

Inquest into the deaths arising from the Lindt Café siege

Statement by Jeremy Gormly SC, Counsel Assisting, regarding Commonwealth Australian Defence Force issues

1. As I have recently made clear, we are anxious not to unnecessarily prolong the inquest or allow it to diverge from its primary purpose. However, the role played by the Australian Defence Force ('ADF'), during the Lindt Café siege has been a clear topic of relevance since the siege occurred. It has been on the list of issues of the inquest from an early stage.
2. There are three main questions. The first is about the role the ADF did play. The second is about the role it could have played. The third is about such post-siege ADF review, debrief or analysis as may have occurred. Material has been sought from the Commonwealth in respect of its role in the siege which should cover these issues. A body of material has been provided by the Commonwealth. The Commonwealth has declared through its counsel that the siege was well within the capability of the NSW Police.
3. The role of the ADF concerning the siege has also been raised in the media on a number of occasions, including in recent months. The media have reported unnamed persons who appear to speak with specialist ADF knowledge. Those persons are reported as providing information inconsistent with the stated Commonwealth position.
4. I raise this for two purposes. The first is to make a call for witnesses about the ADF role in the siege or in support of the assertions recently made in *The Australian* which I will shortly identify, to come forward and provide that evidence. The second purpose is to engage with the Commonwealth in whatever way relevantly responds to the assertions being made by these persons in the media now, and in any evidence they may provide in the future.
5. I will take some moments to set out:

- a. our investigation of the matter so far, and
- b. the expectations we have of evidence on this issue.

I will then detail the requests being made.

6. It is well known that the NSW Police had management of the siege. It made the critical decisions, using NSW Police resources. It managed the siege from start to finish; that included the forced entry of the Café using officers of its Tactical Operations Unit.
7. It is also known that during the siege, the ADF had been on notice for possible call-out and management of the siege. There were ADF personnel involved in observer and liaison roles.
8. The role of the ADF during the siege became known from a number of sources including evidence from Air Chief Marshal Binskin to a Senate Foreign Affairs, Defence and Trade Legislation Committee Estimates hearing on 25 February 2015, being nine weeks after the siege.
9. From his evidence and other sources it has become known that during the siege there were ADF officers on standby at the NSW Police Operations Centre. In addition, the ADF had built a mock-up of the Lindt Cafe at Holsworthy Army Base to trial and rehearse forced entry. It offered the facility to the NSW Police for training, although as we have heard in evidence that offer could not be taken up on the night. It was also known that ADF liaison officers attended the Lindt siege Forward Command Post from about 9.00pm on the night of the siege.
10. Generally speaking it is the police who have the legislative powers and obligations to police domestic breaches of the law including criminal sieges. In general terms the ADF is constitutionally prohibited from policing domestic breaches of the law. The ADF is not itself a police force. Its powers and functions are quite different from those of a police force. Police forces act domestically principally among citizens while military forces act to respond to foreign attack.

11. It is a long held general arrangement in most western democratic countries that military forces have no place in the domestic field except in specifically identified circumstances.
12. The possible legitimate role of the ADF in an incident like the Lindt Café siege is contained in a formal counter-terrorist structure developed in the 1990s and coordinated between the Commonwealth, the States and the territories in a national system for terrorist response. In general terms the ADF can only take a role in domestic terrorist incidents under that structure if the state or territory police force ordinarily responsible for responding to the incident, declares the event beyond its capability. No such declaration was made by the NSW Police Force in this case during the Lindt Cafe siege.
13. If a declaration of incapacity to manage a siege by state or territory police occurs, a series of constitutional and legislative steps must then occur before the ADF can be called in to assist.
14. In this case the armed forces were put on notice in accordance with established national counter-terrorist protocol. The NSW Police maintained management as an incident within its capacity.
15. The Commonwealth has agreed with the decision of the NSW Police. On 1 April 2016 in this inquest, Dr Renwick SC for the Commonwealth at T2580 (of the transcript) said his clear instructions were that at all times the Commonwealth took the view that the management and resolution of this siege was well within the capacity of the NSW Police Force.
16. Nevertheless there remains public debate about what role the ADF could or should have taken in the siege. Prior to Dr Renwick's statement to your Honour there had been public debate to the effect that management of the siege should have been conducted by the ADF rather than the NSW Police.
17. Some argue that the ADF experience in various theatres of armed conflict would have made it better able to manage the conflict than a domestic entity

such as a police force. The public argument on the issue sometimes refers to ADF experience in Afghanistan and Iraq.

