

INQUIRY REPORT

**INQUIRY INTO THE CIRCUMSTANCES SURROUNDING
THE TRESPASS INCIDENT AT SWAN ISLAND ON
02 OCTOBER 2014**

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FOREWORD

I, [REDACTED] Lieutenant-Colonel MA Kelly have been duly appointed by MAJGEN PW Gilmore, Deputy Chief of Army, to conduct an Inquiry into matters surrounding a trespass incident at Swan Island on 2 October 2014.

The Instrument of Appointment and Terms of Reference are attached at Annex A.

I am satisfied that all information relevant to the Inquiry that is practicable to obtain has been obtained, that the report has been prepared setting out the findings and recommendations and is now furnished to the Appointing Officer with all the evidence obtained, including statements, records of other evidence taken and documents received and accepted as evidence.

I do not believe there are any impediments to the Appointing Officer relying on the findings or recommendations contained in this report.



M.A. KELLY
LTCOL
Inquiry Officer

22 January 2015

EXECUTIVE SUMMARY

Incident

1. On the morning of 2 Oct 14, eight (8) persons associated with the Swan Island Peace Convergence (SIPC) gained access to the Swan Island Training Facility (SITF). Four (4) of these persons were arrested by members of VICPOL, the other four (4) persons were detained by two (2) members of the Swan Island Army Detachment (SIAD), arrested and searched prior to being handed over to VICPOL for processing and further civil action.
2. The actions of the two (2) members of the SIAD were subsequently reported widely in the media, with allegations of mistreatment during the detention process being made by the four (4) persons arrested and searched.
3. It is the detention of the (4) persons by two (2) members of the SIAD that is the focus of this Inquiry.

Preparation by the COC

4. The planned conduct of the 2014 protest activity by the SIPC was known to [REDACTED] the SIAD, VICPOL and [REDACTED]
5. In preparation for the conduct of the 2014 protest by the SIPC a range of preparatory and planning meetings were held between members of the SIAD, VICPOL and [REDACTED]. At these meetings, plans to deal with the management of the protest activity were formulated and it was decided that there would be a VICPOL presence at the SITF during the period of the protest. Ten (10) members of VICPOL were located at the SITF (8 x water police and 2 x motorcycle police).

Sequence of events

Initial contact

6. Upon initial contact with a SIAD member (Soldier 3) the four (4) persons suspected of trespassing on [REDACTED]. They took no offensive action, nor did they actively attempt to flee from the vicinity in which they were located. They kept walking along the road as initially observed.
7. Soldier 3 [REDACTED] (Soldier 1 [REDACTED] Soldier 1 [REDACTED] and Soldier 2 [REDACTED] (another SIAD member) responded, arrived at the scene and exited their vehicle. Soldier 1 [REDACTED] called on the identified persons to “stop”. The group of four (4) persons then split into two groups of two (2) persons.
8. The first group of two (2) persons was detained by Soldiers 1 and 2 [REDACTED] in the vicinity of the initial contact area, the other group of two (2) persons fled into close by scrub-land in an attempt to evade detention.

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Detention of the first group

9. The first group of two (2) persons was arrested - one (1) person by Soldier 1 the other by Soldier 2 Soldier 1 was responsible for the arrest and search of one person. Soldier 2 the other. VICPOL elements were notified of the arrests and Soldiers 1 and 2 then pursued the group of two (2) persons who had fled the scene. After the arrests were completed, the two (2) arrested persons were left under the control of Soldier 3 who maintained control of them until elements of VICPOL arrived to take them into their custody. Soldier 3 then moved by vehicle to support Soldiers 1 and 2 in their search of the second group of persons.

Detention of the second group

10. Upon leaving the scene of the first arrests, Soldiers 1 and 2 commenced a search for the group that had fled and subsequently located them in scrub-land where they were arrested. Similarly to the first detention activity, Soldier 1 arrested and searched one person, Soldier 2 the other. VICPOL was advised of the arrests and responded, subsequently taking the arrested persons into their custody.

Use of handcuffs and blindfolds

11. As part of the detention process, Soldiers 1 and 2 applied handcuffs (cable ties) and blindfolds (hessian bags) to all four (4) persons arrested.

The removal of clothing

12. Soldier 1 was responsible for the arrest and search of two (2) persons. As part of the search procedure he removed each persons trousers by cutting them with a pocket knife in order for a more detailed search to be conducted. This action was required because of resistance displayed by the relevant arrested person during the initial part of the search procedure.

Legal considerations

13. Appointment as a member of the ADF provides a person with specific powers that are relevant to the arrest of persons reasonably suspected of trespassing on Defence premises.¹ However, even if a power his held, it must be exercised in a manner that is appropriate and reasonable in the circumstances.

14. One of the primary matters for consideration as part of this Inquiry involves determining if SIAD members were exercising lawful powers when responding to the presence of persons within the SITF on the morning of 2 Oct 14. If it is found that SIAD members were acting unlawfully when they responded, issues surrounding the reasonableness of their actions do not arise as one cannot reasonably exercise a power if that power does not exist. However, if it is found they were acting lawfully when arresting and searching the arrested persons, the reasonableness of their actions must be considered.

15. A condition precedent for any action by SAID member's is determining whether the persons identified within the SITF on 2 Oct 14 were in fact trespassing on Commonwealth land at the time of the incident, and, if so, whether this action provided members of the SIAD

¹ e.g. Power of Arrest, Section 72P(2) *Defence Act 1903* (CTH).

with the power to arrest and subsequently search them. It is only if this condition precedent is established that the reasonableness of any actions taken by members of the SIAD becomes a live matter for consideration.

Power to arrest and search

16. Section 72P of the *Defence Act 1903* (Cth) ('the Act') provides ADF, and therefore SIAD, members with a specific legislative power to arrest persons for trespass offences however, there is no specific power of search provided in respect to any such persons who may be arrested.

17. [REDACTED]

18. [REDACTED]

a. [REDACTED]

b. [REDACTED]

c. [REDACTED]

19. [REDACTED] the SIAD members had the power to arrest and search persons associated with the SIPC found trespassing on Commonwealth land at the time of the incident. [REDACTED]

Reasonableness of the arrest and search

20. In determining whether the actions taken by members of the SIAD were reasonable in the circumstances, their actions have been assessed to determine if they are 'devoid of any plausible justification', or ones for which 'no logical basis can be discerned'.

21. At the time of the incident SIAD members were not aware whether they were dealing with mere 'non-violent protesters', persons who were exploiting the cover provided by the actions of the SIPC or members of a foreign intelligence service.

22. Prior to the incident, on 23 Sep 14, members of VICPOL and the AFP were attacked and stabbed by a man in vicinity of the Endeavour Hills in Melbourne that was related to an ongoing law enforcement investigation related to counter-terrorism operations by law enforcement agencies. While not being a direct driver for their actions in dealing with arrested persons it is clear that this event, and the overall heightened security environment under the national threat assessment level and SAFEBASE 'Charlie', were all relevant factors influencing the state of mind of SIAD members during the incident.

² Attached at Annex E.

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23. In the circumstances it is considered reasonable that members of the SIAD would exercise increased vigilance at the time of the incident and that immediately assessing unidentified persons within the SITF perimeter as having benign intentions without detailed investigation would not have been a reasonable response in the circumstances.

24. The relevant SIAD members had considerable experience in arrest and detention procedures gained from operational experience and the procedures used during the arrest of persons on 2 Oct 14 relied on techniques proven to be effective. While detention procedures used in an operational environment may not be directly transferable to a non-operational environment, they cannot help but influence the procedures utilised by relevant SIAD members during any arrest and search process.

25. The arrested persons were actively resisting the arrest and search procedures that SIAD members were undertaking. SIAD members had identified themselves as members of the ADF, had placed the relevant persons under arrest, had a reasonable belief that it was necessary to search the arrested persons and used a minimum of force to do so.

26. The action of arrest always has the potential to be considered behaviour that may give rise to a feeling of offence in the arrested person. It is not unusual for the process of arrest to be accompanied by the use of intimidating language in an attempt to impose the will of arresting officers on the subjects of any arrest. The blindfolding and searching of arrested persons, while no doubt confronting for them, was done in a manner that did not cause any significant injury to them, was not done in a public area, was conducted by persons of the same sex, did not involve invasive internal body search procedures and was undertaken using the minimum force necessary in the circumstances.

27. On the balance of probabilities it is found that the arrest and search procedures applied by members of the SIAD were initiated in an environment where they did not know the intentions of the arrested persons, their likely response to being confronted by ADF members, to maintain the protected identity status (PIS) of SIAD members and to ensure that arrested persons did not have any weapons or other offensive items in their possession.

28. It is found that the actions taken by members of the SIAD were based on logical decision-making and were reasonable in the circumstances.

Perception of response

29. One of the primary aims of the SIPC is to generate media coverage for their activities and, as far as possible, generate media reporting that leads to criticism of ADF activities.

30. While the actions of the members of the SIAD were lawful and reasonable in the circumstances, they had the effect of providing a platform for members of the SIPC to generate media interest in the incident and provide an avenue for others to generate adverse media coverage related to the ADF.

31. The blindfolding of arrested persons and the removal of clothing by members of the SIAD, while justifiable in the circumstances, has the potential to provide for uniformed comment and criticism to be levelled at Defence.

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32. Regardless of the appropriateness of any response to the incursion of the SITF perimeter, a perception may exist that the response from ADF members was “heavy handed”. This was certainly the views of experienced senior officers interviewed during the Inquiry ([REDACTED] and [REDACTED]). In the circumstances, it is considered that this perception is justified.

Responsibility for response to the incident

33. Primacy of response to any SIPC protest activities was the responsibility of VICPOL and this COA was confirmed with CIVPOL elements who attended planning/coordination meetings conducted on 8 Aug 14, 2 Sep 14 and 24 Sep 14 in preparation for the 2014 SPIC. Notwithstanding this being the intended response, SIAD members were required to assist in providing security to ADF facilities located at the northern end of the SITF.

34. CIVPOL elements are the appropriate elements to effect arrests for trespass however, should any ADF member have to respond to a trespass situation they should be accompanied by elements of CIVPOL during any response.

Legislative amendments to the Act

35. [REDACTED] it is found that the members of the SIAD had the power to search persons arrested at the SITF on 2 Oct 14.

36. Notwithstanding the finding that the SIAD members had a power to search arrested persons, such a power is an ‘incidental power’ that exists under section 72P of the Act. The common law position is always open to interpretation by a court of competent jurisdiction and, should such a court not agree that the ‘incidental power’ to search exists, search actions that are necessary and undertaken in good faith by ADF members may still be found to be unlawful, exposing both them, and Defence, to possible litigation.

37. To remove doubt it is considered appropriate that the common law position, [REDACTED] be established in legislation.

Powers of arrest and search documentation

38. A document titled, ‘*Powers of Arrest and Search*’³ was provided by [REDACTED] Soldier 1 to all members of the SIAD and it purports to summarises the powers that are held by members of the ADF concerning a person found to be trespassing on Commonwealth land. The genesis of the document was explored at interview with the [REDACTED] and it was confirmed that this document does not form part of [REDACTED] and appears to be a SIAD locally produced document.

39. [REDACTED], Standing Orders, Volume 4 “Security” contain an Annex that identifies the “*Legal Powers of ADF members conducting duties such as guard, sentry, watchman or escort*”.⁴ This Annex makes reference to, and provides some explanation of, the powers of arrest held by members of the ADF under the Act. It also makes reference to the powers of search that are purportedly held by members of the ADF in certain circumstances. It is

³ See Enclosure 3, Tab A.

⁴ See Enclosure 3, Tab B.

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unclear whether the contents of the Annex were reviewed for accuracy by a legal officer prior to it being enacted.⁵

40. The document titled, '*Powers of Arrest and Search*' should be removed from distribution [REDACTED] and not relied upon. Annex G [REDACTED] Standing Orders, Volume 4 "Security" should be reviewed by an appropriately qualified legal officer and, subject to their advice, amended and/or reissued.

