

# INDIVIDUAL COMMUNICATION TO THE UNITED NATIONS HUMAN RIGHTS COMMITTEE

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**Submitted by:** Ms (Elizabeth) Gail Hickey on behalf of her deceased son Thomas 'TJ' Hickey ('**TJ Hickey**')

**Alleged victim:** TJ Hickey

**State party:** The Commonwealth of Australia ('**Australia**')<sup>1</sup>

**Date of Submission:** 14 February 2010

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**Claim:** In the matter of TJ Hickey, Australia has violated its human rights obligations under Articles 2, 6 and 26 of the *International Covenant on Civil and Political Rights*<sup>2</sup> ('**the ICCPR**').

**Application:** To the United Nations Human Rights Committee ('**the Committee**') under Article 1 of the *First Optional Protocol*<sup>3</sup> to the *ICCPR*.

**Residence:** TJ Hickey was at all material times a resident of Australia.

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**State Party:** Australia.

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<sup>1</sup> Including the State of New South Wales, as per article 50 of the ICCPR.

<sup>2</sup> Opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

<sup>3</sup> *Optional Protocol to the International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 302, art 2 (entered into force 23 March 1976) ('*First Optional Protocol*').

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## 1 Summary

At 11:15 on 14 February 2004, TJ Hickey, a 17 year old Aboriginal youth, was impaled on a metal fence at Phillip St, Redfern, in New South Wales, Australia, during a police operation: he died early the next morning at the Prince of Wales Hospital.

There was information available to the New South Wales Police Force (**‘the Police Force’**) at the time TJ Hickey was impaled and at the time he died, which potentially implicated members of the Police Force in TJ Hickey’s death.

The author contends that, in these circumstances, Australia was obliged under article 6 of the ICCPR – the right to life - to ensure that the death was effectively investigated. This in turn required investigation by a body independent of the Police Force.

The injury and death were investigated by the Police Force.<sup>4</sup> New South Wales did not and does not have an investigative body capable of independently investigating deaths involving the Police Force.

The author contends that Australia has therefore breached Article 6 and Article 2 of the ICCPR.

The Committee has thus far refrained from articulating exhaustively the content of the duty to investigate effectively.<sup>5</sup> This matter presents an ideal opportunity for the Committee to examine more closely an important point of interpretation and to offer authoritative guidance on it.

Furthermore, the author contends that Australia is under additional obligations under Article 26 of the ICCPR - to ensure independent investigation of the deaths of Indigenous Australians when there is evidence of potential police or state involvement, and that such an investigation must look for racially motivated violence, neglect or omission. That obligation is sharpened by the history of violence and neglect of Indigenous Australians by Australian governments – and in particular Australian police officers.

This obligation was not met in the investigation of TJ Hickey’s death.

The author contends that Australia has therefore breached Article 26 and Article 2 of the ICCPR.

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<sup>4</sup> The initial investigation into TJ Hickey’s death was conducted by Detective Senior Sergeant Robert Dickson, Detective Senior Constable Michael Kyneur and Detective Senior Constable Craig Bradley (see exhibit 2, page 1). All three investigators were members of the Leichhardt Local Area Command (see exhibit 2, page 1). Leichhardt Local Area Command is located in a Police Station within the NSW Police force and adjacent to the Redfern Police Station and the Redfern Local Area Command. At the time of the incident both stations were under the command of Deputy Commissioner Waites as well as the NSW Commissioner for Police (see exhibit 3, NSW Police Force Organisational Chart).

<sup>5</sup> Dominic McGoldrick, *The Human Rights Committee* (1994) 344.

There was a coronial inquest following the initial police investigation (**‘the Inquest’**). The author says this did not and could not cure the breaches identified above. The Coroner is not set up to conduct an initial investigation. The Inquest was reliant on the initial investigation by the Police Force: the Police Force interviewed witnesses and was charged with the collection of forensic evidence; the Police Force decided the contents of the coroner’s brief, and controlled the exhibits and the autopsy material; the Police Force decided which experts would be engaged to assess the forensic evidence and which evidence should be forensically assessed; the Police Force decided who would be treated as a suspect, the questions that would be asked and the timing of those questions. The police investigators decided the breadth of the issues to be explored in their investigation, including the extent of organisational and policy failure within the police. From the outset, it was a case of the Police Force investigating itself. While the Inquest was heard by a coroner (a non-police officer) his inquiry was wholly informed by the adequacy, breadth and direction of the police investigation.

## 2 Facts of the Claim

Date	Event
11 February 2004	A notice about TJ Hickey being a “high risk offender” was updated and posted prominently at the Redfern Police Station. <sup>6</sup>
14 February 2004	Police Force members Constable Allan Rimell and Ruth Rocha drove in police vehicle Redfern 17, Senior Constable Michael Hollingsworth and Constable Maree Reynold drove in police vehicle Redfern 16 <sup>7</sup> and Constable Daryl Pace and Sergeant Philip Dyball in un-marked police vehicle Redfern 103 were involved in a police operation in Redfern NSW searching for an Indigenous male. <sup>8</sup>
14 February 2004	During the police operation and in the vicinity of the operation, TJ Hickey rode his bicycle from his aunt’s house to ‘the Block’ and then back via Renwick St towards his aunt’s house. TJ Hickey’s girlfriend April Ceisman was timing his return to his aunt’s house. <sup>9</sup>
14 February 2004	On his way back to Ms Ceisman, TJ Hickey became a person of interest to the driver of Redfern 16. <sup>10</sup>
14 February 2004	At 11:15am TJ Hickey was impaled through his neck and chest on the poles of a white metal fence in Phillip St, Redfern during this police operation. <sup>11</sup>
	Witnesses including Iris Hobson, Thomas Connar, Roy John

<sup>6</sup>Inquest Transcript 6/7/04 – Detective Lee Bailey cross examination by Stratton p22, paragraph 15 attached as exhibit 5.

<sup>7</sup> Statement of Detective Senior Constable Michael Kyneur at paragraph 9 attached as exhibit 19.

<sup>8</sup> Statement of Constable Daryl Pace dated 15 March 2004 at paragraph 5 attached as exhibit 6

<sup>9</sup> Statement of Michael Kyneur at paragraph 6 & 7 attached as exhibit 19.

<sup>10</sup> Inquest Findings 17 August 2004 at page 24 attached as exhibit 1.

<sup>11</sup> Inquest Findings 17 August 2004 at page 1 attached as exhibit 1.

	Hickey, Stewart Clanachan and Kiarna Dungay all made statements that they saw police following Mr Hickey. <sup>12</sup> Kiarna Dungay, a child, witnessed a police car striking TJ Hickeys bike and making it “go wonky”. <sup>13</sup> The Coroner accepts that “[the police] on the whole of the evidence did follow the boy.” <sup>14</sup>
14 February 2004	A police rescue van arrived shortly after the incident. <sup>15</sup> It was turned away by police and did not assist TJ Hickey. <sup>16</sup>
14 February 2004	At 11:30am Inspector Bob Emery arrived on the scene in response to a call from Constable Allan Rimell. Inspector Emery oversaw the initial police investigation into the incident and, in communication with Police Commander Bob Waites, <sup>17</sup> decided that the incident was not a critical incident. <sup>18</sup> Emery was “extremely concerned about the welfare of the police...[and] .arrange[d] for a counsellor to attend as soon as practical.” <sup>19</sup>
14 February 2004	During the afternoon of 14 February 2004, Redfern police received “a number of phone calls blaming” Detective Senior Constable Pace for the TJ incident. <sup>20</sup> Despite this, Darryl Pace was not interviewed by the police investigators and his name did not appear as an “involved police” officer in the brief Index. <sup>21</sup> Furthermore he conducted briefings for the Investigator and interviewed a key civilian witness. <sup>22</sup>
14 February 2004	Police officers Hollingsworth, Rimmell, Rocha and Reynolds who were alleged to have been involved in a pursuit made and discussed their statements in front of each other. <sup>23</sup> Reynolds witnessed the signing of Rocha’s statement, Rocha witnessed the signing of Hollingsworth’s statement. <sup>24</sup>
14 February 2004	John Zammit, a key civilian witness for the police, was interviewed by Detective Senior Constable Darryl Pace. <sup>25</sup>
15 February 2004	TJ Hickey died in the Prince of Wales Hospital at 1:20am.
15 February 2004	Mrs Hickey attended the Redfern Police Station and was spoken to by

<sup>12</sup> Statements from Iris Hobson at para [9], Thomas Connar at para [4] Roy John Hickey at para [8,9], Stewart Clanachan at para [9,10] and Kiarna Dungay at her answer to question 373 on page 55 (taken by Natasha Fleeting) attached as exhibit 7.

<sup>13</sup> Statement of Kiarna Dungay at Answer to question 373 on page 55 (taken by Natasha Fleeting) attached as exhibit 7.

<sup>14</sup> See the Coroner’s findings at page 24, para [2] attached as exhibit 1.

<sup>15</sup> Statement of Lisa Coleman taken by Carl Hughes attached as exhibit 8. Statement of Thomas Connar, para [6] attached as exhibit 7.

<sup>16</sup> Police VKG Log Channel A with page tagged, attached as exhibit 9.

<sup>17</sup> See page 3 of “COPS” data entry attached as Exhibit 30.

<sup>18</sup> Statement of Bob Emery 17 May 2004 at para [9] attached as exhibit 10.

<sup>19</sup> Statement of Bob Emery 17 May 2004 at para [8] attached as exhibit 10.

<sup>20</sup> NSW Police Final Report A Strike Force Coburn with referenced page attached as exhibit 11.

<sup>21</sup> See Index of investigation into death of TJ Hickey attached as exhibit 2.

<sup>22</sup> Statement of Daryl Pace at exhibit 6.

<sup>23</sup> See the Transcript of Inquest dated 7/7/04 Fullerton X Rocha pages 24, 25 and dated 7/7/04 Fullerton X Reynolds pages 55, 56 attached as exhibit 13.

<sup>24</sup> See the original statements of Rimell, Rocha, Hollingsworth, Reynolds attached as exhibit 12.

<sup>25</sup> Statement of Daryl Pace at para [11] attached as exhibit 6.

