peers v. Greece, no. 28524/95, § 74, ECHR 2001-III).

47. Although Article 3 of the Convention cannot be construed as laying down a general obligation to release detainees on health grounds, it nonetheless imposes an obligation on the State to protect the physical well-being of persons deprived of their liberty, for example by providing them with the requisite medical assistance …

52. Despite the assurances of the Government that in case of an emergency urgent medical assistance could be given without delay by calling an ambulance and transporting the patient to a nearby hospital (see paragraph 43 above), no explanation was offered for the three-hour delay before such assistance was given. While it was eventually determined that the crisis had not been very dangerous, the applicant had been left in pain and in a state of anxiety throughout that period, not knowing exactly what his condition was and when he would be given qualified medical assistance.

53. 54. It follows that the applicant was not given timely medical assistance in the CFECC remand centre and was left in a state of anxiety in respect of his health.

55. Mr Istratii also complained about his transfer to a detainee hospital without leaving him time for recovery and about his handcuffing while in hospital. The Court notes that less than four hours after the surgery the applicant was taken to a detainee hospital and that the transfer took two and a half hours (see paragraph 18 above)…

56. In such conditions, where there was no risk of the applicant's fleeing and where the recovery time allowed was very short whereas the journey time was relatively long, the Court is not convinced that any concerns about the applicant's possible escape should have outweighed the clear need to ensure his recovery.

57. The Court notes that the Government gave no explanation for the need to handcuff the applicant, except to emphasise that he had not been handcuffed during surgery. Indeed, the applicant's medical condition (both before and after surgery) effectively excluded any risk of fleeing or of causing violence, as noted in paragraph 54 above, and there was no claim that he had any record of violence. In such circumstances, and in light of the further fact that two CFECC officers guarded the applicant in his hospital room, his handcuffing to a wall heater was disproportionate to the needs of security and unjustifiably

humiliated him, whether or not that had been the intention (cf. Mouisel v. France, no. 67263/01, § 47, ECHR 2002 IX; Henaf v. France, no. 65436/01, § 52, ECHR 2003 XI).

58. In the Court's view, the failure to provide immediate medical assistance to the applicant in an emergency situation, as well as his transfer to another hospital before he could sufficiently recover, together with his humiliation by being handcuffed while in hospital, amounted to inhuman and degrading treatment within the meaning of Article 3 of the Convention (see Kudła, cited above, § 94; Farbtuhs v. Latvia, cited above, § 51; Nevmerzhitsky v. Ukraine, no. 54825/00, § 106, 5 April 2005).

In *Assenov and Others v Bulgaria* (1998) 28 EHRR 652 the Court noted:

> Article 3, as the Court has observed on many occasions, enshrines one of the fundamental values of democratic society. Even in the most difficult of circumstances, such as the fight against terrorism or crime, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 even in the event of a public emergency threatening the life of the nation (see the above-mentioned Aksoy judgment, p. 2278, § 62). 94. The Court recalls that ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is relative: it depends on all the circumstances of the case, such as the duration of the treatment, its physical and/or mental effects and, in some cases, the sex, age and state of health of the victim. In respect of a person deprived of his liberty, **recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article** 3 (see the Tekin v. Turkey judgment of 9 June 1998, Reports 1998-IV, pp. 1517–18, §§ 52 and 53). 95. The Court considers that the degree of bruising found by the doctor who examined Mr Assenov (see paragraph 11 above) indicates that the latter's injuries, whether caused by his father or by the police, were sufficiently serious to amount to ill-treatment within the scope of Article 3 (see, for e 95. The Court considers that the degree of bruising found by the doctor who examined Mr Assenov (see paragraph 11 above) indicates that the latter's injuries, whether caused by his father or by the police, were sufficiently serious to amount to ill-treatment within the scope of Article 3 (see, for example, the A. v. the United Kingdom judgment of 23 September 1998, Reports 1998-VI, p. 2699, § 21, and the abovementioned. (emphasis added)

In *Alsayed Allaham v Greece* (Application no. 25771/03) 18 January 2007 the European Court held:

> *1. In considering whether a punishment or treatment is "degrading" within the meaning of Article 3, the Court will also have regard to whether its object is to humiliate and debase the person concerned and whether, as far as the consequences are concerned, it adversely affected his or her personality in a manner incompatible with Article 3*

(see, for example, Raninen v. Finland, judgment of 16 December 1997, Reports 1997-VIII, pp. 2821-22, § 55).

