Communication No 1885/2009

Submitted on Behalf of Ms Corinna Horvath

under the Optional Protocol to the

International Covenant on Civil and Political Rights

Reply to the Australian Government

2 July 2010

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Introduction

1. By submission dated 19 August 2008, Ms Corinna Horvath ("the Author") has applied to the United Nations Human Rights Committee pursuant to Article 1 of the First Optional Protocol of the *International Covenant on Civil and Political Rights* ("ICCPR"), claiming that she has suffered violations of her human rights as protected by articles 2, 7, 9, 10 and 17 of the ICCPR.

2. On 24 March 2010, the State of Australia filed written submissions on the admissibility and merits of this matter.

3. These submissions reply to the State of Australia.

Summary of Facts; Reply to paragraphs 8-19

4. It is submitted that the facts of the matter as described in Australia's reply significantly minimize the level of police brutality experienced by the author as well as the extent of her injuries.[1] To that end, the Author relies on the facts found by His Honour Judge Williams in the County Court of Victoria.[2] His Honour's findings of fact were not challenged by the State of Victoria, or the individual Police members involved, on appeal.[3] Indeed, in the reasons for judgment of the Court of Appeal of the Supreme Court of Victoria in *State of Victoria v Horvath* (2002) 6 VR 326, it is stated:

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[1] See for example [12]-[13] of Australia's reply.
[2] *Horvath & ors v. Christensen & Ors* 23 February 2001 per Williams J. of the Victorian Court attached as exhibit 1.
[3] *State of Victoria v Horvath* (2002) 6 VR 326.

“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, rightly, we think, 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. Is 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 the 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... ”

On the material before us, we entirely agree with his Honour's description and criticism of the police conduct."[Emphasis added][4]

5. The County Court of Victoria was satisfied that the author was the victim of not only assaults and false imprisonment, but also subject to a malicious prosecution as part of an ill-motivated exercise. The Court of Appeal did not take issue with these findings. With respect, it is improper for the State of Australia to attempt to justify police actions *post facto* by attempting to attack the character of the author. The live issue in this matter is what should flow from deplorable police conduct, not whether the conduct itself was justified.

6. In its summary of facts, the State party appears unable or unwilling to refer to the incident as an assault, notwithstanding the clear findings of the County Court of Victoria, undisturbed by the Court of Appeal. The State also appears to ignore that the Author was subject to not only false imprisonment, but also a malicious prosecution.

7. It is further submitted that that Australia's assertion that the Ms Horvath received "prompt" medical attention is inaccurate.[5] Judge Williams found that as a result of the assaults Ms Horvath was rendered senseless, sustained a broken nose, chipped teeth, facial injuries and bruising. She was then dragged to a Police van and then taken to the Hastings Police Station.[6]

8. A person who has suffered a significant head injury a result of police violence should have immediately been taken to hospital by ambulance rather than to a police station. Victoria police policy requires that a person in a non-responsive state be taken to hospital. [7] The Author's evidence was that the police did not call an Ambulance to the Police Station. She was left scream in the police cells.

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[4] [15].
[5] [14].
[6] *State of Victoria v Horvath* (2002) 6 VR 326, [8]-[11].
[7] See Victoria Police Manual ("VPM"), 103-7 Intoxicated, injured or ill persons, attached as exhibit 2.

Instead it was the Author's parents who called the Ambulance, following their receipt of a call from a doctor at the Police Station who was concerned about Ms Horvath's condition.

Engagement of Article 2

9. At paragraph 62 and 66 Australia argues that Article 2 is not engaged because Ms Horvath has been remedied for the acts of the police officers. It is submitted that the acts of the Police in this case, did violate Articles 7,9,10 & 17 and that the remedies afforded by Australia were wholly insufficient to remedy these violations. As a consequence, Article 2 is indeed engaged and continues to be violated. Australia must provide effective remedies, in order to remedy Articles 7,9,10 & 17 as well as Article 2.

Capacity of Police Defendants to pay judgment debt; Reply to paragraphs 35 – 42

10. Mr David Brett of McKean Park Lawyers was instructed to act on behalf of Ms Horvath and the other plaintiffs to enforce the judgments obtained in the County Court and Court of Appeal proceedings. Mr Brett is an expert in the area of judgement debt recovery and bankruptcy.[8]

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[8] Part of Mr Brett's professional resume is as follows: Mr Brett was admitted to practise as an Australian Legal Practitioner in 1978. For the past 20 years he has practised almost exclusively in the area of litigation. He obtained his accreditation as a commercial litigation specialist from the Law Institute of Victoria in 1996. He became a member of the Law Institute Commercial Litigation Specialisation Advisory Committee in 1998. That committee sets the examinations for commercial litigation specialisation for the Law Institute of Victoria. He then resigned from the Advisory Committee in 2001, and became a member of the Specialisation Board of the Law Institute of Victoria, which has the responsibility for the oversight and implementation of the Specialisation Scheme of the Law Institute. He became Chairman of the Specialisation Board on October 2008, a position which he continues to occupy. Mr Brett is the founder and Chairman of the Commercial Litigation Specialist Discussion Group which has been in existence for some 15 years, and which is designed to provide ongoing legal education to accredited commercial litigation specialists. He is also a member of the CPA Insolvency Discussion Group. He has presented a number of papers on insolvency related topics, and acted in numerous cases involving the recovery of assets from judgement debtors. He is extremely familiar with the provisions of the Bankruptcy Act dealing with property that is recoverable upon a bankruptcy, and seeks to provide commercially sensible advice to his clients to maximise the value of the return to them, rather than seeking to obtain a pyrrhic victory leading to a less beneficial financial return. He has also been engaged to provide reports as an expert on commercial litigation in cases dealing with allegations of negligence against legal practitioners.

11. Mr Brett provided an advice along with substantiating documentation of the steps he took to recover the debts owed to Ms Horvath and her three co-plaintiffs. This advice is attached as exhibit 3.

12. In his advice, Mr Brett notes that having diligently undertaken all necessary enquiries into the defendant's financial status, the negotiated settlement for $45,000 for all Plaintiffs from all non-bankrupt Defendants for damages and costs was the best possible outcome for them. He states:

> "It is the writer's clear view that Corinna Horvath, Craig Love, Colleen Kneise and David Kneise have exhausted all available domestic remedies. Out of the four Defendants, one is bankrupt and the remaining 3 have assets, which in the event that they were to declare bankrupts would have resulted in <u>substantially less monies</u> being available to the Plaintiffs." [emphasis added]

13. He notes that in relation to Mr Jenkin, who went bankrupt shortly after the Court of Appeal decision, he was obliged to notify the Trustee in Bankruptcy of the money owed to Ms Horvath and that "as no communication was received from the Trustee, it is apparent that no funds were available in the bankruptcy for distribution to the creditors."

14. We submit that it is clear from Mr Brett's advice and the supporting documents attached that Ms Horvath has exhausted all avenues in seeking to recover the judgment debt and that the Police involved are incapable of paying the actual debt owed.

15. At paragraph 41, Australia notes that the damages owed to Ms Horvath totaled $143,525. However, in addition to this amount, Ms Horvath and her three co-plaintiffs owed an estimate of $500,000 in legal fees to cover the costs of their

representation. Consequently, the total amounts owed to Ms Horvath were substantially higher than that represented by the State of Australia. The settlement for $45,000 came nowhere near the sums that were owed. The Trial lasted for approximately two months. Senior and junior counsel as well as an instructing solicitor represented the four plaintiffs on a "no win, no fee" basis. This meant that legal representatives would not be paid unless the Plaintiffs succeeded in the case and impliedly recovered costs against the Defendants. If any of the Plaintiffs recovered damages, they would have been obliged to pay their legal advisers before retaining any excess.[9] For a remedy to be a real remedy, it must cover the reasonable costs involved in seeking that remedy.