Preventing future incidents

At the SITF

41. Based on the previous behaviours of the SIPC it is likely that they will again protest at the SITF in 2015 (and probably later). In such circumstances, even if there is an increased CIVPOL and contracted security presence, it is still possible that members of the SIAD may have involvement with SIPC members who trespass onto the SITF. To be prepared for any such possible SITF-specific encounters, [REDACTED] a set of SOPs to address dealing with the arrest of unauthorised persons found on the SITF.

At other defence sites

42. Regardless of whether legislative amendments are made to clarify the powers of arrest and search that ADF members have, generic SOPs should be developed that address the 'on the ground' issues associated with the arrest and search of unauthorised persons found on Defence premises. These SOPs should take into account the existing legislative and common law provisions, and issues identified in this Report.

43. In order to remove, as far as possible, circumstances that are attractive to media outlets reporting on any future responses to incursions at defence facilities consideration should be given to ensuring SOPs:

- a. do not require the removal of clothing to effect a search of any persons placed under arrest by ADF members;
- b. do not require the application of blindfolds/hoods to any persons arrested; and
- c. ensure that CIVPOL elements are present with any ADF members undertaking arrest activities.

Findings and Recommendations

44. Tables 1 and 2 on the following pages detail the Inquiry's findings and recommendations respectively.

⁵ Enclosure 3, Tab C; Email from [REDACTED] dated 16 Dec 14 at 1408 hrs.

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Table 1 – Findings of the Inquiry

Finding	Para in Report	Finding	Decision / Comment
1	168-193	The arrested persons were trespassing on defence premises, namely the SITF, on 2 Oct 14	
2	168-193	Members of the SIAD had reasonable grounds to believe that persons located at the SITF on 2 Oct 14 may have committed an offence against section 72P and/or section 82 of the Act.	
3	168-193	It was reasonable in the circumstances for members of the SIAD to arrest such persons.	
4	194-195	The hand over of arrested persons from the control of the SIAD members to elements of VICPOL occurred as soon as reasonably practicable in the circumstances and complied with the requirements of section 72K of the <i>Defence Act 1903</i> (Cth).	
5	201-203	The arrested persons committed the act of trespass when they entered the SITF and none of the recognised defences to trespass are available.	
6	204-206	Members of the SIAD had the authority to conduct a citizen's arrest on the persons they identified within the boundaries of the SITF on 2 Oct 14.	
7	207-217	Members of the SIAD had the power to search persons they arrested at the SITF on 2 Oct 14.	
8	218-222	The conduct of a search of the arrested persons by members of the SIAD was necessary in the circumstances.	
9	252-254	The arrest the persons found within the SITF by [REDACTED] Soldiers 1 and 2 was reasonable in the circumstances.	
10	255-260	The use of blindfolds on arrested persons was reasonable in the circumstances.	
11	265-269	The use of handcuffs to restrain arrested protesters was reasonable in the circumstances.	
12	270-280	The search of the arrested person was reasonable in the circumstances.	
13	316-325	The allegations of mistreatment made by the arrested persons are not able to be substantiated.	

Table 2 – Recommendations of the Inquiry

Serial	Inquiry Officer Recommendation	Decision	Implementation Responsibility and Comment
1	A senior member of the ██████████ be responsible for engagement with VICPOL and civilian security elements located at the SITF to ensure that appropriate resources are provided to deal with any incursion to the facility.	Agreed/ Not agreed	
2	Section 72P of the <i>Defence Act 1903</i> (Cth) be amended to provide ADF members with a specific power of arrest, restraint and search of persons, and the seizure of offensive items.	Agreed/ Not agreed	
3	As part of annual force preservation training, all ADF members are advised of their powers under Section 72P of the <i>Defence Act 1903</i> (Cth).	Agreed/ Not agreed	
4	That planning for a response to any future breaches of the SITF perimeter should be developed to ensure that ADF responses do not require the application of blindfolds/hoods to any persons arrested by ADF members.	Agreed/ Not agreed	
5	██████████ detailed SOPs: <ul style="list-style-type: none"> • that address relevant issues associated with the arrest of persons found to be on the SITF without authorisation; and • are assessed by a suitably qualified legal officer prior to being adopted ██████████ 	Agreed/ Not agreed	
6	The ADF centrally develop SOPs that address generic issues associated with the arrest of persons found to be on the Defence premises without authorisation and these SOPs are promulgated.	Agreed/ Not agreed	
7	The SIAD document titled, <i>'Powers of Arrest and Search'</i> should: <ul style="list-style-type: none"> • not be used, or relied upon, for providing guidance or instructions to ADF members exercising any powers of arrest or search; and • be removed from distribution ██████████ 	Agreed/ Not agreed	
8	The content ██████████, Standing Orders, Volume 4 "Security", Annex G should be reviewed by an appropriately qualified legal officer and, subject to their advice, amended and/or reissued.	Agreed/ Not agreed	
9	Should any formal complaint of mistreatment be made by any of the arrested persons that allege possible criminal conduct by any SIAD member such complaint should be referred to the ADFIS and/or CIVPOL for investigation.	Agreed/ Not agreed	

REFERENCES

- A. Army Administrative Inquiries Cell *Administrative Instruction - Inquiry 110086 – Trespass Incident at Swan Island*.
- B. ADFP 06.1.4 *Administrative Inquiries Manual* (Edition 2) Chapter 6 (Inquiry Officer Inquiries).
- C. ADFP 06.1.3 *Guide to Administrative Decision Making*.
- D. DI (G) ADMIN 67–2, *Quick Assessment*.
- E. DI(A) OPS 68–1 - *Military Risk Management*.
- F. Defence Security Manual *Part 2:24 Protected identity status*.
- G. [REDACTED] Directive 03/2010 – Operational Security.
- H. Defence Security Manual.

45. The references applied to this Inquiry were current at the time of the events that are the subject of this Inquiry. Due to the size of Refs C and H they have not been attached to this Report. They are available at <http://intranet.defence.gov.au/home/documents/adfdocs/ADFP/adfp06.1.3.htm> and <http://intranet.defence.gov.au/dsa/dsm/chm/> respectively.

46. All other references are included in Enclosure 1.

INQUIRY CONDUCT AND ADMINISTRATION

Appointment and Terms of Reference

47. The Instrument of Appointment and Terms of Reference (TOR)⁶ were received by the Inquiry Officer (IO) on 13 Oct 14 with a report due-by date of 28 Nov 14.

48. By the Instrument of Appointment CAPT John Tracey, AALC was appointed as Inquiry Assistant for the Inquiry. CAPT Tracey assisted the IO by gathering evidence, attending interviews with witnesses and in other respects.

Scoping and planning

49. An Inquiry Plan was submitted to the Appointing Officer on 23 Oct 14 and approved. On 20 Nov 14 a request to the extension date until 30 Jan 15 was sought. This extension was sought in order to facilitate the involvement of the persons arrested by members of the SIAD in the Inquiry. The request for extension was subsequently approved by the AO.

50. The Inquiry Plan and other correspondence with the Appointing Officer (AO) are included at Enclosure 2.

Progress reports

51. Progress reports were submitted in accordance with Ref A on 24 Oct 14, 31 Oct 14, 9 Nov 14, 20 Nov 14, 1 Dec 14 and 22 Dec 14 and are included at Enclosure 2.

⁶ Annex A.

Conduct of the inquiry

52. The Inquiry was conducted in private, in accordance with Regulation 72 of the *Defence (Inquiry) Regulations*. The Inquiry was conducted in accordance with the requirements of ADFP 06.1.4 *Administrative Inquiries Manual* (Edition 2) Chapter 6 (Inquiry Officer Inquiries).

Taking of evidence

53. No evidence was taken on oath or affirmation, in accordance with Regulation 73 of the *Defence (Inquiry) Regulations*.

Witness expenses

54. No claims for witness expenses were submitted.

Administrative support

55. The Inquiry Administrative Instruction is at Ref A.⁷ The following support was provided by the Army Administrative Inquiries Cell, AHQ (AAIC):

- a. Administrative support to IO and IA;
- b. Tracking of the Inquiry on ADFAITS;
- c. Processing of interviews for transcription;
- d. Legal review of draft report; and
- e. ARTS for the IO and IA.

Witnesses

56. Witness statements, transcripts of interview and responses to follow up questions are attached at Annex B in alphabetical order.

57. A number of persons not directly involved in the incident, but with knowledge relevant to the matters under Inquiry, were also interviewed to gather background information relevant to the Inquiry. In such circumstances, formal witness interviews were not conducted.

58. The members of the SIAD involved in the incident, and members of their chain of command are located at geographically diverse locations. All members of the SIAD were interviewed in person, save for Soldier 2 who was absent on approved leave during the interview stage of the Inquiry. He was interviewed by telephone.

59. A senior member of the SIPC, [REDACTED] was contacted by the IO on 30 Oct 14 in order to make arrangements to interview the persons associated with the SIPC that were detained by ADF members on 2 Oct 14. [REDACTED] was requested to provide the IO with the contact details of the four (4) arrested persons or, alternatively, provide the IO's contact

⁷ Enclosure 1.

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details to these persons so they could contact the Inquiry. [REDACTED] was again contacted by the IO on 6 Nov 14 by telephone and [REDACTED] confirmed that the four (4) arrested persons had been contacted by [REDACTED] and advised that the IO was providing them an opportunity to be involved in the Inquiry and provide evidence related to the incident.

60. [REDACTED] Person 1 one of the arrested persons, was spoken to by telephone on two (2) occasions by the IO (30 Oct 14 and 6 Nov 14). On 30 Oct 14 he was invited to participate in an interview with the Inquiry.⁸ [REDACTED] Person 1 had not made any further contact with the IO and was subsequently telephoned again on 6 Nov 14 and advised that the Inquiry has a deadline and if he wished to participate he should make the necessary arrangements to do so. He indicated that he wanted to be involved in the Inquiry.

61. On 13 Nov 14, email communication was received from [REDACTED] that stated he had been requested by the four (4) arrested persons to liaise with the IO regarding them providing witness statements to the Inquiry and participating in interviews with the IO.⁹

62. On 28 Nov 14, [REDACTED] advised the IO that the arrested persons would not participate in face-to-face interviews but would provide statements to the Inquiry.¹⁰

63. On 12 Dec 14, statements from the four (4) arrested persons were provided to the IO by [REDACTED]¹¹ These statements are included in Annex B.

64. During the conduct of the Inquiry seven (7) persons were interviewed, four (4) written statements were received and two (2) persons with specific knowledge of the infrastructure and security arrangements at the SITF were consulted. Subsequent to Statements being provided to the Inquiry by the arrested persons it was necessary to seek detailed responses to allegations made by the arrested persons. Accordingly, supplementary questions were put to [REDACTED] Soldiers 1, 2 and 3 on 15 Jan 15 and their written responses considered. The relevant persons involved are identified in the following table.

PMKeyS	Name	Involvement	Current Unit	Method of Interview & Date	
				Telephone (T), in Person (P) or Written Response (WR).	Date
[REDACTED]	[REDACTED] Soldier 1	Witness	SIAD	P WR	5 Nov 14 16 Jan 15
	[REDACTED] Soldier 2	Witness	SIAD	T WR	11 Nov 14 20 Jan 15
	[REDACTED]	Witness	SIAD	P	5 Nov 14
	[REDACTED]	Witness	SIAD	P	5 Nov 14
	[REDACTED] Soldier 3	Witness	SIAD	P WR	6 Nov 14 16 Jan 15
	[REDACTED]	Witness	SOC	T	11 Nov 14
	[REDACTED]				

⁸ Enclosure 3, Tab D – Email to [REDACTED] Person 1 dated 30 Oct 14 at 1435 hrs.

