

TO:

Premier,
Hon Dr Denis Napthine
Level 1, 1 Treasury Place,
Melbourne, VIC 3002

Leader of the Opposition,
Hon Daniel Michael Andrews
517A Princes Highway,
Noble Park, VIC 3174

Attorney General,
Hon Robert William Clark,
Level 26, 121 Exhibition Street,
Melbourne, VIC 3000

Shadow Attorney General,
Hon Martin Philip Pakula
Suite 3, 387-389 Springvale Road,
Springvale, VIC 3171

Minister for Police
and Emergency Services,
Hon Kim Arthur Wells
Level 16, 121 Exhibition Street,
Melbourne, VIC 3000

Shadow Minister for Police
and Emergency Services,
Mr Wade Noonan
101 Douglas Parade,
Williamstown, VIC 3016

CC.

Chief Commissioner of Police,
Ken Lay
Victoria Police Centre, GPO Box 913,
Melbourne, VIC, 3001

24 July 2014

**RE: United Nations Human Rights
Committee Communication No. 1885/2009
(Horvath v Australia)**

We, the undersigned organisations, are writing to urge a substantive response from the State of Victoria to the findings of the United Nations Human Rights Committee ('Committee'), and the timely implementation of the Committee's direction to Australia and, by necessity, the State of Victoria, to remedy its breaches of the International Covenant on Civil and Political Rights ('ICCPR'), as articulated on 27 March 2014.

Specifically, we request that the Victorian Parliament cause an open and transparent review of specific Victorian legislation to ensure conformity with the ICCPR in light of the views adopted by the Committee in respect of the communication submitted by Victorian woman, Ms Corinna Horvath.

This would encompass a review of both the new *Victoria Police Act 2013* (Vic) and the *Independent Broad-Based Anti-Corruption Commission Act 2011* (Vic). The review of Victoria's legislation should ensure an adequate public consultation period.

Overview

Ms Corinna Horvath was brutally assaulted, along with her friends and partner, by a group of police during an unlawful raid on her home in March 1996. Ms Horvath was 21 years of age at the time. The police officers' gross acts of violence left her with a fractured nose and tooth and rendered her unconscious, after which she was unlawfully arrested and detained. Her injuries required surgery and five days in hospital.

In his 2001 judgment on the civil claim concerning the police officers' conduct, Judge Williams of the County Court described the event as;

"the sudden arrival late in the evening of five police vehicles and numerous police members, bright lights, loud commanding voices, a real and intended show of force and authority, no proper explanation, a violent forcible entry by kicking in the door, a terrifying invasion of the interior of the house (where children were sleeping) by baton-wielding hostile police ... Overall it was a disgraceful and outrageous display of police force in a



Anthony Kelly
Executive Officer
Flemington Kensington
Community Legal Centre
PO Box 487,
Flemington. VIC 3000
T: 03 9376 4355
F: 03 9376 4529



Hugh De Kretser
Executive Officer
Human Rights Law Centre
Level 17, 461 Bourke Street,
Melbourne VIC 3000
T: 03 8636 4450
F: 03 8636 4455



Dr Olivia Ball
Director,
Remedy Australia
T: 03 9489 7202
www.remedy.org.au

private house...[involving] excessive and unnecessary violence wrought out of unmeritorious motives of ill-will and a desire to get even..."

However, despite clear findings of fact in the civil proceedings against the defendant police officers involved in the raid on Ms Horvath's home, no employment or disciplinary consequences flowed from the County Court's decision. Neither did Ms Horvath ever receive the full damages awarded to her by the County Court for the intentional torts committed by the officers; compensation that was upheld by the Supreme Court of Victoria Court of Appeal.

In the matter of *Horvath v Australia (2014)*, the Committee found that the State party is under an obligation to compensate Ms Horvath adequately, to amend the law to guarantee that victims of police human rights abuses are adequately compensated and to ensure that police perpetrators of human rights violations are adequately disciplined through an independent, effective and impartial complaints body.

As a party to the ICCPR, it is up to the Australian Government to ensure effective remedies and non-repetition measures are implemented. The State is obliged to ensure victims of human rights abuses 'shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity' (ICCPR art 2).