	Daryl Pace and Philip Dyball. <sup>26</sup> She viewed the bike TJ Hickey had been riding and noticed that the back wheel was wobbly or loose and the chain was hanging off it. <sup>27</sup> While at the police station on the 15 <sup>th</sup> of February she told police she thought police were responsible for the death of TJ Hickey. <sup>28</sup> She was subsequently interviewed by Sergeant Dickson on 3 March 2004. Dickson does not appear to have asked her questions about the police actions prior to the riot or why the Author believed police were involved in her son's death. <sup>29</sup>
15 February 2004	Initial Investigator Police Inspector Bob Emery told the media that the police were not chasing Mr Hickey and that the police worked "incredibly industriously to render first aid". <sup>30</sup>
15 February 2004	"Wanted – Child Murderers" posters appear around Redfern with images of police. <sup>31</sup>
15 February 2004	Redfern residents attack police vehicles, the train station and riot police. The incident lasted 7 hours. 40 police were injured. <sup>32</sup> The incident attracted international media.
16 February 2004	Police Commander Bob Waites said that the riot was caused because, "they were under the belief that the police were actually involved in a pursuit where an Aboriginal youth was killed and that wasn't true." <sup>33</sup>
16 February 2004	Media reports recorded a member of Redfern's Indigenous' community stating, "One report I got was that the police were smiling and sniggering and that sort of thing....A 17 year old boy has been killed, there are question marks all over the police involvement in that death and to provoke the local people by driving up and down the street during the Sunday afternoon has only led to the circumstances of last night." On page three of the media report another Indigenous person is quoted as saying, 'The Aboriginal Community have their own witnesses and there are also non-Aboriginal witnesses to the unnecessary chase that resulted in the death of this young man.' <sup>34</sup>
16 February 2004	Premier Bob Carr is reported to have said to the BBC "We have full confidence in the police and they have our full backing." He also said "there will be an independent assessment of the tragic death of a young man". <sup>35</sup>
16 February 2004	Following a decision that the death was now to be considered a "critical

<sup>26</sup> Dyball and Pace recall it as being the 15<sup>th</sup> of February, the Author recalls the meeting was on 16<sup>th</sup> February: Statement of Dyball attached as exhibit 15 and the statement of Pace is attached as exhibit 6. The statement of Gail (Elizabeth) Hickey attached as exhibit 16.

<sup>27</sup> Statement of Gail (Elizabeth) Hickey at paragraph 23, page 6 attached as exhibit 16.

<sup>28</sup> Statement of Robert Emery 17 May 2004 at Paragraph 18 attached as exhibit 10.

<sup>29</sup> Statement of Gail (Elizabeth) Hickey attached as exhibit 16.

<sup>30</sup> *Sydney Morning Herald*, 15 February 2004 Sydney teen dies after fence impaling, attached as exhibit 17.

<sup>31</sup> See Michael Perry, "Aborigines Riot in Sydney Over Boy's Death", Monday Feb 16<sup>th</sup> 2004 Reuters attached as exhibit 18.

<sup>32</sup> Statement of Detective Senior Constable Michael Kyneur at paragraph 35 attached as exhibit 19.

<sup>33</sup> Channelnewsasia.com 16/2/2004 "30 Australian police injured in riot after death of Aboriginal Youth", attached as exhibit 21.

<sup>34</sup> News.com.au "Police 'provoked youths at Redfern" reported on 16 February 2004 attached as exhibit 14.

<sup>35</sup> <http://news.bbc.co.uk/2/hi/asia-pacific/3492969.stm> 16 Feb 2004, page 2, attached as exhibit 20.

	incident”, NSW police officer Detective Senior Constable Kyneur from the Leichhardt Area Command took over the investigation from Emery. DS/C Kyneur was briefed by Darryl Pace about the incident. <sup>36</sup>
16 February 2004	Mrs Hickey was reported in the <i>Newcastle Herald</i> to say, “witnesses had told her police were chasing him before the accident, and that police had pulled him off the fence and searched his pockets before he was taken to the Prince Of Wales Hospital.” <sup>37</sup>
21 February 2004	Despite being informed he was investigating a “critical incident”, Kyneur did not interview four of the police involved until 21 February 2004. <sup>38</sup> He claimed the delay was due to his superior’s concern about welfare issues. <sup>39</sup> He re-interviewed police in the presence of an officer from the NSW Ombudsman. <sup>40</sup>
25 March 2004	The police refused to allow Mrs Hickey and a forensic consultant retained on her behalf to photograph the bicycle TJ Hickey was riding. <sup>41</sup> When she viewed the bike, April Ciesman stated that a wheel had been replaced on the bike. <sup>42</sup> The bike had at all times been in police custody.
5 July – 16 July 2004	TJ Hickey’s Inquest was conducted by NSW State Coroner Abernathy.
15 July 2004	According to ABC media an internal police inquiry found no breach in procedures, despite the inconsistencies in police statements. <sup>43</sup>
17 August 2004	Following the Inquest, the NSW State Coroner John Abernathy concluded that police actions did not contribute to TJ Hickey’s death. <sup>44</sup>
26 September 2004	Assistant Commissioner Waites sent a letter to the author’s legal representative Mr Brezniak stating that an internal investigation would not continue given the Coroner’s conclusions at the inquest. <sup>45</sup>
14 September 2009	The NSW Ombudsman confirmed that it exercised an oversight function only in relation to the complaint and made no report into the death of TJ Hickey. <sup>46</sup>

<sup>36</sup> Statement from Daryl Pace attached at para [14] as exhibit 6 and Statement of Detective Senior Constable Michael Kyneur at para [41] attached as exhibit 19.

<sup>37</sup> 16/2/2009 Newcastle Herald “*Teen death sparks riot*” attached as exhibit 22.

<sup>38</sup> Inquest Transcript - 5/7/2004 p47 Kyneur X (Fullerton) Attached as exhibit 23.

<sup>39</sup> Ibid.

<sup>40</sup> See page 2 of each of the interviews of the four police attached at exhibit 29.

<sup>41</sup> Letter to McGowan Lawyers on 14 April 2004 by Carl Hughes. The author first viewed the bike on 15 February 2004, however was unable to photograph the bike when she attended with her forensic expert, see page 2 of letter attached as exhibit 8.

<sup>42</sup> Statement of April Ciesman at para [21] attached as exhibit 24.

<sup>43</sup> 7:30 Report 15 July 2004, at page 4, transcript attached as exhibit 26. Also see page 23 of the Inquest Findings attached as exhibit 1.

<sup>44</sup> Inquest Findings of 17 August 2004 at page 25 attached as exhibit 1

<sup>45</sup> The Assistance Commissioner’s letter is attached as exhibit 27.

<sup>46</sup> Letter from Timothy Lowe Legal Counsel for the NSW Ombudsman attached as exhibit 31.

### **3 Admissibility of Claim**

The author submits that this claim is admissible for determination by the Committee pursuant to the *First Optional Protocol* and in satisfaction of the Committee's *Rules of Procedure*.

#### **3.1 *First Optional Protocol***

##### **3.1.1 Articles 1 and 3**

###### ***Ratione Temporis***

At all material times, TJ Hickey was a resident of Australia, which acceded to the *First Optional Protocol* on 25 September 1991. The events in question occurred in 2004. At all material times, TJ Hickey was subject to the jurisdiction of both the State of New South Wales and of Australia.

###### **'Victim'**

The violations of the *ICCPR* complained of in the instant case arise from Australia's conduct in respect of TJ Hickey: he is an individual 'victim' for the purposes of Article 1.

###### ***Anonymity***

For the purposes of Article 3, this communication is not made anonymously. It is made by the victim's mother, Mrs Hickey, on behalf of the victim, TJ Hickey, as he is deceased and so unable to submit the communication personally.<sup>47</sup>

###### ***Delay***

While delay in submission 'does not of itself involve abuse of the rights of communication', it may in certain circumstances be inimical to it being considered by the Committee.<sup>48</sup> This is not the case here. The material events the subject of this communication were concluded by 2005; however, the author submits that there exists 'a reasonable explanation justifying [this] delay.'<sup>49</sup> Mrs Hickey was unaware of the relevant UN mechanisms and the legal issues under the *ICCPR* until 2009. Also, TJ Hickey's death remains a live and controversial issue for the Indigenous community and Australians generally. A determination by the Committee would therefore be a matter of significant public interest.

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<sup>47</sup> United Nations Human Rights Committee, *Rules of Procedure of the Human Rights Committee*, UN Doc CCPR/C/3/Rev.3 (1994) Rule 90(b); see eg *Mbenge et al v Zaire*, United Nations Human Rights Committee, Communication No 16/77, UN Doc A/38/40, 25 March 1983.

<sup>48</sup> *Gobin v Mauritius*, United Nations Human Rights Committee, Communication No 787/1997, UN Doc CCPR/C/72D/787/1997 (2001).

<sup>49</sup> *Ibid.*

Alternatively, the author submits that the dissenting opinion of Messrs Henkin, Scheinin, Shearer and Yalden and Mme Chanut in *Gobin v Mauritius*,<sup>50</sup> which expressed the concern that delay should never be a bar on seeking human rights remedies through the Optional Protocol, was correct at law, and this should be confirmed by the Committee in this case.

### **3.1.2 Article 2**

This communication relates to a matter arising under the *ICCPR*. The author submits that Australia is in violation of Articles 6, 26 and/or 2 of the *ICCPR* (see submissions on the merits below).

### **3.1.3 Article 5**

#### ***Examination by another procedure***

This matter is not under examination by another international investigation or settlement procedure.

#### ***Exhaustion of domestic remedies***

##### *Judicial remedies*

This communication is about the failure by Australia (and by New South Wales in particular) to ensure effective investigation of deaths involving or potentially involving the Police Force.

The Inquest was held. Numerous requests for a new inquest were refused.<sup>51</sup>

Section 85 of the *Coroners Act 2009* (NSW)<sup>52</sup> empowers the Supreme Court of New South Wales to quash a coronial inquest that has been held and order that a new inquest be held, if the Court is satisfied that it is necessary or desirable to do so in the interests of justice. The author submits that such an order could not remedy the failure of the State to provide an independent investigation into TJ Hickey's death. There is not, and has never been, a body in NSW which can independently investigate deaths where police are implicated: such an order would be 'unlikely to bring effective relief'; it would be 'a priori ineffective'.<sup>53</sup>

Furthermore, the requirement (discussed below) that – in order to ensure an effective investigation – an independent body collect evidence promptly to prevent contamination cannot now be remedied by a successful appeal as the opportunity has been lost. For example, a fresh investigation by an independent body cannot conduct a new autopsy or investigate the vehicles involved, separate the police from each other and from the exhibits, or collect evidence from any immediate witnesses who did not

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<sup>50</sup> United Nations Human Rights Committee, Communication No 787/1997, UN Doc CCPR/C/72/D/787/1997.

<sup>51</sup> Letter to Paul Wilkinson dated 25 March 2008 and ABC news report dated 24/9/04 attached as exhibit 32. Letter to L Rhiannon MLC from the NSW Attorney General attached as exhibit 33. Letter to and from Clover Moore Member for Bligh to the NSW Attorney General attached and marked exhibit 34.

<sup>52</sup> Section 85 *Coroners Act 2009* attached as exhibit 28.

<sup>53</sup> P.M.P.K. v. Sweden, CAT/C/155/D/30/1995, UN Committee Against Torture (CAT), 20 November 1995, [7].

wish to speak to the police at the time. These procedural breaches are incapable of remedy by a fresh inquest and no other domestic remedy exists.