⁹ Enclosure 3, Tab E – Email from [REDACTED] dated 13 Nov 14 at 1003 hrs.

¹⁰ Enclosure 3, Tab F – Email from [REDACTED] dated 28 Nov 14 at 0819 hrs.

¹¹ Enclosure 3, Tab G – Email from [REDACTED] dated 12 Dec 14 at 1911 hrs.

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[REDACTED]	[REDACTED]	Witness	DC, SOC	P	10 Nov 14
[REDACTED]	[REDACTED]	Interested Party	[REDACTED]	P	5 Nov 14
[REDACTED]	[REDACTED]	Interested Party	[REDACTED]	P	5 Nov 14
N/A	Person 1	Arrested Protester	SIPC	Written Statement	12 Dec 14
N/A	Person 2	Arrested Protester	SIPC	Written Statement	12 Dec 14
N/A	Person 4	Arrested Protester	SIPC	Written Statement	12 Dec 14
N/A	Person 3	Arrested Protester	SIPC	Written Statement	12 Dec 14

Right and obligations, privacy, independence and impartiality, etc

65. Each witness interviewed was provided with the following documents (at Annex C):

- a. Instrument of Appointment;
- b. Privacy Notice;
- c. Statement of Independence and Impartiality;
- d. The Rights and Obligations of a Witness to an Inquiry;
- e. The Terms of Reference applicable to that witness; and
- f. A template acknowledgement form to sign and return.

66. The documents identified in paragraph 65 were provided to [REDACTED] for on-forwarding to the arrested persons and he confirmed that he had done this. The arrested persons did not return a signed acknowledgement form to the IO.

67. Each witness interviewed acknowledged the receipt, and understanding, of the documents listed in paragraph 65 prior to being interviewed. Documentation confirming this is included in Annex B with other documents relating to that witness's evidence.

Report terminology

68. The four (4) persons associated with the SIPC who were arrested and searched by members of the SIAD are, for ease of reference, referred to as 'arrested persons' in this Report.

Legal review

69. The draft Inquiry Officer's report was subjected to legal review prior to being finalised and submitted. The legal reviewer was appointed by the Director AAIC, AHQ. [REDACTED]

Quick assessment

70. A QA into the incident was completed by [REDACTED] on 3 Oct 14.¹²

Methodology and standard of proof

71. The methodology adopted was:

- a. the identification and a thorough review of relevant documents relating to the issues under inquiry;
- b. the identification and interview of personnel considered relevant to the issues under inquiry; and
- c. the requirements of ADFP 06.1.4 *Administrative Inquiries Manual* Chapter 6.

72. Evidence was assessed cognisant of the requirements of ADFP 06.1.3 *Administrative Decision Making* (Chapter 3) and ADFP 06.1.4 dealing with how evidence is weighed and considered. The findings throughout the report are supported by relevant evidence and are reasonable decisions supported by sufficient and logical reasoning. All relevant matters and information have been taken into consideration. Where necessary, additional information was obtained and considered before reaching conclusions and the requirement to remain open to obtaining additional information and considering this remained throughout the conduct of the inquiry.

73. Regard was had to the standard of proof being ‘on the balance of probabilities’ and on the basis of reliable evidence. Findings were only made where reasonably satisfied that a particular fact is more likely than not to be true. The probative value of evidence was considered and the seriousness of the matters, and the gravity of any consequences that may flow from any findings, was considered. More weight was provided to documentary evidence than oral statements, and more weight to direct evidence than hearsay evidence. Hearsay evidence was not relied upon where matters involved potentially serious wrongdoing, were inherently unlikely, or had the potential for grave consequences. The credibility of all evidence was weighed prior to it being accepted.

Provision of support to complainants and respondent

74. At interview, all ADF witnesses were questioned concerning the availability of supports services to them. All confirmed that appropriate arrangements were in place.

TERMS OF REFERENCE

75. Pursuant to the Instrument of Appointment dated 10 Oct 14, issued by the AO, the following Terms of Reference (TOR) were provided concerning the trespass incident at Swan Island on 2 Oct 14:

Actions prior to 2 Oct 14

76. How did it become known, and by whom, that members of the Swan Island Peace Convergence (SIPC) would be conducting their annual protest during the period 27 Sep 14 to 3 Oct 14.

¹² Annex D.

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77. Once it became known that SIPC would be conducting their annual protest during the period 27 Sep 14 to 3 Oct 14, what preparatory actions were taken by the Swan Island Army Detachment (SIAD) command including:

- a. Meetings/briefing conducted involving SIAD command and/or CIVPOL, including who attended those meetings/briefings.
- b. Details of any security plan including the plan for 'actions on' in the event that the perimeter is breached:
- c. Details of briefings, training or orders provided to defence members at SIAD including those who were to form part of any necessary response to protest activities. Who provided any briefings, training or orders?
- d. What advice (including advice from [REDACTED] and/or specialist advice) was requested/obtained during any of the above preparatory actions? Who requested the advice? Who provided any advice and content of the advice?
- e. The extent to which any assessment included a review of actions that occurred in SIPC's protest actions in 2013?

Incident of 2 Oct 14

78. Circumstances as to how, when (time) and by whom did it become known that protestors were in the vicinity of SIAD and/or that protestors had breached the perimeter.

79. What immediate actions were taken, and by whom, upon notification that protestors were in the vicinity of SIAD and/or that protestors had breached the perimeter? What was CIVPOL's involvement at this time? Were CIVPOL notified? If so, when and how?

80. Circumstances surrounding the discovery and identification of protestors inside the perimeter including, at each point that protestors were discovered/identified, the following:

- a. How, when, and who discovered the protestors, how many protestors were discovered/identified, where the protestors were located when discovered, what were the actions of protestors prior to and upon discovery?
- b. Actions taken upon discovery of protestors inside the perimeter including:
 - (1) The nature and circumstances of the arrest, search and detention of protestors including behaviour of the protestors during arrest, search and detention. What was said to the protestors immediately prior to and during the process of arrest and during the conduct of searches/detention?
 - (2) The nature and circumstances surrounding the use of any restraints and/or blindfolds/hoods.
 - (3) How, when and who briefed SIAD command and CIVPOL of the discovery of protestors and any arrest, search and detention.

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- (4) The nature and circumstances of the handover/takeover of protestors to CIVPOL.
- c. Actions taken by SIAD command/CIVPOL when informed of the discovery and arrest of protestors inside the perimeter

Context management issues

81. Whether there were other issues surrounding the operational or work environment which may have contributed to the alleged incident on 2 Oct 14.
82. Whether there was any failure on the part of any person to prevent the alleged incident on 2 Oct 14.
83. Whether the conduct of any person in reporting or not reporting the actions taken as a result of the incident has been inappropriate and whether there was any knowledge of such conduct by the supervisors or the superiors of that person and, if so, to what degree.
84. Whether relevant members have been provided with access to adequate support services (such as counselling, medical or legal assistance).
85. Whether there are any systematic issues highlighted as a result of alleged incidents on 2 Oct 14 which should be addressed at a unit, single Service or Australian Defence Force level.

EVIDENCE

- a. Records of Interview.
- b. Statements provided by the four (4) arrested persons.
- c. Response to supplementary questions.¹³
- d. Evidentiary documents – Enclosure 3.
- e. 1 x QA undertaken by [REDACTED]

BACKGROUND TO THE INQUIRY

Swan Island Training Facility

86. Swan Island is a low lying island between Port Phillip and Swan Bay. The Swan Island Training Facility (SITF) is located adjacent to Queenscliff, Victoria, on the central and eastern part of Swan Island, approximately 105 kilometres south west of the Melbourne CBD. It is used primarily as a training area for the Department of Defence.

87. [REDACTED]

88. It was clearly accepted during the conduct of the *2008 Swan Island Commission of Inquiry*¹⁴ that Commonwealth activities at Swan Island are very sensitive in nature, are directly related to national security and the need to protect these national security interests is

¹³ Annex B, [REDACTED] Soldiers 1, 2 and 3 – Supplementary Questions.

¹⁴ COI into the deaths of ADF members in an incident at Swan Island.

imperative. This situation remains unchanged and note of the status of the SITF was taken into account for purposes relevant to the matters under inquiry.

Swan Island Peace Convergence

What is it?

89. For the past five (5) years, peace activists have gathered at Queenscliff at the entry to the SITF for a week of protesting against ADF participation in overseas military operations. This gathering of activists is known as the 'convergence'.

Who are they?

90. From information that is publically available it is assessed that attendees at the convergence are comprised of a range of persons, including 'experienced' peace activists with a history of protesting against ADF activities, through to less experienced persons with varying degrees of commitment to the aims of the convergence. The key organisers of the SIPC are [REDACTED] and [REDACTED].

Why do they converge at the SITF?

91. The activists believe that the SITF is a key training facility for members of the [REDACTED]. One of the primary aims of the convergence is to draw attention to AUS participation in military operations with coalition partners and generate adverse publicity for [REDACTED] involvement in, and support, of military operations. The aims and activities of the SIPC are readily accessible from open source material.¹⁵

92. The SIPC is widely advertised and promoted within the 'peace movement' in Australia, has been conducted on an annual basis for at least the last five (5) years and involves peace activists gathering at the entry point to the SITF, attempting to blockade the bridge that leads to the facility and disrupt activities conducted there. The 'convergences' are conducted for an average period of one (1) week and also involve other related activities such as:

- a. training in non-violent protesting;
- b. engagement with the Queenscliff community;
- c. conducting 'peace vigils'; and
- d. participative workshops focusing on Australia's role in operations in the MEAO.¹⁶

93. Attendees at the SIPC have a history of trespassing onto the SITF, taking photographs of infrastructure located at the facility, interfering with equipment and publishing their 'breaches' of security to the general public via the SIPC web site.¹⁷

¹⁵ <http://swanislandpeace.org/convergence-2013/past-actions-at-swan-island/> accessed at 14 Nov 14.

¹⁶ Swan Island Peace Convergence; <http://swanislandpeace.org/> accessed on 20 October 2014.

¹⁷ <http://www.swanislandpeace.org/>.

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Pre 2014 activities

94. During the period 2010 – 2013, peace activists converged at the SITF each year for five (5) day periods, with the intention of blockading the facility. A number of incursions into the SITF occurred:

- a. 2013 - approximately fifteen (15) activists entered the SITF and were arrested by VICPOL.¹⁸
- b. 2012 - No incursions onto the facility were detected and no arrests by VICPOL were made.
- c. 2011 - No incursions onto the facility were detected however, ten (10) persons associated with the convergence were arrested by VICPOL for a range of protest/public order related offences.
- d. 2010 - On 31 Mar 10, four (4) peace activists (known as the *Bonhoeffer Peace Collective*) entered the SITF by swimming from Queenscliff to Swan Island. Two (2) members of this group interfered with ADF property by attempting to disable a satellite dish located within the facility and published photographs of infrastructure located at the facility. These persons were arrested for trespass by VICPOL and dealt with by the civilian courts. In June, nine (9) activists were arrested by VICPOL for protest related offences while attempting to blockade entry to the SITF.

The 2014 convergence

95. During the period 27 Sep to 3 Oct 14, civilian personnel associated with the SIPC conducted their annual protest against the operation of the Swan Island facility.

96. Two of the members of the 'Bonhoeffer' group that trespassed onto the SITF in 2010, [REDACTED] and [REDACTED] were involved in organising the 2014 SIPC and are now acting as the 'representatives' of the four (4) persons arrested by SIAD members on 2 Oct 14 in their dealings with the Inquiry.

Media reporting of the 2014 incident

97. The arrest of the four (4) persons by members of the SIAD on 2 Oct 14 was reported widely in the media, with allegations of mistreatment during the detention process being made by the four (4) arrested persons.