2. In the light of the above circumstances, the Court considers that the physical harm suffered by the applicant at the hands of the police, as well as the feelings of fear, anguish and inferiority which the impugned treatment had produced in him, must have caused the applicant suffering of sufficient severity for the acts of the police to be categorised as inhuman and degrading treatment within the meaning of Article 3 of the Convention (see, mutatis mutandis, Balogh v. Hungary, no. 47940/99, 20 July 2004).[24]

In *Menesheva v Russa*, Application 59361/00 5 March 2006, a case involving the arrest and detention of a young woman, the European Court found that the presence of injuries in the absence of any plausible explanation other than that they were inflicted by police could be accepted as evidence of ill-treatment. The issue then for the court to determine was whether the ill-treatment was sufficiently serious to constitute the very serious and cruel suffering that is defined as Article 3 ill-treatment. The court said, at paragraph 6:

> *"3. The acts complained of were such as to arouse in the applicant feelings of fear, anguish and inferiority capable of humiliating and debasing her and possibly breaking her physical and moral resistance. In any event, the Court reiterates that, in respect of persons deprived of their liberty, recourse to physical force which has not been made strictly necessary by their own conduct diminishes human dignity and is in principle an infringement of the right set forth in Article 3 (see Selmouni, cited above, § 99).*
>
> *4. The Court finds that in the instant case the existence of physical pain or suffering is attested by the medical expert and the applicant's statements regarding her ill-treatment in custody. The sequence of events also demonstrates that the pain and suffering was inflicted on her intentionally, in particular with the view of extracting from her information concerning L (see §§ 53-54 above).*
>
> *5. To assess the severity of the "pain or suffering" inflicted on the applicant, the Court has regard to all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, as in some cases, the sex, age and state of health of the victim (see Batı, cited above, § 120). The Court observes that at the material time the applicant was only 19 years old and, being a female confronted with several male policemen, she was particularly vulnerable. Furthermore, the ill-treatment lasted for several hours during which she was twice beaten up and subjected to other forms of violent physical and moral impact.*
>
> *6. In these circumstances, the Court concludes that, taken as a whole and having regard to its purpose and severity, the ill-treatment at issue amounted to torture within the meaning of Article 3 of the Convention."*

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[24] Paragraph 32 and 33.

These cases indicate that the following treatment can amount to ill-treatment in the context of Article 3 of the European Convention:

(a) a delay in the provision of medical treatment;

(b) unnecessary recourse to physical force with has not been made strictly necessary by the person's conduct;[25]

(c) unnecessary handcuffing; and/or

(d) unlawful detention.[26]

Other relevant issues include:

(e) The length of time of the treatment;

(f) The vulnerability of the person, including gender;

(g) The intentionality of the treatment; and/or

(h) Inducement of feelings of fear, anguish and inferiority sufficiently to be characterized as to be inhuman and degrading.

It is submitted that treatment meeting the Article 3 (European Convention) also breach Article 7 of the ICCPR.

Application of Article 7 principles to the Author

The level of force used against the Author during the raid went far beyond the force required to detain her. The trial judge found that Jenkin:

> "*…pulled her to the floor and began "brutally and unnecessarily" to punch her in the face thereby fracturing her nose and rendering her senseless. In the result, Horvath had no recollection of Jenkin's assault on her. With the assistance of Saunders, Jenkin then rolled Horvath over and, despite her bleeding nose, handcuffed her and then dragged her out to the van. Williams J rejected Jenkin's claim that he tackled Horvath and punched her because she threatened to assault him. As a result of Jenkin's conduct towards her, Horvath suffered a fractured nose and other facial injuries, including bruising and a chipped tooth. She also had some bruising, scratches and abrasions to other parts of her body. She attended Frankston Hospital on 9 or 10 March 1996 and after a week was re-admitted for five days in relation to her nose injury. After some months she recovered from her physical injuries and was left with some nose scars and possibly aggravation of hay fever. Besides suffering physical injuries, she also suffered from anxiety and depression in respect of which she received treatment.*"

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25 Also see *Kmetty v. Hungary* (Application no. 57967/00) ECHR 16 December 2003.

26 *C v Australia*- decision under the ICCPR of the Human Rights Committee found unlawful detention can amount to ill-treatment, *Menesheva v Russia* 9 March 2006. Both detentions included mistreatment (neglect/assaults).

It is submitted that this deplorable conduct reaches the bar set for Article 7 ill-treatment. It could not be said that it was made in any way necessary by the Author's conduct, or the conduct of other civilians present at the time.

Specific obligations of the State in respect of Article 7

The European Court of Human Rights and the Committee have found that the right to freedom from ill-treatment in the respective conventions they govern impose two obligations on State parties:

(a) A substantive (or negative) obligation to prevent violations of the relevant article; and

(b) A procedural (or positive) obligation to provide an effective investigation into allegations of substantive violations.