In *Pratt and Morgan v Jamaica*,<sup>54</sup> the Committee said:

*That the local remedies rule does not require resort to appeals that objectively have no prospect of success, is a well established principle of international law and of the Committee's jurisprudence.*

The author submits that any recourse to the Supreme Court would have no prospect of success, if 'success' is understood to mean an order for a fresh coronial inquest that excluded evidence gathered by the Police Force.

Neither Australia nor the State of New South Wales have a charter of rights protecting the right to life. The author submits that an application to the Supreme Court or to any other tribunal would be futile in terms of vindicating TJ Hickey's rights, as discussed in this communication.

#### *Non-judicial remedies*

The author submits that the Committee was correct in its decision in *C v Australia*<sup>55</sup> in finding that certain administrative remedies need not have been sought for the purposes of the *First Optional Protocol*:

*any decision of these bodies [the Commonwealth Ombudsman and the Human Rights and Equal Opportunities Commission] even if they had decided the author's claims in his favour, would only have had recommendatory rather than binding effect, by which the Executive would, at its discretion, have been free to disregard. As such, these remedies cannot be described as ones which would, in terms of the Optional Protocol, be effective.*

The author submits therefore that all available domestic remedies have been exhausted for the purposes of the *First Optional Protocol*.

### **3.2 No *res judicata* issue**

The author submits that there is no *res judicata* issue arising with respect to Article 5(2)(a). As neither the Commonwealth nor the State of New South Wales have a charter of rights protecting the right to life, the question of a potential human rights violation in this matter has not been considered by any tribunal in Australia.

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<sup>54</sup> United Nations Human Rights Committee, Communication Nos 210/86, 225/87.

<sup>55</sup> United Nations Human Rights Committee, Communication No 900/99.

## 4 Submissions on Law and Merit

The author submits that the law in the State of New South Wales and the conduct of certain organs of that State<sup>56</sup> are inconsistent with Australia's international obligations under the *ICCPR*. In particular, Australia is in violation of its obligations under Articles 6, 26 and 2 of the *ICCPR*.

### 4.1 Article 6

The author submits that Article 6(1) of the *ICCPR* imposes on States party to the treaty:

- a negative obligation not to deprive an individual of his or her life arbitrarily or unlawfully; and
- a positive obligation to adopt measures that are conducive to allowing one to live.<sup>57</sup>

The author submits that the negative obligation will be violated in those cases where:

- the facts disclose a material possibility that the State has deprived an individual of his or her life arbitrarily or unlawfully; and
- the State has failed to investigate the death effectively.

It follows that a violation of Article 6(1) may be established notwithstanding that it is not possible to establish to the requisite standard of proof that the State has indeed deprived an individual of his or her life arbitrarily or unlawfully.

#### 4.1.1 The existence of a duty to investigate effectively

The interpretation of Article 6(1) suggested above is broad. However, the Committee has described the negative obligation as being of 'paramount importance'<sup>58</sup> in protecting this 'supreme right',<sup>59</sup> the right to life, 'which should not be interpreted narrowly.'<sup>60</sup>

#### *Relevant Committee jurisprudence*

Furthermore, the existence of such a duty is supported by Committee jurisprudence generally. The Committee has stated that a corollary of the negative obligation is a duty incumbent upon States to 'establish effective facilities and procedures to

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<sup>56</sup> *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171, art 50, (entered into force 23 March 1976).

<sup>57</sup> Sarah Joseph, Jenny Shultz and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (2<sup>nd</sup> ed, 2004) 155.

<sup>58</sup> United Nations Human Rights Committee, *General Comment 6*, UN Doc HRI/GEN/1/Rev.6 (1983) [3].

<sup>59</sup> *Ibid*, [1].

<sup>60</sup> *Ibid*.

investigate thoroughly cases of missing and disappeared persons in circumstances which *may* involve a violation of the right to life.<sup>61</sup>

In its jurisprudence responding to a number of individual communications, the Committee, having first found substantive violations of the right to life, has urged the States involved to investigate the deaths at issue.

In *Baboeram et al v Suriname*<sup>62</sup> the Committee found that Suriname was subject to a duty ‘to take effective steps to investigate’ the conduct the subject of the violation. In *Miango Muiyo v Zaire*<sup>63</sup> the Committee held that the State had an obligation to take ‘effective steps to investigate the circumstances of the death of [the victim]’. In *Laureano v Peru*,<sup>64</sup> the Committee ‘urge[d] the State party to open a proper investigation into the disappearance of [the victim]’. In *Chongwe v Zambia*,<sup>65</sup> the Committee ‘urge[d] the State party to carry out independent investigation of the shooting incident’.

It may be objected that in the cases cited above, the Committee framed the duty to investigate in the context of a *remedy* to an Article 6(1) violation, pursuant to Article 2(3)(a) of the *ICCPR*, rather than as a freestanding obligation under Article 6(1) itself. However, in *Herrera Rubio v Colombia*,<sup>66</sup> the Committee found that while the conduct of the State was heavily implicated in the deaths of the victims,

*no conclusive evidence has been produced to establish the identity of the murderers. In this connection the Committee refers to its general comment No. 6 (16) concerning article 6 of the Covenant, which provides, inter alia, that States parties should take specific and effective measures to prevent the disappearance of individuals and establish effective facilities and procedures to investigate thoroughly, by an appropriate impartial body, cases of missing and disappeared persons in circumstances which may involve a violation of the right to life.*

While the facts before the Committee did not permit it to determine that the State had violated Article 6(1) by way of having killed the victim unlawfully or arbitrarily, it did find that

*the facts as found by the Committee disclose violations of the Covenant with respect to ... Article 6, because the State party failed to take appropriate measures to prevent the disappearance and subsequent killings of Jose*

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<sup>61</sup> *Ibid*, [4] (emphasis added).

<sup>62</sup> United Nations Human Rights Committee, Communication Nos 146/1983 and 148 to 154/1983, UN Doc Supp No 40 (A/40/40) (1985) 187.

<sup>63</sup> United Nations Human Rights Committee, Communication No 194/1985, UN Doc CCPR/C/OP/2 (1990) 219.

<sup>64</sup> United Nations Human Rights Committee, Communication No 540/1993, UN Doc CCPR/C/56/D/540/1993.

<sup>65</sup> United Nations Human Rights Committee, Communication No 821/1998, UN Doc CCPR/C/70/D/821/1998.

<sup>66</sup> United Nations Human Rights Committee, Communication No 161/1983, UN Doc CCPR/C/OP/2.

*Herrera and Emma Rubio de Herrera and to investigate effectively the responsibility for their murders.*<sup>67</sup>[emphasis added]

Therefore, in *Herrera Rubio v Colombia*, the Committee was prepared to find that a failure to investigate a death effectively in circumstances where the State was strongly implicated was itself sufficient to establish a breach of Article 6(1).

### ***Relevant ECHR jurisprudence***

The author submits that the jurisprudence of several other bodies may be of assistance to the Committee in drawing out the implications of Article 6 in terms of the duty to investigate. The European Court of Human Rights ('ECHR'), as well as domestic tribunals interpreting domestic implementations of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*,<sup>68</sup> have explored this issue on numerous occasions and in considerable detail.

In the case of *Kaya v Turkey*,<sup>69</sup> the applicant complained that his brother had been deliberately killed by Turkish security forces. The ECHR determined that – even though it had not been proved beyond reasonable doubt that the victim had been deliberately killed by soldiers in the circumstances alleged by the applicant – Turkey had breached Article 2 of the *European Convention on Human Rights* (the right to life) by failing to institute an effective investigation:

*The Court observes that the procedural protection of the right to life inherent in Article 2 of the Convention secures the accountability of agents of the State for their use of lethal force by subjecting their actions to some form of independent and public scrutiny capable of leading to a determination of whether the force used was or was not justified in a particular set of circumstances ...*<sup>70</sup>

#### **4.1.2 The content of a duty to investigate effectively**

##### ***Summary***

The Committee has thus far refrained from articulating exhaustively the content of the duty to investigate effectively.<sup>71</sup> This matter presents an ideal opportunity for the Committee to examine more closely an important point of interpretation and to offer authoritative guidance on it.

The author submits that human rights jurisprudence, of both the Committee and of other tribunals, support the proposition that there will be a violation of Article 6 of the ICCPR where:

- the facts of a case disclose a material possibility that the State has deprived an individual of his or her life arbitrarily or unlawfully; and
- the State has failed to investigate the death effectively.

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<sup>67</sup> Ibid (emphasis added).

<sup>68</sup> Opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) ('*European Convention on Human Rights*').

<sup>69</sup> (1998) 28 EHRR 1, *Reports* 1998-I.

<sup>70</sup> Ibid [87].

<sup>71</sup> Dominic McGoldrick, *The Human Rights Committee* (1994) 344.

The author further submits, by reference to the authorities set out below, that an effective investigation in such circumstances:

1. *must be independent*; and
2. *should generally also be adequate, prompt and transparent*; and
3. *should enable the effective participation of the family, and allay suspicion*; and
4. *should be initiated by the State*.

The author submits that these are all features of an “effective investigation” for the purposes of Article 6(1) of the *ICCPR*. The author does not contend that each of these features is necessary for an investigation to be effective, but does contend that independence is necessary.

The author’s claim in this communication focuses principally on the requirement that an effective investigation must be independent. The author’s claim is founded on the proposition that TJ Hickey’s death had to be investigated by an investigative body independent of the Police Force, but was not.

The proposition that the adequacy, promptness and transparency of – and effective participation of the family in – the investigation, are also generally required for an ‘effective investigation’ is supported by reference to authority. That none of these features were present in the investigation of TJ Hickey’s death is raised on documentary evidence included with this communication.

But the author does not ask the Committee to make findings about the adequacy, promptness or transparency of the investigation. Rather, these matters are raised – both as matters of law and matters of fact – in order to demonstrate the necessity of the requirement for independence. The author submits that the reasonably grounded allegations in TJ Hickey’s case of failure to provide an *adequate, prompt and transparent* investigation that involved the *effective participation of the family*, clearly illustrate the need for an *independent* investigation. There can be no assurance for victims that the conduct of investigations will be adequate, prompt and transparent, when members of the implicated body are conducting the investigation.

In other words, the author relies on the failure by Australia to provide an independent investigation, and seeks to support the importance of an independent investigation by reference to the other features.

### ***Independence***

The author submits that an investigation can only be effective if it is independent: independence is necessary, though not necessarily sufficient, for an effective investigation. By ‘independence’ is meant the institutional and functional separation of the investigative organ from the State organ implicated in an alleged *ICCPR* violation.

Limited support for this proposition is present in the Committee jurisprudence cited above; in particular, in the Committee’s discussion in *Herrera Rubio v Colombia* of its *General Comment 6*.

