



Submission to IBAC Inquiry into the External Oversight of Police Corruption and Misconduct in Victoria

August 2017

by Annabelle Pendlebury

Remedy Australia appreciates this opportunity to make a submission to the inquiry conducted by the Independent Broad-based Anti-corruption Commission Committee (IBAC) into the external oversight and investigation of police corruption and misconduct in Victoria.

Australia is obliged to remedy violations of its human rights treaty commitments and to “take steps to prevent similar violations occurring in the future”,¹ as per *International Covenant on Civil and Political Rights*, article 2(3), which guarantees the right to an effective and enforceable remedy:

“any person whose rights ... are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity . . .”

Remedy Australia is a national, non-governmental, non-profit human rights monitoring organisation, which believes Australia should comply with UN decisions on human rights complaints, both past and future. Remedy Australia monitors individual human rights complaints adjudicated by the UN treaty committees, assesses Australia’s progress in remedying each violation and reports our findings online and to the UN.

We submit the following recommendations to IBAC, with special reference to findings by the United Nations Human Rights Committee in the case *Horvath v Australia*.²

¹ Human Rights Committee, *Views: Communication No. 1885/2009*, 110th sess, UN Doc CCPR/C/110/D/1885/2009 (10-28 March 2014) (*Horvath v Australia*), [10].

² *Horvath v Australia*, UN Doc CCPR/C/110/D/1885/200918.

Background

In 1996, Ms Corinna Horvath was brutally assaulted, along with her friends and partner, by a group of police officers during an unlawful raid on her home. As a result, Ms Horvath was hospitalised for five days.

In 2001, His Honour Judge Williams in the County Court of Victoria ruled against the police officers involved in the raid and Ms Horvath was awarded compensation.³ In the subsequent appeal case, the Victorian Court of Appeal upheld the trial judge's findings against four of the police officers, including assault, unlawful arrest, false imprisonment and malicious prosecution.⁴

However, when the police officers declared bankruptcy, Ms Horvath was unable to obtain the full amount of compensation awarded to her by the Court, instead settling for a fraction of what she was owed because the State of Victoria could not be held liable for the conduct of the police officers. This is because the torts committed by the officers fell within an exception to State liability. The State of Victoria is only liable for torts committed by police officers in the performance of their duties, but not when it involves 'serious and wilful misconduct' by its officers.⁵

Furthermore, despite clear judicial findings of negligence, the police officers faced no disciplinary consequences in their employment at Victoria Police. Some of the officers have since been promoted.

After exhausting all domestic remedies, Ms Horvath submitted a communication to the United Nations Human Rights Committee in 2008, seeking compensation and disciplinary action against the police officers who committed the assault.

In its 2014 final views, the UN Human Rights Committee found that Ms Horvath's right to an effective remedy was violated. It recommended full compensation, and that the Australian Government ensure victims of police assault can access compensation throughout its jurisdiction. The State of Victoria must take responsibility for its agents when they commit human rights violations, and the Victorian Government failed this international obligation. Additionally, the UN Human Rights Committee asserted that complaints must be heard by an independent body.

Following the findings of the UN Human Rights Committee, Ms Horvath received compensation and an apology from the Chief Commissioner of Victoria Police.

While Ms Horvath received an individual substantive remedy, the fact that this remedy took eighteen years to achieve is unacceptable. It represents a dismal human rights failure for Victoria and a failure of her right to an effective remedy under the ICCPR article 2, paragraph 3.

Importantly, the UN Human Rights Committee also declared that Australia is "under an obligation to take steps to prevent similar violations occurring in the future" and recommended Victoria adopt legislative reform "to ensure its conformity with the requirements of the Covenant."⁶

³ *Horvath v Christensen* (Unreported, County Court of Victoria, Williams J, 23 February 2001).

⁴ *State of Victoria v Horvath* (2002) 6 VR 326, [15].

⁵ Sophie Ellis, 'Why the Police Act needs changing: When it comes to police violence and misconduct Victoria's laws protect police, not its citizens' (2014) 88 *Law Institute Journal* 28, 29.

⁶ *Horvath v Australia*, UN Doc CCPR/C/110/D/1885/200918, [10].

The present inquiry provides an opportunity to fulfil the *Horvath* decision in full by recommending effective non-repetition measures to ensure human rights violations such as were committed against Ms Horvath are not repeated.

