

**SUBMISSION TO VICTORIAN MINISTER FOR POLICE AND EMERGENCY SERVICES**

**REFORM TO THE VICARIOUS LIABILITY OF VICTORIA POLICE FOR WRONGS COMMITTED BY  
POLICE OFFICERS**



4 June 2008

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## **About the Federation of Community Legal Centres (Vic) Inc**

The Federation is the peak body for fifty three community legal centres across Victoria. The Federation leads and supports community legal centres to pursue social equity and to challenge injustice.

The Federation:

- provides information and referrals to people seeking legal assistance
- initiates and resources law reform to develop a fairer legal system that better responds to the needs of the disadvantaged
- works to build a stronger and more effective community legal sector
- provides services and support to community legal centres
- represents community legal centres with stakeholders

The Federation assists its diverse membership to collaborate for justice. Workers and volunteers throughout Victoria come together through working groups and other networks to exchange ideas and develop strategies to improve the effectiveness of their work.

## **About community legal centres**

Community legal centres are independent community organisations which provide free legal services to the public. Community legal centres provide free legal advice, information and representation to more than 100,000 Victorians each year.

Generalist community legal centres provide services on a range of legal issues to people in their local geographic area. There are generalist community legal centres in metropolitan Melbourne and in rural and regional Victoria.

Specialist community legal centres focus on groups of people with special needs or particular areas of law (eg mental health, disability, consumer law, environment etc).

Community legal centres receive funds and resources from a variety of sources including state, federal and local government, philanthropic foundations, pro bono contributions and donations. Centres also harness the energy and expertise of hundreds of volunteers across Victoria.

Community legal centres provide effective and creative solutions to legal problems based on their experience within their community. It is our community relationship that distinguishes us from other legal providers and enables us to respond effectively to the needs of our communities as they arise and change.

Community legal centres integrate assistance for individual clients with community legal education, community development and law reform projects that are based on client need and that are preventative in outcome.

Community legal centres are committed to collaboration with government, legal aid, the private legal profession and community partners to ensure the best outcomes for our clients and the justice system in Australia.

## Summary

We urge the Victorian Government to amend the *Police Regulation Act 1958* (Vic) ("Police Regulation Act") so that the State is liable for all legal wrongs committed by Victorian police officers in the execution or purported execution of their duties.

This submission complements the submission made by the Victorian Bar dated 20 September 2007. We support and endorse that submission.

This submission argues that the current denial of responsibility by the Victoria for some wrongs by police officers is a breach of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ("the Charter") in that:

- the denial of responsibility is inconsistent with the obligation on Victorian police officers (as public authorities<sup>1</sup>) under section 38 of the Charter to act compatibly with the human rights outlined in the Charter and give proper consideration to human rights in making decisions;
- the Victorian Government is not providing "effective remedies" for human rights violations by police officers as required by the Charter; and
- the current impediments to bringing legal action to recover compensation for wrongs by police officers breach the right to a fair hearing under section 24 of the Charter.

The submission also argues that:

- the current denial of responsibility by the State for some wrongs by police officers is out of step with the position in a majority of Australian jurisdictions; and
- the Government should amend section 28LC of the *Wrongs Act 1958* (Vic) ("Wrongs Act") so that wrongs committed by police officers are not subject to permanent injury threshold limits.

### **Human rights abuses by police are a significant and systemic issue**

Human rights abuses by police officers are regularly reported to Victorian community legal centres by our clients.

For example, since October 2005, the Flemington & Kensington Community Legal Centre ("FKCLC") has recorded over 40 reports of police abuse and misconduct against members of minority groups in Melbourne's inner-west.

Police behaviour reported to FKCLC includes assaults requiring the victims to be hospitalized, punitive beatings of handcuffed or otherwise restrained people, unlawful imprisonment, unlawful detention, acts of torture and brutality within police stations, excessive use of force, unlawful searches, threats of sexual violence, strip searches conducted after threats of sexual violence, strip searches in unjustified and humiliating circumstances, racist and sexist comments, thefts of money, vehicles and mobile phones, harassment, degrading and humiliating conduct and ill-treatment against racial and religious minorities. In some of the reports, children as young as 10 have been assaulted and mothers sprayed with capsicum spray.