A number of concluding observations of the Committee's Reports to the General Assembly, commenting on the human rights compliance of various member States, lend further support, in particular where the Committee has discussed deaths allegedly involving the police. In its concluding observations on the United Kingdom of Great Britain and Northern Ireland the Committee said:<sup>72</sup>

*The Committee is deeply disturbed that, a considerable time after murders of persons (including human rights defenders) in Northern Ireland have occurred, a significant number of such instances have yet to receive fully independent and comprehensive investigations, and the persons responsible to be prosecuted. This phenomenon is doubly troubling where persistent allegations of involvement and collusion by members of the State party's security forces, including the Force Research Unit, remain unresolved. The State party should implement, as a matter of particular urgency given the passage of time, the measures required to ensure a full, transparent and credible accounting of the circumstances surrounding violations of the right to life in Northern Ireland in these and other cases.*

In another concluding observation, this time of Sweden, the Committee said:<sup>73</sup>

*The State party should ensure the completion of investigations into such use of force, in conditions of total transparency and through a mechanism independent of the law enforcement authorities.*

In its concluding observations on Kenya, the Committee said:<sup>74</sup>

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

It is established in ECHR jurisprudence that the independence of an investigation is of paramount importance to the effectiveness of an investigation. The *necessity* of an independent investigation to its effectiveness was articulated in the case of *Kelly and Ors v United Kingdom*.<sup>75</sup> 'it may generally be regarded as necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events'. That the United Kingdom government has an obligation to conduct an independent investigation where there is credible evidence of a potential breach of Article 2 of the *European Convention on Human Rights*, as incorporated into that State's domestic law,<sup>76</sup> was recently confirmed by the UK Court of Appeal.<sup>77</sup>

These decisions have placed a requirement on the UK Government to expand and fund the investigative functions of the Independent Police Complaints Commission

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<sup>72</sup> Report of the United Nations Human Rights Committee, UN Doc A/57/40 vol I (2002) 57 [75].

<sup>73</sup> Ibid [79].

<sup>74</sup> Report of the United Nations Human Rights Committee, UN Doc A/60/40 vol I (2005) 44 [86].

<sup>75</sup> Judgment of 4 May 2001 [95].

<sup>76</sup> *Human Rights Act 1998* (UK).

<sup>77</sup> *AM & Ors, R (on the application of) v Secretary of State for the Home Department & Ors* [2009] EWCA Civ 219 (17 March 2009).

(‘the IPCC’) to provide it with the capacity to investigate all deaths in which police are implicated.<sup>78</sup>

In *Ramsahai and Ors v The Netherlands*<sup>79</sup> the ECHR found a violation of the right to life on the grounds that the same police force that was involved in the incident (the Amsterdam/Amstelland police force) carried out the forensic examination of the scene, the door-to-door search for witnesses and the initial questioning of the witnesses, including the police officers.<sup>80</sup>

This independence has been described as ‘organizational and functional independence; that is, investigation should be conducted by non-police investigators according to established principles of independence and impartiality’.<sup>81</sup> It has also been described as requiring ‘a lack of hierarchical or institutional connection but also a practical independence’.<sup>82</sup> Or in other words, it must be ‘independent in law and practice’.<sup>83</sup> The cases have established that ‘[s]upervision [of the police investigation] by another authority, however independent, has been found not to be a sufficient safeguard for the independence of the investigation.’<sup>84</sup> There must be no hierarchical linkage (whether chain of command or administratively)<sup>85</sup> between the investigator and those subject to investigation.<sup>86</sup> It must be both objectively and subjectively impartial.<sup>87</sup>

#### *The importance of independent investigation of police*

In *Jordan v United Kingdom*,<sup>88</sup> the fact that officers in the investigation (the Royal Ulster Constabulary) were from the same force as the one under investigation undermined the independence of the investigation. The ECHR found that even though an independent person from the IPCC was present during interviews, this did not make the investigation independent.<sup>89</sup>

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<sup>78</sup> Report of the Comptroller and Auditor General, National Audit Office, London 12 November 2008, p5.

[http://www.nao.org.uk/publications/0708/police\\_complaints\\_commission.aspx](http://www.nao.org.uk/publications/0708/police_complaints_commission.aspx)

<sup>79</sup> [2007] ECHR 393 (15 May 2007).

<sup>80</sup> Ibid [335] – [341].

<sup>81</sup> Opinion of the Commissioner for Human Rights, Thomas Hammarberg, concerning independent and effective determination of complaints against the police CommDH(2009)4 12 March 2009.

<sup>82</sup> *Ramsahai v The Netherlands* (2007) ECHR 393 [325]; see also *Kelly and Ors v United Kingdom* Judgment of 4 May 2001 [95].

<sup>83</sup> *Nachova and Ors v Bulgaria* [GC] (2005) ECHR [112].

<sup>84</sup> *Ramsahai v The Netherlands* (2007) ECHR 393 [337]; *Bati and Ors v Turkey* [GC] (2004) ECHR [135].

<sup>85</sup> *Oğur v Turkey* (2001) 31 EHRR 40 [91].

<sup>86</sup> *Kaya v Turkey* (1998) 28 EHRR 1, Reports 1998-I, [95].

<sup>87</sup> *Gülec v Turkey* (1999) 28 EHRR 121 [76].

<sup>88</sup> [2001] ECHR 327 (4 May 2001).

<sup>89</sup> Ibid [120].

The Manitoba Aboriginal Justice Inquiry into the police investigation of the Winnipeg Police Departments shooting of JJ Harper on 9 March 1988<sup>90</sup> stated:

‘Our second conclusion is that the Winnipeg Police Department was guided more by self-interest in the Harper investigation than by public interest. There were many errors and poor decisions. Supervision was not competent and evidence was mishandled. Harper’s death was not investigated in a thorough and independent fashion. This resulted in the failure of the subsequent inquest to examine and explain all the circumstances surrounding the death in a manner that the public could accept and respect.’

These conclusions and observations reinforce the international human rights law requirement for an independent investigation. It is also critical that the independent investigators be culturally independent of the police. For example, it is not appropriate for an outside police force to investigate a death in police custody. The Frank Paul Commission of Inquiry in Canada stated:

Given that the RCMP polices 70 percent of British Columbia’s population and has the largest police force in the province, it would seem to make sense to assign police-related death investigations to that force, as an alternative to using other municipal forces. On the issue of independence, however, I question whether the level of public confidence would increase significantly if the criminal investigation of police-related deaths were assigned to the RCMP rather than to another municipal police department—it is still the police investigating themselves. Though the RCMP has a well-earned reputation for competence in serious crime investigations, and though it has the capacity to respond immediately and has access to specialized services, I have deep reservations about making such a recommendation.<sup>91</sup>

The 1999 UK Stephen Lawrence Inquiry found similarly:

‘That the Home Secretary, taking into account the strong expression of public perception in this regard, consider what steps can and should be taken to ensure that serious complaints against police officers are independently investigated. Investigation of police officers by their own or another Police Service is widely regarded as unjust, and does not inspire public confidence.’<sup>92</sup>

In reporting on a similar poor police investigation, on 12 February 2009 the Davis Commission Report into the Death of Frank Paul found that:

Having concluded that the current practice of a home police department conducting criminal investigations of police-related deaths is fundamentally flawed due to conflict of interest, it follows that no amount of tinkering with the current practice can eliminate that underlying conflict of interest. The

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<sup>90</sup> Report of the Aboriginal Justice Implementation Commission, Manitoba, Aboriginal Justice Inquiry of Manitoba, *Report into the investigation of the death of JJ Harper*, chapter 9, page 1, 29 June 2001, available at <http://www.ajic.mb.ca/volumelll/chapter9.html>

<sup>91</sup> *“Cold and Alone”* Davis Commission Inquiry (BC Canada) into the Death of Frank Paul page 223, available at <http://www.frankpaulinquiry.ca/>.

<sup>92</sup> See the Recommendations at paragraph 58 available at <http://www.archive.official-documents.co.uk/document/cm42/4262/4262.htm>

challenge lies in developing a new system for the investigation of police-related deaths.<sup>93</sup>

The author submits that investigations relating to the conduct of police officers require the investigation not only of the individual or individuals who may have contributed to the death or injury of a person, but also the investigation of any organisational causes that led to that conduct, the entire agency's practices and procedures fall under question. Accordingly, no one within the agency's overall hierarchy is truly independent from the investigation.

*What kind of "independence" is required?*

Therefore, the author submits that an investigation will not be independent for the purposes of the *ICCPR* in circumstances where the organ investigating a matter in which an organ of the state is implicated is:

- not formally, objectively, or organisationally separate from the implicated organ; or
- not practically, subjectively or functionally separate from the implicated organ.

Furthermore, 'investigation' should be given a literal and strict meaning. That is, the mere supervision of an investigating organ by another organ that may meet the criteria above is insufficient to render the investigation itself 'independent'.

### ***Adequacy***

A further feature of an effective investigation is that it is adequate. The author contends that the investigation of TJ Hickey's death was *in fact* inadequate, but does not ask the Committee to determine whether or not this is so. Rather, as explained above, the author contends that the perception by TJ Hickey's family and community of its inadequacy demonstrates in a compelling manner the necessity that such investigations be conducted by an independent body.

The ECHR has described the requirement to conduct an adequate investigation in the following way:

*The investigation must also be effective in the sense that it is capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances ... and to the identification and punishment of those responsible. This is not an obligation of result, but of means. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including inter alia eye witness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death ... Any deficiency in the investigation which undermines its ability to establish the cause of death or the person responsible will risk falling foul of this standard.<sup>94</sup>*

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<sup>93</sup> Ibid note 91, at page 218.

<sup>94</sup> *Kelly and Ors v United Kingdom* Judgment of 4 May 2001 [96].

Furthermore, as the Court of Appeal in the United Kingdom held, the investigation is ‘not simply about what happened ... it is about why it happened’.<sup>95</sup> The investigative obligation of the State may — depending on the facts at issue — go well beyond the ascertainment of individual fault and reach questions of system, management and institutional culture.<sup>96</sup>

The decision to conclude that a human rights violation has occurred is completely dependent upon, and informed by, the thoroughness of the fact gathering process. On numerous occasions the ECHR has been unable to determine whether a violation occurred because of serious flaws in the investigation process.<sup>97</sup>

*Inadequate investigation not ameliorated by later coronial inquest*

A coroner is no substitute for a body which can conduct an initial independent investigation. The effect of an inadequate investigation cannot later be ameliorated by a coronial inquest.

In Australia, the Final Report of Royal Commission into Aboriginal Deaths in Custody noted:<sup>98</sup> (“**The Royal Commission**”)

*The breadth and quality of the coronial inquest often ‘reflected the inadequacies of perfunctory police investigations and did little more than formalise the conclusions of police investigators’.*

The Royal Commission Report emphasised the ‘general inability of coroners to control the quality of preliminary police investigations which lay the foundation for the subsequent coronial inquest’.<sup>99</sup>

In the investigation into the police-involved death of Indigenous man Frank Paul in Vancouver, a police detective failed to collect all relevant evidence in his initial investigation. This had a profound effect on the outcome.<sup>100</sup>

In *Jordan v UK*, the ECHR stated:

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<sup>95</sup> *AM & Ors, R (on the application of) v Secretary of State for the Home Department & Ors* [2009] EWCA Civ 219 (17 March 2009) 9.