Accordingly, Remedy Australia submits the following recommendations.

Remedy Australia's recommendations

1. Implement an independent investigatory system that aligns with international human rights standards and ensures all victims of human rights abuses arising from police misconduct receive an effective remedy.
2. Implement an independent system for police oversight that aligns with international human rights standards and ensures police officers in breach of human rights are disciplined.
3. Introduce compulsory, evidence-based human rights training for commencing and in-service police officers in Victoria.
4. Amend the *Charter of Human Rights and Responsibilities Act 2006* (Vic) to expressly include the right to an effective and enforceable remedy of any person whose rights are violated, notwithstanding that the violation has been committed by persons acting in an official capacity.
5. Amend the *Victoria Police Act 2013* (Vic) to ensure the State is liable for all police misconduct.

Recommendation 1

Implement an independent investigatory system that aligns with international human rights standards and ensures all victims of human rights abuses arising from police misconduct receive an effective remedy.

This inquiry calls for a review of the challenges involved in the investigation of complaints about police in Victoria.

Remedy Australia believes such a review is necessary, as the current investigatory system fails to satisfy Australia's international human rights obligations. It is a system that failed Ms Horvath and, if no reform is adopted, it is a system that will continue to fail others facing similar situations.

The UN Human Rights Committee declared in *Horvath v Australia* that article 2 paragraph 3 of the ICCPR imposes upon Australia an obligation to investigate allegations of human rights violations "promptly, thoroughly and effectively through independent and impartial bodies".⁷ The Committee condemned the inadequate investigation process conducted by Victoria Police as it failed to meet these ICCPR requirements. In particular, Ms Horvath was not permitted to give evidence in a trial or call other witnesses, she was refused access to the investigation file, there was no public hearing and she was unable to reopen proceedings after the police made their finding.⁸ The Committee therefore concluded that Australia had failed its obligation to provide Ms Horvath with an effective remedy.⁹

As these proceedings failed to meet the requirements of an effective remedy under the ICCPR, the absence of effective non-repetition measures to correct their deficits amounts to a continuing violation of the rights of Australian citizens. The Committee's recommendation to change domestic laws and practices to ensure conformity with the ICCPR has thus far gone unheeded. There is no reason to believe that the experience of Ms Horvath would not be repeated in other investigations into police misconduct. Consequently, the current system for the investigation of complaints amounts to an ongoing violation of the rights of the ICCPR. To ensure any complainant in a similar position as Ms Horvath receives an effective remedy, the system for investigating complaints against police must be rectified urgently.

In 2009, the European Commissioner for Human Rights identified five key aspects that must be fulfilled before an investigation into police misconduct can be deemed compliant with human rights standards.¹⁰ In accordance with these internationally recognised standards, we recommend the investigation of human rights abuses in Victoria be carried out by a body that conforms to the following five human rights characteristics:¹¹

⁷ *Ibid*, 16[8.2].

⁸ *Ibid*, 16[8.3].

⁹ *Ibid*, 16[8.3].

¹⁰ Tamar Hopkins, 'When police complaint mechanisms fail: The use of civil litigation' (2011) 36 *Alternative Law Journal* 99, 99.

¹¹ Anthony Kelly & Tamar Hopkins, 'Independent Investigations of Complaints Against the Police' (Policy Briefing Paper, Police Accountability Project Melbourne, 2015), 11.

1. Independent of the police

The investigating body should be institutionally, practically and culturally independent from police. Legal frameworks should safeguard this independence.

2. Capable of conducting an adequate investigation

The investigating body must be capable of determining whether police have breached legal or disciplinary standards and whether police practices are compliant with human rights.

3. Prompt

The investigating body must be capable of enforcing timelines within the investigation process, with suspect and witness interviews occurring immediately. Police should also provide documents promptly, while investigators should be empowered to seize documents via a warrant, if necessary.

4. Transparent and open to public scrutiny

The investigation itself must be open to the public and data about complaints against police, prosecutions and disciplinary decisions should be publicly reported.

5. Victim-centred and enables the victim to fully participate in the investigation

The investigative body should ensure complainants are protected from unfair treatment after making a complaint. The complainant should have a right to an explanation regarding the outcome of their complaint and complainants should have the capacity to seek a review of that decision.