People have reported being told by police to "get back to Africa," "black cunt", "go home", "we won't stop till you are locked up", you are a "terrorist", a "monkey" and "your Qu'ran is shit".

Reported and observed effects on individuals and witnesses to the violence have included intense paranoia, fear, refusal to leave the house, helplessness, loss of weight, dropping out of school, long term injuries, permanent loss of sight, long term pain, scarring, deep distress and distrust of institutions. In some cases people have left Victoria and Australia rather than continue facing the degree of harassment they receive in Flemington at the

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<sup>1</sup> See s 4(1)(d) of the Charter and *Guneser v Magistrates' Court of Victoria & Anor* [2008] VSC 57 (5 March 2008), [61].

hands of police. Some people have ongoing medical needs as a result of police misconduct that they cannot afford to attend to.

Similarly, other community legal centres including Fitzroy Legal Service, Victorian Aboriginal Legal Service, Mental Health Legal Centre, South West Community Legal Centre and Western Suburbs Community Legal Service, have received recent reports of human rights abuses by police.

The South West Community Legal Centre in Warrnambool received two complaints of police misconduct. In one, the client reported that the police officer deliberately jammed his foot in a police “divvy” van door causing serious injuries. In the other case, police officers were recorded on video assaulting a young person. A solicitor was able to view the video at the police station before the video was subsequently “lost” by police.

Reports of human rights abuses are not isolated to community legal centre clients. For example:

- The Office of Police Integrity reported this year it was investigating claims of misconduct by police of sex workers in St Kilda;<sup>2</sup>
- Three police officers in the Armed Offenders Squad were successfully prosecuted this year for assaulting a suspect in a police station and attempting to mislead an Office of Police Integrity hearing into the assault<sup>3</sup>;
- A woman, who was attending a police station to deal with around \$400 of unpaid parking fines, was strip searched and left standing naked in the station<sup>4</sup>; and
- A police officer was successfully prosecuted for seeking sexual favours in return for not giving a young female driver a traffic infringement<sup>5</sup>

The case *Victoria v Horvath* [2002] VSCA 177 (“*Horvath*”), referred to in detail in the Victorian Bar’s submission, also involved egregious human rights abuses by police officers in the form of unlawful entry, assault, arrests and malicious prosecution.

These examples are a clear indication that human rights abuses by police are a significant and systemic problem in Victoria.

### **Human rights abuses by police and the Charter**

The Victorian Government and Victoria Police are required to protect and promote human rights in accordance with the Charter.

The Charter guarantees the protection of a range of human rights relevant to police misconduct including:

- Right to equality before the law and freedom from discrimination (section 8);
- Right to life (section 9) which includes the right to be treated with dignity and respect;
- Protection from torture and cruel, inhuman or degrading treatment (section 10) which is relevant to person in the care of custody of the Victoria Police and aims to protect a person’s dignity and physical and mental integrity;
- Privacy and reputation (section 13) which includes the right to family and home and provides additional protection against a violation of these rights which is arbitrary or unlawful;
- Rights to freedom of thought, conscience, religion and belief (section 14);
- Protection of families and children (section 17);
- Cultural rights (section 19);

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<sup>2</sup> See *The Age* 6 February 2008, Reko Rennie

<sup>3</sup> See *The Age* 26 May 2008, Mex Cooper

<sup>4</sup> *De Reus v Gray* [2003] VSCA 84

<sup>5</sup> See *The Herald Sun* 12 February 2008, Elissa Hunt

- Right to liberty and security of person (section 21) which also provides guarantees against arbitrary arrest or detention (section 21(2)) and deprivation of liberty other than in accordance with the law (section 21(3)); and
- Right to humane treatment when deprived of liberty (section 22).

The reported cases of police abuses in the above section, are likely to constitute both breaches of rights under the Charter and, in many cases, common law torts (wrongs).