<sup>96</sup> *AM & Ors, R (on the application of) v Secretary of State for the Home Department & Ors* [2009] EWCA Civ 219 (17 March 2009) [60].

<sup>97</sup> For example, In the case of *Anguelova v Bulgaria* [2002] ECHR 489 at paragraphs 142 – 144, the ECHR found that the failure of the police investigators sufficiently to document the injuries of a boy allegedly mistreated by police in custody undermined its capacity to determine the causes of those injuries.

<sup>98</sup> Royal Commission into Aboriginal Deaths in Custody 1991, *National Report*, Australian Government Publishing Service, Canberra, Vol. 1, p. 130 and available at <http://www.austlii.edu.au/au/other/IndigLRes/rciadic/>

<sup>99</sup> Quoted in Boronia Halsted, November 1995, *Australian Deaths in Custody, No. 10 Coroners’ Recommendations and the Prevention of Deaths in Custody: A Victorian Case Study* available at <http://www.aic.gov.au/documents/4/D/F/%7B4DFAD9F6-CD7B-4A56-8512-828A37EDBD1F%7Ddic10.pdf>

<sup>100</sup> The Davies Report available at <http://www.frankpaulinquiry.ca/> See other examples, *Semsi Onen v Turkey* - 22876/93 [2002] ECHR 445 (14 May 2002). Also see the Royal Commission into Aboriginal Deaths in Custody at footnote 98, Vol 1 4.2.2, 4.2.3.

*At the inquest in this case, Sergeant A informed the Coroner that he would not appear. He has therefore not been subject to examination concerning his account of events. The records of his two interviews with investigation police officers were made available to the Coroner instead. This does not enable any satisfactory assessment to be made of either his reliability or credibility on crucial factual issues. It detracts from the inquest's capacity to establish the facts immediately relevant to the death, in particular the lawfulness of the use of force and thereby to achieve one of the purposes required by Article 2 of the convention [the right to life].<sup>101</sup>*

### **Promptness**

The ECHR has held that:

*the requirement of promptness and reasonable expedition is implicit in this context ... It must be expected that there may be obstacles or difficulties which prevent progress in an investigation in a particular situation. However, a prompt response by the authorities in investigating a use of lethal force may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts.<sup>102</sup>*

Further, 'competent Authorities must act with exemplary diligence and promptness'.<sup>103</sup>

Finally, in *Ramsahai and Ors v The Netherlands*<sup>104</sup> the ECHR found that the failure to separate and question officers until 3 days after an incident and the failure to take steps to reduce the risk of collusion, even in the absence of collusion amounted to 'a significant shortcoming in the adequacy of the investigation.'

### **Effective participation of family**

The right of the family members of a person who has died in custody to actively participate in the investigation has been summarised in *Jordan v UK*<sup>105</sup> ("Jordan") and *R v Secretary of State for the Home Department ex parte Amin*.<sup>106</sup> The right of family members to protect their interests – which are often in conflict with those of the police-<sup>107</sup> is not merely a right arising from a sense of fairness, but exists to ensure that the state is capable of discharging its duty to conduct an effective investigation.<sup>108</sup> The author submits that an 'effective investigation' is one that permits

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<sup>101</sup> [2001] 37 EHRR 52 [127].

<sup>102</sup> *Kelly and Ors v United Kingdom* Judgment of 4 May 2001 [97].

<sup>103</sup> See, eg, *Isayeva and Ors v Russia*, Nos 57947/00, 57948/00 and 57949/00, §§ 208-213, (24 February 2005).

<sup>104</sup> (2007) ECHR 393, [330].

<sup>105</sup> [2001] 37 EHRR 52, paras [133] & [134].

<sup>106</sup> [2003] UKHL 51, paras [31], [34].

<sup>107</sup> See *Jordan* [2001] 37 EHRR 52, at para [134].

<sup>108</sup> Shaw & Coles 2007, "Unlocking the Truth, Families' Experience of the Investigation of Deaths in Custody" Inquest UK, p 51 See a clear example of family's impact on the investigation of Ian Tomlinson death in 2009 <http://www.guardian.co.uk/uk/2009/apr/17/ian-tomlinson-statements>.

a sufficient degree of public scrutiny and enables the effective participation of the victim's family:

*[f]or the same reasons [as the reasons for promptness of investigation], 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 next of kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests...*<sup>109</sup>

In *Anguelova v Bulgaria* this principle was stated thus: '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, maintain public confidence in the authorities' adherence to the rule of law and prevent any appearance of collusion in or tolerance of unlawful acts.'<sup>110</sup>

The need for the involvement and effective participation of the victim or their family as an element of the public scrutiny of the investigation has been noted by the UK Court of Appeal.<sup>111</sup>

### ***Allays suspicion***

Independence of the investigating body is also critical to allay suspicion of impropriety by the State; findings by the body whose members are potentially implicated in a death are far less likely to achieve this purpose. In *R v Secretary for the Home Department ex parte Amin*,<sup>112</sup> Lord Bingham said:

*The purposes of [an independent] investigation are clear: to ensure so far as possible that the full facts are brought to light; that culpable and discreditable conduct is exposed and brought to public notice; that suspicion of deliberate wrong doing (if justified) is allayed; that dangerous practices and procedures are rectified; and that those who have lost their relative may at least have the satisfaction of knowing that lessons learned from his [or her] death may save the lives of others.*

This feature takes on a special significance when Australian police officers are implicated, or potentially implicated, in the death of an Indigenous Australian. That is because the history between Indigenous Australians and the Australian police forces understandably gives rise to a greater level of suspicion in the minds of Indigenous Australians when police are potentially implicated in the death of one of their community. The implications of this are discussed below in relation to Article 26.

### ***Initiation by the State***

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<sup>109</sup> *Kelly and Ors v United Kingdom* Judgment of 4 May 2001 [98].

<sup>110</sup> No 38361/97, ECHR (2002) IV 40.

<sup>111</sup> For example in *Khan, R (on the application of) v Secretary of State for Health* [2003] EWCA Civ 1129 (10 October 2003) the England and Wales Court of Appeal found that the central role at the inquest of the family of a young girl who died in state care entitled them to state funded legal assistance. <http://www.bailii.org/ew/cases/EWCA/Civ/2003/1129.html>

<sup>112</sup> [2003] UKHL 51 at para [31].

A further feature of an effective investigation is that it is initiated by the State.<sup>113</sup> This principle is clearly apparent in cases where there has been a death or debilitating injury in custody leaving the complainant unable to bring a complaint or give an account about what occurred.<sup>114</sup>

#### **4.1.3 Application to this case**

##### ***Police were implicated in the death of TJ Hickey***

There was information available to the State of New South Wales (through the Police Force or otherwise) at the time of TJ Hickey's death, and further information which became available shortly thereafter, which potentially implicated the Police Force in his death.

After the Inquest, the Coroner found that:<sup>115</sup>

*On the evidence before me I am satisfied that the driver of Redfern 16 did follow TJ Hickey down Renwick Street, causing his vehicle to traverse most of the length of the pathway.*

*At some point on Renwick Street, the driver of Redfern 16 determined to follow TJ Hickey as a person of interest. Whether this was a determined interest or a casual interest I could only obtain by hearing evidence from Constable Hollingsworth. [Who refused to give evidence] It follows, that there is no evidence at all that the observer was involved in any decision to follow the deceased.*

*The manner in which TJ Hickey rode his defective bicycle may have been influenced by the proximity and path of the police vehicle Redfern 16.*

This information about the decision to follow TJ Hickey was known to police at the time he was impaled, and at the time he died. The author submits that this in itself was sufficient to trigger the requirement that the death be investigated by a body other than the Police Force.

The following information was also available at the time of, or shortly after, TJ Hickey's death:

- The Redfern Police station received telephone calls from members of the public on 14 February 2004, the afternoon of the incident when TJ Hickey was impaled, implicating a police officer (Darryl Pace) in TJ Hickey's the incident;<sup>116</sup>

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<sup>113</sup> See *JL, R (On the Application of) v Secretary of State For Justice* [2008] UKHL 68 (26 November 2008) [35]; *Hugh Jordan v United Kingdom* [2001] ECHR 327 (4 May 2001) [105].

<sup>114</sup> *JL, R (On the Application of) v Secretary of State For Justice* [2008] UKHL 68 (26 November 2008) [65].

<sup>115</sup> The Inquest Findings at page 24 attached as exhibit 1.

<sup>116</sup> The NSW Police Final Report referenced page attached as exhibit 11.

- While at the police station on the 15<sup>th</sup> of February, Mrs Hickey told members of the Police Force that she thought police were responsible for the death of TJ Hickey.<sup>117</sup>
- On 16 February the Commissioner of Police acknowledged that people in Redfern believed that police were chasing TJ Hickey when he died and that this is why a riot occurred on 15 February 2004;<sup>118</sup>
- On 15 February 2004, ‘wanted, child murderer’ signs appeared around Redfern drawing a link between the police and TJ Hickey’s death;<sup>119</sup>
- Witnesses report seeing police ‘patting down’ TJ Hickey after he was impaled rather than providing medical assistance<sup>120</sup>;
- Witnesses report seeing the Police Rescue Van being sent away from the scene before the ambulance arrived;<sup>121</sup>
- A witness reports seeing TJ Hickey’s bike being struck by the police;<sup>122</sup>
- Witnesses report seeing a police vehicle following TJ Hickey shortly before his death;<sup>123</sup>
- According to Police Force member Rocha’s evidence in cross examination at the Inquest, the police were aware of allegations that they had been pursuing TJ Hickey on 14 February 2004 at about the time they wrote up their statements;<sup>124</sup>
- TJ Hickey was on a police ‘high risk offender’ list which had been updated two days before the incident;<sup>125</sup> and

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<sup>117</sup> Statement of Robert Emery 17 May 2004 at Paragraph 18 attached as exhibit 10.

<sup>118</sup> Channelnewsasia.com 16/2/2004 “30 Australian police injured in riot after death of Aboriginal Youth” attached as exhibit 21.

<sup>119</sup> Statement of Detective Senior Constable Michael Kyneur attached as exhibit 19.

<sup>120</sup> Witness statements attached in exhibit 8, the accusations made in these statements came to the attention of police in a complaint made to police by Mr Brezniak with reference number P0400836 see exhibit 27.

<sup>121</sup> Statement of Thomas Connar attached as exhibit 7 Statement of Lisa Coleman taken by Carl Hughes. Hughes’ letter attached as exhibit 8. There is also references to the Police Rescue Van being informed “we are not reqd” in Police VKG Log Channel A tagged and attached as exhibit 9.

<sup>122</sup> Kiarna Dungay at her answer to question 373 on page 55 (taken by Natasha Fleeting) attached as exhibit 7.