Background conclusions

98. Based on evidence provided by members of the SIPC, the SIAD and [REDACTED], it is uncontroversial that on the morning of 2 Oct 14, eight (8) members of the SIPC gained access to the SITF. Based on evidence provided to the Inquiry it is believed that these persons gained access to the SITF by swimming the short distance from the Queenscliff Boat Harbour to Swan Island¹⁹, moved north by foot along the boundary fence²⁰ and entered the SITF. These persons were not authorised to enter the SITF.

¹⁸ *The Australian*, <http://www.theaustralian.com.au/national-affairs/defence/protesters-break-into-victorian-swan-island-sas-training-base/story-e6frg8yo-1226726676128> accessed on 16 Nov 14.

¹⁹ Annex D, QA [REDACTED] statement dated 3 Oct 2014; Annex B, [REDACTED] statement.

²⁰ [REDACTED]

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99. Further, it is uncontroversial that four (4) of the eight (8) members associated with the SIPC that had gained access to the SITF were initially detained by members of the SIAD and then handed over to VICPOL for further processing. The four (4) members of the SIPC detained by members of the SIAD were, Messers:

- a. Person 1
- b. Person 2
- c. Person 4; and
- d. Person 3.²¹

100. The other four (4) protesters were detained at the SITF by members of VICPOL and their identity and treatment falls outside the TOR of the Inquiry.

Protesters version of the incident

101. In the early morning of 2 Oct 14, eight (8) protesters associated with the SIPC gained access to Swan Island where they then split into two groups of four (4) persons.

102. One group was identified and detained by members of VICPOL. The other group of four (4) persons split in two sub-groups of two (2) persons each. These four (4) persons were subsequently apprehended by ADF personnel.

103. A review of various media reports, public statements²² and statements provided to the Inquiry by the arrested persons²³ reveal that during the detention/arrest process these persons allege that:

- a. they were forcibly stripped naked, handcuffed, struck on the face and choked;
- b. they had some of their clothing cut off with knives;
- c. hessian bags were placed over their heads and they were told “*welcome to the bag motherfucker*” and asked “*do you want to go for a swim*” before their pants were removed and then were dragged naked across the ground;
- d. during the incident ADF members stood on their heads and backs causing injury and said to them, “*If you move we will kick you in the face*”;
- e. one of the arrested persons (Person 1) was threatened with being raped if he did not answer questions being put to him;
- f. they were dragged, picked up and dropped on the ground when they didn’t respond to questions from ADF members; and
- g. alleged threats and assaults by ADF members only stopped when members of the VICPOL arrived on the scene.

Particulars of specific allegations

Person 1

104. Person 1 version of events relays that, “*We heard a car come screaming around the corner and two plain-clothed men jumped out and rushed towards us*”. When being approached by the ADF members, Person 1 says he had his hands in the air and was saying,

²¹ Enclosure 3, Tab E – Email from Person 1 to IO dated 13 Nov 14 at 1003 hrs.

²² For example see, Enclosure 3, Tab N - ABC News, <http://www.abc.net.au/news/2014-10-09/adf-to-probe-claims-of-treatment-of-anti-war-protesters/5802818> accessed at 30 Oct 14.

²³ Included in Annex B.

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"I'm a non-violent protester and I won't be resisting". He says he was then tackled to the ground, handcuffed using cable ties and had a hessian bag placed over his head. During the incident he states that ADF members said to him, *"Welcome to the bag, motherfucker"*.

105. During the incident he states that he was *"repeatedly slapped around the face and head with an open hand"*, threatened with being choked and threatened with rape²⁴. He states that he told the ADF members they were torturing him and was told by them, *"I don't give a fuck"*. He alleges that during the search procedure he had his pants and underwear pulled down by an ADF member and was dragged along the ground over to a pile of woodchips.

Person 2

106. Person 2 relates a similar version of events to that of Person 1 with the variation that as part of the search process his trousers were ripped or cut from ankle to waist by an ADF member using a knife. He states that soon after he was arrested and blindfolded he was told, *"welcome to the bag, motherfucker"* and he was told by an ADF member, *"the reason I'm stripping you is to make sure you're not a fucking terrorist and you haven't got any weapons on you"*.

Person 4

107. Person 4 has made no direct public statement concerning his version of events however, in his statement to the Inquiry he alleges that while handcuffed and blindfolded during the search procedure he had his trousers, *"ripped off, and then my underwear down to about my knees"*, had his head pushed, *"hard into the road"* and when he refused to disclose the number of persons trespassing on the SITF a person, *"pushed what I thought was his thumb into my ear causing pain."*

Person 3

108. Person 3's version of events is similar to that recounted by Person 4 however, he states that he was, *"hit numerous times on my head, my back...knead in the back a few times"*, had his trousers *"cut off me and pulled off"* and yelled at by an ADF member.

The Quick Assessment

109. The first stage in investigating the trespass incident at the SITF required that a Quick Assessment (QA) be conducted. A QA is not used to determine outcomes such as adverse findings, or to circumvent the need for further inquiry where such inquiry would otherwise be necessary. Once a QA has been completed, a commander must then decide what further inquiry, if any, is appropriate.²⁵

110. Recording and tracking of QAs is to be maintained at Unit level or in the relevant workplace and when the QA has been completed, a documented brief must be given to the commander who directed the QA.²⁶ In respect to the trespass incident at the SITF, a QA was undertaken by [REDACTED] and completed on 3 Oct 14. The QA report was provided to the [REDACTED] upon completion of the QA.

²⁴ *"I'll shove this stick up your arse"*

²⁵ ADFP 06.1.4 *Administrative Inquiries Manual, Chapter 4, Routine Inquiries*, para 4.2.

²⁶ Enclosure 1 - DI(G) ADMIN 67-2, *Quick Assessment*, para 12; 21.

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111. Any QA undertaken must be retained by the Unit as it may be required as part of any further review, inquiry or investigation.²⁷ The QA conducted by [REDACTED] and supporting documentation, was retained and provided to the Inquiry.²⁸

112. The QA undertaken by [REDACTED] has been reviewed and it is considered that it was conducted in a timely manner in accordance with current Defence policy and instructions.

ANALYSIS OF EVIDENCE

Date, time and place of incident/s

113. The incident involved the identification, detention and treatment of four the (4) persons associated with the SIPC arrested and searched by members of the SIAD.

114. Upon initial contact with elements of the SIAD, the four (4) persons suspected of trespassing at the SITF separated into two (2) groups of two (2) persons each. These sub-groups were subsequently detained by members of the SIAD.

115. The incident occurred on the morning of 2 Oct 14 and commenced at approximately 0645 hrs. All action was finalised at approximately 1400 hrs.²⁹

Environmental conditions

Terrain

116. Imagery of the incident sites and a viewing of those sites by the IO on 5 Nov 14 indicate that the site where the arrest of the 1st group of protesters occurred is an open grassed area adjacent to modern man-made structures and administrative buildings not unlike those found on any number of defence sites. The site where the 2nd group of protesters was arrested consists of low-lying coastal scrub and areas of saltmarsh. A sketch map of the relevant locations is included in Enclosure 3.³⁰

Weather

117. The weather conditions at the time of the incidents were somewhat overcast however it was dry.³¹

Visibility

118. The visibility conditions at the time of the incident were good and it is considered that the recollection of witnesses based on their visible observation of events was not adversely impacted by visibility factors.³²

²⁷ Enclosure 1 - DI(G) ADMIN 67-2, *Quick Assessment*, para 26.

²⁸ Attached at Annex D.

²⁹ QA dated 3 Oct 2014, para 6.

³⁰ Enclosure 3, Tab HI - Sketch map of SITF showing relevant locations.

³¹ Annex B, Soldier 1

Annex B, Soldier 1

Chain of Command

[Redacted]

119. [Redacted]

120. [Redacted]

121. [Redacted]

122. At interview [Redacted] confirmed that he was responsible for ordering [Redacted] undertake a QA into the incident and the QA report was provided on 3 Oct 14.³⁸

SIAD

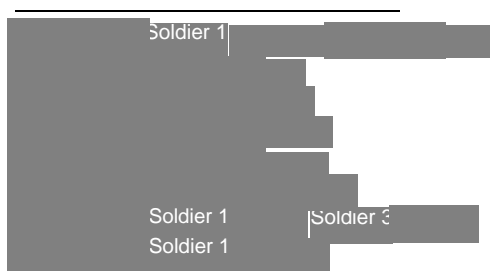
123. [Redacted]. The senior member of the SIAD is [Redacted] however, this position is currently unfilled and, at the time of the incident, [Redacted]. The OIC of the SIAD at the time of the incident was [Redacted] Soldier 1

124. Soldier 1 [Redacted] stated at interview that he had the ability to make day-to-day decisions related to the running of the SIAD, especially related to matters impacting on the effective operation of the facility.⁴⁰ Based on the information provided by [Redacted] Soldier 1 at interview it is considered that there is a degree of autonomy provided to the members of the SIAD however, this autonomy is exercised within defined organisational responsibilities and structures.

SIAD force dispositions and command and control

125. The members of the SIAD involved in the incident were:

- a. Soldier 1 [Redacted]
- b. Soldier 2 [Redacted]
- c. Soldier 3 [Redacted]
- d. [Redacted]
- e. [Redacted]



126. [Soldiers 2 and 3] were at all relevant times under the command of [Soldier 1] OIC, SIAD.⁴¹

127. [REDACTED]

Security level at the time of the incident

128. At the time of the incident, the SITF was operating under SAFEBASE Alert level 'Charlie', which specifies that "*sufficient indications exist that specific threat action is likely; however, no definite target or time of attack has been identified.*"⁴²

129. At the time of the incident the National Terrorism Alert Level had recently been increased to 'high'. The change in the alert level was based on government's concern about the increased likelihood of a terrorist attack in Australia, the increasing number of Australians working with, connected to, or inspired by terrorist groups and the increasing threat that such persons pose.⁴³

The incident – sequence of events

130. Eight (8) protesters associated with the SIPC entered the SITF on 2 Oct 14 where they split into two sub-groups of four persons. Media reports stated that when one group of four (4) persons took photos of themselves holding anti-war banners, they were apprehended by a group of plain-clothes Defence personnel.⁴⁴ This situation is supported by the statements provided by the four (4) arrested persons to the Inquiry.

131. It was confirmed at interview with relevant members of the SIAD that on the morning of 2 Oct 14, eight (8) persons associated with the SIPC gained access to the SITF. Four (4) of these persons were arrested by members of VICPOL without any direct involvement from the SIAD. The remaining four (4) persons were arrested by members of the SIAD and then handed over to elements of VICPOL for processing.

Initial contact

132. At approximately 0645 hrs on 2 Oct 14, a member of the SIAD ([Soldier 2]) was listening to commercial radio station 3AW. As a result of commentary made on the radio broadcast he became aware that persons associated with the SIPC had allegedly entered the SITF and were preparing to be interviewed on the radio. [Soldier 2] immediately alerted the OIC, SIAD ([Soldier 1]) of this situation. [Soldier 1] then alerted other members of the SIAD and VICPOL elements located at the SITF. SIAD elements then commenced vehicle

⁴¹ Annex B, [Soldier 1] [Soldier 3]

⁴² *Defence Security Manual*, Annex A to Part 2:3.

⁴³ <http://www.pm.gov.au/media/2014-09-12/national-terrorism-public-alert-level-raised-high> accessed at 2 Dec 14.

⁴⁴ See for example *Swan Island protesters claim they were hooded and stripped at ASIS base; Critics say 'dumb' to trespass in heightened security climate* at '<http://www.abc.net.au/news/2014-10-09/adf-to-probe-claims-of-treatment-of-anti-war-protesters/5802818>' accessed on 21 October 2014.

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mounted patrols to search for the persons associated with the SIPC suspected to be present on the SITF. [Redacted Soldier 3] was mounted in one motor vehicle, [Redacted Soldiers 1 and 2] in another.