18. It is sometimes said that the more offensive approach of military forces rather than the protective or defensive approach of police (perhaps encapsulated in the police policy of contain and negotiate), would better suit a terrorist disturbance.
19. For these reasons and in part because there was some involvement of the ADF around this siege, the matter has remained an issue in this inquest.
20. Public interest immunity of course affects the examination. Furthermore, any question of how the ADF would have handled the siege is wholly hypothetical because the ADF was not called upon to take any role in the siege.
21. Nevertheless some specific steps have been taken in the investigation.
22. The first was that the Commonwealth has provided at the request of the inquest, a detailed analysis of the structure of the counter-terrorist capacity in Australia including the ways in which the ADF might become involved. That document was tendered and made publicly available during segment two of the inquest. It can be found at Tab 124 of Exhibit 5.
23. The document sets out the framework of inter-state, territory and Commonwealth measures for counter-terrorist response. It also sets out the underlying constitutional and statutory framework required for domestic involvement of the ADF together with the agreed measures among the states, territories and the Commonwealth should there be a terrorist event anywhere in Australia. The document was illuminating and met some of the needs of the inquest for information about possible ADF response to a domestic terrorist event.
24. The document discloses that use of the ADF requires first a call by the affected state or territory police that its own policing resources cannot manage the event. If ADF involvement is required, that call commences

through the State or territory by communication to the Governor-General. No doubt the required steps can be undertaken with all necessary speed but they were not triggered in this case. Indeed they never have been triggered. The ADF has never engaged in armed work with weapons domestically in Australia.

25. A related question concerns the powers of the ADF when called into the domestic sphere. The ADF does not have special rights to shoot or use force domestically. Their obligations are governed and restricted by the Commonwealth *Defence Act*. While ADF officers are deployed in domestic situations, the law of NSW is excluded but is replaced by Part IIIAAA of the *Defence Act*. It imposes restrictions and limitations on the use of force similar in intent and operation to those binding Police acting domestically in NSW.
26. As to the question of training, it appears that there is liaison by police forces with the ADF together with some shared training though little is known of the extent of that cooperation at the moment. It was interesting that the NSW Police witness known as the Commander of the State Protection Group said in evidence that she personally knew all the ADF officers with whom he made contact during the siege.
27. All police forces have counter-terrorist experts involved in the national structure and it appears for these reasons that state police forces are usually the entities we see reported in finding, stopping and arresting those who plan terrorist activity.
28. What do other countries do? In the United Kingdom, the United States, Canada and New Zealand, terrorist incidents are managed by police, not by armed forces.
29. But we understand that changed terrorist siege management is a question that is receiving as much consideration internationally as it is here.

30. The next step taken in this inquiry to examine ADF issues was to obtain statements from each of the ADF officers involved on the night of the siege and examine their actions in the light of the structure as a whole.
31. Eleven statements have been produced by the Commonwealth. They show a very limited involvement from the ADF observers and liaison officers. None who gave those statements seemed to warrant being called to give oral evidence. None provide evidence that comes remotely close to the matters reported in the media.
32. The next step to be taken in the inquest on the ADF issue will be to request additional information from the Commonwealth to respond to those assertions made by the unnamed sources in the newspaper articles. We seek that response mostly because the assertions seem to be informed by expertise of a kind one might expect to find only in the Commonwealth spheres of activity.
33. The Commonwealth has made clear ADF reluctance to become involved in questions concerning opinions about NSW domestic policing or to hypothesize about events that did not occur such as what the ADF would have done had it managed the siege. What we seek concerns facts and documents, not opinion.
34. I turn now specifically to the recent articles in *The Australian* and *The Weekend Australian* in late March and early April. The articles report unnamed persons as saying the following:
- a. First, that the NSW Police Command was warned by army experts that they may not have the capability to handle the siege. (I must say that there is no evidence of such statements in the NSW Police documents including its contemporaneous logs, which support that contention but if there is a witness to the contrary, it would assist the investigation and we invite such persons to come forward.)