Victims of Crime Compensation; Reply to paragraphs 46 – 48

16. Australia asserts that the Author could have pursued a claim in the Victims of Crime Assistance Tribunal ("the Tribunal") for compensation for breaches of Articles 7, 9, 10 & 17 of the ICCPR, and accordingly she has not exhausted domestic remedies.

17. The Author has sought the advice of Ms Phoebe Knowles, of counsel, who has advised on this section of the reply.

The Victims of Crime Assistance Tribunal

18. The Tribunal was established by the *Victims of Crime Assistance Act 1996* ("the VOCAT Act") to provide financial assistance to victims of violent crime committed in Victoria. The Tribunal does not provide compensation for pain and suffering[10]

[9] See the letter dated 11 November 2008 provided to the Human Rights Committee by the Author attached as exhibit 4.
[10] Previously provided for pursuant to the *Crimes Compensation Tribunal 1972 (repealed) s 15.* See also *Victims of Crime Assistance Bill 1996* (Vic), Second Reading Speech, Mr Hulls, Victorian Parliament, Hansard 21 November 1996, page 1435.

and focuses on timely and practical measures to assist a victim of crime, such as counselling.[11]

19. An extendable time limit of two years applies to VOCAT claims, *Victims of Crime Assistance Act 1996* (the "VOCAT Act"), s 29. The presumption is that an out of time application will be struck out, s 29(2). The incident occurred 15 years ago. It is unlikely that time limits would be extended in these circumstances.[12]

20. The Tribunal may award amounts as "financial assistance" and "special financial assistance". Financial assistance is granted for medical and counselling expenses actually or likely to be incurred, loss of earnings and damage to clothes during the act of violence.[13] Special financial assistance may be seen as compensatory in nature. The Tribunal awards modest amounts when an applicant suffers "any significant adverse effect as a direct result of an act of violence committed against him or her".[14] The Tribunal uses categories of offences to determine the maximum level of special financial assistance to be awarded. If the Tribunal found that the author had suffered a very serious injury, they may be eligible for between AUD$4,667 to $10,000. It is possible that in Ms Horvath's circumstances, if she does not establish that she suffered a very serious injury, she would be eligible for financial assistance in the amounts of either $130-$650 or $650-$1300, being amounts awarded in respect of offences inflicting serious injury and assault respectively.[15]

21. The Tribunal aims to provide a "symbolic expression by the State of the community's sympathy and condolence for, and recognition of a victim's experience" and its awards "<u>are not intended to reflect the level of compensation</u>

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[11] *Victims of Crime Assistance Bill 1996* (Vic), Second Reading Speech, Attorney-General Wade, Victorian Parliament, Hansard 31 October 1996, page 1024.
[12] VOCAT Act, s 29.
[13] VOCAT Act, s 8.
[14] VOCAT Act, s 8A.
[15] VOCAT Act, s 8A and *Victims of Crime Assistance (Special Financial Assistance) Regulations 2000*, Schedule 1.

to which victims of crime may be entitled at common law or otherwise."[16] [emphasis added]

22. The Tribunal does not make any findings of guilt and may award financial assistance even though no person has been charged or found guilty of a criminal offence. In determining an application, the Tribunal is not required to follow the rules of evidence and may inform itself in any manner it sees fit.[17] Applications may be granted without a hearing and where a hearing is conducted, those with a substantial interest in the matter (such as alleged perpetrators) are entitled but are not required to attend.[18]

23. The Tribunal does not hold to account the perpetrators of abuse. Perpetrators are not held liable in any way through the process.

24. Ms Knowles advice is attached as exhibit 5 and the author relies on it below in answer to Australia's contentions.

Whether an award from the Tribunal amounts to exhausting domestic remedies

25. An award the Tribunal is not an effective remedy for the following reasons:

(a) Ms Horvath has complied with the rule to exhaust domestic remedies as she has pursued adequate alternative judicial remedies and provided Australia with an opportunity to remedy the issues outlined in the communication; and

(b) the Tribunal does not have the capacity to *remedy* the breaches outlined in the communication and the breaches suffered require steps to be taken which are beyond the powers of the Tribunal. Accordingly, an award from

[16] VOCAT Act s1(2)(b) and 3.
[17] VOCAT Act, s 38.
[18] VOCAT Act, ss 33 and 35.

the Tribunal is not an effective remedy to the human rights breaches in the communication.

26. The Inter-American Commission of Human Rights has opined:

> "the requirement to exhaust all remedies available under domestic law does not mean that the alleged victims are obliged to exhaust all the remedies at their disposal. As to the exahustion of domestic remedies, the Commission has reiterated that if the alleged victim endeavoured to resolve the matter by making use of a valid, adequate alternative judicial remedy available in the domestic legal system and the State had an oppourtunity to remedy the issue within its jurisdiction, the purpose of the legal precept is fulfilled."[19]

27. The author is not required to access all those remedies which are available. Rather, to comply with the rule, an author must access those remedies which are available and effective in redressing the wrong. Such remedies must also provide the State with an opportunity to respond to and remedy the issue within its jurisdiction. Ms Horvath has pursued civil action before the domestic Australian courts to the High Court of Australia, the ultimate Court within the Australian jurisdiction, and has provided Australian with an opportunity to respond to and remedy the issues within Australia.

28. Further, Tribunal cannot provide an effective remedy to the harm suffered by Ms Horvath for the breaches of her human rights as articulated in the communication. Each human right shall be addressed in turn:

[19] Inter-American Commission on Human Rights, Report No. 18/06, Petition 12.353, *Arley José Escher et al. v Brazil* (2 March 2006), [28] (citing Inter-American Commission on Human Rights, Report No. 57/03, Petition 12,337, *Valdés Díaz v Chile* (October 10, 2003), [40]; Report No. 70/04, Petition 667/01, *Naranjo et al. v Venezuela* (October 13, 2004), [52]).

(a) *Effective discipline and prosecution of those who committed criminal offences against Ms Horvath (Article 2 of the ICCPR)*

The Tribunal cannot provide an effective remedy to this breach. The Tribunal does not hear prosecutions of those involved in an act of violence nor does it make judicial findings of guilt for criminal offences. It has no role in disciplining offenders.

(b) *Effective investigation, prosecution and bringing to account police offenders, including severing of the employment of those involved (Article 7 of the ICCPR)*

While the Tribunal can take steps to investigate the facts surrounding an application for financial assistance from a primary or secondary victim of an act of violence, the Tribunal is not an investigative body nor does it have any role in determining the ongoing employment of Victorian Police Officers. Its investigative powers are limited to establishing whether an act of violence occurred rather than determining who is responsible for the act and imposing a penalty.

(c) *Provision of an enforceable right to compensation for arbitrary arrest (Article 9 of the ICCPR)*

As detailed above, the Tribunal awards modest amounts to meet expenses incurred by a victim relating to an act of violence. The amounts do not represent amounts obtainable as compensation under the common law or elsewhere. The modest awards are not an effective remedy to the serious violation of a person's right to be free from arbitrary deprivation of liberty.

(d) *Remedy for the failure to provide immediate medical treatment for Ms Horvath (Article 10 of the ICCPR)*

While the Tribunal may award financial assistance to victims to pay for medical needs, the circumstances of this breach relate to police misconduct and Ms Horvath's immediate medical needs during and following the incident. In this situation, the Tribunal's awards are not an effective remedy to this breach.

(e) *Remedy for the arbitrary and unlawful interference with Ms Horvath's privacy, family and home as well as the malicious attack on her honour and reputation (Article 17 of the ICCPR)*

The Tribunal has no relevant role in remedying this breach.