The positive obligation is an intrinsic part of both Articles 3 (under the European Convention) and 7 (under the ICCPR), and it is not necessary (though often done) to rely on additional enforcement provisions (such as Article 2 of the ICCPR). The positive obligation is essential for the negative obligation to have any meaning.[27]

The leading European case on this issue is *Assenov and Others v Bulgaria* (1998) 28 EHRR 652, where is was observed:

> *The Court considers that, in these circumstances, where an individual raises an arguable claim that he has been seriously ill-treated by the police or other such agents of the State unlawfully and in breach of Article 3, that provision, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in ... [the] Convention", requires by implication that there should be an effective official investigation. This investigation, as with that under Article 2, should be capable of leading to the identification and punishment of those responsible (see, in relation to Article 2 of the Convention, the McCann and Others v. the United Kingdom judgment of 27 September 1995, Series A no. 324, p. 49, § 161, the Kaya v. Turkey judgment of 19 February 1998, Reports 1998-I, p. 324, § 86, and the Yasa v. Turkey judgment of 2 September 1998, Reports 1998-VI, p. 2438, § 98). If this were not the case, the general legal prohibition of torture and inhuman and degrading treatment and punishment, despite its fundamental importance (see paragraph 93 above), would be ineffective in practice and it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity.*[28]

The requirements of an effective investigation are as follows:

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[27] *Menesheva v Russa*, Application 59361/00 5 March 2006 para 61-74. Also see *Bekos and Koutropoulos v Greece*, Application 15250/02 13 December 2005.

[28] See Bekos.

(a) independence, and no hierarchical linkage (whether chain of command or administratively)[29] between the investigator and those subject to investigation;[30]

(b) objective and subjective impartiality;[31]

(c) that it be capable of leading to the identification and punishment of those responsible;[32]

(d) subject to public scrutiny;[33] and

(e) competent Authorities must act with exemplary diligence and promptness.[34]

The Committee in interpreting the requirements of an Article 7 investigation under the ICCPR has made the following comments:

(a) In it concluding observations on Hong Kong:

> *The Committee expresses concern over the investigative procedure in respect of alleged human rights violations by the police. It notes that the investigation of such complaints rests within the Police Force itself rather than being carried out in a manner that ensures its independence and credibility. In light of the high proportion of complaints against police officers which are found by the investigating police to be unsubstantiated, the Committee expresses concern about the credibility of the investigation process and takes the view that investigation into complaints of abuse of authority by members of the Police Force must be, and must appear to be, fair and independent and must therefore be entrusted to an independent mechanism. The Committee welcomes the changes made to strengthen the status and authority of the Independent Police Complaints Council but notes that these changes still leave investigations entirely in the hands of the police.*[35]

(b) In its concluding observations on the Syrian Arab Republic:

> *The State party should …ensure prompt, thorough, and impartial investigations by an independent mechanism into all allegations of*

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29 *Ogur v. Turkey* 20 May 1999 ECHR para 91.

30 *Mahmut Kaya* 28 March 2000 ECHR para 95.

31 *Gulec v Turkey* 27 July 1998 ECHR para 76.

32 (See *Assenov and Others*, judgment of 28 October 1998, *Reports* 1998-VIII, p. 3290, § 102 and *Labita v. Italy* [GC], no. 26772/95, § 131, ECHR 2000-IV).

33 *Askoy v Turkey* para 98

34 (See, for example, *Isayeva and Others v. Russia*, nos. 57947/00, 57948/00 and 57949/00, §§ 208-213, 24 February 2005).

35 Concluding observations of the Human Rights Committee 9 November 1995 Hong Kong para 11.

torture and ill-treatment, prosecute and punish perpetrators, and provide effective remedies and rehabilitations to the victims.[36]

(c) In its concluding observations on Brazil:

> *The State party should ensure that the constitutional safeguard of federalization of human rights crimes becomes and efficient and practical mechanism in order to ensure prompt, thorough, independent and impartial investigations and prosecution of serious human rights violations.*[37]

(d) In its concluding observations on Kenya:

> *The State party should…ensure that allegations of torture and similar ill-treatment, as well as of deaths in custody, are promptly and thoroughly investigated by an independent body so that perpetrators are brought to justice….*[38]

These above principles have been accepted in the United Kingdom. For example, *In R(LD) v Secretary of State for the Home Department* [2005] EWHC 728 (Admin), paragraph 9 Munby J stated:

> *A corresponding obligation to carry out "an effective investigation" arises under Article 3 where an individual raises an arguable claim that he has been "seriously ill-treated" by the police or other agents of the State in breach of Article 3: Assenov and Others v Bulgaria (1998) 28 EHRR 652 at paragraph 102.*

This conclusion is consistent with other decisions concerning Article 3 under the ECHR determined by the European Court of Human Rights.[39]

It is also consistent with a recent comment by the UN Committee on the Convention Against Torture, 39th Session, (5-23 November 2007) General Comment No 2.