If these five benchmarks are incorporated into Victoria's system for police investigations, it will provide distinct improvements. Ms Horvath's remedy was neither prompt nor transparent. She was not permitted access to the reasoning behind the unsuccessful verdict of her case and when charges were eventually laid against the police officer involved, she had waited 20 years.

At present, IBAC refers approximately 90 per cent of police misconduct allegations to Victoria Police for investigation.¹² This system clearly lacks independence and impartiality. What is more, it is doubtful whether the current system for investigations is capable of conducting an adequate investigation because statistics show the police often fail to identify meritorious complaints and the criminal courts are instead much more effective at holding police to account.¹³

It is therefore essential that Victoria implement the five human rights benchmarks set out above in order to improve upon these significant flaws within the current system for investigations into police misconduct.

¹² Ellis, above n 5, 29.

¹³ Kelly & Hopkins, above n 11, 4.

Recommendation 2

Implement an independent system for police oversight that aligns with international human rights standards and ensures police officers in breach of human rights are disciplined.

The internal system for disciplining police officers accused of human rights abuses is significantly flawed. This was evidenced by Ms Horvath's plight. Despite clear findings of fact by the Victorian Country Court in 2001 that four police officers were liable for serious offences against Ms Horvath, Victoria Police took no action to discipline the officers. In fact, the police officer who allegedly broke Ms Horvath's nose, Leading Senior Constable David Jenkin, was only officially charged with an offence in 2016.¹⁴ That the process of seeking justice took Ms Horvath decades reveals the faults in the current system of police oversight.

It is primarily due to the lack of independence that this disciplinary system is failing. While IBAC has the power to investigate complaints against the police, in practice IBAC frequently refers complaints to Victoria Police for investigation.¹⁵ As mentioned above, IBAC refers more than 90 per cent of police misconduct cases back to police for investigation.¹⁶ What this means is that the police are investigating themselves. As a result, the accountability of the police is reduced. Furthermore, as in the case of *Horvath*, a large number of complaints investigated internally by Victoria Police result in an 'unsubstantiated' finding. In contrast, when complaints are reviewed by an external body such as the court system, most complaints are found to have substance.¹⁷ As the UN Human Rights Committee has noted, this reveals serious "shortcomings regarding the disciplinary proceedings".¹⁸

Disciplinary measures against police officers who have committed human rights abuses serves several important functions. Namely, it provides justice to the victim and also acts as a form of prevention against future misconduct by making clear to police and the public that human rights abuses by police are not tolerated. An independent system for investigations of human rights abuses by police is critical if we are to avoid scenarios like the Horvath case where police officers were allowed to continue in their employment and faced no disciplinary consequences for decades.

According to the 'Horvath test' formulated by Flemington and Kensington Community Legal Centre's Police Accountability Project, if the case of Corinna Horvath were to occur again today, the victim would face similar delays and obstacles in achieving a remedy. Therefore, in order to pass the Horvath test and ensure future complainants do not experience similar injustices, the system of police oversight must be rectified.

Remedy Australia recommends a human rights compliant system, based upon best practise models in other jurisdictions.

¹⁴ Independent Broad-Based Anti-Corruption Commission, 'IBAC charges Victoria Police officer in relation to assault offences' (Media Release, 29 November 2016).

¹⁵ Independent Broad-Based Anti-Corruption Commission, 'Audit of Victoria Police Complaints Handling Systems at Regional Level' (Report, September 2016) 8.

¹⁶ Ellis, above n 5, 29.

¹⁷ Kelly & Hopkins, above n 11, 4.

¹⁸ *Horvath v Australia*, UN Doc CCPR/C/110/D/1885/200918, 17[8.8].

Best Practice Model – The Police Ombudsman for Northern Ireland

The [Police Ombudsman for Northern Ireland](#) should be used as a key point of reference for Victoria. It reveals that police oversight can and should involve independent, prompt investigation of complaints by an external body.