133. [Redacted Soldier 3] identified four (4) persons walking along a formed road at the northern end of the SITF. These persons took no offensive action however they did separate into two (2) groups of two (2) persons each. Neither group actively attempted to flee from the vicinity in which they were located.⁴⁵

134. [Redacted Soldier 3] did not approach the four (4) identified persons but [Redacted] [Redacted Soldier 1]⁴⁶ [Redacted Soldiers 1 and 2] responded, arrived at the scene and exited their vehicle, and [Redacted Soldier 1] called on the identified persons to “stop”.⁴⁷ One group of two (2) persons then fled into scrub.⁴⁸

135. The first group of two (2) persons that had not fled the scene was detained by [Redacted Soldiers 1 and 2] in the vicinity of the initial contact area. The other group of two (2) persons in the scrub evaded detention at this stage.⁴⁹

136. Based on the version of events provided to the Inquiry by the arrested persons it is found that the first group of (2) persons comprised [Redacted Person 1] and [Redacted Person 2]. The second group of persons comprised [Redacted Person 3] and [Redacted Person 4].⁵⁰

Detention of the first group ([Redacted Person 1] and [Redacted Person 2])

137. The first group of two (2) persons was arrested - one (1) person by [Redacted Soldier 1] the other by [Redacted Soldier 2]. Upon order from [Redacted Soldier 1] [Redacted Soldier 3] moved forward and provided ‘Person Under Constraint’ (PUC) kits⁵¹ to [Redacted Soldiers 1 and 2]. The arrested persons were then secured using cable tie handcuffs and blindfolds from the PUC kits, and searched.

138. The only significant variation between the arrest and search process used by [Redacted Soldiers 1 and 2] is that [Redacted Soldier 2] applied cable tie restraints to the legs of the person he arrested and [Redacted Soldier 1] removed the pants of the person he arrested⁵² as part of the search procedure.

139. Once the arrested persons had been secured, VICPOL elements were notified of the arrests and responded. The two (2) arrested persons were left under the control of [Redacted Soldier 3] while [Redacted Soldiers 1 and 2] pursued the group of two (2) persons who had fled into the scrub. [Redacted Soldier 3] maintained control of the arrested persons until VICPOL elements arrived to take charge of them.

Detention of the second group ([Redacted Person 3] and [Redacted Person 4])

140. Upon leaving the scene of the first arrests, [Redacted Soldiers 1 and 2] commenced a dismounted search of scrub-land for the group of two (2) persons who had fled. Once handover of the first group of arrested persons to VICPOL had been completed, [Redacted Soldier 3]

⁴⁵ [Redacted Soldier 3]
[Redacted Soldier 3]
[Redacted Soldier 2]
[Redacted Soldier 3]
[Redacted Soldier 2]
[Redacted Person 2] [Redacted Person 1] [Redacted Person 3] and [Redacted Person 4] statements.

⁵¹ Containing cable tie handcuffs and hessian bag blindfolds.

⁵² [Redacted Soldier 1]

Risk Management

General

147. Calculated risk-taking is a key aspect of Army's philosophy and Army personnel must be adept at identifying and managing risks. To achieve this, Army supports a risk management culture that is fundamental to Army's core business and in achieving mission success.

148. Military Risk Management (MRM) is the process through which Army has developed a proactive, risk-aware and adaptive culture. Its purpose is to empower personnel to understand risk so they can focus on achieving objectives, exploiting opportunities and identifying and managing key threats and hazards. In simple terms, MRM is a systematic process of threat identification, assessment and control, which seeks to prevent or minimise the potential consequences to military activities.⁶³

Risk appreciation

149. Risk appreciation is the overall process of risk identification, risk analysis, risk evaluation and risk treatment. Risks are identified and assessed, and appropriate control measures implemented to reduce risks to tolerated thresholds. During an activity, risks need to be monitored and control measures adjusted to ensure that risk levels remain within tolerances.⁶⁴

Previous relevant risk events

150. Based on evidence provided to the Inquiry from members of the SIAD and their COC, and a review of open source material, it is considered that it was known that persons associated with the SIPC had previously participated in activities that presented a risk profile that suggested they may undertake activities that could compromise the security of the SITF. At interview ██████████ confirmed that the previous activities of the SIPC, in particular their previous breaches of the perimeter at the SITF, was known to the COC.⁶⁵ At interview members of the SIAD made particular reference to being aware of previous activities of the SIPC, in particular, their incursion onto the SITF in 2010 and 2013.⁶⁶

151. During the period 2010 – 2013, the SIPC had converged at the SITF and had breached the perimeter of the facility on at least two (2) previous occasions. Accordingly, it was considered reasonable in the circumstances that risk mitigation procedures be established to deal with the proposed 2014 SIPC.

Chain of Command Preparation

152. Internal and external communication and consultation underpins effective risk management and plans for communication and consultation should be developed at an early stage.

⁶³ Enclosure 1, DI(A) OPS 68-1, *Military Risk Management*, para 1-6.

⁶⁴ Enclosure 1, DI(A) OPS 68-1, *Military Risk Management*, para 38-43.

██████████ Soldier 1

██████████ Soldier 2

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153. As part of preparing for the SIPC activities, it was confirmed at interview with Soldier 1 [REDACTED] that three planning/coordination meetings were conducted in preparation for dealing with the 2014 protests by the SIPC. These meetings were conducted in location at Swan Island on 8 Aug 14, 2 Sep14 and 24 Sep 14. At these meetings elements of the SIAD, VICPOL, civilian security contractors [REDACTED] participated.⁶⁷

154. Soldier 1 [REDACTED] stated at interview that he backbriefed his COC on preparations that were made to deal with security issues related to the activities of the 2014 SIPC. At interview he produced a series of email correspondence between him and his direct COC that confirmed this communication.⁷⁰ Due to the security classification of this communication it has not been included in this report.

155. At interview [REDACTED] stated that the SIAD had established a relationship with elements of VICPOL in respect to dealing with security incidents at the SITF however, he was not aware of the details of any plan developed by the security agencies to address a breach of the SITF perimeter.⁷¹ At interview it was confirmed with Soldiers 1, 3 [REDACTED] that elements of VICPOL had attended the planning/coordination meetings conducted in preparation for the 2014 SIPC.⁷²

156. The outcome of the planning meetings conducted in preparation of the 2014 SIPC was not formally backbriefed to members of the SIAD by Soldier 1 [REDACTED] however, at interview SIAD members indicated they understood the arrangements in place to deal with the 2014 SIPC and the key aspects of the security arrangements that were established.⁷³

157. The preparation of risk management strategies was raised with [REDACTED] at interview and he stated that he was not specifically aware of any formal risk assessment or risk planning undertaken in preparation for the 2014 SIPC. He stated that such activity was more correctly a Unit responsibility and that it would be unlikely that such matters would be escalated to his level within the COC.⁷⁴

158. At interview, [REDACTED] was questioned concerning responsibilities for the response to a breach of the perimeter of the SITF and it was his view that this incident should have been managed by elements of civilian security contractors stationed at the SITF and VICPOL rather than placing members of the SIAD in a position where they had to become involved in the arrest and detention of arrested persons.⁷⁵

159. Based on the information provided by members of the SIAD at interview it is assessed that the key factor influencing planning any response to activities of the SIPC by the SIAD was that primacy of response to any breach of the SITF perimeter was the responsibility of

Soldier 1 [REDACTED]
Soldier 3 [REDACTED]
Soldier 1 [REDACTED]
Soldier 1 [REDACTED] Soldier 3 [REDACTED]
Soldier 3 [REDACTED]

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contracted security guards⁷⁶ and VICPOL.⁷⁷ VICPOL elements were located at the SITF during the period of the proposed protest for this specific purpose in accordance with primacy of response responsibilities developed during planning/coordination meetings undertaken in preparation for the 2014 SIPC.⁷⁸

160. [REDACTED] if required however, this was, at best a ‘be prepared’ task and only to be operationalised in a “*worst case scenario*” should VICPOL not be able to effectively handle any issues that arose.⁷⁹ In the circumstances it is considered that the approach taken by [REDACTED] Soldier 1 as OIC, and the other members of the SIAD, was reasonable in the circumstances.

Post 2014 COC involvement

161. The SIPC has a history of protesting at the SITF. From their previous actions, it is considered likely that they will continue to undertake such activities and continue to attempt to gain access to the facility in order to generate media coverage for their causes. In such circumstances it is considered appropriate that future planning of SIAD involvement in responding to the SIPC activities, as part of any multi-agency approach, should be coordinated at a senior level within the [REDACTED]

162. While members of the SIAD have the technical skills to deal with SIPC-related matters on the ground it would be advantageous if more senior members [REDACTED] became involved in risk assessment and contingency planning activities with CIVPOL and [REDACTED]. This approach would have the advantage of ensuring the [REDACTED] and [REDACTED] was fully aware of relevant issues and was positioned to engage at senior levels with VICPOL and [REDACTED] to ensure their planned activities were appropriate to the threat and operating environment.

163. In view of the failure of VICPOL elements and civilian security contractors to effectively deal with the incursion in 2014 without the assistance of the SIAD, it is recommended that a senior member of the [REDACTED] be provided responsibility for engagement with these elements to ensure that appropriate resources are provided to negate any need of supplementation by the SIAD in responding to any future incursion-like incidents at the SITF.

Recommendation 1:

It is recommended that a senior member of the [REDACTED] be responsible for engagement with VICPOL and civilian security elements located at the SITF to ensure that appropriate resources are provided to deal with any incursion to the facility.

[REDACTED] Soldier 1
[REDACTED] Soldier 1
[REDACTED] Soldier 1 [REDACTED] Soldier 2 [REDACTED] Soldier 3

PRIMARY MATTERS FOR CONSIDERATION

Was the SIAD response lawful and reasonable?

164. A primary matter for consideration involves determining if SIAD members were exercising lawful powers when they detained the arrested persons within the SITF on the morning of 2 Oct 14.

165. If it is found that SIAD members were acting unlawfully, issues concerning the reasonableness of their actions do not arise as one cannot reasonably exercise a power if that power does not exist. However, if SIAD members were acting lawfully then the reasonableness of their actions becomes relevant.

166. Even if a person has a legal power to act, the exercise of such a power must be exercised reasonably.⁸⁰ Accordingly, even if SIAD members were acting lawfully when they responded to the breach of the SITF on 2 Oct 14, the reasonableness of their actions must be determined.

WHAT POWERS DID SIAD MEMBERS HAVE?

167. Any action taken by members of the SIAD are governed primarily by legislation. Where legislation does not address an issue, or remains silent on it, the common law may be relied upon to determine powers available to SIAD members. Accordingly, an assessment of the legislative and common law powers available to members of the SIAD in responding to the incident are considered below.

LEGISLATIVE POWERS

Part IIIAAA *Defence Act 1903 (Cth)* – Call out of ADF by Governor-General

168. Part IIIAAA of the Act (sections 51 – 51Y) provides a legislative regime to manage the call out of the ADF to respond to threats against the Commonwealth and/or defence premises and personnel.

169. For the purposes of this Inquiry it is not necessary to consider any powers available to ADF members under the Part IIIAAA legislative regime as the activation of the ADF under section 51A(2) of the Act did not occur and members of the SIAD were not operating under the Part IIIAAA regime when they responded to the incident.

Part VII *Defence Act 1903 (Cth)* – Offences

170. Part VII of the Act identifies a range of offence provisions. Relevantly, for the purposes of the Inquiry, it creates an offence under section 82 that specifies if a person enters or approaches any defence installation with photography equipment in their possession, has no lawful authority for that conduct and intends to photograph the defence installation the person is guilty of an offence. In such circumstances the person may be arrested without warrant by an ADF member.

⁸⁰ *Minister for Immigration and Citizenship v Li* [2013] HCA 18.