Application to the Author's case

The investigation into the Author's abuse was carried out by the Ethical Standards Department, a part of the Victoria Police. The Victoria Police disciplinary system was the subject of substantial criticism in a 2007 Office of Police Integrity Report entitled, "A Fairer Police Disciplinary System". [Exhibit 4]

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[36] Concluding observations of the Human Rights Committee 9 August 2005 in the Syrian Arab Republic para 9.

[37] Concluding observations of the Human Rights Committee 1 December 2005, Brazil, para 13.

[38] Concluding observations of the Human Rights Committee 29 April 2005, Kenya, para 18.

[39] Aksoy v Turkey 1996 , Assenov v Bulgaria 1998, Kmetty v Hungary 2003 – decisions by the European Court of Human Rights under the ECHR.

The Author's case is described at page 37 and 38 of this report, although fictional liberties have been taken in describing the Author's case (including the award of damages, and the gender of the Author). It is, however, clear from the Report that the OPI considers that the failure of the disciplinary process to have held police accountable in this case is of concern.

The County Court of Victoria, in civil proceedings brought by the Author three years later, came to clear findings of fault against the police in respect to the Author.[40]

At pages 54 to 61 of his judgement, Judge Williams found Sergeant Christensen "manifestly negligent" in conducting the raid. His Honour found at page 69 that Constable Jenkin was engaged in trespass and "brutally and excessively assaulted Corinna Horvath and falsely arrested and imprisoned her." He found at page 75 that Jenkin used force that was "quite disproportionate to any belief he might have been able to hold on objectively reasonable grounds…"

Judge Williams found at page 80 that Constable Jenkin had conducted a prosecution against the Author that was "not based upon a proper motive, but arose from a mixture of ill-will and a desire to justify *ex post facto* the general conduct of police throughout the whole affair." On this basis he found the tort of malicious prosecution to be made out.

It is noteworthy that the standards of proof of civil proceedings are the same as for disciplinary proceedings. Despite the same standards of proof, the disciplinary process failed to achieve the same result as an independent judicial hearing.

The Committee Against Torture stated in a general comment dated 23 November 2007[41] that:

> The committee considers that amnesties or other impediments which preclude or indicate unwillingness to provide prompt and fair prosecution and punishment of perpetrators of torture or ill-treatment violate the principle of non-derogability.

It further noted that it is the State's obligation to prevent torture and ill treatment, including ill treatment or torture by perpetrators acting in conjunction with or at the behest of the State party.

It is submitted that Victoria Police officers are acting at the behest or in the name of the State Party and that the State Party must ensure effective measures to:

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[40] Exhibit 2

[41] Committee Against Torture 39th Session 5-23 November 2007, Dist. General CAT/C/CG/2/CPR.1/Rev.4 General Comment No. 2 Implementation of article 2 by States Parties.

> *…investigate, punish, and prevent further torture or ill-treatment in the future, with particular attention to the legal responsibility of both the direct perpetrators and officials in the chain of command, whether by acts of instigation, consent or acquiesence.*[42]

By reason of a failure to effectively investigate or use the findings in the civil proceedings as evidence to remove police perpetrators from duty, proven perpetrators of abuse are still employed without any form of discipline. This inaction condones and effectively authorises further potential violation of Article 7 of the ECHR. The State of Victoria plays a role in permitting a culture of impunity and immunity within Victoria Police when it fails to take appropriate action against police perpetrators and those who fail in their duty of care to citizens.

Continuing to employ a known perpetrator of human rights abuses places the public at unacceptable risk of further violations.

(c) Article 9

> 1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
>
> 2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
>
> 3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.
>
> 4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
>
> 5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

Article 9 has been generally applied to examine detention of an administrative (immigration) or preventative nature. However, the Article has wider applicability. In *Shams et al. v. Australia* (V)1255, 20 July 2007 the Human Rights Committee observed:

[42] Ibid at paragraph 7

"…in order to avoid a characterisation of arbitrariness, detention should not continue beyond the period for which the State party can provide appropriate justification."[43]

Without a warrant, the police had no right to enter and arrest the Author. At no point was the detention justified or lawful. In County Court proceedings, Williams J found that she had been falsely arrested and imprisoned[44].