For example, unlawful assaults or arrests by police officers are likely to constitute both common law torts (wrongs) such as assault and false imprisonment as well as breaches of human rights guarantees in the Charter such as the right to liberty and security of person, the protection against arbitrary arrest and detention and potentially the prohibition on torture and cruel, inhuman or degrading treatment.<sup>6</sup>

Similarly, breaches by police of right to life, the right to liberty and security of person and the prohibition on torture and cruel, inhuman or degrading treatment brought about by a failure of police to take positive steps to protect those rights, may also constitute common law negligence.<sup>7</sup>

### **Obligation to provide an effective remedy for human rights breaches**

There is a general obligation under human rights law to provide “effective remedies” in relation to human rights violations. This obligation is guaranteed under article 2(3) of the *International Covenant on Civil and Political Rights* (ICCPR) which entered into force for Australia in 1980.

Section 32(2) of the Charter and the Charter’s Explanatory Memorandum confirm that international law and decisions of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision. The Explanatory Memorandum also suggests that decisions of the European Court of Human Rights and the United Nations treaty monitoring bodies (including the United Nations Human Rights Committee) will be particularly relevant.

The UN Human Rights Committee, in their General Comment 31 on obligation to provide “an effective remedy”, noted:

Article 2, paragraph 3, requires that States Parties make reparation to individuals whose Covenant rights have been violated. Without reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of article 2, paragraph 3, is not discharged. In addition to the explicit reparation required by articles 9, paragraph 5, and 14, paragraph 6, the Committee considers that the Covenant generally entails appropriate compensation. The Committee notes that, where appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.<sup>8</sup>

The Committee has also held that compensation be available when a violation Article 10 of the ICCPR

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<sup>6</sup> Severe fear, anguish and inferiority felt by an applicant while in police custody has been held to amount to a breach of the right to be free from torture by the European Court of Human Rights: *Alsayed Allaham v Greece* [2007] ECHR No 25771/03 (18 January 2007).

<sup>7</sup> See for example *Osman v UK* ECtHR (1998) and *Z v UK* ECtHR (2001)

<sup>8</sup> General Comment No. 31 [80] *Nature of the General Legal Obligation Imposed on States Parties to the Covenant* 26/05/2004.

(human treatment of persons deprived of their liberty) occurs.<sup>9</sup> A similar obligation exists in respect of Article 7 of the ICCPR (torture, cruel, inhumane and ill-treatment) violations.<sup>10</sup>

In *Christopher Hapimana Ben Mark Taunoa and Ors v The Attorney General and Anor* [2007] NZSC 70 (31 August 2007), a case concerning the ill-treatment of prisoners and drawing on effective remedy provisions of the ICCPR, the Supreme Court of New Zealand stated:

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

"The New Zealand Bill of Rights Act, unless it is to be no more than an empty statement, is a commitment by the Crown that those who in the three branches of government exercise its functions, powers and duties will observe the rights that the Bill affirms. It is I consider implicit in that commitment, indeed essential to its worth, that the Courts are not only to observe the Bill in the discharge of their own duties but are able to grant appropriate and effective remedies where rights have been infringed. I see no reason to think that this should depend on the terms of a written constitution. Enjoyment of the basic human rights are the entitlement of every citizen, and their protection the obligation of every civilised state."

**Victoria is currently in breach of the Charter as it does not provide an "effective remedy" for human rights breaches by police officers**

Victoria does not provide an effective remedy for human rights breaches by police officers. Leaving aside the issue of ineffective avenues of criminal prosecution and disciplinary action against police officers who commit misconduct, Victoria does not provide an effective compensation remedy for victims of police human rights abuses.

The Charter does not provide any independent cause of action or right to compensation itself. To receive compensation, a victim of police human rights violations must bring civil litigation under tort law. As is shown below, this remedy is ineffective and illusory.

At common law, police officers are not employees of the State, but rather are officers exercising independent discretion<sup>11</sup>. Accordingly, the usual rule, where an employer is vicariously liable for the acts of its employees committed in the "course of employment", does not apply.

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<sup>9</sup> General Comment No. 21: Replaces general comment 9 concerning humane treatment of persons deprived of liberty (Art. 10) 10/04/92.

<sup>10</sup> General Comment No. 20, (Art. 7) paragraph 15: 10/3/92. The European Court of Human Rights has also held that a failure to investigate, punish or provide remedies for breaches may constitute a violation of the right to freedom from torture under the European Convention. The Court has held that the freedom was breached by the failure of the state to take adequate disciplinary action against police officers responsible for subjecting a prisoner to cruel and degrading treatment such that the failure amounted to a providing de facto immunity and violating the obligation to prevent and provide remedies for contravening conduct. *Zeynep Ozcan v Turkey*, Application No 45906/99 (20 February 2007).