29. The European Court of Human Rights has held that the rule requiring the exhaustion of domestic remedies requires recourse to those remedies which "are available and sufficient to afford redress in respect of the breaches alleged."[20] Accordingly, whether or not a remedy will be effective as contemplated by Article 2 of the Optional Protocol to the ICCPR depends in part on the remedy's relationship to the alleged breach and its capacity to sufficiently remedy the breach.

30. In some circumstances an administrative remedy, such as a finding from a discrimination tribunal or national human rights commission, may be effective if the decision is enforceable, the proceedings provide due process of law and the remedies provided are adequate in the circumstances of the particular case.[21]

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[20] European Court of Human Rights, *Akdivar et al v Turkey*, Judgment of 16 September 1996, Reports of Judgments and Decisions 1996 IV, 1210, [66].

[21] See for example, Inter-American Commission on Human Rights, Report No. 60/03, Petition 12.108, *Reyes et al. v Chile* (10 October 2003), [51], regarding administrative procedure's capacity to protect the right to freedom of information. In the context of the law of diplomatic protection of aliens, the Special Rapporteur for the International Law Commission noted that "[*a]dministrative or other remedies which are*

The administrative body must apply clearly defined legal standards and the remedy must be adequate for the relief sought.

31. The relationship between the effectiveness of the remedy and the alleged breach was considered by the Inter-American Commission on Human Rights where it found that administrative remedies were inadequate where the violations included the rights to life and security of persons. The Commission stated, in *Cañas Cano et al. v Colombia*:

> "[t]he Commission considers that the facts alleged by the petitioners in this case involve the alleged violation of such fundamental rights as the right to life and the right to humane treatment. As these are indictable offenses under domestic law, it is the State itself that must investigate and prosecute them. Therefore, it is the development of this criminal law process that the Commission must consider in order to determine whether local remedies have been exhausted, or indeed whether the corresponding exceptions apply.…[T]he Commission has held that the contentious-administrative jurisdiction is exclusively a mechanism for supervising the administrative activity of the State, aimed at obtaining compensation for damages caused by the abuse of authority. In general, this process is not an adequate mechanism, by itself, to make reparation for human rights violations and hence need not be exhausted when, as in the present case, there is another means for securing redress for the harm done and the prosecution and punishment that the law demands."
> [citations omitted and emphasis added] [22]

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not judicial or quasi-judicial in character and are of a discretionary character therefore fall outside the application of the local remedies rule." Second report on diplomatic protection, Mr John Dugard, Special Rapporteur on Diplomatic Protection, International Law Commission, Fifty-third session, UN Doc. A/CN.4/514, [14] (citations omitted).

[22] Inter-American Commission on Human Rights, Report No. 75/03, Petition 42/02, Cañas Cano et al. v Colombia (22 October 2003), [27-28].

32. In this matter, Police members have been found to have committed the torts of assault and false imprisonment. These torts correspond with indictable offences in Victorian law.

33. The adequacy of a remedy (and whether the rule may be invoked in response to a communication) depends on the alleged breach, the type of relief which may be obtained and its appropriateness to the breach.[23]

34. For the following reasons, compensation from the Tribunal is not an effective remedy to the breaches articulated in the communication:

(a) the Tribunal aims to provide a symbolic gesture of condolence;

(b) the Tribunal provides modest amounts of financial assistance to meet practical expenses relating to the act of violence. These amounts are not compensatory and do not reflect the amounts which might be obtained by pursuing civil action;

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[23] See further, Human Rights Committee, Communication No. 1159/2003, *Sankara v Burkina Faso*, Views adopted 28 March 2006, [6.4]:

> "[t]he effectiveness of a remedy also depended, to a certain extent, on the nature of the alleged violation. In the present case, the alleged violation concerned the right to life, and was linked primarily to the alleged failure to conduct an inquiry and to initiate proceedings against the guilty parties…. In these circumstances, the Committee considered that the non-contentious remedies mentioned by the State party …could not be considered effective for the purposes of [Article 5(2)(b) of the First Optional Protocol.]"

See also CERD, *Sefic v Denmark*, Communication No. 32/2003, UN Doc. A/61/18 (2006), [6.2]:

> "the Committee recalls its jurisprudence that the types of civil remedies proposed by the State party may not be considered as offering an adequate avenue of redress. <u>The complaint, which was filed with the police department and subsequently with the Public Prosecutor, alleged the commission of a criminal offence and sought a conviction of the company</u> Fair Insurance A/S under the Danish Act against Discrimination. <u>The same objective could not be achieved by instituting a civil action, which would result only in compensation for damages</u> awarded to the petitioner" (emphasis added);

Further, Inter-American Court of Human Rights, *Velásquez Rodríguez Case*, Judgment of 29 July 1988, (Ser. C) No. 4 (1988), [64]: "[i]f a remedy is not adequate in a specific case, it obviously need not be exhausted….".

(c) the Tribunal does not investigate alleged criminal offences, make judicial findings or impose penalties for those found guilty of criminal offences; and

(d) the Tribunal's role is limited to determining that an act of violence has occurred and then whether the application for financial assistance should be granted to meet expenses relating to an act of violence.

35. The Tribunal's procedure is not designed and does not remedy breaches of the human rights suffered by Ms Horvath in any meaningful sense. An award from the Tribunal is not an effective remedy to the relevant breaches set out by Ms Horvath in her communication.

"Relieving the Perpetrators of Individual Responsibility"; Reply to paragraphs 51-62

36. Australia attempts to defend its failure to directly compensate the Author by reference to General Comment 31 on Article 2 of the ICCPR, asserting that States parties "may not relieve perpetrators from personal liability." However, the purpose of this prohibition is to prevent the State from granting "amnesties, immunities or indemnities to violators". The Author seeks none of these outcomes.

37. It would be absurd to infer from a principle designed to prevent individuals from being indemnified by the State that the State should therefore not compensate victims of human rights abuses at the hands of its agents. If Australia's submissions were accepted, then a State party would never be liable to compensate victims for the actions of State agent. Such a position is nonsensical.

38. The State is responsible for its police and is the authority under which the police act. The actions and omissions of police are undertaken solely for the purposes of the State. The State gives special powers to the police to arrest, detain and charge members of the community. It is the State's responsibility to ensure its police do not violate human rights. It cannot relieve itself of this critical responsibility. Nor can it relieve itself of its responsibility for adequately remedying violations of human rights. By directly compensating the author, the State ensures that its obligations to compensate victims of human rights abuses are fulfilled.

39. Such a position does not relieve the individual perpetrators of liability. The perpetrators must defend themselves in the civil proceedings and suffer the shame of being found to be violators. It is also open for the State to pursue the individual perpetrators for reimbursement. For example the State has the power to require police to indemnify it for its losses.

40. By shielding the State from liability for the actions of its Police force, the author submits that Australia's common law as elucidated in *Enever v The King* (1906) 3 CLR 969 is inconsistent with Article 2 of the ICCPR. Furthermore, the State's current solution in Victoria, pursuant to section 123 of the *Police Regulations Act 1958* does not bring the State's laws into conformity with Article 2. The practical effect of section 123 is to absolve the State of responsibility for police who act in bad faith; those who act unreasonably and outside the course of their duty. This effectively renders the State immune for serious human rights abuses by its police officers.

41. In light of the above, the State is obliged to change its domestic laws. The Human Rights Committee in its Comment 31 on Article 2 states at paragraph 13:

> "Article 2, paragraph 2, requires that States Parties take the necessary steps to give effect to the Covenant rights in the domestic order. It follows

that, unless Covenant rights are already protected by their domestic laws or practices, States Parties are required on ratification to make such changes to domestic laws and practices as are necessary to ensure their conformity with the Covenant. Where there are inconsistencies between domestic law and the Covenant, article 2 requires that the domestic law or practice be changed to meet the standards imposed by the Covenant's substantive guarantees."

It is noteworthy that changes to the law have occurred in several States in Australia. This information is set out in Schedule 1 of the Communication dated 19 August 2008. There is no reason why Victoria cannot amend its legislation in line with New South Wales and Queensland.