Part VIA Defence Act 1903 (Cth) – Security of defence premises

171. The use of power to protect Defence bases, facilities, assets and personnel within Australia is clearly set out in Part VIA of the Act (section 71 – 72S). This Part of the Act, amongst other things, sets out the meaning of relevant terms used in the Part, provides for matters relating to a particular class of person identified as a ‘defence security official’, sets out the powers exercisable by defence security officials and members of the ADF, processes related to the seizure of things and establishes offences related to unauthorised entry onto defence premises.

172. Defence security officials are a particular class of person and they are provided with ‘enhanced’ powers of arrest, and search, over and above the general power of arrest that is provided to all ADF members in accordance with section 72P(2) of the Act.

173. In order for the actions of the SIAD members to be authorised under Part VIA of the Act it is necessary that the relevant members are either:

- a. acting in the capacity of a ‘defence security official’ appointed in accordance with the provisions of the Act and exercising relevant ‘enhanced’ powers (sections 71 - 72N); or
- b. are members of the ADF and are exercising their specific powers in accordance with section 72P(2) of the Act.

Defence security officials – exercise of powers

174. Part VIA of the Act establishes a class of person who are provided additional powers to those held by other members of the ADF. This Part provides for the appointment of persons who are designated as a ‘defence security official’ and provides such persons with a range of powers to arrest, detain and search persons found to be on defence premises without authorisation.

175. A defence security official is a ‘security authorised member of the Defence Force’⁸¹ and is authorised to conduct the detention, and a non-consensual search, of a person who is on defence premises without authorisation.⁸²

176. In exercising their powers under the Act, a defence security official may only use such force as is reasonable and necessary in the circumstances⁸³, and must not subject a person to greater indignity than is reasonable and necessary in the circumstances⁸⁴.

Are members of the SIAD defence security officials?

177. At interview members of the SIAD were questioned concerning their understanding of the role and responsibilities of a ‘defence security official’ appointed under Part VIA of the Act and whether they had been appointed to such a role. None of the SIAD members believed they had been appointed as a ‘defence security official’, had no knowledge of the

⁸¹ *Defence Act 1903 (Cth)*, s71C(1).

⁸² *Defence Act 1903 (Cth)*, s71T.

⁸³ *Defence Act 1903 (Cth)*, 72G(1).

⁸⁴ *Defence Act 1903 (Cth)*, 72G(3).

role and responsibilities of a person holding such an appointment and had not undertaken any specific training for such a role.⁸⁵

178. Based on the information available to the Inquiry it is found that members of the SIAD were not, either individually, or as a class, appointed as a defence security official in accordance with section 71C(2) of the Act. Accordingly, members of the SIAD did not have, and could not exercise, the powers of a defence security official on 2 Oct 14.

ADF member - exercise of relevant powers

Power to arrest for a trespass offence

179. Members of the ADF have a range of powers provided to them in order to deal with unauthorised entry to Defence premises. Part VIA of the Act (i.e. Security of Defence Premises) provides limited authority for ADF members to arrest a person for unauthorised entry on Defence premises.

180. Section 72P(2) of the Act provides that, under certain circumstances, a member of the ADF may without warrant, arrest any person if the member reasonably believes that the person is not authorised to be on defence premises (i.e. trespassing on defence premises).

Power to search arrested persons

181. Part VIA of the Act does not specifically provide ADF members, who are not defence security officials, with the power to search arrested persons. Section 72P of the Act states:

72P Unauthorised entry etc. on defence premises or defence accommodation

(1) A person commits an offence if:

(a) the person enters or is on:

(i) defence premises; or

(ii) defence accommodation; and

(b) the person is not authorised to be on the premises or accommodation.

Penalty: 50 penalty units.

Note: An offence under this section is a *protective service offence* for the purposes of the *Australian Federal Police Act 1979*.

(2) A member of the Defence Force, a member or special member of the Australian Federal Police, a protective service officer or a member of the police force of a State or Territory may, without warrant, arrest any person if the member reasonably believes that the person has committed an offence against subsection (1).

(3) Nothing in this section prevents the arrest of a person in accordance with any other law.

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182. The conditions precedent to the exercise of the section 72P(2) powers by members of the ADF are that:

- a. persons exercising relevant powers are members of the ADF;
- b. the powers are exercised in relation to defence premises;
- c. the person against whom the powers are used is not authorised to be on defence premises; and
- d. the ADF member reasonably believes that the person has committed a relevant offence enlivening their powers.

Are members of the SIAD members of the ADF?

183. All SIAD members are members of the ADF and authorised to exercise the relevant powers provided to members of the ADF under the Act.

Is the SITF ‘defence premises’?

184. Part VIA of the Act creates the concept of ‘defence premises’, and these are defined in section 71A of the Act. For the purposes of this Inquiry they can be defined as, ‘any area of land or other place, a building or other structure, a vehicle, vessel or aircraft, or a prohibited area within the meaning of the *Defence (Special Undertakings) Act 1952* that is located in Australia and is owned or occupied by the Commonwealth for use by the Defence Force or the Department of Defence.’

185. The SITF is a ‘defence premises’ within the meaning of the Act.

Authorised to be on defence premises

186. Based on evidence provided to the Inquiry⁸⁶ and public statements made by the arrested persons it is accepted that they were not authorised to be present on Defence premises on 2 Oct 14.

Committed an offence section 72P

187. Section 72P of the Act provides that, under certain circumstances, a member of the ADF may without warrant, arrest any person if the member reasonably believes that the person has committed an offence against Section 72P (i.e. is not authorised to be on defence premises).

188. The arrested protesters were located on defence premises and SIAD members were aware that a radio broadcast had been made by persons claiming to have entered the SITF as part of SIPC protest activities. It was reasonable in the circumstances for members of the SIAD to believe that the persons they identified on the SITF on 2 Oct 14 were not authorised to be present on such premises and may have committed an offence under section 72P(1) of the Act. Accordingly, it is found that it was reasonable for members of the SIAD to arrest the arrested persons under section 72P(2) of the Act.

⁸⁶ Annex B, Person 2 Person 1 Person 3 and Person 4 statements.

Committed an offence - section 82

189. Section 82 of the Act provides a power of arrest where a member of the ADF has reasonable grounds to believe that a person has committed an offence against that section by making a sketch, drawing, photograph, picture or painting of any defence installation in Australia or of any part of one.

190. Section 82(4) of the Act provides that any ADF member may, without warrant, arrest any person who they have reasonable grounds to believe has committed an offence against section 82, and take them before a Court of summary jurisdiction to be dealt with according to law.

82(4) Any member of the Defence Force, member or special member of the Australian Federal Police or member of the Police Force of a State or Territory, may, without warrant, arrest any person who he has reasonable ground to believe has committed an offence against this section, and take him before a Court of summary jurisdiction to be dealt with according to law.

191. Based on evidence provided to the Inquiry, it is found that it was reasonable for members of the SIAD to suspect that the persons they identified within the SITF on 2 Oct 14, had equipment in their possession that was being used for the purposes of photographing a defence installation and had been taking photographs of defence facilities. Such action had been observed by Soldier 3 as part of his initial contact with the arrested persons.⁸⁷

192. The taking of photographs of defence installations and infrastructure at the SITF by persons associated with the SIPC is common practice and photographs of defence installations at the SITF have been taken previously by persons associated with the SIPC who have gained unlawful access to the SITF. These photographs have been posted on the SIPC web site and remain publically available.⁸⁸

193. It is found that relevant members of the SIAD had reasonable grounds to believe that persons located at the SITF on 2 Oct 14 may have committed an offence against section 82 of the Act. Accordingly, it is found that it was reasonable in the circumstances for members of the SIAD to arrest such persons in accordance with the provisions of section 82(4) of the Act.

Finding 1:

It is found that the arrested persons were trespassing on defence premises, namely the SITF, on 2 Oct 14.

Finding 2:

It is found that members of the SIAD had reasonable grounds to believe that persons located at the SITF on 2 Oct 14 may have committed an offence against section 72P and/or section 82 of the Act.

Finding 3:

It is found that it was reasonable in the circumstances for members of the SIAD to arrest such persons.

⁸⁷ Soldier 3

⁸⁸ For example, see Swan Island Peace Convergence; <http://swanislandpeace.org/> accessed on 20 October 2014.

Handing over to CIVPOL

194. The power in section 72P is qualified by section 72K of the Act that provides that if a member of the ADF arrests a person under section 72P(2), they must, as soon as practicable after the arrest, bring the person, or cause the person to be brought, before:

- a. a member or special member of the Australian Federal Police; or
- b. a member of the police force of a State or Territory.

195. Based on evidence provided to the inquiry by members of the SIAD and the arrested persons it is found that members of the SIAD involved in the arrest of protesters handed over the arrested protesters to members of VICPOL within a period of not more than ten (10) minutes after they had been arrested.⁸⁹

Finding 4:

It is found that the hand over of arrested persons from the control of the SIAD members to elements of VICPOL occurred as soon as reasonably practicable in the circumstances and complied with the requirements of section 72K of the Act.

Summary

196. At the time of arresting the arrested persons it is found that [redacted] Soldiers 1, 2 and 3 [redacted]:

- a. were members of the ADF;
- b. exercised their arrest powers in relation to unauthorised entry and/or photography of defence premises;
- c. the persons against whom their powers were exercised were not authorised to be on defence premises; and
- d. reasonably believed that the persons against who they exercised their arrest powers had committed an offence that enlivened their powers.

197. Based on evidence provided to the Inquiry, it is found that the members of the SIAD had a legislative power to arrest the arrested protesters for an offence under both section 72P(2) and section 82(4) of the Act. Accordingly, it is found that [redacted] Soldiers 1, 2 and 3 [redacted] were authorised to arrest the arrested persons.

198. Further, it is found that in exercising their powers under section 72P of the Act the members of the SIAD also had the benefit of the relevant provisions outlined in section 72S which provides that Part VIA of the Act does not, by implication, limit the exercise of the powers, or the rights, of an ADF member under the common law.

⁸⁹ [redacted] Soldier 3 [redacted] Soldier 1 [redacted] Person 2 [redacted] Person 1 [redacted] Person 3 [redacted] and [redacted] Person 4 [redacted] statements.

COMMON LAW POWERS

199. Appointment to or enlistment in the ADF does not deprive a person of the rights, or exempt that person from liabilities, arising under the ordinary law of the land.⁹⁰ If legislation does not, either specifically or by obvious implication, address a matter then in certain circumstances the common law may be referred to in order to clarify the law related to a set of circumstances or matter.

200. Section 72S of the Act specifically states that Part VIA of the Act does not limit the exercise of the powers, or the rights, of an ADF member under the Act, under any other law (including the common law) or otherwise in the performance of their duty as a member of the ADF.⁹¹

What is trespass?

201. At common law, the concept of trespass, in so far as it relates to the matters under Inquiry, involves an ‘unjustified entry’⁹² by a person onto land in the possession of another, which is carried out either intentionally or negligently. It should be noted that there exists no requirement for any damage to be done to land or property for a trespass to occur.

202. It is a defence to any charge of trespass if a person can:

- a. prove that the entry on to the land was by the leave and/or licence of the person then in possession of the land;⁹³ or
- b. justified because their actions were reasonably necessary⁹⁴ for the preservation or protection of life, or for the preservation of the property of the defendant or possibly of others, and were carried out with reasonable care.⁹⁵

203. Based on public statements made by the arrested persons⁹⁶ it is found that, at common law, these persons committed the act of trespass when they entered the SITF and that none of the recognised defences to trespass arise on the evidence available.

Finding 5:

It is found that the arrested persons committed the act of trespass when they entered the SITF and that none of the recognised defences to trespass are available.

⁹⁰ *McWaters v Day* (1989) 168 CLR 289; *Polyukhovich v Commonwealth (War Crimes Act Case)* (1991) 172 CLR 501.