The Ombudsman began operation in 2000 after an overhaul of the system for investigating complaints about police in Northern Ireland. Previously, police complaints were investigated by other police officers. A process of reform marked the commencement of independent, impartial, civilian oversight of policing and rehabilitation of public confidence in the police service.¹⁹

The Ombudsman is directly accountable to the Northern Ireland Assembly, through the Minister for Justice and is appointed for a fixed term of seven years by The Queen. With an overall staff of around 150 (in a population of 1.8 million), the Ombudsman has its own investigation capacity including specific investigators who are granted substantial powers to investigate complaints, including the power to secure incident scenes and seize documents and property. Police must, according to law, provide any information required for an investigation by the Ombudsman. Unlike IBAC in Victoria, the Ombudsman undertakes all police complaint investigations,²⁰ unless the complaint is deemed less serious and the complainant consents to a referral to the police. It has the capacity to appeal internal police disciplinary decisions to an independent tribunal and to direct the Chief Constable to take disciplinary action.

As the Northern Irish example demonstrates, it is entirely possible and indeed beneficial to move away from a system compromised by potential for bias in favour of independence and genuine accountability.

Remedy Australia therefore contends that Victoria needs a system that can ensure police misconduct is not only investigated effectively as per Recommendation 1, but leads to appropriate disciplinary measures, where required.

¹⁹ Police Ombudsman for Northern Ireland, 'Annual Reports and Accounts' (Annual Report, 2000) 11.

²⁰ Louise Porter & Tim Prenzler, 'Police oversight in the United Kingdom: The balance of independence and collaboration' (2012) 40 *International Journal of Law, Crime and Justice* 152, 154.

Recommendation 3

Introduce compulsory, evidence-based human rights training for commencing and in-service police officers in Victoria.

In addition to effective investigation and discipline of police to remedy and deter misconduct, we need to take positive measures to train our police to take a rights-based approach to their work. Effective human rights training will help prevent police misconduct and human rights violations from occurring in the first place. Therefore, Remedy Australia recommends reforming the human rights training undertaken by Victoria Police.

It is shocking that the police officers in Ms Horvath's case saw fit to commit human rights abuses in the first place. Victoria must take responsibility for ensuring that its officers do not violate human rights and must implement measures to preclude this kind of offending.

Remedy Australia welcomes the 'Equality is Not the Same' scheme Victoria Police has undertaken to include human rights standards to police training. For example, Victoria Police has incorporated human rights education into foundation training at the academy and promotional programs.²¹ Further, Victoria Police is developing a policing specific human rights training package in consultation with the Victorian Equal Opportunities and Human Rights Commission.²²

However, these new training initiatives are intended for newly recruited officers. Human rights training should be treated as an ongoing learning process. Existing police cannot be left in service without adequate training in how to protect human rights and avoid their violation on duty.

Remedy Australia recommends extending this training package so that it is revisited by police officers throughout their career with Victoria Police. This helps to reinforce that an awareness of human rights is important throughout an officer's career. Furthermore, comprehensive in-service training could aid cultural change.

This recommendation seeks to 'protect and promote human rights', in conformity with the obligation imposed upon all public authorities under section 1 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

Thus, in order to prevent police misconduct from occurring, as recommended by the UN Human Rights Committee, a cultural shift must occur at Victoria Police, aided by expanded human rights training for officers at all stages of their career.

²¹ Victoria Police, 'Equality is Not the Same: Year 2 Report 2015' (Action Plan, December 2015) 8.

²² *Ibid.*

Recommendation 4

Amend the *Charter of Human Rights and Responsibilities Act 2006 (Vic)* to expressly include the right to an effective and enforceable remedy of any person whose rights are violated, notwithstanding that the violation has been committed by persons acting in an official capacity

As discussed under Recommendation 2, the *International Covenant on Civil and Political Rights* – according to the highest world authority on its interpretation – contains an implied right of victims to have alleged police misconduct investigated by an independent, impartial and transparent body.

Victoria's Charter protects civil and political rights, but does not include an explicit right to have serious complaints against police investigated by an independent body. Neither, according to the recent Victorian Court of Appeal case of *Bare v IBAC*,²³ does the Charter contain this right implicitly.

In *Bare*, the appellant alleged that police had assaulted and racially vilified him during a random traffic stop and that, according to section 10(b) of the Charter concerning cruel, inhuman or degrading treatment, Mr Bare had an implied right to an effective, independent investigation of his complaint.²⁴ Bare contended that when the Office of Police Integrity (since replaced by IBAC) referred his complaint to Victoria Police, it breached this implied right. The Victorian Supreme Court was unanimous in its decision that section 10(b) of the Charter did not contain an implied right to an effective investigation.²⁵

This finding in *Bare* indicates that the Charter is falling below international standards for investigations into police misconduct. The Court held that the Charter does not contain the same implied right found within other human rights instruments, such as the *European Convention on Human Rights*.