42. In paying compensation to the author, the State would recognise its own responsibility to compensate the victims of abuses by police. This would not encourage police to act irresponsibly. As noted above, the State can then pursue the individual officers through civil action, and also take criminal and disciplinary action against them.

43. The present situation in Victoria merely encourages police who have engaged in human rights abuses to go bankrupt, re-arrange their assets or otherwise disperse their funds, and means that when damages are awarded to victims, such victories are illusory.

44. The award of aggravated, exemplary or punitive damages to a victim of police violence does not alter the State's responsibility to ensure the Victim is appropriately compensated. It is accepted that aggravated, exemplary and punitive damages are intended to have a deterrent effect. The deterrent impact must however be felt by both the police and the State for whom the Police officer was acting. The State can ensure the deterrent value of these awards is shared

with the police through pursuing the individual officers to reimburse it, along with taking all criminal and disciplinary functions.

45. To that end, it must be noted that even in situations where police act in "bad faith", such activity does not occur in a vacuum. Police violence, such as that perpetrated in the present case, occurs in part due to systemic failures in training, oversight and disciplinary measures. State liability for the actions of its agents ensures that such systemic failures are addressed. The Author repeats its submissions on pages 21-25 in the original communication in that respect. It is to be noted that no police officer has received any punishment for the criminal acts perpetrated against the author.

Failure to prosecute or discipline; Reply to Paragraphs 63-83

46. At paragraph 65, the State argues that because there is no right of an individual to require the State to criminally prosecute another person, there is no general obligation on the State to institute criminal proceedings in cases involving human rights violations. With respect, the right of an individual to compel prosecution and the obligation of the State to prosecute are two separate issues.

47. The State *is* under an obligation to institute criminal proceedings against police who use excessive force against citizens. The Human Rights Committee stated in 2009 in its concluding observation on Australia:

> "The Committee expresses concern at reports of excessive use of force by law enforcement officials against groups, such as indigenous people, racial minorities, persons with disabilities, as well as young people; and regrets that the investigations of allegations of police misconduct are carried out by the police itself. The Committee is concerned by reports of the excessive use of the electro-muscular disruption devices (EMDs) "TASERs" by police forces in certain Australian states and territories.

(articles 6 and 7). The State party should take firm measures to eradicate all forms of excessive use of force by law enforcement officials. It should in particular: a) establish a mechanism to carry out independent investigations of complaints concerning excessive use of force by law enforcement officials; b) initiate proceedings against alleged perpetrators; c) increase its efforts to provide training to law enforcement officers with regard to excessive use of force, as well as on the principle of proportionality when using force; d) ensure that restraint devices, including TASERs, are only used in situations where greater or lethal force would otherwise have been justified; e) bring its legislative provisions and policies for the use of force into line with the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials; and e) provide adequate reparation to the victims."[24][Emphasis added]

48. The Committee's General Comment 31 also prevails upon States to ensure perpetrators are brought to justice. This includes "investigation, prosecution, and punishment."[25]

49. The Inter-American Commission on Human Rights stated in *Canas Cano et al v Colombia*:

> "[t]he Commission considers that the facts alleged by the petitioners in this case involve the alleged violation of such fundamental rights as the right to life and the right to humane treatment. As these are indictable offenses under domestic law, it is the State itself that must investigate and

[24] Concluding observations of the Human Rights Committee 3 April 2009 Australia, [21] available at: http://www2.ohchr.org/english/bodies/hrc/hrcs95.htm

[25] 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. [8].

prosecute them. Therefore, it is the development of this criminal law process that the Commission must consider in order to determine with local remedies have been exhausted, or indeed whether the corresponding exceptions apply…"[26]

50. In the recent decision (1 June 2010) of *Gafgen v Germany*[27], the European Court of Human Rights said at paragraph [121]:

> "In assessing whether the national authorities further afforded the applicant appropriate and sufficient redress for the breach of Article 3 [the equivalent of Article 7 if the ICCPR] the Court must determine, in the first place, whether they carried out a thorough and effective investigation against those responsible in compliance with the requirements of its case-law. In doing so…. the outcome of the investigations and of the ensuing criminal proceedings, including the sanction imposed as well as disciplinary measures taken, have been considered decisive. It is vital in ensuring that the deterrent effect of the judicial system in place and the significance of the role it is required to play in preventing violations of the prohibition of ill-treatment are not undermined."

51. The author repeats its submissions at pages 25-26 and 31-33 of its original communication.

The effectiveness of the investigation and disciplinary process; Reply to paragraphs 66-83

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[26] Inter-American Commission on Human Rights, Report No. 75/03, Petition 42/02, *Canas Cano et al.v Colombia* (22 October 2003), [27-28].
[27] *Gafgen v Germany* 22978/05 [2010] ECHR 759 (1 June 2010)

52. The State of Australia advances the following propositions in support of its claim on the effectiveness of the Victoria's disciplinary system in remedying the violations against the Author:

a) The Ethical Standards Department is impartial;

b) The Deputy Ombudsman (police complaints) was informed of the Ethical Standards Department's investigation and that this effectively overcomes any concerns of lack of partiality in the ethical standards department's investigations; and

c) The disparity between the findings of the trial judge and outcome of the disciplinary proceedings can be explained by reference to the different standards that apply.

In the following paragraphs, the author will respond to each of these points.

53. In *Bati & Ors v. Turkey* (Applications nos. 33097/96 and 57834/00) ECHR 3 June 2004 the European Court of Human Rights held:

> "135. For an investigation into torture or ill-treatment by agents of the State to be regarded as effective, the general rule is that the persons responsible for the inquiries and those conducting the investigation should be independent of anyone implicated in the events (see, *mutatis mutandis*, *Güleç v. Turkey*, judgment of 27 July 1998, *Reports* 1998-IV, p. 1733, §§ 81-82, and *Oğur v. Turkey* [GC], no. 21594/93, §§ 91-92, ECHR 1999-III). This means not only that there should be no hierarchical or institutional connection but also that the investigators should be independent in practice (see, *mutatis mutandis*, *Ergi v. Turkey*, judgment of 28 July 1998, *Reports* 1998-IV, pp. 1778-79, §§ 83-84, and *Hugh Jordan v. the United Kingdom*, no. 24746/94, § 120, 4 May 2001).

137. For the same reasons, there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. The degree of public scrutiny required may well vary from case to case. In all cases, however, the complainant must be afforded effective access to the investigatory procedure (see *Aksoy*, cited above, p. 2287, § 98, and *Büyükdağ*, cited above, § 67)."

54. In *Agiza v. Sweden* (233/2003), CAT, A/60/44 (20 May 2005) 197 at paragraph 13.7 the Committee Against Torture said;

> "The Committee observes that in the case of an allegation of torture or cruel, inhuman or degrading treatment having occurred, the right to remedy requires, after the event, an effective, independent and impartial investigation of such allegations." [Emphasis added]

55. The Ethical Standards Department is an internal department within the Victoria Police. As an internal body it is institutionally and hierarchically connected to the perpetrators and lacks practical independence. Its investigations do not inspire confidence in the Victorian community.[28] In the history of complaints to the Ethical Standards Department, findings of criminal or tortuous conduct against police is rare. It is currently the case that the Ethical Standards Department or other members of the Victoria Police investigate or otherwise manage the overwhelming majority of complaints against police.[29]

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[28] See for example: Palmer & McCulloch 2005, *"Civil Litigation Against the Police",* Criminology Research Council available at: http://www.criminologyresearchcouncil.gov.au/reports/200102-19.pdf p 85. OPI Report 2007, "A Fairer Disciplinary System" Victoria, Australia. Hopkins, Tamar 2009, "*The Effective Investigation of Complaints against Police*" Victorian Law Foundation, p 82. Federation of Community Legal Centres, "The Investigation of Complaints Made about the Police", reproduced in Rod Settle 1990, "*Police Power Use and Abuse*," Muxworthy Press pp 120-124.