<sup>11</sup> *Enever v The King* (1906) 3 CLR 969

Because the usual common law rule as to employer vicarious liability does not apply to police officers, in Australia, the liability of the State for the wrongs of its police officers has been regulated by statute. These statutes were introduced to provide immunity from suit for police officers in certain circumstances.

In Victoria, section 123 of the Police Regulation Act provides that:

- a police officer is not personally liable for anything “necessarily or reasonably done” or omitted to be done “in good faith in the course of their duty”; and
- any liability that the officer would otherwise have had, transfers to the State.

The result of the combination of the common law and the Police Regulation Act, is that the State is only liable for wrongs of police officers that are “necessarily or reasonably” committed “in good faith” and “in the course of their duty”. This is much narrower than an employer’s liability for wrongs of its employees. The necessary and reasonable requirement in particular weighs against State liability as most wrongs and abuses will, by definition, not be necessarily or reasonably done.

Accordingly, where a police officer commits an intentional wrong such as assault, false imprisonment or malicious prosecution, it will be rare for the State to be liable, even though the officer may have purportedly used powers and authority conferred on them by the State when committing those wrongs, and may have done so for the purported benefit of the State.

To recover compensation, a victim of those wrongs must rely on damages being paid by the individual police perpetrators of that abuse, as opposed to the State. In cases where the individual police officer has no capacity to pay, the victim will receive no compensation.

Given the likely quantum of awards of damages where there are human rights abuses, and the legal costs involved in bringing civil litigation of this nature, in most cases, individual police officers will have no capacity to pay compensation to victims of human rights abuses and the victim will end up with no redress.

This position is compounded by the injury thresholds in the Wrongs Act which prevent some civil claims against police (discussed later in this submission).

The current legal situation in Victoria does not provide an effective remedy for human rights abuses by police. This breaches the requirements of the Charter. It provides no incentive for the State to prevent further abuses by police officers.

The State should ensure that effective remedies are provided for police human rights abuses by taking responsibility for all legal wrongs of police officers committed in the execution or purported execution of their duties. This should be achieved by amending section 123 of the Police Regulation Act accordingly.

### **Fair Trial – Access to Courts**

Section 24 of the Charter guarantees the right to a fair hearing. This section is largely based on article 14 of the ICCPR which guarantees the access of all people to a court for the determination of their rights.

The UN Human Rights Committee, in their General Comment on article 14, noted:

A situation in which an individual’s attempts to access the competent courts or tribunals are systematically frustrated de jure or de facto runs counter to the guarantee of article 14, paragraph 1, first sentence. This guarantee also prohibits any distinctions regarding access to courts and tribunals

that are not based on law and cannot be justified on objective and reasonable grounds...The availability or absence of legal assistance often determines whether or not a person can access the relevant proceedings or participate in them in a meaningful way...In particular, a rigid duty under law to award costs to a winning party without consideration of the implications thereof or without providing legal aid may have a deterrent effect on the ability of persons to pursue the vindication of their rights under the Covenant in proceedings available to them<sup>12</sup>.

The right to a fair hearing is a fundamental human right which must not be limited in the mere interests of “practicality and convenience”.<sup>13</sup> Courts have determined that equal access to the courts requires the legal system to be set up in such a way as to ensure that people are not excluded from the court process.<sup>14</sup> Equal access to courts is also linked to the notion of equality before the courts.

In Victoria, the failure of the State to take appropriate responsibility for police human rights abuses breaches the right to a fair hearing for victims of police human rights abuses. The breach is compounded by the injury thresholds in the Wrongs Act which prevent some civil claims against police (discussed further in the following section).

Litigation against the police is a time consuming, costly, hotly contested and risky enterprise. Victims of police abuse face serious credibility issues in proving police misconduct. As occurred in the *Horvath* case, police commonly prosecute victims of police abuse as a defensive tactic. A victim often first has to prove their innocence of the crime, and then contemplate taking action to prove the misconduct.<sup>15</sup>

Even if they can prove their case, most victims of human rights abuses by police officers will have no access to compensation unless the individual police officer has a capacity to pay, which will be rare given the quantum of damages involved.