The Author's false arrest and imprisonment falls squarely within the ambit of clause 1 of Article 9. Moreover, persons form whom have had their rights violated under this Article shall be entitled to an enforceable right to compensation. There has consequently been a violation of Article 9(4).

(d) Article 10

> 1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.
>
> 2. (a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;
>
> (b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.
>
> 3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

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[43] Paragraph 7.1

[44] See page 69 of William J Exhibit 2

Paragraph 3 and 4 of the UN Human Rights Committee General Comment 21 on Article 10 reads as follows:

> *"Article 10, paragraph 1, imposes on States parties a positive obligation towards persons who are particularly vulnerable because of their status as persons deprived of liberty, and complements for them the ban on torture or other cruel, inhuman or degrading treatment or punishment contained in article 7 of the Covenant. Thus, not only may persons deprived of their liberty not be subjected to treatment that is contrary to article 7, including medical or scientific experimentation, but neither may they be subjected to any hardship or constraint other than that resulting from the deprivation of liberty; respect for the dignity of such persons must be guaranteed under the same conditions as for that of free persons. Persons deprived of their liberty enjoy all the rights set forth in the Covenant, subject to the restrictions that are unavoidable in a closed environment.*
>
> *4. Treating all persons deprived of their liberty with humanity and with respect for their dignity is a fundamental and universally applicable rule…."*

In *Kennedy v Trinidad and Tobago* 845/1998, at paragraph 7.7 and 7.8, the Human Rights Committee drew a distinction between Article 10 violations and Article 7 violations stating that the Article 10 relates to prison conditions while Article 7 relates to a violent attack. In Kennedy, the Author was beaten after arrest, at a police station. This was viewed as an Article 7 violation.

The Author notes that her treatment after the initial assault and trespass also amounts to degrading treatment.

Following the brutal beating, the Author was handcuffed in a manner that restricted her from reducing the pain and blood flow from her nose or otherwise relieving her injuries, and rather than being taken directly to hospital, was taken to the police station. She was firstly taken to the police cells. She was eventually discovered by a police doctor, who contacted her parents. It was the Author's parents who arranged to have her taken by Ambulance to Frankston Hospital.[45] It is this continuing treatment and decision to detain that triggers the application of this Article. A humane response, and one required under current police policy[46], would have been to take her immediately to hospital or in this instance where there is no power to detain, to call an ambulance. The assault, constraint by handcuffing, arrest, detention and delay in medical treatment is inhumane and a violation of Article 10 (in addition to Article 3).The Police decision to detain in a situation where medical attention was obviously required added to the trauma experienced by the Author. Being forced to submit to detention by assailants who have already demonstrated their capacity for unjustified and excessive violence is inhumane.

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[45] See page 6 of Williams J decision in the County Court 23 February 2001.

[46] VPM 103-7 (Victoria Police Manual) Exhibit 11

In *Madafferi v. Australia* (V) 1011/2001 26 July 2004 (at paragraph 9.3) the UN Human Rights Committee held that the placement of a person in immigration detention against the advice of medical staff could be a violation of Article 10. In Madafferi the Author was made an involuntary hospital patient subsequent to his detention. In the present Author's case, she was required to spend 5 days in hospital after the event.

(f) Article 17

> 1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, or correspondence, nor to unlawful attacks on his honour and reputation.
>
> 2. Everyone has the right to the protection of the law against such interference or attacks.

In General Comment No. 16 (08/04/88) regarding Article 17, the UN Human Rights Committee note at paragraphs 3 and 4:

> *"The term "unlawful" means that no interference can take place except in cases envisaged by the law. Interference authorized by States can only take place on the basis of law, which itself must comply with the provisions, aims and objectives of the Covenant.*
>
> *"The expression "arbitrary interference" is also relevant to the protection of the right provided for in article 17. In the Committee's view the expression "arbitrary interference" can also extend to interference provided for under the law. The introduction of the concept of arbitrariness is intend to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances."*

In *Keegan v The United Kingdom* ECHR 18 July 2006 *(Application no. 28867/03)* police entered a home with a warrant, obtained based on an address which came to the attention of police over six months prior to the raid. During the months between obtaining the address and the execution of the warrant, a new and unconnected family had moved into the premises. The Court held that while the police were not acting with maliciousness in executing the warrant, they had failed to take reasonable and available precautions to ensure that the facts remained the same; that the target of the warrant was still in residence. The Court determined that this failure established a breach of the family's of the right to privacy and freedom of arbitrary interference. Paragraphs 29, 30 and 31 from this judgment relevantly read:

> *29. It is not disputed that the forcible entry by the police into the applicants' home interfered with their right to respect for their*

home under Article 8 paragraph 1 of the Convention and that it was "in accordance with the law" on a domestic level and pursued a legitimate aim, the prevention of disorder and crime, as required by the second paragraph of Article 8. What remains to be determined is whether the interference was justified under the remaining requirement of paragraph 2, namely whether it was "necessary in a democratic society" to achieve that aim.
30. According to the Court's settled case-law, the notion of necessity implies that the interference corresponds to a "pressing social need" and, in particular that it is proportionate to the legitimate aim pursued (see e.g. Olsson v. Sweden, judgment of 24 March 1988, Series A no. 130, § 67). The Court must accordingly ascertain whether, in the circumstances of the case, the entry of the applicants' home struck a fair balance between the relevant interests, namely their right to respect for their home balance, on the one hand, and the prevention of disorder and crime on the other (see McLeod v. the United Kingdom, judgment of 23 September 1998, Reports of Judgments and Decisions 1998-VIII, § 53).
31. While a certain margin of appreciation is left to the Contracting States, the exceptions provided for in paragraph 2 of Article 8 are to be interpreted narrowly and the need for measures in a given case must be convincingly established (see Funke v. France, judgment of 25 February 1993, Series A no. 256-A, § 55). The Court will assess in particular whether the reasons adduced to justify such measures were relevant and sufficient and whether there were adequate and effective safeguards against abuse (see e.g. Buck v. Germany, judgment of 28 April 2005, §§ 44-45).

Application of Article 17 to the Author

Police forced their way into the Author's home without a lawful basis. If they had reasonably believed that she had committed a serious indictable offence or had a warrant, their invasion might have been justified. Without such belief or Authorization, the inference with her home, family and privacy by all police involved was arbitrary and unlawful. The Author was then maliciously prosecuted for assaulting Jenkin.[47] It is submitted that the subsequent malicious prosecution of the Author was an unlawful attack on her honour and reputation. On any view it constituted a disproportionate police response which could not be justified by any conception of "pressing social need". The injuries suffered by the Author plainly reflect the lack of adequate safeguards against abuse.

In breach of Article 17(2) police failed to protect the Author's right to privacy. They were instead the agents of the violation and used the law, through bringing charges against her to further violate her rights.

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[47] See pages 78, 79, 80 of Williams J decision in the County Court 23 February 2001. Exhibit 2

3.2 Remedies Sought

1. The Author be awarded compensation, assessed according to the standards applicable under Australian domestic law, for the violation of her rights under the ICCPR.

2. The State party be directed to enact legislation to override *Enever* and allow for compensation by the State party for the illegal activities of police officers.

3. The State party be directed to ensure genuine access and assistance to people taking civil action alleging police abuse, to ensure civil actions will have systemic impact on reform within police agencies and that the human rights of all are protected and promoted.

4. The State party be directed to review and implement reforms to the current disciplinary procedures applicable to police officers in the State of Victoria to ensure that:

    - all police who are found civilly liable for human rights abuses, are disciplined and removed from the Force;

    - the State prosecutes Police who have committed criminal offences; and

    - police not subject to civil proceedings be investigated and subject to proceedings capable of leading to their removal from duty where appropriate.

Schedule 1

Vicarious Liability of States for Police Torts in Australia

	For all conduct?	For punitive damages?	Where police act in good faith?
NT	Yes	No	Yes - State only
WA	No	No	Yes - State only
Com	Yes	No	Yes - State only
Vic	No	No	Yes - State only
SA	No	No	Yes - State only
NSW	Yes	Yes	Yes - State only
Tas	No	No	Yes - State only
Qld	Yes	Yes	Yes - State only

In four jurisdictions the legislature has abrogated the *Enever* principle and is vicariously liable as per the employee/employer relationship. In two States this liability includes punitive damages. In all States the State will cover damages recoverable from police where police act in good faith, with honesty or without corruption or maliciousness.[48]

At present, it is submitted that NSW and Queensland are the only States meeting international human rights standards.

Northern Territory

Under the *Police Administration Act (NT)* section 148B,C the State is liable to pay all but punitive damages for all torts committed by police (as per the employer/employee relationship).[49]

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[48] See Schedule 1 for more details.

[49] **148B Protection of members from civil liability:**

(1) This section applies to a person who is or has been a member.
(2) The person is not civilly liable for an act done or omitted to be done by the person in good faith in the performance or purported performance of duties as a member.