[29] In 2009, the office of Police Integrity investigated 3.2% of complaints, the remainder are referred to the police or not investigated: OPI Annual Report 2009 p46.

56. On 12 March 2009, the European Commission for Human Rights delivered an opinion on the fundamental characteristics of an independent and effective determination of complaints against the police. In his opinion, the Commissioner refers to Articles 2 and 3 of the European Convention on Human Rights. These are Articles 6 and 7 of the ICCPR respectively. This communication engages Article 7 of the ICCPR the Opinion is highly relevant. The Commissioner stated:

> "An independent and effective complaints system is essential for securing and maintaining public trust and confidence in the police, and will serve as a fundamental protection against ill-treatment and misconduct. An independent police complaints body (IPCB) should form a pivotal part of such a system.
>
> Five principles of effective police complaints investigation have been developed in the jurisprudence of the European Court of Human Rights on Articles 2 and 3 of the ECHR:
>
> **1. Independence**: there should not be institutional or hierarchical connections between the investigators and the officer complained against and there should be practical independence;
>
> **2. Adequacy**: the investigation should be capable of gathering evidence to determine whether police behaviour complained of was unlawful and to identify and punish those responsible;
>
> **3. Promptness**: the investigation should be conducted promptly and in an expeditious manner in order to maintain confidence in the rule of law;
>
> **4. Public scrutiny**: procedures and decision-making should be open and transparent in order to ensure accountability; and

5. Victim involvement: the complainant should be involved in the complaints process in order to safeguard his or her legitimate interests.

Articles 2 and 3 of the ECHR are fundamental provisions and enshrine basic values of the democratic societies making up the Council of Europe. There are two principal purposes of the five ECHR effective police complaints investigation principles. On the one hand, they have been developed to ensure that an individual has an effective remedy for an alleged violation of Article 2 or 3 of the ECHR. On the other hand, the principles are intended to protect against violation of these fundamental rights by providing for an investigative framework that is effective and capable of bringing offenders to justice.

The minimum requirement is that a member state must ensure arrangements are in place to comply with the five principles in the event that Article 2 or 3 of the ECHR is engaged. In furtherance of this aim the CPT has strongly encouraged the creation of a fully-fledged independent investigative body."[30]

57. It is submitted that the Human Rights Commissioner's Opinion is a useful guide for the Human Rights Committee's consideration of whether the Ethical Standards Department's investigation was sufficient to provide an "effective investigation" of the human rights allegations in Ms Horvath's case. It is noted that the Commissioner's view is that the standards set out are minimum standards and while they must be complied with in the investigation of alleged violations of Article 3 (the ICCPR equivalent to Article 7) they should apply more broadly.

58. Did the investigation meet Human Rights Standards?

[30]Opinion of the European Commissioner for Human Rights, March 2009 available at: https://wcd.coe.int/ViewDoc.jsp?id=1417857&Site=CommDH&BackColorInternet=FEC65B&BackColorIntranet=FEC65B&BackColorLogged=FFC679#P87_3854 [29-33]

1. Independence: The Ethical Standards Department is an internal police department. The Author submits that it does not reach the standard required by *Bati & Ors v. Turkey*, *(Applications nos. 33097/96 and 57834/00)* ECHR 3 June 2004.

2. Adequacy: The author was not called to give evidence into the hearing of the disciplinary charge against Jenkin. Neither were any of the civilian witnesses. One of the civilian witnesses was a direct eye witness to Jenkins brutal assault on the author. She had not consumed any alcohol and was relatively independent. The police did not obtain a statement from her, nor did they call her to give evidence. Without hearing from key witnesses to the incident, it is not possible for this process to adequately determine the facts.

3. Promptness: The disciplinary hearing occurred two years after the incident. The investigation took 11 months. Such a delay would be inexplicable even when civilian witnesses were required to give evidence; in circumstances where they were not, it is inexcusable.

4. Public Scrutiny: The Author made a request for a copy of the disciplinary file related to her case which was denied under a Freedom of Information request because it was claimed that would divert too much of the State's resources to provide it to her.[31] The only publicly released information about the process was contained in a brief paragraph of the Office of Police Integrity report "A Fairer Disciplinary System" attached to the original communication. There has been no public scrutiny of the investigation or hearing or the decision.

5.Victim Involvement: The author is unable to comment on the specifics of the process that was undertaken in her case as she was denied effective access to the investigatory procedure. For example, she was not requested to attend the disciplinary hearing.

[31] See letter from Victoria Police dated 13 March 2008 attached as exhibit 6.

59. The failure of the State to provide an independent and effective investigation into her complaint is itself a breach of the procedural obligation of Article 7 and is in and of itself sufficient to substantiate the author's Communication to the Committee. Indeed, such a manifest failure by the State to investigate its agents is relevant to all human rights alleged by the author to have been breached in this case.

Oversight by the Deputy Ombudsman

60. The State submits at paragraph 77 of its submissions that the because the Deputy Ombudsman (Police Complaints) would be notified of the existence of the disciplinary investigation, then this was a sufficient safeguard of the process in human rights terms. However, the European Court of Human Rights has held:

> "Supervision [of the police investigation] by another authority, however independent, has been found not to be a sufficient safeguard for the independence of the investigation."[32]

61. In the case of the Ombudsman, mere notification was all that was required, not even supervision by the independent agency. Australia's complaint scheme clearly breaches Article 7's requirement for an independent and effective investigation.

Difference between disciplinary standards and civil standards

62. The State submits that the hearing into the disciplinary office by the hearing officer was adequate. It purports to explain the difference between the outcome of the disciplinary hearing and the civil proceeding on the basis that a different

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[32] *Ramsahai v The Netherlands* [2007] ECHR 393, (15 May 2007) para 337. *Bati v Turkey* [2004] ECHR (3.6.2004) para 135.

standard of proof applies. It is established in Australia[33], and the United Kingdom that the standard of proof at disciplinary hearings is not the criminal standard but rather the civil standard, namely, "the balance of probabilities".

63. While the High Court of Australia established in the *Briginshaw* case[34] that there is no third standard of proof it also held that the consequences of an adverse finding must be considered in reaching a conclusion about whether the evidence meets the civil standard. For example, in 2003, the High Court held that the *Briginshaw* standard is "on the balance of probabilities; but with appropriate regard to the nature of the proceedings, the issue to be proved and the gravity of the matters alleged"[35].

64. The consequences of civil proceedings in the form of punitive damages and public shaming are serious consequences. The consequences of disciplinary processes involving assaults by police officers are sometime loss of employment, but equally can include demotion or counseling. The consequences of both civil and disciplinary proceedings are potentially serious and grave. Thus the cogency of the evidence to produce findings in both categories of cases is the same.

65. The Hearing Officer's Reference Guide (1997) referred to in Australia's reply implies that there is a third standard of proof. With respect, this guide is wrong at law. It is not the standard that shifts but the quality of the evidence that is required to satisfy the hearing officer. This same issue applies in civil proceedings. The more serious the finding (such as when considering awarding aggravated or exemplary damages), the more cogent the evidence must be for the fact-finder.

[33] See OPI 2007 "*A Fairer Disciplinary System*", Victoria, Australia at page 36.
[34] *Briginshaw v Briginshaw* 60 CLR 336 at 361 (30 June 1938)
[35] *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd* (2003) 216 CLR 161; [2003] HCA 49 per Kirby J[46].

66. A reference to the standard of proof to explain the difference between the disciplinary hearing result and the civil proceeding is unjustified and unsupported. In any event, it fails to address that the disciplinary hearing failed to adduce *viva voce* evidence from civilian witnesses to the police misconduct, which reflected a systemic and serious failure of the process in circumstances where it was purported that there was insufficient evidence to make a finding of misconduct.