Further, civil litigation to seek compensation for wrongs committed by police officers is incredibly expensive. Civil claims can cost around \$40–100,000 or more in legal costs and disbursements. Plaintiffs also risk having to pay the legal costs of individual police officers or the State if they are not successful.

Victoria Legal Aid rarely makes grants of legal aid in civil claims such as these<sup>16</sup> and it would be extremely rare for a victim of police human rights abuses to have both the financial capacity and the willingness to pay for legal fees of this magnitude themselves.

In the past, individuals would have utilised “no win no fee” arrangements with law firms and barristers under which they only have to pay the firm’s and the barrister’s fees if they recover compensation for the client. Because of the outcome in the *Horvath* case, firms and barristers are now extremely reluctant to enter into “no win no fee” arrangements for police misconduct matters, because of the significant risk that the firm will never be paid for work they do in the matter (due the individual officers having no capacity to pay, and the likelihood that the State will not be liable).

Community legal centres do not have the resources or expertise to conduct a significant number of police misconduct cases. Prior to *Horvath* decision, community legal centres had a reasonable chance of referring these

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<sup>12</sup> Human Rights Committee, *General Comment No. 32*, Article 14: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32 (2007).

<sup>13</sup> *R v McBride* [2007] ACTSC 8 (13 February 2007).

<sup>14</sup> Department for Constitutional Affairs, *Human Rights: Human Lives* (2006), available at [www.dca.gov.uk/peoples-rights/human-rights/pdf/hr-handbook-public-authorities.pdf](http://www.dca.gov.uk/peoples-rights/human-rights/pdf/hr-handbook-public-authorities.pdf).

<sup>15</sup> See for example the recent case of Ahmed Dini, *The Age* 21 October 2007, Liz Porter

<sup>16</sup> See Victoria Legal Aid guidelines at [www.legalaid.vic.gov.au](http://www.legalaid.vic.gov.au)



matters to firms on a “no win no fee” basis. The reluctance of firms and barristers now to take these matters on is seriously negatively affecting access to justice for our clients.

For example, FKCLC received advice from counsel that many of the cases of abuse and misconduct reported by its clients are amenable to civil litigation. However, lawyers at FKCLC have found barristers and law firms reluctant to initiate and act in these cases.

Similarly, lawyers at Western Suburbs Legal Service have also faced concerns raised by private lawyers about the implications of section 123 on their capacity run tort proceedings relating to police violence. As recently as 22 April 2008, a Victorian law firm refused to act on a “no win no fee basis” for a client of a community legal centre despite agreeing he had a tort claim because the action was only available against the police officer and not the State.

In contrast, as set out in the submission of the Victorian Bar, the individual police officers have access to quality legal representation either paid for by the State or the Police Association.

The difficulty in obtaining legal representation creates an additional hurdle for victims facing the already daunting task of bringing their cases to court. Compared with the relative resources and advantage of the State and the police officers, there is unequal access to the courts for the resolution of these matters. The cumulative effect is that victims of police abuse are de facto prevented from accessing the courts to obtain redress. We submit that this breaches the right to a fair hearing under section 24 of the Charter.

As victims are effectively unable to pursue civil actions, a fair trial is denied.

If the State took responsibility for all legal wrongs of police officers committed in the execution or purported execution of their duties, this would significantly remedy this situation. It would significantly improve victims access to proper legal representation for their claims providing more equal access to the courts.

## Wrongs Act amendment

The Wrongs Act currently bans claims for non-economic loss (such as pain and suffering compensation) unless the person meets a “significant injury” threshold. In broad terms, the threshold is a permanent physical impairment of more than 5% or a permanent psychological impairment of more than 10%.

These thresholds will not be met in cases where a person suffers a serious injury as a result of a wrong, but the injury heals with little or no ongoing effects eg: a broken leg or broken nose.

The thresholds were introduced to respond to a perceived crisis in insurance premiums. For policy reasons, in section 28LC of the Act, the Government excluded certain types of claims from the requirement that they meet the injury threshold. These claims include “intentional acts done with intent to cause death or injury”, sexual assault and sexual misconduct.