148C Territory's vicarious liability:

(1) The Territory is vicariously liable for a tort committed by a member in the performance or purported performance of duties as a member in the same way as an employer is liable for a tort committed by an employee of the employer in the course of the employee's employment.
(2) However, subsection (1) does not apply if, under the Act under which the duties were performed or purportedly performed, the Territory does not incur civil liability for the tort.
(3) In addition, the Territory's vicarious liability for a tort committed by a member does not

Western Australia

Under the *Acts Amendment (Police Immunity) Act 1999 (WA)* section 5(3) in its amendment of Section 137 of the *Police Act 1892 (WA*), the State is liable for police acts done without malice or corruption. Police are immune in these situations.[50]

South Australia

Under section 65 of *Police Act 1998 (South Australia*) the State is liable in place of the police for "honest acts".[51]

Queensland

Under the *Police Service Administration Act 1990 (Queensland)* section 10.5, the State is liable as per employer/employee relationship and police immune where acting "in good faith" AND without "gross negligence".[52]

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extend to a liability to pay damages in the nature of punitive damages.

[50] "(1) A member of SA Police does not incur any civil liability for an honest act or omission in the exercise or discharge, or purported exercise or discharge, of a power, function or duty conferred or imposed by or under this or another Act or any law.

(2) A liability that would, but for sub-section (1) lie against a member of SA Police lies against the crown."

"An action in tort does lie against a member of the Police force for anything that the member has done, without corruption or malice, while performing or purporting to perform the functions of a member of the Police Force, whether or not under a written or other law.

(5) The Crown is liable for a tort that results from –

(a) anything done by a member of the Police Force, without corruption or malice, while performing or purporting to perform the functions or a member of the Police Force, wither or not under written or other law."

[51]

[52] (1) The Crown is liable for a tort committed by any officer, staff member, recruit or volunteer, acting, or purporting to act, in the execution of duty as an officer, a staff member, recruit or volunteer, in like manner as an employer is liable for tort committed by the employer's servant in the course of employment.

(1A) The Crown is to be treated for all purposes as a joint tortfeasor with the officer, staff member, recruit or volunteer who committed the tort.

(2) In no case does the Crown's liability for a tort committed by any officer, staff member, recruit or volunteer extend to a liability to pay damages in the nature of punitive damages.

(3) In proceedings upon a claim by the Crown for damages in respect of a tort, actions done or omissions made by an officer acting, or purporting to act, in the execution of duty as an officer may be relied on as constituting contributory negligence by the Crown, if the actions or omissions could have been so relied on if they had been done or made by a servant of the Crown in the course of employment.

(4) For the purposes of this section, an action done or omission made by an officer acting, or purporting to act, in the capacity of a constable is taken to have been done or made by the officer acting, or purporting to act, in the execution of duty as an officer.

(5) If an officer, staff member, recruit or volunteer incurs liability in law for a tort committed by the officer, staff member, recruit or volunteer in the course of rendering assistance, directly or indirectly, to a person suffering, or apparently suffering, from illness or injury in circumstances that the officer, staff member, recruit or volunteer reasonably considers to constitute an emergency, and if the officer, staff member, recruit or volunteer acted therein in good faith and without gross negligence, the Crown is to indemnify and keep indemnified the officer, staff member, recruit or volunteer in respect of that liability.

Tasmania

Under the *Police Regulations Act 1898 (Tasmania)* section 163, the State but not individual police officers is liable for acts done in "good faith". There is no State liability beyond this.[53]

Commonwealth

Under the *Australian Federal Police Act 1979* at 64B, there is State liability for all torts as per employer/employee – but no liability for punitive damages.[54]

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(6) In this section--volunteer means a person appointed by the commissioner to perform duties for the service on an unpaid voluntary basis on conditions decided by the commissioner.

[53] Section 52:

"(1) A police officer shall not incur any civil liability for an act or omission done or made in good faith in the exercise or discharge, or purported exercise or discharge of any powers, functions, duties, or responsibilities conferred or imposed upon him by any provision of this or any other Act (whenever enacted) or by law.

(2) A liability that would, but for sub-section (1), lie against a police officer shall lie against the Crown."

[54] **Liability for wrongful acts of members:**

(1) The Commonwealth is liable in respect of a tort committed by a member or a protective service officer in the performance or purported performance of his or her duties as such a member or a protective service officer in like manner as a person is liable in respect of a tort committed by his or her employee in the course of his or her employment, and shall, in respect of such a tort, be treated for all purposes as a joint tortfeasor with the member or the protective service officer.