67. The difference in outcomes between the disciplinary process and the civil trial lies in the lack of adequacy, transparency, accountability and independence of the disciplinary hearing process. The author and other key civilian witnesses were not called to give evidence. The author was not given access to relevant documents or invited to make submissions or cross-examine the police officers. Critical evidence was not called. The finding was not made public. There was no appeal mechanism for the author. The deficient nature of the police disciplinary hearing process and its lack of accountability resulted in it being destined to fail in human rights terms.

68. Furthermore, once the Civil proceeding finding has been made, during which it should be noted that Officer Christensen agreed that he lied to the Ethical Standards Department[36] and the Judge found that "the police have told lies on matters of major significance"[37], there was the opportunity to re-open or recommence disciplinary proceedings and to refer a prosecution brief to the Office of Public Prosecutions. The State failed to pursue these avenues at the time. It continues to fail to pursue these avenues now.

69. The abject failure of the complaint and disciplinary process is well demonstrated by this case. Furthermore, as Australia's submission's reveal, the names of the agencies involved in oversight may have changed, but the process remains

[36] *Horvath & Ors v Christensen & Ors* 23 Feb 2001 per Williams J at p 15.
[37] Ibid at p 19.

inadequate, lacks independence and is incapable of bringing violators of human rights to justice.

Reply on Article 7; paragraphs 84-112

70. Australia submits that the Author's treatment did not amount to cruel, inhuman or degrading treatment or torture. Australia states that any exacerbating factor or element of reprehensibleness in Ms Horvath's purported arrest or detention was insufficient to meet the threshold level of severity required for a breach of Article 7. The author disagrees with these submissions.

71. Judge Williams, in his written reasons, described the police conduct as a, "terrifying invasion of the interior of the house by baton-wielding hostile police, running in and manhandling occupants."[38] His Honour said that Jenkin's conduct was "a most high-handed approach accompanied by excessive and unnecessary violence wrought out of unmeritorious motives of ill-will and a desire to get even."[39] The Judge found that:

> "I am satisfied that the circumstances attending her treatment in the house justify an additional amount for aggravated damages for the insult, humiliation and loss of dignity she suffered, and I refer in particular to the brutality of the blows to her face and nose, the hands being cuffed behind her back so she was unable to comfort her injuries or the flow of blood, the unnecessary rough handling afforded to her in moving to van and at the police station where the hands remained cuffed behind her back for some time even in the cell."

72. At paragraph 92 of its submissions Australia cites *Vuolanne v Finland (265/1989)* for the proposition that Article 7 requires elements beyond the mere fact of

[38] Ibid at p 94.
[39] Ibid at p 95.

deprivation of liberty. Judge Williams found that the author had been trespassed against, brutally and maliciously assaulted, unlawfully arrested, falsely imprisoned and then maliciously prosecuted. The author submits that the treatment she received went well beyond a deprivation of liberty. In the same paragraph, Australia cites *Jensen v Australia (762/1197)* to purportedly support the proposition that the humiliation experienced must be exacerbated by conduct beyond the usual incidents of arrest. On the basis of Judge Williams findings, the Author submits that the author's treatment by the police plainly placed this incident beyond the usual incidents of arrest.

73. In *McTaggart v. Jamaica*, No. 749/1997 at paragraph 8.7, the Human Rights Committee stated:

> "The author has alleged that, on 4 March 1997, he and several other death row inmates were severely beaten by warders and then five men including himself were forced into one cell. Later, the warders burnt his belongings including letters from his lawyers, trial transcript and copy of his petition to the Privy Council. The Committee notes that the State party promised to investigate the matter. It considers that, in the absence of any information from the State party, the treatment described by the author constitutes treatment prohibited by article 7 of the Covenant, and is likewise in violation with the obligation under article 10, paragraph 1, of the Covenant, to treat prisoners with humanity and with respect for the inherent dignity of the human person."

74. This case is authority for the proposition that a beating can amount to a violation of Article 7. While the circumstances are different in the Authors case, there exists similar features: excessive, unnecessary, deliberate and malicious infliction of pain and suffering. In the Author's case, the treatment experienced extended to a malicious prosecution.

75. Article 7 refers to cruel, inhumane and degrading treatment and punishment as well as torture. The subtle differences between the different categories of conduct prohibited under Article 7 was described in relation to the analagous Article 3 of the *European Convention on Human Rights and Fundamental Freedoms* in *Gafgen v Germany* 22978/05 [2010] 2010 ECHR 759 (1 June 2010). In that case, the Police conceded that they used threats of serious harm to obtain information from a person. The European Court held that while this treatment did not amount to torture, it was ill-treatment and was therefore a violation of Article 3 of the European Court of Human Rights. The Court stated at paragraphs [87]-[91]:

> "In order for ill-treatment to fall within the scope of Article 3 it must attain a minimum level of severity. The assessment of this minimum depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim. Further factors include the purpose for which the treatment was inflicted together with the intention or motivation behind it as well as its context, such as an atmosphere of heightened tension and emotions.
>
> The Court has considered treatment to be "inhuman" because, *inter alia*, it was premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical and mental suffering Treatment has been held to be "degrading" when it was such as to arouse in its victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance, or when it was such as to drive the victim to act against his will or conscience.
>
> In determining whether a particular form of ill-treatment should be classified as torture, consideration must be given to the distinction,

embodied in Article 3, between this notion and that of inhuman or degrading treatment. As noted in previous cases, it appears that it was the intention that the Convention should, by means of such a distinction, attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering. In addition to the severity of the treatment, there is a purposive element to torture, as recognised in the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which in Article 1 defines torture in terms of the intentional infliction of severe pain or suffering with the aim, *inter alia*, of obtaining information, inflicting punishment or intimidating.

The Court further reiterates that a threat of conduct prohibited by Article 3, provided it is sufficiently real and immediate, may fall foul of that provision. Thus, to threaten an individual with torture may constitute at least inhuman treatment."

76. The Author was a youthful 21 year-old woman at the time of the incident. The treatment was premeditated and its aim was to punish and intimidate the Author for asserting her lawful rights. The Author was repeatedly punched causing very serious and cruel suffering in the form of a broken nose, facial injuries, bruising to face and other parts of her body, chipped tooth, loss of consciousness, fear, anguish, distress, intimidation and ongoing psychological conditions.[40] The assault continued while the author was helpless and unconscious and on her back.

77. According to Judge Williams, the police viewed the Author with "extraordinary bigotry and bias," describing her as a "filthy, dirty, drug-affected female."[41] This attitude provides support for the Author's claim that the intention of the treatment was to debase, degrade and punish her. The Judge stated in reference to the intention of the perpetrators, "[s]ome retaliatory action would be seen, no doubt,

[40] Ibid at pp 89, 90

[41] Ibid at p 18.

as an appropriate means of showing loyalty and solidarity to "the boys"."[42] The Judge found that the police were motivated by hostility and prejudice, not logic and good sense in entering the author's premises.

78. It is submitted that conduct described by the Judge and the motivation behind it is precisely the type of conduct and intent that is specifically prohibited by Article 7. The Author was a vulnerable young woman. She was deliberately terrified, humiliated, beaten and brutally treated and punished. The atmosphere was one of heightened fear and tension. The treatment was unnecessarily prolonged by the Author's arrest and transport to the police station where she continued to be cuffed in the cells of the station.

79. The author submits that this treatment meets the definition of torture under Article 7. In the alternative, the author submits that the treatment was at least cruel, inhumane or degrading treatment or punishment pursuant to Article 7.

80. It is submitted that regardless of which classification within Article 7 is applied, the State failed to provide an effective remedy to the Police misconduct.