Police misconduct is not excluded from the requirement. Accordingly, unless a person can show that the police misconduct was an “intentional act done... to cause injury” or sexual assault or sexual misconduct, the person will have to satisfy the injury threshold.

This is a significant bar to receiving compensation for injuries received through misconduct committed by police officers.

Situations where the person would have to satisfy the injury threshold might include:

- where a supervising sergeant is negligent in failing to prevent a junior officer from assaulting and falsely imprisoning a person;
- where the police are negligent in failing to investigate and act on reports of family violence resulting in a woman being subjected to further assaults;
- when a person is negligently sprayed with capsicum spray by a police officer intending to spray another;
- where police command fail to remove an officer from duty who is known to have violated human rights in the past and the officer commits further abuses; or
- where police conduct a negligent (rather than intentional) unlawful search conducted in public.

In those cases, where the person received injuries (physical or psychological) which do not meet the threshold, they will be unable to receive non-economic compensation. This bar reinforces the arguments above that Victoria is failing to provide an “effective remedy” for police human rights abuses and that it is breaching the right to a fair trial under the Charter.

The justification for imposing the restriction on claims (ie; perceived insurance crisis) is clearly outweighed by the strong policy reasons in favour of removing the restriction in police misconduct cases.

All victims of police wrongs should receive compensation appropriate to the level of injury and the circumstances of the misconduct. Imposing a restriction on compensation on these cases removes an incentive for Victoria Police to eliminate misconduct.

The restriction should be removed for cases of police misconduct. It could be removed by amending section 28LC(a) of the Wrongs Act to include police misconduct. Alternatively, it appears that section 28LC(3) would allow the a regulation to be passed excluding police misconduct from the restriction.

### Victoria's position is out of step with other Australian jurisdictions

The table below summarises the extent of State liability for wrongs committed by police officers across all Australian jurisdictions.

The table shows that in a majority of Australian jurisdictions, legislation has been introduced so that the State is vicariously liable for the wrongs of police officers in accordance with the usual employer-employer test ie; for all wrongs committed in the execution or purported execution of duty. In NSW this liability can extend to punitive damages.

In all states, the State is liable for damages recoverable from police where police act in good faith, with honesty or without corruption or malice.

The relevant legislation is extracted in Appendix 1 to this submission.

The table shows that Victoria is currently out of step with the majority of Australian jurisdictions. Victoria should follow the majority of Australian jurisdictions and legislate so that the State is liable for all legal wrongs of police officers committed in the execution or purported execution of their duties.

	<b>All conduct in the execution or purported execution of duty</b>	<b>Punitive damages</b>	<b>Where police act in good faith</b>
<b>Victoria</b>	No	No	Yes
<b>New South Wales</b>	Yes	Yes	Yes
<b>Queensland</b>	Yes	No	Yes
<b>Western Australia</b>	Discretionary	No	Yes
<b>South Australia</b>	No	No	Yes
<b>Tasmania</b>	No	No	Yes
<b>Northern Territory</b>	Yes	No	Yes
<b>ACT</b>	As per Federal	As per Federal	As per Federal
<b>Federal</b>	Yes	No	Yes

## **Appendix 1 – Liability of the State for wrongs committed by police officers in other Australian Jurisdictions**

### **New South Wales**

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

Section 213 of the *Police Act* provides that:

A member of the police service is not liable for any injury or damage caused by any act or omission of the member in the exercise by the member in good faith of a function conferred or imposed by or under this or any other act or law (whether written or unwritten).

Section 8(1) of the *Law Reform (Vicarious Liability) Act* provides that:

(1) Notwithstanding any law to the contrary, the Crown is vicariously liable in respect of the tort committed by a person in the service of the Crown in the performance or purported performance by the person of a function (including an independent function) where the performance or purported performance of the function:

- (a) is in the course of the person's service with the Crown or is an incident of the person's service (whether or not it was a term of the person's appointment to the service of the Crown that the person perform the function), or
- (b) is directed to or is incidental to the carrying on of any business, enterprise, undertaking or activity of the Crown.

### **Queensland**

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

Section 10.5 provides that:

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

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

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

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

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

to act, in the execution of duty as an officer.