(2) In a claim by the Commonwealth for damages in respect of a tort, an act or omission of a member or a protective service officer in the performance or purported performance of his or her duties as a member or a protective service officer may be relied on as constituting contributory negligence by the Commonwealth if the act or omission could have been so relied on if it had been done by an employee of the Commonwealth in the course of his or her employment.

(3) The liability of the Commonwealth under subsection (1) does not extend to a liability to pay damages in the nature of punitive damages.

(4) Without limiting the application of subsection (1), the Commonwealth may:

(a) where proceedings have been instituted against a member or a protective service officer with respect to a tort committed by the member or the protective service officer in the performance or purported performance of his or her duties as a member or a protective service officer--as joint tortfeasor with the member or the protective service officer (whether or not the Commonwealth is a party to the proceedings):

(i) pay to the plaintiff, on behalf of the member or the protective service officer, the whole or a part of any damages or costs (not being damages in the nature of punitive damages) that the member or the protective service officer has been ordered by the Court in the proceedings to pay to the plaintiff; and

(ii) pay to the member or the protective service officer any costs incurred by him or her in the proceedings and not recovered from the plaintiff; or

(b) where a member or a protective service officer has entered into a settlement of a claim by another person that has, or might have, given rise to proceedings of a kind referred to in paragraph (a)--as joint tortfeasor with the member or the protective service officer (whether or not the Commonwealth is a party to the settlement), pay to that other person the whole or a part of the amount that, under the terms of the settlement, the member or the protective service officer is liable to pay to that other person.

(5) For the purposes of this section:

(a) an act or omission of a member in the capacity of a constable shall be deemed to have been done in the performance of his or her duties as a member; and

New South Wales

Under the *Police Service Act 1990 (NSW)* s213(1) and the *Law Reform (Vicarious Liability) Act 1983 (NSW)* section 8, the State is liable as per the employee/employer relationship and there is no individual liability for police for acts done in good faith.[55]

(b) a reference to a plaintiff includes a reference to a defendant counter-claiming; and
(c) a reference to a member includes a reference to a special member; and
(d) a reference to a protective service officer includes a reference to a special protective service officer.

[55] "A member of the police service is not liable for any injury or damage caused by any act or omission of the member in the exercise by the member in good faith of a function conferred or imposed by or under this or any other act or law with respect to the protection of persons from injury or death or property from damage."

8 Further vicarious liability of the Crown:

(1) Notwithstanding any law to the contrary, the Crown is vicariously liable in respect of the tort committed by a person in the service of the Crown in the performance or purported performance by the person of a function (including an independent function) where the performance or purported performance of the function:
(a) is in the course of the person's service with the Crown or is an incident of the person's service (whether or not it was a term of the person's appointment to the service of the Crown that the person perform the function), or
(b) is directed to or is incidental to the carrying on of any business, enterprise, undertaking or activity of the Crown.

(2) Sub-section (1) does not apply to or in respect of a tort committed by a person in the conduct of any business, enterprise, undertaking or activity which is:
(a) carried on by the person on the person's own account, or
(b) carried on by any partnership, of which the person is a member, on account of the partnership.

Glossary of Terms

Office of Police Integrity – Established in 2004 under the *Police Regulations Act 1958* to act as a complaint handling body, provide independent oversight of Victoria Police, and review Victoria Police investigations. Can investigate individual claims but rarely investigates claims of human rights abuse by the public. Much of its time is given to investigating complaints made by employees within Victoria Police. 12 month limitation on filling of complaints. Employs both serving members of the police and civilians.

Ethical Standards Department – Investigates, or delegates to regional police for investigation the overwhelming majority of complaints by the public of human rights abuses. Is a department of the Victoria Police located at the Victoria Police Centre and is entirely staffed by serving police members. Rules for the conduct of investigations are contained in the Ethical Standards Disciplinary Investigation Manual and Victoria Police Manual.

Disciplinary Charge – Charge brought under section 71 of the *Police Regulations Act 1958.*

Disciplinary Proceedings – Inquiry under section 75 of the *Police Regulations Act 1958.*

International Covenant on Civil and Political Rights – Adopted and opened for signature, ratification and accession by United Nations General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976, in accordance with Article 49.

Magistrates Court – The first tier of Victoria's Court system, prosecutions are run by police prosecutors rather than the Office of Public Prosecutions. This Court hears summary offences and indictable offences on election.

County Court of Victoria – Original jurisdiction for civil proceedings under the *Wrongs Act 1958*, indictable offences, re-hearings of appeals from lower courts on their merits.

Victorian Supreme Court of Appeal – Appellate jurisdiction over County Court and lower courts and tribunals on questions of law.

High Court of Australia – Final appellate court from State Supreme Courts since the *Australia Act 1987*.