⁹¹ *Defence Act 1903* (Cth), s72S.

⁹² That is, an entry effected otherwise than with the consent of the occupier or under lawful authority: *Plenty v Dillon* (1991) 171 CLR 635 at 647.

⁹³ *Plenty v Dillon* (1991) 171 CLR 635 at 647.

⁹⁴ The act must be one which a reasonable person would undertake in the face of a real and imminent peril, that question being viewed at the time of the acts in question and not retrospectively: *Cope v Sharpe (No 2)* [1912] 1 KB 496.

⁹⁵ *Beckingham v Port Jackson and Manly Steamship Co* (1957) SR (NSW) 403.

⁹⁶ ‘7.30 Report’, ABC, broadcast 9 Oct 14.

Powers of arrest

204. Regardless of any powers that may be provided to a member of the ADF under legislation, all members retain the right to conduct a ‘citizen’s arrest.’

205. At common law, a person may arrest a person found committing a crime, but the arrest will only be lawful if the crime has actually been committed.⁹⁷ In both the Commonwealth and Victorian jurisdictions, the power of citizen’s arrest has now been confirmed by statute.⁹⁸

206. Based on evidence provided by [redacted Soldiers 1, 2 and 3] to the Inquiry it is found that these members of the SIAD had reasonable grounds to suspect that a crime⁹⁹ had been committed by persons entering the SITF.

Finding 6:

It is found that members of the SIAD had the authority to conduct a citizen’s arrest on the persons they identified within the boundaries of the SITF on 2 Oct 14.

Powers of search

207. Prior to the arrested persons being handed over to VICPOL, members of the SIAD searched these persons. While the Act specifically provides powers of search to ‘defence security officials’, members of the SIAD were not appointed within such a class of persons at the time they conducted a search of the arrested protesters. The powers provided to ADF members under sections 72P and 82(4) of the Act (arrest powers) do not include a specific legislative power to search arrested persons. Accordingly, it must be determined if the relevant members of the SIAD [redacted Soldiers 1 and 2] had a common law power to search the persons they arrested.

208. Details of the search procedure applied to the arrested persons was explained in detail by [redacted Soldier 1] at interview.¹⁰⁰ He stated that the searches were conducted by initially placing the arrested person under control on the ground, cable-tie handcuffs and blindfolds were applied, an initial ‘pat down’ search¹⁰¹ was conducted, with particular attention being paid to possible concealment areas in the arrested persons groin area. In two cases, the arrested person’s trousers were removed by being cut with a pocket knife in order for a more detailed search to be conducted because of resistance displayed by the relevant arrested person during the initial part of the ‘pat down’ search procedure.

209. The procedure described by [redacted Soldier 1] at interview supports the version of events recounted by [redacted Soldier 2] with the exception that [redacted Soldier 2] did not cut any clothing from either of the arrested persons he was dealing with. [redacted Soldier 2] stated at interview that he was able to effectively search arrested persons he was dealing with by lowering their pants and

⁹⁷ *Walters v WH Smith & Son Ltd* [1914] 1 KB 595 at 602.

⁹⁸ *Crimes Act 1914* (Cth), s3Z; *Crimes Act 1958* (Vic), ss457-458.

⁹⁹ Either under *Crimes Act 1914* (Cth), s89 (Trespassing on Commonwealth Land); *Defence Act 1903* (Cth), ss72, 82.

¹⁰⁰ [redacted Soldier 1]

¹⁰¹ A search of a person conducted by running the hands over the person’s outer garments.

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inspecting or lowering their underwear to check for concealed items. While he did not deem the cutting of clothing necessary, he did search the arrested persons he was dealing with in such a manner as to confirm no offensive items were concealed in their underwear.¹⁰²

210. The search process described by [Soldier 1] less the cutting of clothing, corresponds in all material aspects with the procedure used by [Soldier 2]¹⁰³ and recounted by the arrested protesters.¹⁰⁴

211. The reason provided by [Soldier 1] for the conduct of the searches was to ascertain if the arrested persons had in their possession any weapons or other offensive items that may pose a threat to the SIAD members.¹⁰⁵ [Soldier 1] stated that he made this known to arrested persons.¹⁰⁶ [Soldier 3] who was not directly involved in the conduct of any searches, but who was in close proximity to the search activity, was asked for his observations concerning [Soldier 1] notification of the purpose of the search. He stated that he heard [Soldier 1] tell arrested persons that they were being searched to ascertain if they had possession of any weapons.¹⁰⁷ The evidence provided by [Soldier 3] is considered reliable as he was a witness to the search activities being undertaken but did not actively participate in the search process. On the balance of probabilities it is found that the arrested persons were advised of the purpose of the search they were subjected to.

Did the members of the SIAD have a legislative power to search

212. If the relevant members of the SIAD had a legislative power to search the arrested protesters the only issue that requires determination is whether such a power was exercised in a reasonable manner. However, based upon a review of relevant legislative provisions it was the initial opinion of the IO that members of the SIAD had no specific legislative or statutory power to search members of the SIPC they arrested on 2 Oct 14. Accordingly, it was therefore necessary to consider if members of the SIAD had an inherent power, or power incidental to the exercise of the statutory arrest power, to search arrested persons.

Is there an inherent and incidental power of search

213. The issues raised concerning inherent and/or incidental powers involve a range of complex legal matters that require consideration.

214. Any incidental powers of search are not unlimited and they must be justified in the circumstances of each case. While there is no relevant specific legislative power of search provided to ADF members, there is common law authority which provides that, *“it is the duty of any constable who lawfully has a prisoner in his charge to take all reasonable measures to ensure that the prisoner does not escape or assist others to do so, does not injure himself or others, does not destroy or dispose of evidence and does not commit further crime.”*¹⁰⁸

102 [Soldier 2]
[Soldier 2]
104 [Person 2] [Person 1] [Person 3] and [Person 4] statements.
105 [Soldier 1]
[Soldier 1]
[Soldier 3]

¹⁰⁸ *Lindley v Rutter* [1981] QB 128 per Donaldson LJ.

215. [REDACTED]

216. [REDACTED]

a. [REDACTED]

b. [REDACTED]

Did the power to search exist?

217. [REDACTED] it is found that the members of the SIAD had the power to search persons they arrested at the SITF on 2 Oct 14.

Finding 7:

It is found that members of the SIAD had the power to search persons they arrested at the SITF on 2 Oct 14.

Was the search necessary?

218. Based on the evidence provided by relevant SIAD members¹¹⁰ it is found that arrested persons were advised that they were being searched to ensure they did not possess any weapons and they actively resisted the search procedures that SIAD members were undertaking.

219. Slightly more than one (1) week prior to the detention of the arrested persons, on 23 Sep 14, members of VICPOL and the AFP were attacked and stabbed by a man in vicinity of the Endeavour Hills in Melbourne. The assailant involved in this incident was shot and killed by law enforcement officers during the incident.¹¹¹ [REDACTED] Soldier 1 made reference to this incident at interview and stated that SIAD members were not aware whether arrested persons were simply non-violent protesters, or persons who may have held more sinister intentions towards ADF members.¹¹² While not being a direct driver for their actions in dealing with arrested protesters it is clear that the Endeavour Hills event, and the overall heightened security environment,¹¹³ was relevant to the state of mind of SIAD members during the incident.

¹⁰⁹ Annex E, Legal Advice – COL Morcombe QC, AALC.

¹¹⁰ [REDACTED] Soldiers 1, 2 and 3

¹¹¹ ABC News at <http://www.abc.net.au/news/2014-09-23/one-person-shot-dead-two-stabbed-endeavour-hills/5764408>.

¹¹² [REDACTED] Soldier 1

¹¹³ National Counter Terrorism Alert Level – High.

220. In the circumstances it is considered reasonable that members of the SIAD would exercise increased vigilance at the time of the incident and that immediately assessing unidentified persons within the SITF perimeter as having benign intentions without detailed investigation would not have been a reasonable response in the circumstances.

221. It would be unreasonable in the circumstances for an ADF member to be authorised to arrest a person for a relevant offence and not to search the person in order to ensure they did not retain possession of offensive items that could be used to harm the member, or others.

222. It is found that in the circumstances conducting a search of arrested persons was necessary to ensure the safety of all persons involved in the incident.

Finding 8:

It is found that the conduct of a search of the arrested persons by members of the SIAD was necessary in the circumstances.

Putting the matter beyond doubt

223. Notwithstanding the finding that the power to search arrested persons is an incidental power that exists under section 72P of the Act it is considered that this power should be clearly specified in the Act. If an ADF member is provided the legislative power to arrest a person for an offence, it seems illogical for them not to be provided a complementary search power in order to ensure that any arrested person does not possess offensive items and/or weapons that may be used against the member, or others.

224. The legal position, [REDACTED] is always open to interpretation by a court of competent jurisdiction and, should such a court not agree with the position [REDACTED] it may find that such a power does not exist. Such a finding may result in future search actions considered necessary in the circumstances and taken in good faith by ADF members, being found to be unlawful, exposing both them, and Defence, to possible litigation.

225. To remove doubt it is considered appropriate that the common law position, [REDACTED] be established in legislation. Section 72P of the Act should be amended to provide ADF members with a specific powers of arrest, restraint and search of persons, and the seizure of offensive items. Such a course of action would remove any doubt should this type of situation ever come before a court for consideration.

226. Further, as section 72P of the Act in either its current, or any amended, form provides specific powers to ADF members, the operation of this section, and procedures to be used if exercising powers thereunder, should be addressed as part of the annual force preservation training package.

Recommendation 2:

It is recommended that Section 72P of the *Defence Act 1903* (Cth) be amended to provide ADF members with a specific power of arrest, restraint and search of persons, and the seizure of offensive items.

Recommendation 3:

It is recommended that as part of annual force preservation training, all ADF members are advised of their powers under Section 72P of the *Defence Act 1903* (Cth).

SUMMARY OF LEGISLATIVE AND COMMON LAW POWERS

227. Based on an assessment of relevant legislative provisions, the common law [REDACTED] it is found that members of the SIAD had the power to arrest and then search the arrested protesters.

WAS THE EXERCISE OF POWER REASONABLE?

228. While the power for members of the SIAD to arrest and search arrested persons existed, it is necessary to determine if the exercise of the power by relevant SIAD members occurred in a manner that was reasonable in the circumstances.¹¹⁴

Influence of ‘Safebase’ alert levels

229. Defence’s protective security alert system is known as SAFEBASE. The SAFEBASE alert system provides planning guidance and standards to Defence on appropriate measures to take in response to varying threat levels.

230. Like most defence facilities, the SITF had been operating under the “BRAVO’ alert status for a considerable period of time prior to the incident. The alert status was raised to ‘CHARLIE’ on 19 Sep 14.¹¹⁵

231. SAFEBASE CHARLIE is characterised by a strengthening of measures to deter and detect unauthorised access to Defence premises.¹¹⁶ A review of the National Counter-Terrorism and SAFEBASE Alert Level Alignment table clearly identifies that the threat type of ‘terrorist attack could occur’ exists when SAFEBASE CHARLIE has been activated.¹¹⁷

¹¹⁴ *Minister for Immigration and Citizenship v Li* [2013] HCA 18.

¹¹⁵ Enclosure 3, Tab JK - SECDEF and CDF Message to Defence Members (dated 19/9/14).

¹¹⁶ *Defence Security Manual*, 2:3 ‘Safebase’ (Ver 3-01 May 2013), para 3.1; 3.37 -3.38.

¹¹⁷ *Defence Security Manual*, 2:3 ‘Safebase’ (Ver 3-01 May 2013), Annex B.

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232. The QA¹¹⁸ makes reference to views expressed by [Soldier 1] related to the increase of the SAFEbase alert status to CHARLIE as being a driver for the requirement to search arrested persons for “knives, guns or needles” and the use of blindfolds/hoods IOT protect the identities of [redacted] personnel during the “increased SAFEbase alert level (to CHARLIE)”.