81. In *Gafgen v Germany* 22978/05 [2010] 2010 ECHR 759 (1 June 2010), the European Court of Human Rights stated:

> "In cases of wilful ill-treatment the breach of Article 3 cannot be remedied only by an award of compensation to the victim. This is so because, if the authorities could confine their reaction to incidents of wilful ill-treatment by State agents to the mere payment of compensation, while not doing enough to prosecute and punish those responsible, it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity, and the general legal prohibition of torture

[42] Ibid at p 44.

and inhuman and degrading treatment, despite its fundamental importance, would be ineffective in practice."[43]

82. This finding is important because it indicates that the remedy for a lessor violation than torture, but nonetheless still a violation of Article 3, still necessitates the prosecution and punishment of those responsible. It is submitted that this reasoning is applicable to Article 7 violations under the ICCPR.

83. At paragraph 116, the Court in *Gafgen* held:

> In cases of wilful ill-treatment by State agents in breach of Article 3, the Court has repeatedly found that…. State authorities must have conducted a thorough and effective investigation capable of leading to the identification and punishment of those responsible….."

84. In *Agiza v. Sweden* (233/2003), CAT, A/60/44 (20 May 2005) 197 at paragraph 13.7 the Committee said;

> "The Committee observes that in the case of an allegation of torture or cruel, inhuman or degrading treatment having occurred, the right to remedy requires, after the event, an effective, independent and impartial investigation of such allegations." [Emphasis added]

85. It is respectfully submitted that decisions of the Committee Against Torture and the European Court of Human Rights are a useful guide when interpreting Article 7 of the ICCPR and that it is appropriate for the Human Rights Committee to find that compensation and an independent and effective investigation are both required to remedy the breaches of Article 7 that the Author experienced. For the reasons provided earlier, the Author has received neither.

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[43] [119].

The Right to Liberty - Article 9; Reply to Paragraphs 113-122

86. With regard to the right to liberty and security of person, the Author notes that the State party has accepted that "arbitrariness" is not to be equated with meaning "against the law", but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law.[44]

87. However, the State party has failed to acknowledge that when considering whether given conduct is "arbitrary", considerations of reasonableness apply,[45] and that the State should be required to demonstrate that there are not less invasive means of achieving the same ends.[46]

88. With regard to the Police entry to the premises during the incident, the Author does not accept the State's assertion that "…the members of Victoria Police who effected Ms Horvath's purported arrest were mistaken as to the lawfulness of those acts".[47] Such a position ignores the findings of police hostility referred to above. Indeed, the Court of Appeal noted the finding of the Trial Judge that "…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".[48]

89. Merely because in proceedings below the State of Victoria asserted that the entry to the premises was done in good faith, that does not make it so. The assertion was totally contrary to the findings of the Trial Judge. That was a limited concession by the State in the context of civil litigation that rendered it liable for police conduct up to

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[44] Submissions, [118].
[45] *Jalloh v Netherlands*, United Nations Human Rights Committee, Communication No 794/1998 at 8.2.
[46] *C v Australia*, United Nations Human Rights Committee, Communication No 900/1999 at 8.2.
[47] [120].
[48] *State of Victoria v Horvath* (2002) 6 VR 326, [5].

the point of entry to the premises, but not with regard to what occurred after entry has been effected.

90. The State party fails to acknowledge that in order for an entry to a premises to be lawful pursuant to s 459A of the *Crimes Act 1958* (Vic), then the police officer must believe *on reasonable grounds* that a person has committed a *serious indictable offence*. In short:

   i) The Author does not accept the purported belief of the police officers was genuine;

   ii) Even if the belief was genuine, such a belief was not based upon reasonable grounds; and

   iii) The State Party has failed to identify any conduct of the author that could amount to a "serious indictable offence" on the facts of this matter.

91. When one has regard to the above considerations of arbitrariness, it is plain that the police entry was inappropriate, unjust and unreasonable. Notably, there were many less invasive steps that the Police could have utilised to effect an arrest if it was truly necessary, such as obtaining a warrant or conducting static observations of the premises.

92. In any event, the State Party fails to substantively deal the key point with regard to the Author's human right to liberty and security of person. Even if the entry to the premises was believed to be lawful by individual police officers, this does not mean what occurred after entry was lawful. As noted by the Trial Judge, and cited by the Court of Appeal:

> "[Constable] Jenkin then proceeded to the lounge room 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. His Honour 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."[49]

93. Such actions by Victoria Police are in clear breach of the author's right to liberty and security of person. Even if there was a mistaken belief about the legality of entry, that cannot absolve police, and the State of Victoria, for what followed. It is frankly astonishing that the State Party has not conceded that the actions of police members breached the author's right to liberty and security of person in such circumstances.

94. To the extent it is necessary to do so in light of the State's purported justification of Police misconduct, the Author further submits in the alternative that the actions of police were in breach of her freedom of movement as protected by Article 12 of the ICCPR.

95. With regard to the right to liberty and security of person, the author also relies on the judgment of the European Court of Human Rights in *Gillan and Quinton v United Kingdom*, (Application no. 4158/05), European Court of Human Rights, 12 January 2010, where is was held that:

[49] *State of Victoria v Horvath* (2002) 6 VR 326, [8].

> "In order to determine whether someone has been "deprived of his liberty" within the meaning of Article 5 [the equivalent right], the starting point must be his concrete situation and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question. The difference between deprivation of and restriction upon liberty is nonetheless merely one of degree or intensity, and not one of nature or substance. …
>
> The Court observes that although the length of time during which each applicant was stopped and search did not in either case exceed 30 minutes, during this period the applicants were entirely deprived of any freedom of movement. They were obliged to remain where they were and submit to the search and if they had refused they would have been liable to arrest, detention at a police station and criminal charges. This element of coercion is indicative of a deprivation of liberty within the meaning of Article 5 § 1 (see, for example, *Foka v. Turkey*, no. 28940/95, §§ 74-79, 24 June 2008). In the event, however, the Court is not required finally to determine this question in the light of its findings below in connection with Article 8 of the Convention."[50]

96. The Author was taken into custody after suffering an assault and false imprisonment perpetrated by Police. This plainly engaged her right to liberty and security of person. The onus rests on the State to justify the conduct referred to above, and it is submitted that in light of the clear factual findings of the Trial Judge it has failed to demonstrate that the actions of Police (either in entering the premises, in what occurred at the premises, or in what followed with the transportation of the Author to the Police Station and in being held at the Police Station) was proportionate in the circumstances.

[50] [56] – [57]

97. In order to provide an "enforceable" right to compensation pursuant to Article 9(5) of the ICCPR, a person such as the author who has had her rights violated must be able to achieve appropriate and adequate compensation for the breach. Due to that State legislation that seeks to immunise itself from civil suit, and due to the Police not being able to provide adequate and awarded compensation to the author, the author's right to compensation has been rendered unenforceable. The principle protected by Article 9(5) of the ICCPR buttresses the protection provided for by Article 2(3) of the ICCPR.

98. In the alternative, the author argues that if the Human Rights Committee cannot be satisfied that a breach of Article 9(5) has occurred, it is open for it to find a violation of Article 12, or "Freedom of Movement". While no jurisprudence on this exists under the ICCPR is worth noting that the European Court has determined that the "right to liberty" is on a continuum with the "freedom of movement". In *Guzzardi v Italy* (1980) 3 EHRR 333 the Court stated at paragraph 92. that:

> "…. in proclaiming the 'right to liberty', paragraph 1 of Article 5 [the equivalent right to Article 9] is contemplating the physical liberty of the person; its aim is to ensure that no one should be dispossessed of this liberty in an arbitrary fashion. As was pointed out by those appearing before the Court, the paragraph is not concerned with mere restrictions on liberty of movement; such restrictions are governed by Article 2 of Protocol No. 4 [freedom of movement] which has not been ratified by Italy. In order to determine whether someone has been 'deprived of his liberty' within the meaning of Article 5, the starting point must be his concrete situation and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question.
>
> 93. The difference between deprivation of and restriction upon liberty is nonetheless merely one of degree or intensity, and not one of nature or

substance. Although the process of classification into one or other of these categories sometimes proves to be no easy task in that some borderline cases are a matter of pure opinion, the Court cannot avoid making the selection upon which the applicability or inapplicability of Article 5 depends."