<sup>123</sup> Statements from Iris Hobson at para [9], Thomas Connar at para [4] Roy John Hickey at para [8,9], Stewart Clanachan at para [9,10] attached at exhibit 7.

<sup>124</sup> According to Transcript of Inquest dated 7/7/04 Fullerton X Rocha pages 23 attached as exhibit 13 the allegation that the police were pursuing TJ Hickey was known to the police at the time they wrote up their statements on 14 February 2004.

<sup>125</sup> Inquest Transcript 6/7/04 – Detective Lee Bailey cross examination by Stratton p22 attached as exhibit 5.

- A warrant for TJ Hickey’s arrest was standing on the day of his death; he was not wearing a bicycle helmet; his bail conditions precluded him from being at the “Block”;<sup>126</sup> he was an Aboriginal youth in an area where studies have shown that police exhibit a high propensity to arrest and harass Aboriginal young people.<sup>127</sup>

These facts demonstrate that there was, both at the time of TJ Hickey’s impalement and death, and shortly afterwards, information and evidence available to the State of New South Wales indicating that Police Force may have been implicated in some way in TJ Hickey’s death.

The author submits therefore that the obligation under Article 6(1) to ensure an effective investigation of TJ Hickey’s death was triggered.

***There was no independent investigative body available to conduct the investigation***

The State of New South Wales had not at the time of TJ Hickey’s death – and still has not – established or constituted an investigative body (whether by legislation or otherwise) capable of independently investigating his death. His death was investigated by the Police Force.

The author contends that, by not conducting an independent investigation – and by not being capable of doing so – New South Wales (and thereby Australia) failed to ensure an effective investigation of TJ Hickey’s death.

The author submits that this is sufficient to demonstrate a breach by Australia of Article 6(1) of the ICCPR.

***The police investigation was not independent***

The author submits that the circumstances of this case warrant the intervention of the Committee because not only was there a failure to conduct an investigation by an independent body, but the lack of independence of the investigation actually conducted patently demonstrate the reason for requiring investigation by an independent body.

The author submits that the investigation by the Police Force into TJ Hickey’s death was not independent, for the following reasons.

***The organ investigating the victim’s death was not objectively, formally, or organisationally separate from the organ implicated in the death***

The State organ potentially implicated in the TJ Hickey’s death was the Police Force; in particular, a number of officers operating in the Redfern area of Sydney, associated principally with the Redfern Police Station.<sup>128</sup> The investigation into TJ Hickey’s death was carried out by Police Force members from the Leichardt Police Station, proximate geographically to Redfern.<sup>129</sup> Thus it was members of the Police Force

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<sup>126</sup> Inquest Finding page 3 attached as exhibit 1.

<sup>127</sup> See the report by Chris Cuneen – Police Relations in Redfern attached as exhibit 4.

<sup>128</sup> See Statement of Michael Kyneur, para [4] attached as exhibit 19.

<sup>129</sup> See Brief cover page attached as exhibit 2.

who carried out a forensic examination of the crime scene and determined which police vehicles to examine.<sup>130</sup> It was members of the Police Force who were involved in the search for witnesses.<sup>131</sup> All police officers were members of the same organisation; within the same command structure, and so under the same command (of the NSW Commissioner for Police and Assistant Commissioner Waites).<sup>132</sup>

*The organ investigating the victim's death was not practically, subjectively, or functionally separate from the organ implicated in the death;*

The author submits that the fact that the organs were not objectively independent should mean that *a fortiori* they were not subjectively independent. However, further support for this is evident in the fact that the principal police investigator, and officer who provided evidence of the investigation at the inquest was Detective Senior Constable Kyneur.<sup>133</sup> Kyneur's commander, Assistant Commissioner Waites, had by 16 February 2004 reached the conclusion that the police were not pursuing TJ Hickey.<sup>134</sup>

Kyneur was of comparable or of lower rank to some of the officers at the scene, and lower in rank than his commander, Waites, who had prejudged the outcome.<sup>135</sup> For Kyneur to have found that the police did in fact pursue TJ Hickey would have placed him in conflict with his superior. Further, he was told by his senior officer to hold off interviewing police for many days — a command with which he complied.<sup>136</sup>

Given the importance of command and control structures within police agencies, it is submitted that relative rank is critical for a person making potentially adverse findings against others. The problem of police investigating themselves has been explored by both academics and commissions of inquiry. For example, Monash University's Associate Professor Colleen Lewis notes:

‘This strong group loyalty is one of the culture's many beneficial features in dangerous operational situations. However, it has proven to be its ‘Achilles' heel’ in relation to complaints about police behaviour. The exceptionally strong unwritten code, that police must stick together at all times, encourages police to cover up the misconduct, even the criminal activities of other officers.’<sup>137</sup>

It is also worth noting that alongside the police investigation of the death was a police investigation into a complaint made by TJ Hickey's mother that the police had pursued her son. The police decision to conclude that the police did not pursue TJ

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<sup>130</sup> See Statement of Michael Kyneur, attached as exhibit 19.

<sup>131</sup> *Ibid.*

<sup>132</sup> See organisational chart attached as exhibit 3.

<sup>133</sup> See Statement of Michael Kyneur, attached as exhibit 19.

<sup>134</sup> Media statement by Waites Channelnewsasia.com 16/2/2004 “30 Australian police injured in riot after death of Aboriginal Youth”. Attached as exhibit 21 Senior police prejudice supporting the police actions before an investigation has occurred is seen in other police involved deaths see for example: <http://www.adelaidenow.com.au/beautiful-boy-shot-dead-by-vic-police/story-e6freol3-1111118295407>

<sup>135</sup> *Ibid.*

<sup>136</sup> Inquest Transcript - 5/7/2004 p47 Kyneur X (Fullerton) attached as exhibit 23.

<sup>137</sup> Lewis (1991) as quoted in Harrison and Cunneen, *An Independent Police Complaint Commission*, Liberty UK, (2000) p 6.

Hickey was signed off by Assistant Commissioner Waites in September 2004.<sup>138</sup> In February 2004, Waites made public statements<sup>139</sup> that the police were not pursuing TJ Hickey. A decision maker who has already named their position months before an investigation is completed is biased, at least as a matter of appearance.

The author notes that there is a range of different bodies provided around the world to investigate police. The author submits that the requirement of independence, and the presence of the other features set out above, are best met by a civilian agency. The Author points to the Police Ombudsman of Northern Ireland as an example of such an agency. (See the appendix for more details) The Police Ombudsman of Northern Ireland is a civilian agency that conducts the investigation into complaints against police and deaths where the role of police is implicated. In contrast the New South Wales Ombudsman has a mere review or oversight function in relation to police complaints, if at all.<sup>140</sup>

### ***The Police Investigation was not adequate***

The author alleges that the police investigation into the death of TJ Hickey was not adequate, and that this too demonstrates the need for an independent investigative body. The author points to the following matters to ground this allegation. To reiterate, the author does not ask the Committee to determine whether *in fact* the investigation was inadequate, but points to the following matters to demonstrate the importance of having an independent body investigate TJ Hickey's death.

- Key individuals potentially implicated in TJ Hickey's death were not interviewed by the investigating police;
  - Daryl Pace was never interviewed, indeed Pace was permitted to carry out roles in the investigation itself, interviewing Zammit, a key civilian witness, as part of the investigation;
- Several purported witnesses of TJ Hickey's death and the events immediately preceding and after the event were not interviewed by the Police;
  - For example, witnesses Glen Ronald McArthur and Lisa Gai Coleman were not interviewed by the Police Force.<sup>141</sup>
- The relevant police officers were not interviewed for a week, were not separated, and they had ample time to discuss the matter between themselves. Indeed they wrote their original statements in each other's company as evidenced by the witness signatures on Hollingsworth and Rocha's statements and the evidence of Rocha and Reynolds in the Inquest.<sup>142</sup> When investigations fail to separate police witnesses and allow police to provide

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<sup>138</sup> See exhibit 27.

<sup>139</sup> Channelnewsasia.com 16/2/2004 "30 Australian police injured in riot after death of Aboriginal Youth", attached as exhibit 21.

<sup>140</sup> <http://www.ombo.nsw.gov.au/complaints/nswpolice.html#whatwe>

<sup>141</sup> Statements attached as exhibit 8.

<sup>142</sup> Statements attached as exhibit 12 and transcript as exhibit 13.

their own statements and notes, remarkable similarities in the statements are often observed;<sup>143</sup>

- Police patrol cars 17 and 103 implicated in the matter were not impounded elsewhere than Redfern Police Station until several days after the incident;<sup>144</sup>
- TJ Hickey's bicycle was not impounded elsewhere than Redfern Police Station until several days after the incident;<sup>145</sup>
- The investigation failed to obtain mobile phone records for the police involved in the alleged pursuit of TJ Hickey. These records could have contained crucial evidence about the planning of police movements prior to the incident;<sup>146</sup>
- Officers implicated in TJ Hickey's death do not appear to have been drug tested immediately after the incident; and
- There appeared to be no exploration of whether the removal of TJ Hickey's body from the poles and or failure to allow the Police Rescue Van to treat him had any impact on TJ Hickey's death.

***The Coronial Inquest could not ameliorate the lack of independence or inadequacy of the initial police investigation***

This proposition stands on its own.

However, the author wishes to demonstrate its cogency by reference to an example in TJ Hickey's case. Senior Constable Hollingsworth was the most senior officer involved in two police vehicles assumed to pursuing TJ Hickey.<sup>147</sup> He was driving the car that was found by the Coroner to have followed TJ Hickey down Renwick St.<sup>148</sup> He objected to giving evidence on the basis that it may lead to disciplinary action against him. The Coroner ruled that he did not have to give evidence because of this risk.<sup>149</sup> This is directly comparable to what happened in *Jordan* (see above). He made a signed statement on 14 February and was interviewed by police investigators on 21 February 2004.<sup>150</sup> The failure of the investigation to have Hollingsworth, the most senior officer involved in the pursuit of Mr Hickey, give evidence at the Inquest seriously undermined its capacity to hold the police investigation to account.

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<sup>143</sup> See, eg, *Taman Inquiry* September 2008, Manitoba Canada, Vol A pg 46. *Saunders & Anor, R (on the application of) v The Association of Chief Police Officers & Ors* [2008] EWHC 2372 (Admin) (10 October 2008)

<sup>144</sup> See exhibit 19 at para [47]. Redfern 103 – the car driven by Pace does not appear to have been impounded or tested at all.

<sup>145</sup> See exhibit 19 at para [46].

<sup>146</sup> Mobile phone records do not appear to have been collected.

<sup>147</sup> See exhibit 2. Rimmell, Rocha and Reynolds are referred to as Constables. Pace was not assumed by the investigators to have been pursuing TJ Hickey.

<sup>148</sup> See exhibit 1 at page 24.

<sup>149</sup> See exhibit 26 at page 3.

