

Inquest into the deaths arising from the Lindt Café siege

Directions hearing on 7 September 2016

Address by Mr Jeremy Gormly SC regarding Australian Defence Force issues

1. Your Honour, an area of the issues described in broad terms as ‘the ADF issue’ needs to be addressed. It has been an area of factual investigation that has attracted extensive family interest and public comment. The comments I will make are intended to bring such Australian Defence Force (‘**ADF**’) evidence as it stands, to a head, with a view to identifying what your Honour might do with it, what your Honour may receive submissions about from those interested in the issue, and what your Honour may have to decide.
2. The ADF issue has been among the inquest’s issues from the start. I need to say that it has necessarily yielded only small amounts of usable evidence.
3. Many thorny problems have emerged along the investigative path. It has been the most difficult of areas to investigate and examine, though for reasons that can be identified. The difficulties have involved public interest immunity, questions of comparability of action by armed military forces with those of police action, as well as the protection needed for ADF armed methodologies; and of course all those problems are the more difficult when Australia has troops in active service. All required considerable respect. Any public inquiry, in whatever way it was constituted, would have met these difficulties.
4. It might have been possible to leave the ADF issue alone altogether as one too difficult to penetrate in public hearings, with recommendations that the issue be examined in another way. That however would have left an unsatisfactory number of questions unaddressed – including that if asked to do so, the ADF could have actively participated in the siege, but also the question of maximising availability of resources for a terrorist siege, no matter what jurisdiction the resources came from. Attempts were made to press the issue as far as reasonably possible.
5. The ADF issue has exposed for investigation a number of related limbs. Let me briefly identify the principal limbs as they have emerged over time, since the siege:
 - a. What were the precise roles of the ADF officers who were present during the siege?
 - b. Should the ADF manage terrorist sieges and is it practical for the ADF to handle all domestic terrorist matters?
 - c. Is the current handover arrangement from Police to the ADF suitable, or are there other options?

- d. Are police and ADF training regimes sufficient to meet the national challenge of terrorism, by enabling state or territory police to respond as needed?
- e. Finally, is there a need to reconsider the legal and jurisdictional divisions between the Commonwealth-governed ADF and the various State and territory police, by ensuring sharing and optimal availability of all counter-terrorist resources? The question here is not one of inter-jurisdictional cooperation, or the willingness to cooperate, but may be one of capacity within the legal structures that govern cooperation.

I'll return to this last point shortly, but in effect it asks, ought not the police continue as siege managers having acquired this first, complex experience of terrorist action? Police are the managers in most comparable countries. The police are widespread and have a capacity for immediate response that is not available to the ADF. In this case, the Police were on the scene within minutes. The police will almost always be the first entity on the scene, as they are in most countries. The ADF might still be available for multi-site, or large scale incidents, but short of a handover from police to the ADF, is there any benefit or restriction on greater sharing of resources, with a focus on higher inter-operability?

The issues became clearer as more material became available, but these were the general areas of question that arose from the investigation.

6. These questions achieved some exposure in the publication of newspaper articles in *The Australian* in late March and early April this year. Specific questions were raised about weapons, ammunition, funding, training and handovers.
7. Detailed enquiries were made of the Commonwealth following these articles, particularly as the statements seemed to be coming from well-informed ADF or former ADF sources.
8. Those enquiries have been followed up with other requests, notices for the production of documents, and further inquiries. In early May of this year, I made a public call for information and for witnesses that could deal with the issue.
9. Some former ADF officers and members of the public came forward and proffered information or offered to proffer it on various conditions. This was explored but it did not prove a useful path. Where information was proffered and could be accepted it was either based on a misconception of the facts or it did not add anything new. In other cases where it was proffered sometimes on terms, the terms could not be accepted, or the information could not be used; for instance, some of it, if received in detail, would have raised protected areas of methodology. There was of course at all times a need to ensure that no breach of an immunity or secrecy provision could occur.

10. The position of the Commonwealth in relation to these various inquiries can be summarised in a number of short propositions:

- a. The ADF could not manage the siege unless the New South Wales Police first declared a lack of capability, following which the ADF was invited through the current detailed inter-government process to manage the siege. It is different where there is a threat of nuclear attack or events are on Commonwealth territory, but generally speaking, the Commonwealth observes that the siege was a police matter. The Commonwealth points out that no arrangements were triggered by the New South Wales Police, so any question about what the ADF would have done if called upon is hypothetical and of limited evidentiary use.
- b. The Commonwealth stated its view about the New South Wales Police, articulated to this Court by Dr James Renwick SC for the Commonwealth, on 1 April this year (at T2580). He said:

‘at all times the Commonwealth took the view that the management and resolution of this siege was well within the capacity of the New South Wales Police Force. That view never changed.’