99. If anything, this case would support our assertion that the violation Ms Horvath suffered was at the higher end of the continuum. Nevertheless, if the Committee were not persuaded that Ms Horvath's right to liberty had been violated it may be open to it to find a violation of Article 12.

The Right to Humane Treatment When Deprived of Liberty – Article 10; Paragraphs 122-137

100. The Author, in her submissions, acknowledged that there is a distinction between Articles 7 and 10.[51]

101. The State Party fails to acknowledge that the author has identified a key "exacerbating factor" in its original submissions with regard to how the Author was treated after her liberty had been deprived. This is that the Author, who had suffered a significant head injury, was:

i) handcuffed, resulting in her being unable to stem blood flow, reduce her pain or otherwise relieve her injuries;

ii) transported in police vehicles to police cells rather than having an ambulance attend the scene immediately;

iii) taken to police cells rather than directly to hospital. Indeed, medical attention for the Author had to be arranged by her parents. The police

[51] At 37.

involved failed to provide the author with adequate and immediate medical attention of their own volition.

102. Accordingly, Article 10 of the ICCPR is engaged on the facts of this case after the author was taken into custody. Once under purported arrest, the author was not treated with humanity and respect for the inherent dignity of the human person.

103. That author notes that the State Party again attempts to justify the hand-cuffing and transportation of the applicant on the basis that it was in the context "…of what was considered to be a lawful arrest".[52] The author submits that, consistent with the factual findings of the Trial Judge as adopted by the Court of Appeal, by the time of her transportation the author has been assaulted and falsely imprisoned. At that stage, and in light of her serious head injury, it could not be said that her arrest was lawful.

104. The attempt by the State Party to highlight the author's "non-co-operation with police"[53] to justify her being hand-cuffed and placed in detention in circumstances where she, as a 21 year old woman, had been the victim of a violent assault undertaken by police in circumstances of bad faith and significant hostility, resulting in a serious head injury, is manifestly absurd.

105. The State party ignores that an unlawful arrest following an assault, which amounts to false imprisonment, is itself a circumstance of significant debasement and humiliation. The Police acted outside the scope of their lawful duties, will severe consequences to the well-being of the Author.

106. In light of what occurred at the premises, a proportionate police response would have been to immediately call and ambulance or convey the author to hospital.

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[52] [133].
[53] [133].

The fact this was not done by Police members who were not directly involved in the assault upon the author is a cause for alarm in circumstances where she had been the victim of significant violence at the hands of Police.

The Right to Privacy – Article 17; Paragraphs 138-149

107. The author repeats her submissions with regard to her right to privacy and right not to be subject to unlawful attacks on her reputation.[54]

108. For the reasons above, the author submits that the police actions in entering the premises were unlawful. Indeed Judge Williams found that the police were unlawfully trespassing when they entered the house. In the alternative, the author repeats her submission that when considering whether actions of police were "arbitrary", that is not to be equated with meaning "against the law", but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law.[55] In addition, the State party has failed to acknowledge that when considering whether action is "arbitrary" considerations of reasonableness apply,[56] and that the State should be required to demonstrate that there are not less invasive means of achieving the same ends.[57]

109. The police conduct during the raid, in constituting assaults and false imprisonment against the author, cannot be held to be anything other than unlawful, arbitrary, and disproportionate conduct.

110. The applicant again rejects the assertion by the State Party that the police who entered the premises were mistaken as to the lawfulness of those acts.[58] In any

[54] Page 38-9.
[55] As noted by the State in its submissions with regard to the right to liberty, [118].
[56] *Jalloh v Netherlands*, United Nations Human Rights Committee, Communication No 794/1998 at 8.2.
[57] *C v Australia*, United Nations Human Rights Committee, Communication No 900/1999 at 8.2.
[58] [147].

event, even if that was so, it cannot justify the events that followed. The State party fails to acknowledge that in a key paragraph the Court of Appeal held that:

> "…this is a case where that damage flowed as a direct result of the police officers pursuing a common design to which all, including Christensen, were parties. It was a common design to use such force as the officers believed necessary, in the exercise of their independent discretions, to achieve the result which they desired. In this sense, it seems to us that any fault of Christensen in planning and supervising the "raid" was **overtaken by the agreement which the officers had made in the course of which they committed the intentional torts as part of their common design."**[59]

111. With respect, there could not be a clearer indication that the Court of Appeal, having considered the factual findings of the Trial Judge, found that the police present had committed intentional torts of assault and false imprisonment.

112. In finding that the State of Victoria was not liable for the Police conduct in this matter, the Court of Appeal was certainly not concluding that this was because the actions of the police were undertaken in good faith and were reasonable. Rather, it was the very reason that the conduct was undertaken unreasonably, not in good faith and not in the course of Police duty that resulted in s 123(1) of the *Police Regulation Act 1958* shielding the State from liability.

113. Indeed, in the Court of Appeal proceeding, the State of Victoria expressly submitted that the State was liable only "up to the point of [Police] entry into the premises and not in respect of [Police] conduct inside the premises." The State Party should not now attempt to submit that the conduct of police inside the premises was reasonable or proportionate. If that was so, then the State of Victoria would have been liable for the Police conduct pursuant to s 123(2) of the *Police Regulation Act 1958.*

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[59] *State of Victoria v Horvath* (2002) 6 VR 326, [71].

114. The State Party seeks to distinguish *Keegan v The United Kingdom* on the basis that the protection of the right to privacy as protected by Article 8 of the European Convention on Human Rights and Fundamental Freedoms is “fundamentally different” to the protection afforded by Article 17 of the ICCPR. The State Party provides no justification for that submission. It remains unsubstantiated.

115. Moreover, and contrary to the submissions of the State Party, merely because the factual circumstances in *Keegan v The United Kingdom* and *Rojas Garcia v Columbia* are different to the present case (because the persons subject to the raids had “no connection whatsoever with the suspect or offence”[60]) does not mean that the right to privacy was not engaged and breached in this matter. If the assertion of the State was correct, that would mean that any police raid where there was some connection with a given suspect or offence would not engage the right to privacy no matter what occurred during a Police raid. Such a position would be plainly contrary to the text and purpose of the ICCPR.

116. The principal question in this matter with regard to the author’s right to privacy is whether the actions taken by police were proportionate once they had entered the premises, regardless of whether that entry was lawful. Simply put, in circumstances where the conduct has been found to constitute the torts of assault and false imprisonment at law, such conduct cannot be proportionate.

117. The State Party submits that because the Author was successful in her action in malicious prosecution against Constable Jenkin, that means that she had an effective remedy at law. With respect, it is the very fact that the author succeeded in her claim of malicious prosecution against a member of Victoria Police, but has not received an adequate or effective remedy for that conduct that illustrates why the State party is in breach of not only Article 17 of the ICCPR, but Article 2 as well. A malicious prosecution by necessity breaches the author’s right to privacy

[60] [145].

and her right not to be subject to unlawful attacks on her reputation.[61] Indeed, the State appears to tacitly accept that the right is engaged, otherwise the issue of whether she had an effective remedy would be superfluous. The attempt by the State party to claim that it is not itself responsible for the actions of a member of the Victorian Police is indicative of the State party attempting to absolve itself from the actions of those employed by Australian States to enforce and uphold the law, and ignores that the applicant in entitled to have her human rights protected and respected by Victoria Police.

[61] Page 38-9.