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

### **Western Australia**

Under the *Acts Amendment (Police Immunity) Act 1999 (WA)* section 5(3) in its amendment of Section 137 of the *Police Act 1892 (WA)*, the State is liable for police acts done without malice or corruption. Police are immune in these situations. Section 138 of the Act provides a discretion to the State to pay compensation in cases where police act with malice or corruption.

Section 137(3)-(5) provide that:

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

(4) An action in tort does not lie against a person for anything that the person has done, without corruption or malice, in assisting a member of the Police Force who is performing or purporting to perform the functions of a member of the Police Force, whether or not under a written or other law.

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

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

(b) anything done by a person, without corruption or malice, in assisting a member of the Police Force who is performing or purporting to perform the functions of a member of the Police Force, whether or not under a written or other law.

(6) The Crown's liability under subsection (5) does not extend to exemplary or punitive damages.

Section 138 provides that:

(1) This section applies if a person ("the claimant" ), in an action in tort, is awarded damages —

(a) against a member of the Police Force ("the defendant" ) for anything that the member has done maliciously or corruptly while performing or purporting to perform the functions of a member of the Police Force, whether or not under a written or other law; or

(b) against a person ("the defendant") for anything that the person has done maliciously or corruptly in assisting a member of the Police Force who is performing or purporting to perform the functions of a member of the Police Force, whether or not under a written or other law,

and the thing was done after the commencement of the *Acts Amendment (Police Immunity) Act 1999* .

(2) The claimant may request the Treasurer to pay the damages awarded to the claimant, other than exemplary or punitive damages, and any costs ordered to be paid to the claimant.

(3) The Treasurer may pay the claimant all or some of the damages and costs if satisfied —

(a) that the claimant is unlikely to recover them from the defendant; and

(b) that there is no relationship or connection between the claimant and the defendant, or a close relative of the defendant, that is likely to result in a benefit or advantage to the defendant if the claimant were paid the damages and costs.

(4) Any amount paid by the Treasurer to the claimant is a debt due to the Crown by the defendant and may be recovered in a court of competent jurisdiction.

(5) In this section — "close relative", in relation to a person, includes a de facto partner of the person.

### **South Australia**

Under section 65 of *Police Act 1998 (SA)* the State is only liable for "honest acts".

Section 65 provides that:

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

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

### **Tasmania**

Under the *Police Service Act 2003 (Tasmania)* section 84, the State is liable for acts done by officers in "good faith". There is no State liability beyond this.

Section 84 of the legislation provides that:

(1) A police officer does not incur any personal liability for any act or omission done or made in good faith in the exercise or performance, or purported exercise or performance, of any powers or duties at common law or under this or any other Act or law.

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

### **Northern Territory**

Under the *Police Administration Act (NT)* sections 148B and 148C, the State is liable for torts committed by police in accordance with the normal employer/employee relationship but it not liable for punitive damages.

The sections provide that:

#### **148B Protection of members from civil liability**

(1) This section applies to a person who is or has been a member.

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

#### **148C Territory's vicarious liability**

(1) The Territory is vicariously liable for a tort committed by a member in the performance or purported performance of duties as a member in the same way as an employer is liable for a tort committed by an

employee of the employer in the course of the employee's employment.

(2) However, subsection (1) does not apply if, under the Act under which the duties were performed or purportedly performed, the Territory does not incur civil liability for the tort.

(3) In addition, the Territory's vicarious liability for a tort committed by a member does not extend to a liability to pay damages in the nature of punitive damages.

#### **Commonwealth and ACT**

Under the *Australian Federal Police Act 1979* (Cth) at section 64B, there is State liability for all torts as per the normal employer/employee test. The legislation excludes State liability for punitive damages. Under an arrangement between the Federal and ACT governments, the Australian Federal Police also provide policing services to the ACT.

Section 64B provides that:

#### **Liability for wrongful acts of members**

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

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

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

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

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

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

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

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

(5) For the purposes of this section:

- (a) an act or omission of a member in the capacity of a constable shall be deemed to have been done in the performance of his or her duties as a member; and
- (b) a reference to a plaintiff includes a reference to a defendant counter-claiming; and
- (c) a reference to a member includes a reference to a special member; and
- (d) a reference to a protective service officer includes a reference to a special protective service officer.