<sup>150</sup> See exhibit 23.

### ***The police investigation was not sufficiently prompt***

The author submits that the police investigation was not sufficiently prompt. This again demonstrates the need for investigation by an independent body.

The following are examples of a lack of promptness in investigating TJ Hickey's death.

- The investigation into TJ Hickey's death was not treated as a critical incident until 16 February 2004, two days after the impaling incident.<sup>151</sup> On 16 February 2004, Police Force officers from the Leichhardt region took over the conduct of the investigation from NSW Police in the Redfern region;<sup>152</sup>
- Officers implicated in TJ Hickey's death were not interviewed until 21 February 2004;<sup>153</sup> and
- Officer Pace, who had been implicated by the individuals on 14 February 2004,<sup>154</sup> was not treated as involved at all.

### ***The police investigation did not permit the adequate involvement of the family in the investigation***

The author submits that there was inadequate family involvement in the investigation. For example, Police refused to allow Mrs Hickey to photograph her son's bicycle when she attended the police station on 25 March 2004 with a forensic expert. She was not informed of her right to have an independent post mortem examination conducted on her son. Nor was she permitted to formulate questions for the investigators to pursue.

#### **4.1.4 Conclusion**

The author submits that the investigation into TJ Hickey's death was not and could not have been conducted by a body independent of the Police Force. The author submits that Australia is therefore in breach of its obligations under Article 6(1) of the *ICCPR*. The author points to the lack of independence in fact, and the well-grounded concerns about the adequacy and promptness of the investigation by the Police Force, to demonstrate why an investigation by an independent body was required.

## **4.2 Article 26**

Article 26 of the *ICCPR* imposes an obligation on States party to the treaty to guarantee the equality of all persons before the law and to provide all persons with the equal protection of the law.

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<sup>151</sup> A decision was made on 16 February 2004 that it was critical see exhibit 19. Commissioner Waites made the decision that it was not critical on 14 February 2004 –Police records attached and marked exhibit 30.

<sup>152</sup> Statement of Kyneur attached as exhibit 19.

<sup>153</sup> See exhibit 23 and also Statement of Kyneur attached as exhibit 19.

<sup>154</sup> See NSW Police Final Report A, Strike Force Coburn, exhibit 11 at page 24.

The author submits that – in light of the history of violence and neglect by Australian governments generally, and police officers in particular (referred to below) – the obligation to conduct an independent investigation where the Police Force was potentially implicated in the death of an Indigenous Australian also becomes an obligation under Article 26. That is because where classes of persons are unequal, it may be discriminatory to treat them equally. In other words, there is a greater obligation to conduct an independent investigation where an Indigenous Australian is killed, due to the combined operation of Article 6 and Article 26.

Furthermore, the author submits that such an investigation must examine the possibility that discriminatory treatment (whether ‘direct’ or ‘indirect’) of the relevant kind played a part in the victim’s death.

#### **4.2.1 The existence of the obligation at law**

It is submitted that while the Committee has not explicitly endorsed this interpretation of Article 6 and Article 26 working together, it is consistent with jurisprudence of the *International Convention on the Elimination of All Forms of Racial Discrimination*<sup>155</sup> as well as the jurisprudence of the ECHR.

The communication of *Ahmed Habassi v Denmark*<sup>156</sup> established that the State’s failure to investigate racial discrimination was a breach of the Convention.

In *Nachova and Ors v Bulgaria*,<sup>157</sup> the ECHR found that the State has an obligation to investigate whether possible racist motives may have led to a death. It said:<sup>158</sup>

*[W]here there is suspicion that racial attitudes induced a violent act it is particularly important that the official investigation is pursued with vigour and impartiality, having regard to the need to reassert continuously society's condemnation of racism and ethnic hatred and to maintain the confidence of minorities in the ability of the authorities to protect them from the threat of racist violence. Compliance with the State's positive obligations under Article 2 of the Convention requires that the domestic legal system must demonstrate its capacity to enforce criminal law against those who unlawfully took the life of another, irrespective of the victim's racial or ethnic origin ... [W]hen investigating violent incidents and, in particular, deaths at the hands of State agents, State authorities have the additional duty to take all reasonable steps to unmask any racist motive and to establish whether or not ethnic hatred or prejudice may have played a role in the events. Failing to do so and treating racially induced violence and brutality on an equal footing with cases that have no racist overtones would be to turn a blind eye to the specific nature of acts that are particularly destructive of fundamental rights. A failure to make a distinction in the way in which situations that are essentially different are handled may constitute unjustified treatment irreconcilable with Article 14 of the Convention ... In order to maintain public confidence in their law enforcement machinery, Contracting States must ensure that in the investigation of incidents involving the use of force a*

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<sup>155</sup> Opened for signature 7 March 1966, 660 UNTS 195 (entered into force 4 January 1969).

<sup>156</sup> Communication No 10/97, UN Doc CERD/C/54/D/10/1997 (17 March 1999).

<sup>157</sup> (2005) ECHR 465.

<sup>158</sup> *Ibid* at p 34.

*distinction is made both in their legal systems and in practice between cases of excessive use of force and of racist killing. Admittedly, proving racial motivation will often be extremely difficult in practice. The respondent State's obligation to investigate possible racist overtones to a violent act is an obligation to use best endeavours and not absolute ... The authorities must do what is reasonable in the circumstances to collect and secure the evidence, explore all practical means of discovering the truth and deliver fully reasoned, impartial and objective decisions, without omitting suspicious facts that may be indicative of a racially induced violence.*

*...The Grand Chamber would add that the authorities' duty to investigate the existence of a possible link between racist attitudes and an act of violence is an aspect of their procedural obligations arising under Article 2 of the Convention, but may also be seen as implicit in their responsibilities under Article 14 of the Convention taken in conjunction with Article 2 to secure the enjoyment of the right to life without discrimination. Owing to the interplay of the two provisions, issues such as those in the present case may fall to be examined under one of the two provisions only, with no separate issue arising under the other, or may require examination under both Articles. This is a question to be decided in each case on its facts and depending on the nature of the allegations made.*

The ECHR found that no racial discrimination had occurred, and so no substantive breach of Article 14. However, it did find there was a procedural breach.<sup>159</sup>

*The Court thus finds that the authorities failed in their duty under Article 14 of the Convention taken together with Article 2 to take all possible steps to investigate whether or not discrimination may have played a role in the events. It follows that there has been a violation of Article 14 of the Convention taken together with Article 2 in its procedural aspect.*

Counsel contends that Article 6 and Article 26 of the ICCPR have a similar interrelationship to the equivalent provisions of the *European Convention on Human Rights*. As a consequence, the State party is under an additional obligation to independently investigate TJ Hickey's death, and in that investigation to investigate vigorously and effectively the possible racist causes the led to the death of TJ Hickey.

#### **4.2.2 The relevant history**

TJ Hickey was an Indigenous Australian youth. It is submitted that TJ Hickey's Aboriginality made it more likely that he would suffer harm at the hands of police than if he were a white Australian.<sup>160</sup> Systemic racism contributes generally to Indigenous deaths in custody.<sup>161</sup> TJ Hickey and his community are subject to over-policing and the frequent use of excessive force at the hands of police because they are Indigenous Australians.

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<sup>159</sup> Ibid at page 35, [168].

<sup>160</sup> 20% of deaths in custody are Indigenous people, while Indigenous people make up 2.5% of the total population: Lisa Collins, Australian Institute of Criminology, *Deaths in Custody in Australia: 2001 National Deaths in Custody Program (NDICP) Annual Report* (2002) .

<sup>161</sup> Johnston, 'RCADIC National Report', V. 2, p 217.

### ***History of Policing Issues in the Redfern area***

Since 1788, the British invasion of Australia has been characterised by violence towards Indigenous Australians. The Royal Commission noted:

*1.4.2 That Aboriginal people were dispossessed of their land without benefit of treaty, agreement or compensation is generally known. But I think little known is the amount of brutality and bloodshed that was involved in enforcing on the ground what was pronounced by the law.*<sup>162</sup>

The involvement of police in the massacres of Indigenous Australians has been documented in many oral and written accounts.<sup>163</sup> Many thousands of Indigenous people were shot, poisoned, beaten and brutalised by police officers.<sup>164</sup>

The role of police and authorities in causing or contributing to the death of Indigenous people today is a grave concern to the Indigenous and broader community.<sup>165</sup>

In October 1987, in response to broad concerns about the frequency of Aboriginal deaths in custody, the Royal Commission was established. The central reason for the establishment of the Royal Commission was the international concern that official explanations masked the racist violence and criminal neglect that lay behind deaths of so many Indigenous people.<sup>166</sup> The Royal Commission examined the deaths of 99 Indigenous people who died between 1 January 1980 and 31 May 1989.

Commissioner Johnston stated in the Royal Commission's report:

*13.2.3 It is my opinion that far too much police intervention in the lives of Aboriginal people throughout Australia has been arbitrary, discriminatory, racist and violent. There is absolutely no doubt in my mind that the antipathy which so many Aboriginal people have towards police is based not just on historical conduct but on the contemporary experience of contact with many police officers.*<sup>167</sup>

In a 1990 report commissioned by the National Inquiry into Racist Violence, for the Human Rights and Equal Opportunity Commission, Chris Cuneen concluded:

*There is a history [of complaints] relating to police practices in Redfern which dates back at least to the original establishment of the ALS in 1970. Many of these [complaints] relate to both discriminatory policing practices and the excessive use of force by police. Redfern has often been presented by the NSW Police Association and*

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<sup>162</sup> <http://www.austlii.edu.au/au/other/IndigLRes/rciadic/national/vol1/13.html>

<sup>163</sup> See, eg, [http://www.nma.gov.au/exhibitions/now\\_showing/first\\_australians/resistance/resources/print\\_index.html](http://www.nma.gov.au/exhibitions/now_showing/first_australians/resistance/resources/print_index.html)

<sup>164</sup> Jonathan Richards 2008, *"The Secret War A True History of Queensland's Native Police."* Queensland University Press.

<sup>165</sup> For example, the death of Mr Ward, an Indigenous man in WA, <http://www.abc.net.au/4corners/content/2009/s2595622.htm> and in Queensland of Indigenous man, Mulrunji Doomadgee have attracted high levels of media attention: <http://www.theaustralian.com.au/news/timeline-the-death-of-mulrunji-doomadgee/story-e6frg6n6-1111113788864>

<sup>166</sup> <http://www.austlii.edu.au/au/other/IndigLRes/rciadic/national/vol1/7.html>

<sup>167</sup> Johnston, 'RCADIC National Report', V. 2, p 217.