Furthermore, it is obliged to 'adopt such legislative or other measures as may be necessary' to ensure conformity with the ICCPR (ICCPR art 2).

Good-faith engagement in the Horvath case will require active cooperation between both the Commonwealth and Victorian Governments since policing - the subject of Ms Horvath's complaint - is a state matter.¹

We believe that a comprehensive, clear and bi-partisan response supported by the Victorian Parliament is not only appropriate, but necessary.

Why this review is necessary

1. Independent Investigations of police misconduct

The Committee considers that the State party failed to show that the disciplinary investigation by the Professional Standards Command (or the then Office of Police Integrity), met the requirements of an effective remedy under the ICCPR.

The UN found that in light of these issues and importantly "given the nature of the deciding body" the disciplinary proceedings were not an effective remedy as required by Australia's obligations under the ICCPR.

Police misconduct should not be investigated by police. We note that Article 2, paragraph 3 of the ICCPR requires that State parties

*'investigate allegations of [Covenant] violations promptly, thoroughly and effectively through independent and impartial bodies.'*²

Currently, there is no independent body in Victoria that is adequately equipped or tasked to investigate allegations of excessive use of force

1. The ICCPR (art 50) states "The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions." which explicitly reinforces the international legal principle established in the Vienna Convention on the Law of Treaties (art 27) which holds that federated political arrangements cannot be invoked as justification for failing to fulfill treaty obligations.

2. General Comment No.31, The Nature of the General Legal Obligation imposed on State Parties to the Covenant, Paragraph 15.



Jane Dixon QC

President
Liberty Victoria
GPO Box 3161 Melbourne
Victoria 3001



Nathan Kennedy

President
Australian Lawyers for
Human Rights
PO Box A147 Sydney South
NSW 1235



Geoff Bowyer

President
Law Institute of Victoria
470 Bourke St
Melbourne 3000
(03) 9607 9311



Dr Mark Zirnsak

Director
Justice & International
Mission Synod of Victoria
and Tasmania

Uniting Church in Australia
130 Little Collins St
Melbourne 3000
T: 03 9251 5265
F: 03 9251 5241

or misconduct by members of Victoria police.³ We note that the majority of complaints received by the Independent Broad Based Anti-Corruption Commission (IBAC) relate to police conduct; however, around 90% of allegations related to police personnel conduct received to date by IBAC have been referred to Victoria Police⁴. IBAC, as its name indicates, is predominantly an anti-corruption body and only a very low percentage of misconduct complaints result in an investigation by IBAC. IBAC does not currently meet the legal obligation for Victoria to have an independent and impartial body which can investigate allegations of police misconduct 'promptly, thoroughly and effectively'.

2. Amending the *Victoria Police Act 2013* (Vic)

This month the *Victoria Police Act 2013* replaced the *Police Regulation Act 1958* as the principal source of law on the administration and governance of police in Victoria.

The Committee found that section 123 of the *Police Regulation Act 1958* 'limits the responsibility of the State for wrongful acts committed by its agents without providing for an alternative mechanism for full compensation for violations of the Covenant by State agents' and is thus incompatible with article 2, of the ICCPR.

Unfortunately, whilst it does expand the responsibility of the State for unlawful actions of its police officers, the new *Victoria Police Act 2013* still fails to adequately remedy this situation.

Under the *Victoria Police Act 2013*, the State will be liable for torts committed by police officers in the performance or purported performance of their duties unless the conduct giving rise to the tort involves "serious and willful misconduct".

Many police torts may fall under this exception for serious and willful misconduct. We submit that it is likely that the police officers' conduct in the Horvath case would have fallen under this exception. Perversely, the worse an officer's conduct, the more likely it will be that the State will not be liable under the exception.

Under section 79 of the *Victoria Police Act 2013*, the State may still be liable to pay compensation for police torts that involve serious and willful misconduct, but only if the victim is unlikely to recover compensation from the individual officer and the victim has "exhausted all other avenues" to recover compensation awarded to them by a court.

These requirements create significant legal and practical barriers to obtaining compensation for police wrongs and impediments to fulfilling the human right to an effective remedy.

In light of *Horvath v Australia* (2014), the Victorian Government should remove the exception for serious and willful misconduct.