- c. The Commonwealth’s next point is that it is not valid to carry out a comparison between domestic policing and ADF methodologies developed for warfare situations against enemy forces in other countries. The existence of an ADF Tactical Assault Group known as ‘TAG East’, trained to work in the event of a handover from police to the ADF, also raises hypothetical issues. The ‘invalid comparison’ objection raised by the Commonwealth presumably also takes into account the fact that Australian forces in Afghanistan do not act alone, working with other allied forces overseas. I say ‘presumably’ because this is not an area in respect of which we would expect the Commonwealth to be forthcoming. And it is not. All matters involving methodologies in armed overseas conflict are highly protected. That must be accepted, for good reason—especially while there are Australian troops serving in Afghanistan. That leads me to the next point made by the Commonwealth.
- d. It argues that much of the information that those assisting your Honour have sought on the ADF issue is necessarily immune from production under the now very familiar doctrine of exclusionary public interest immunity. It is the assessment of those assisting your Honour that such a claim would be upheld, were it put to the test in a challenge.
- e. Finally, the Commonwealth has argued that ADF officers could not and should not be asked to provide advisory comparisons or analyses of the work done by New South Wales Police in their policing role during the siege, because of the invalid comparison argument. Furthermore, any attempt, it is argued, to compare would inevitably lead to issues of public interest immunity about ADF methodologies. The

same applies to the hypothetical question of what the ADF would have done if requested to actively participate in the siege. All such matters would be hypothetical and would depend on when and in what circumstances the siege was taken over.

Those all appear to be valid points but did not terminate the issues.

11. Difficult as this area proved, some of the problem did recede with the evidence from New South Wales Police officers who had engaged in ADF training. More especially, problems receded with the expert evidence of the UK Review team. With their evidence as experienced counter-terrorist police, no question of invalid comparison could arise. It is of course police who manage terrorist events in most countries comparable with Australia, including the United Kingdom. Sadly, they do so with more incidents and therefore greater experience of managing terrorism. This was the first event from which we arguably catch up with more troubled but more experienced countries.
12. Through this investigation and despite the limited evidence available, we come to identify areas of difficulty worthy at least of further investigation and further consideration. For example, the possibility arose in the evidence that good resources might exist to manage a siege or other terrorist incident, but be unavailable for use – short of handover of management from police to the ADF because of perceived legal or jurisdictional boundaries. Whether that actually occurred is a matter for submissions on the evidence available to this inquest but more likely for examination in ways that must be left to other and later executive processes.
13. There was evidence of practical cooperation between jurisdictions during the siege. For example, it seems that the ADF, as part of its preparation for a possible active involvement the siege, created a mock-up of the Lindt Café for the training of ADF officers in an emergency action (“EA”) and perhaps a deliberate action (“DA”). It was also offered to the New South Wales Police Tactical Operations Unit for rehearsal.
14. Another example of inter-jurisdictional cooperation on the night of the siege concerned the EA and a draft DA. Both were examined by ADF officers and were the subject of questions and discussion. Police took some comfort from those discussions, describing the process, in the absence of criticism, as a ‘validation’ by the ADF of their plans.
15. While evidence of onsite cooperation and pooling of know-how by Police and ADF officers emerged in the investigation, so did marked concern by ADF officers to emphasise that they attended in civilian clothing, they did not involve themselves in the siege, that they respected the management of the siege by the Police, that they did not give advice, and did not participate in the assessment of the EA or DA. The Police who appeared to give evidence seemed equally wary of implicating the ADF in an active role, described the presence of these ADF officers as ‘informal’. It seems that Deputy Commissioner Burn approached the issue most directly when she was asked about sharing. She considered that ADF Liaison Officers had a role to inform the Police of the existence of ADF capability that might be useful but was perhaps not known to the Police. Deputy Commissioner Burn seems to be right in practice. Whether there did

or should exist sufficient express sharing arrangements now or in the future, to underpin that practical expectation is a matter for submission or for consideration elsewhere.

16. Of course any concern of the ADF to remain strictly within the legal framework is justified – but it may be that the framework, including in the *Defence Act 1903* (Cth), requires some review. That too, is a matter for submissions or further examination.
17. It was encouraging to see recent media reports that some such re-consideration may presently be under way to meet the changes brought about by the immediacy and the exigencies of modern terrorism.
18. By way of conclusion, we observe that one way or another a body of evidence about the ADF issues directly or by inference, has emerged. The evidence gathered has been incomplete for the reasons given and has not been sufficient to fully address all the ADF related questions. But, it has been sufficient to identify matters that could be explored in other places and in other ways.
19. The point of this outline was to inform your Honour that the ADF area of the investigation has gone as far as it can. And what has been done, together with submissions, is likely to be sufficient for your Honour to make some recommendations, either public or closed, as suggested by the evidence. I will be finalising written submissions on these ADF issues and no doubt parties will do so as well.