*the media as potentially a 'no-go, area'. There [sic] a however evidence of over-policing rather than under-policing, both in the level of intervention the number of police used in particular situations, the extensive use of foot and vehicle patrols) and in the nature of the intervention (the use of particular squads such as the TRG).<sup>168</sup>*

Excessive use of force by police remains a critical concern of Redfern residents. Lyall Munro, an Aboriginal leader in Redfern, said two days after TJ Hickey's death, "You could interview every Aboriginal kid down there that comes from the Block, that comes from this area in Redfern in particular, and the majority will tell you to your face...that they've all been bashed by the police".<sup>169</sup>

### *The Redfern Riot*

On 15 February 2004, following the death of TJ Hickey and the allegations of police involvement in his death and intimidation of witnesses throughout the day, Redfern erupted in protest that hit the international media. TJ Hickey's aunt<sup>170</sup> and cousin<sup>171</sup> were among those charged by the Police Force for participating in the protest. Lyall Munro in interview on the PM radio programme said that the protest was the only way for kids to protect themselves. When told by a reporter that the kids were supposed to protect themselves through the legal system he said, "with...police thugs? What legal system? What legal system?"<sup>172</sup>

Loss of faith in a State's response to racially or religiously motivated police violence is a leading cause of violent protest. Rock throwing and rioting against police is a characteristic of communities who have lost their faith that authorities are capable of remedying the injustice they experience. They are the response of a persecuted population to inhumane treatment and intolerable conditions against which there is no available remedy. Examples of communities responding in this way include Northern Ireland under the oppression of the British Army;<sup>173</sup> Palestine in response to the brutal occupation of Israel;<sup>174</sup> Bradford, UK in response to the police inaction over the rise of terror by white supremacist and anti-Muslim groups;<sup>175</sup> African-Americans in response to the jury acquittal of the police who beat Rodney King in the US; and Palm Island, Australia in response to the death of Indigenous man Mulrunji Doomadgee while in the custody of a Queensland Police Officer.<sup>176</sup>

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<sup>168</sup> See Chris Cuneen, exhibit 4 at page 33.

<sup>169</sup> News.com.au – Police 'provoked youths at Redfern' 16/2/2004

<sup>170</sup> <http://www.smh.com.au/articles/2004/02/20/1077072840696.html>

<sup>171</sup> <http://www.smh.com.au/articles/2004/02/24/1077594809042.html>

<sup>172</sup> ABC Online – PM 16 February 2004 [www.abc.net.au/pm/content/2004/s1046241.htm](http://www.abc.net.au/pm/content/2004/s1046241.htm) attached as exhibit 35.

<sup>173</sup> Civil unrest was a widespread response to the police killings of 13 people on Bloody Sunday-

[http://news.bbc.co.uk/1/hi/english/static/in\\_depth/northern\\_ireland/2000/bloody\\_sunday/map/default.stm](http://news.bbc.co.uk/1/hi/english/static/in_depth/northern_ireland/2000/bloody_sunday/map/default.stm)

<sup>174</sup> Peace & Propaganda and the Promised Land Israel/Palestine, <http://www.youtube.com/watch?v=UldEpr0HCEU> The violent military occupation of Palestine has led to civil unrest.

<sup>176</sup> <http://www.thetallman.com.au/>

The Redfern Riots – understood as desperate act, by a community that has lost faith in the State’s response to an alleged Indigenous death in custody – re-enforces the critical need for the independent and effective investigation of TJ Hickey’s death.

When New South Wales premier Bob Carr announced, after stating his unshaken faith in the Police Force, that there would be three inquiries into the incident, Aden Ridgeway, an Aboriginal political leader said:

*I have my doubts as to whether Premier Carr's "three inquiry" response is sufficient or if it will hit the mark at all. It is a weak response that will not satisfy the community, mostly because it will not be seen as independent of the police and government, and largely because it will not examine any issues concerning the social and material needs of the local Redfern Aboriginal community.*<sup>177</sup>

#### **4.2.3 The additional importance of allaying suspicions where an Indigenous Australian dies, and police officers are potentially implicated**

As foretold by Mr Ridgeway, the police investigation of TJ Hickey’s death and the Inquest that relied on it have in no way allayed the suspicions of his mother or his community about police involvement in TJ Hickey’s death.

The author earlier referred to the need to allay suspicion as a purpose or feature of an effective investigation into a death in which police officers are potentially implicated. The author submits that this need is greater when it is an Indigenous Australian who dies, and the obligation is greater under Article 26, precisely because of the systemic inequality historically and currently experienced by Indigenous Australians.

#### **4.2.4 The investigation into TJ Hickey’s death breached Article 26**

The author submits that the investigation into TJ Hickey’s death failed to take account of his Aboriginality in any way. It was not an independent investigation: the author submits that TJ Hickey’s Aboriginality placed an additional obligation on Australia under Article 6 to ensure that it was. It did not assess, and was not capable of independently assessing, whether or not discrimination (whether direct or indirect) played a part in his death: again, the author submits that it was required to do so under Article 26.

### **4.3 Article 2**

The following submissions are made on the assumption that the Committee finds that Australia breached one or both of Articles 6 and 26 of the ICCPR.

The author submits that Australia has therefore additionally breached its obligations under Article 2 of the ICCPR by:

- Violating substantive obligations under Articles 6 and/or 26; and

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<sup>177</sup> <http://www.onlineopinion.com.au/view.asp?article=1989> Aden Ridgeway 23 February 2004.

- Failing to make available to the victim's family (in particular his mother, who is his representative for the purposes of this communication) any effective remedy for its violations of TJ Hickey's rights recognised by the ICCPR.

In *Christopher Hapimana Ben Mark Taunoa and Ors v The Attorney General and Anor*,<sup>178</sup> the Supreme Court of New Zealand observed:

*Under the Covenant on Civil and Political Rights it is the responsibility of the States Parties to provide in their domestic legal systems an "effective remedy" for breaches of rights. In the New Zealand legal system it is the responsibility of the courts to provide appropriate remedies to those whose rights and interests recognised by law have been infringed.*<sup>179</sup>

The critical issue in this matter is that the State of New South Wales does not currently recognise that where police are implicated in the death of a person, the State has an obligation to ensure an independent and effective investigation of that death, capable of dispelling any fears the community or family members may have of police involvement in the death. This is particularly so where an Indigenous Australian dies.

As a result, the failure to meet this obligation has not been effectively remedied by changes in practice, law and procedure or by compensation and apology. Furthermore, the failure of the State Party to directly compensate Mrs Hickey for violations of TJ Hickey's rights by the State amounts to a violation under Article 2.

#### 4.4 Conclusion

The death of an Indigenous person during police operations raises questions about the widespread nature of racial motivated police violence in Australia. However, it is not just the act that led to the death that is of concern. The investigation of the death is equally a cause of disquiet. For families of people killed during police operations to regain their trust that the State is not complicit in the death of their loved one, the investigation must be independent, effective and thoroughly deal with all the suspicions of the family. The high rate of Indigenous deaths in police custody places an additional burden on Australia to discharge its obligation to Indigenous families in compliance with International standards.

The investigation into the death of TJ Hickey failed to allay the suspicions of Mrs Hickey, or cover all of her concerns about the causes of TJ Hickey's death. It was not independent, adequate, prompt, transparent or protective of TJ Hickey's rights. Most importantly, it was not and could not have been conducted by a body independent of the Police Force.

This was in breach of Australia's obligations under Articles 6, 26 and 2 of the *ICCPR*.

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<sup>178</sup> [2007] NZSC 70 (31 August 2007).

<sup>179</sup> *Ibid* at [106].

## 5 Remedies Sought

Article 2 of the ICCPR requires States parties to ensure effective remedies for human rights abuses and enforcement of these remedies. The Committee noted the following in its *General Comment 31*:<sup>180</sup>

*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.*

Therefore, Mrs Hickey, on behalf of TJ Hickey, seeks the following remedies:

- Mrs Hickey be awarded compensation;
- The State party be called on to enact legislation for the independent and effective investigation of all deaths during police operations and in police custody, or deaths in which there is information which is or should be available to the State (including the Police Force) potentially implicating police in the death in some way;
- The State party be called on to enact legislation that ensures that Indigenous deaths during police operations and custody be thoroughly, independently and adequately investigated, including for any racially prejudicial motivation or other discriminatory motivation, and for any systemic or structural racism; and
- The State party be *directed* to establish a Royal Commission into the death of TJ Hickey.

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<sup>180</sup> United Nations Human Rights Committee, *General Comment 31*, UN Doc CCPR/C/21/Rev.1/Add.13 (2004).

## 6 Appendix

### Investigations of Deaths in Custody in some Commonwealth Common Law Jurisdictions

#### 6.1.1 Northern Ireland

Police involved-deaths and complaints against police are immediately investigated by the fully independent and civilian Police Ombudsman of Northern Ireland (“**PONI**”). PONI is widely regarded as the golden standard in police investigations and aims to ensure its investigations are “Article 2 compliant”.<sup>181</sup> Article 2 is the equivalent of Article 6 of the *ICCPR*. PONI prepares the briefs for coronial investigations. PONI has detailed information about its services on its website.

#### 6.1.2 England and Wales

Since 2004, Deaths in police custody and complaints of torture and ill-treatment in police custody in England and Wales are immediately investigated by the civilian Independent Police Complaints Commission, (“**IPCC**”).<sup>182</sup> The IPCC has had to expand its investigative functions in response to right to life decisions by the ECHR and domestic courts.<sup>183</sup>

#### 6.1.3 Ottawa, Canada

“The Special Investigations Unit, the (“**SIU**”) is a civilian law enforcement agency, independent of the police, that investigates circumstances involving police and civilians which have resulted in serious injury, including sexual assault, or death.”<sup>184</sup>

#### 6.1.4 British Columbia, Canada

The Frank Paul Inquiry 2009 made recommendations that the British Columbia establish an independent investigation commission to investigate police involved deaths involving the Vancouver Police.<sup>185</sup> The chair of the Commission for Public Complaints into the Royal Mounted Canadian Police (“**the RMCP**”) has been calling for independent investigations into deaths and injuries in police custody.<sup>186</sup> On 4 February 2010, the RCMP agreed to refer police involved fatalities to an independent agency.<sup>187</sup>

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<sup>181</sup> <http://www.policeombudsman.org/>

<sup>182</sup> <http://www.ipcc.gov.uk/>

<sup>183</sup> Report of the Comptroller and Auditor General, National Audit Office, London 12 November 2008, p5.

[http://www.nao.org.uk/publications/0708/police\\_complaints\\_commission.aspx](http://www.nao.org.uk/publications/0708/police_complaints_commission.aspx)

<sup>184</sup> <http://www.siu.on.ca/about.html>

<sup>185</sup> “*Cold and Alone*” Davis Commission Inquiry (BC Canada) into the Death of Frank Paul page 223, available at <http://www.frankpaulinquiry.ca/>.

<sup>186</sup> <http://www.cbc.ca/canada/british-columbia/story/2009/12/08/bc-kennedy-vancouver-airport-taser-report.html>

<sup>187</sup> <http://www.cbc.ca/canada/british-columbia/story/2010/02/04/william-elliott-rcmp.html>