- b. Secondly, that the NSW Police Command was warned by army experts that their weapons posed a danger to the hostages because they used small ammunition that could easily shatter. Again, there is no evidence in the NSW Police material of such a warning including from its logs or from any other source, which supports that contention. Of course, if there is a witness in support of the assertions, it would be of interest in the investigation and we invite such persons to come forward.
- c. Next, there are other propositions reported in the articles; for example:
- i. that Army advisors expressed concern about the M4 assault rifles used by the NSW Tactical Operations Unit (“**TOU**”);
 - ii. that Army advisors expressed concern about the high velocity 5.56mm bullets which could fragment after hitting marble surfaces in the Café;
 - iii. that Army sources remain concerned about the lack of cooperation they received from some of the State tactical operations units and the varying levels of capability;
 - iv. that Army Special Forces have better equipment than State tactical operations units;
 - v. that had the Army been given control of the siege its commandos would have used rifles that fire a much heavier 9mm round, which is specially designed for indoor situations that involve citizens and were less likely to fragment;
 - vi. that the NSW TOU used to use 9mm rounds but they were phased out several years ago because of cost;
 - vii. that state units are not well trained and rely on part time members; and

- viii. that the 5.56mm rounds used by the Police were designed for open warfare when targets were 50 to 500m away and were not suitable for close quarters engagements.
- d. In support of these contentions the articles refer to Army Special Forces having experience in close quarters urban warfare in Afghanistan; and that Army commandos had carried out an exercise in Sydney's Martin Place. Underpinning all of these assertions appears to be a contention that the ADF would have handled the siege better than the NSW Police. For such a proposition to be made good, if it is correct, evidence is required.
- e. It is also asserted in the article that Australian Federal Police ('AFP') sources expressed concern about NSW's refusal to accept federal assistance.

In respect of those additional statements no support has been found in any of the AFP documents which were examined by the inquest for other purposes. Likewise no NSW Police records, documents or other material has been found in support. If however there is any person able to support these statements, either with oral evidence by coming forward, or by documents, we invite such persons to come forward. Material in support of the contentions raised in the articles is, if true, useful and relevant to the matters being considered in this inquest.

- 35. The articles I refer to are written by known and respected journalists and were positioned prominently in respected journals. It might reasonably be assumed that the source of the information in these articles is a person or persons who do or did serve in the ADF or they are other well-informed Commonwealth or former Commonwealth officers.
- 36. At present the position cited by Dr Renwick for the Commonwealth probably best reflects the current evidentiary position and the evidence about advice and capability. As to weapons and ammunition, there is

ballistics evidence from the NSW Police and other areas yet to be tested orally, but the expert statements on these issues are largely inconsistent with the assertions made in the media articles.

37. I repeat the invitation to witnesses supporting the contentions in the newspaper articles to come forward.
38. They may do so in the first place by writing to Ms Melissa Heris, solicitor to the inquest. We ask that such persons do so promptly and preferably within 14 days.
39. Secondly, I note the position of the Commonwealth as to the capability of the NSW Police. As to the factual assertions in *'The Australian'* and *'Weekend Australian'* articles we will engage with the Commonwealth to obtain an appropriate evidentiary response to the factual assertions in those newspaper articles, with the view to this inquest having the benefit of that response. Further we assume that there was some form of debrief or post-siege analysis by the ADF for its purposes. We assume that any such debrief would fall within the requests already made of the Commonwealth to provide material relating to ADF involvement in the siege and that such material would be provided to the inquest.
40. Those are the two calls I make. Once this issue becomes clearer we will update your Honour on progress in this area of the inquest issues.

13 May 2016