This would bring Victoria Police into line with the legal position that applies to all Australian employers who are liable for wrongs committed by their employees in the course of their duties, whether the conduct is serious and willful misconduct or otherwise.

3. See: Effective, Transparent, Accountable: An independent system to investigate police-related deaths in Victoria. Report by the Federation of Community Legal Centres (Victoria), Human Rights Law Centre, Darebin Community Legal Centre and Flemington Kensington Community Legal Centre. (June 2011). Hopkins, Tamar, An Effective system for investigating complaints against the police, Flemington & Kensington Community Legal Centre (2009)

4. Independent Broad-Based Anti-Corruption Commission (IBAC) correspondence 13/06/2014

Lawyers



Andrew Stone

National President

Australian Lawyers Alliance

Suite 5, Level 7, 189 Kent Street, Sydney NSW 2000

T: 2 9258 7700

F: 2 9258 7700



Federation of
Community Legal Centres
VICTORIA

Liana Buchanan

Executive Officer

Federation of Community
Legal Centres (Victoria) Inc

L 3, 225 Bourke Street,
Melbourne, Vic 3000

T: 03 9652 1505



Annette Vickery

Deputy Chief
Executive Officer

Victorian Aboriginal
Legal Service

P.O. Box 52, Preston,
Victoria, 3072

T: 1800 064 865

Making this amendment would not encourage police to act irresponsibly as the State could seek to recover any compensation paid to victims from the individual officers who engaged in the serious and willful misconduct, and could also take criminal and disciplinary action against them. It should not be incumbent on victims of police misconduct to pursue officers who perpetrate violent acts against them.

The State of Victoria should accept liability for the tortious conduct of all police members in the course of their duties and align Victorian legislation with other States such as Queensland and New South Wales.⁵ Victoria is unique among Australian states in giving effect to the ICCPR in domestic legislation through the *Charter of Human Rights and Responsibilities Act 2006*, and yet the *Victoria Police Act 2013*, in its present form, fails adequately to protect the human rights within the Charter.

Furthermore, the status quo is a violation of article 2 paragraph 3 of the ICCPR:

“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”

and

“to ensure that the competent authorities shall enforce such remedies when granted”

In summary

Legislative reform is necessary to ensure conformity with the requirements of the ICCPR and fulfill Australia’s and Victoria’s international legal obligations and enhance the safety and human rights of all Victorians.

Further, the Committee has outlined that all participating countries have *“an obligation to adopt appropriate measures to give legal effect to the Views of the Committee as to the interpretation and application of the Covenant in particular cases”* brought before it.⁶

Victoria’s inadequate response to complaints of misconduct by police has been a recurring issue in Victoria for decades and is damaging to not only community trust in police, but also public confidence in societal institutions.

The open and transparent review of legislation requested would provide an opportunity to enact important systemic reforms that reflect both our international obligations, and the expectations of the Victorian community.

Finally, we remind the Victorian Government that it is now obliged to pay Ms Horvath the compensation and legal costs she was awarded by the County Court and the Court of Appeal and to institute effective disciplinary procedures against the police members who violated her human rights.

We note the Australian Government’s obligation to respond to the UN Human Rights Committee by 23 September 2014 and look forward to hearing from you in relation to the above.

Yours sincerely,

encl: UN Human Rights Committee Communication No. 1885/2009

5. NSW (section 213(1) of the Police Services Act 1990), QLD (section 10.5 of the Police Services Administration Act 1990)

6 Human Rights Committee, Report of the Human Rights Committee, vol II, UN GAOR, 49th sess, Supp No 40, UN Doc A/49/40 (21 September 1994) 305.



Emma King

Chief Executive Officer
Victorian Council of Social
Service (VCOSS)
Level 8, 128 Exhibition
Street, Melbourne VIC 3000
T: 03 9235 1000
F: 03 9654 5749



Kristen Wallwork

Executive Director
Springvale Monash Legal
Service Inc.
PO Box 312,
Springvale, VIC 3171
T: 03 9545 7400
F: 03 9562 4534



Ariel Couchman

Director
Youthlaw
At Frontyard, 19 King Street,
Melbourne
T: 03 9611 2423
F: 03 9620 3622