Nor does the Charter contain the explicit and more general right to an effective remedy, such as is found in the *International Covenant on Civil and Political Rights*, on which the Charter was based.

Remedy Australia submits that such a disparity between Victoria's human rights legislation and international law is unacceptable as it indicates that the Charter does not adequately protect the people of Victoria in regards to the right to 'prompt, thorough and effective' investigation of alleged police misconduct through 'independent and impartial bodies'²⁶ and Australia's obligations as a party to the ICCPR. Clearly, there is need for reform.

Article 7 of the ICCPR (the right not be subjected to torture or cruel, inhuman or degrading treatment) has been used in international jurisdictions and by the UN in conjunction with article 2(3) (the right to an effective remedy) to imply the right to an

23 (2015) 326 ALR 198.

24 Jack Maxwell, 'Bare v Independent Broad-Based Anti-Corruption Commission: One step forward, one step back - The Victorian Charter in Bare V Independent Broad-Based Anti-Corruption Commission' (2016) 40 *Melbourne University Law Review* 371, 373.

25 *Bare v IBAC* (2015) 326 ALR 198.

26 *Horvath v Australia*, UN Doc CCPR/C/110/D/1885/200918 [10].

effective investigation. If Victoria had a similar provision in our Charter, this would be open to our courts too.

Further, making the right to an effective remedy explicit in the Charter would provide more general protection to victims of human rights violations in Victoria and more accurately reflect the provisions of the ICCPR, on which the Charter is based. The right to an effective remedy is an essential adjunct to all substantive human rights protections and the Charter is incomplete without it. As William Blackstone observed, ‘every right, when withheld, must have a remedy, and every injury its proper redress’.²⁷ We cannot allow human rights abuses to go unremedied, and protecting the right to an effective remedy in law is a key step forward.

Recommendation 5

Amend the *Victoria Police Act 2013* (Vic) to ensure the State is liable for all police misconduct.

The injustice that Ms Horvath did not receive the compensation ordered by the County Court was not remedied by the recent *Victoria Police Act 2013* (Vic). Under section 74(2) of the *Victoria Police Act*, the State of Victoria is not liable for the tortious conduct of its police officers when the conduct giving rise to the tort amounts to ‘serious and wilful misconduct’. This means the State is still exempt from liability in cases where police officers have perpetrated human rights abuses in a serious and wilful manner. What this means is that in cases where victims of police misconduct miss out on compensation from the individual police perpetrators, because the State of Victoria is not liable, the victim can still be significantly undercompensated.

Although section 79 the *Victoria Police Act* provides that, where a victim can’t obtain damages from the police officer, the State must pay an amount of compensation to the victim, the victim must ‘exhaust’ all avenues to obtaining compensation from the officer, which can involve further lengthy and expensive court processes, and it is still at the discretion of the state to determine what amount the victim will be paid. It is not a fair processes for a victim who has already established in court they are eligible for a fixed amount of compensation for wilful and serious misconduct perpetrated by a police officer.

In order to rectify this, Remedy Australia recommends amending the *Victoria Police Act* to make the State vicariously liable for all tortious conduct of police officers acting within the performance or purported performance of their duty.

This would be in line with model legislation in other states such as New South Wales. The *Law Reform (Vicarious Liability) Act 1983* (NSW) section 8 makes the State of New South Wales liable for torts committed by police officers in the performance or purported performance of their duties.

The current system as it stands permits the state to absolve itself of liability and as a result, no amount of court orders for compensation or international decisions can be

²⁷ William Blackstone, *Commentaries on the Laws of England* (Garland, 1978) 23.

truly effective. Without this law reform, Victoria remains at risk of failing to provide an effective remedy to those who have been or become the victim of police misconduct.

Conclusion

Remedy Australia submits these recommendations to IBAC in the sincere hope they are implemented to improve police oversight and investigation so that police misconduct can be effectively remedied and, ultimately, prevented.

Contact: **Dr Olivia Ball**
Director, Remedy Australia

<http://Remedy.org.au>

[REDACTED]

[REDACTED]