233. This issue was explored with [Soldier 1] at interview and he stated that he took the increased threat level very seriously and that the increase of the alert level to CHARLIE was a matter of significance to the way he responded to the incursion to the SITF.¹¹⁹ When this matter was further explored at interview, [Soldier 1] stated that even though the alert status had been raised he believed that he would have responded to the incident in the same manner, regardless of any increase in the alert status. The raising of the alert status simply required him and his team to, “be extra vigilant”.¹²⁰

234. The change in the alert status was raised at interview with [Soldier 3] and he stated that he did not believe the changed status impacted on the powers available to SIAD members however, it did require an increased level of vigilance. When questioned further on how the SIAD would have reacted to trespassers under a different alert status he was unsure as to what the reaction would have been.¹²¹

235. At interview, [Soldier 2] confirmed that the increase of the SAFEbase alert status did not influence his actions on 2 Oct 14. He stated that his actions towards trespassing persons at the SITF would have remained unchanged regardless of the alert status in place.¹²²

236. The relationship between the alert level in place at the time of the incident and any influence this may have had on the actions of relevant SIAD members was raised at interview with [redacted]. He stated that it was his opinion that this was an important contextual factor in terms of dictating the manner in which SIAD members would approach any incursion or trespass onto defence premises.¹²³

237. At interview, [redacted] stated that he believed that the alert status in place at the time of the incident would have had little impact on the response of members of the SIAD and that they would have detained the arrested persons regardless of the alert status operating at the time.¹²⁴

238. It should be noted that the mere raising of the alert level from one SAFEbase level to another provides no additional powers to ADF members concerning their response to perceived or actual threats. ADF members have no more (or less) power over persons trespassing on Defence property merely because a SAFEbase alert level has changed. While the alert level is immaterial to the powers of an ADF member related to trespassing persons it is considered to be a relevant factor in so far as it demonstrates that a level of threat exists, and appropriate procedures are in place to deal with any such threat.

¹¹⁸ Annex D, Quick Assessment, 3 Oct 14, para 10 – 11.

¹¹⁹ [redacted] Soldier 1

[redacted] Soldier 1

[redacted] Soldier 3

[redacted] Soldier 2

239. Based on the evidence provided at interview, it is assessed that the SIAD were not under any misapprehension as to what an increased alert level meant and, in particular, how it impacted upon their powers of detention, arrest and search of alleged trespassers.¹²⁵

240. SIAD members did not rely on any increased alert status as justification for actions towards trespassing persons. Rather, they would have responded as they did regardless of what alert status was in place.

Influence of protected identity status

241. The Secretary of Defence and the Chief of the Defence Force are responsible for the granting of protected identity status (PIS) to members of the ADF. This authority has been delegated to a range of senior ADF Officers, including, [REDACTED]

[REDACTED]¹²⁶

242. [REDACTED] has determined that all members of [REDACTED] including civilians and contracted personnel are designated as having PIS in accordance with delegations held by [REDACTED]

[REDACTED]¹²⁷

243. Soldiers of [REDACTED] are given PIS due to the nature of the work they undertake for the ADF. It is ADF policy to protect the identity of members of [REDACTED] to prevent the compromise of sensitive tasks, equipment and capabilities with which members of the [REDACTED] may be associated.¹²⁸ This approach is taken to ensure as far as possible that ADF members may conduct sensitive operations now and in the future, free from the risk of interference by foreign intelligence organisations, terrorists and other interest motivated groups.

244. [REDACTED] Soldier 1
[REDACTED] Soldier 2

The issue of maintaining PIS was not a significant matter from [REDACTED] Soldier 3's perspective¹³¹ however, it is considered that his view on this matter may be somewhat influenced by him not being directly involved in the physical detention of arrested persons.

245. [REDACTED] Soldier 2

He stated that this approach to dealing with detained persons is supported by his experience in operational and training situations over a period of fifteen (15) years.¹³² At interview, [REDACTED] Soldier 1 also made reference to his operational experiences related to the wider detention process, not just the application of blindfolds, to arrested persons.¹³³

¹²⁵ [REDACTED] Soldier 1 [REDACTED] Soldier 2

¹²⁶ Enclosure 1, DSM, 2:24 Protected Identities, para 24.16.

¹²⁷ Enclosure 3, Tab L - [REDACTED] Directive 03/2010, para 14.

¹²⁸ Enclosure 1, DSM, 2:24 Protected Identities, para 24.9 – 24.13.

¹²⁹ [REDACTED] Soldier 1

[REDACTED] Soldier 2

[REDACTED] Soldier 3

[REDACTED] Soldier 2

[REDACTED] Soldier 1

246. [REDACTED]

247. [REDACTED]

248. Based on evidence provided to the Inquiry it is considered that the PIS afforded to members of SIAD played a significant role in dictating the response of [REDACTED] Soldiers 1 and 2 in applying blindfolds to the arrested protesters.

Determining 'reasonableness'

249. Determining what is a reasonable response to any given set of circumstances is a situation that regularly confronts the civil and criminal courts. In fact, many of the offences, defences and excuses that exist in both the criminal and civil law make reference to issues of 'reasonableness'.

250. In assessing the reasonableness of the actions of members of the SIAD, for the purposes of the Inquiry it is not necessary to consider the legal differences between the 'reasonable person' known in the law of torts, and the 'ordinary person' known in some aspects of the criminal law.¹³⁶ The actions of SIAD members were directly related to decisions they made at the time of relevant actions and, in such circumstances, it is the reasonableness of this decision-making that should be assessed. In the circumstances, assessment of these decisions against established administrative law principals related to the reasonableness of decision-making is considered the appropriate approach to take.

251. In determining if the actions taken by members of the SIAD were reasonable in the circumstances, their actions have been assessed to determine if they are devoid of any plausible justification¹³⁷, or ones for which no logical basis can be discerned.¹³⁸

Reasonableness of the arrest

252. Under section 72P of the Act, a person commits an offence if they enter, or are on Defence premises and they are not authorised to be there. In such circumstances, a member of the ADF may, without warrant, arrest a person if they reasonably believe that the person is not authorised to be on the defence premises.

253. From the evidence received by the Inquiry it is accepted that the arrested persons were present within the SITF and had no authority to be there. The arrested persons were observed acting in a manner that could give rise to a reasonable belief by relevant SIAD

[REDACTED]

Stingel v R (1990) 171 CLR 312.

¹³⁷ *Prasad v Minister for Immigration and Ethnic Affairs* (1985) 6 FCR 155; *Secretary, Department of Social Security v Willee* (1990) 96 ALR 211; *Wouters, Wright and Holmes v DCT (NSW)* (1988) 20 FCR 342.

¹³⁸ *Chan Yee Kin v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379; *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 367.

members that they were trespassing on defence premises and were taking photographs of defence installations.

254. It is found that the decision to arrest the persons found on 2 Oct 14 within the SITF by [redacted] Soldiers 1 and 2 was one that was made on a logical basis and was reasonable in the circumstances.

Finding 9:

It is found that the arrest the persons found within the SITF by [redacted] Soldiers 1 and 2 was reasonable in the circumstances.

Reasonableness of the use of blindfolds

255. The primary issues raised by relevant members of the SIAD concerning the application of blindfolds to arrested protesters is their belief that it was critical that they maintain their PIS and/or the belief that it was the appropriate way in which to manage detained persons. [redacted] Soldier 1 stated at interview that it was critical that he maintained his PIS.¹³⁹ Based, on the evidence provided at interview, it is assessed that this intention to maintain PIS was a significant factor in driving the response by [redacted] Soldiers 1 and 2 in applying blindfolds to arrested protesters.

256. At the point of initial contact with arrested persons, [redacted] Soldiers 1 and 2 were not aware whether they were simply non-violent protesters, or persons who may have held more sinister intentions towards ADF members.¹⁴⁰ At interview, when questioned on this matter [redacted] stated that, in his opinion, at the time of the incident members of the SIAD would not be able to determine whether the persons they encountered on the SITF were merely protestors, persons who were exploiting the cover provided by the actions of the SIPC or members of a foreign intelligence service.¹⁴¹ The views expressed by [redacted] support the evidence provided by [redacted] Soldier 1 and are considered reasonable in the circumstances.

257. In the circumstances it is considered reasonable that members of the SIAD would be exercising increased vigilance at the time of the incident and that immediately assessing unidentified persons within the SITF perimeter as having benign intentions without detailed investigation would not have been a reasonable response in the circumstances.

258. Based on evidence provided to the Inquiry by relevant witnesses¹⁴², and public reporting of the incident in the media, the arrested protesters were initially approached by members of the SIAD and at this stage had an opportunity, be it limited, to identify the SIAD members. While the subsequent application of blindfolds to arrested protesters by SIAD members prevented further, or detailed, identification it is considered that their PIS had already been somewhat compromised at this stage.

[redacted] Soldier 1
[redacted] Soldier 1
[redacted] Soldiers 1 and 2

259. While alternative measures could have been taken to ensure the maintenance of PIS,¹⁴³ in the circumstances it is not considered reasonable to criticise the blindfolding of arrested persons at the first practicable opportunity.

260. It is found that the use of blindfolds on arrested persons was done in order to maintain, as far as possible, the PIS of members of the SIAD and the decision to apply blindfolds was made on a logical basis and was reasonable in the circumstances.

Finding 10:

It is found that the use of blindfolds on arrested persons was reasonable in the circumstances.

How to address PIS in future

261. While it was a 'be prepared task' for the SIAD to provide security to sensitive ADF assets at the SITF, it was not considered that any direct response to a threat was likely to be required as primacy of responsibility for security of the SITF rested with civilian security contractors and VICPOL elements located on the facility. Accordingly, it was not considered likely that members of SIAD would have any direct confrontation with members of the SIPC.

262. Had members of the SIAD considered that compromising their PIS was a possible outcome of them having to respond to any matter related to the activities of the SIPC then it would have been a simple matter for them to take preparatory action to mitigate this risk. For example, they had already taken preparatory action by preparing PUC kits should they be required for the detention of any persons and they could have easily put procedures in place to respond to any incident wearing masks/balaclavas. The use of such equipment is a course of action that is not unusual for members of [REDACTED] to take if they are interacting with members of the public but wish to maintain their PIS.

263. With the benefit of hindsight it is possible to identify preparatory actions that could have been taken to mitigate against the compromising of PIS that would not have required the application of blindfolds to any arrested persons. However, it is considered that it would be unreasonable in the circumstances to criticise members of the SIAD or their COC for not taking such preparatory action.

264. It is unlikely that the SIPC will cease their activities at the SITF. Accordingly, while primacy of response should remain with civilian security contractors and VICPOL, contingency planning for responding to any breaches of the SITF should be developed to ensure that the PIS of ADF members is able to be protected from the point of initial contact with any relevant persons. Such an approach should negate any necessity for blindfolding any persons detained in the future for unlawful entry to the SITF.

Recommendation 4:

It is recommended that planning for a response to any future breaches of the SITF perimeter should be developed to ensure that ADF responses do not require the application of blindfolds/hoods to any persons arrested by ADF members.

¹⁴³ For example, Domestic Counter Terrorism response arrangements involving the use of balaclavas, no name tags and black uniforms as identified in Annex B, [REDACTED]

Reasonableness of the use of handcuffs

265. A member of the ADF may use handcuffs, if it is considered reasonable and necessary, to restrain a person following their arrest on Defence premises. However, only members of the ADF who have been properly trained and equipped may arrest a person in the circumstances outlined above.¹⁴⁵ The relevant references are silent as to what is considered proper training in this procedure.

266. Members of the ADF have the legislative power to arrest persons suspected of trespassing on ADF facilities. The members of the SIPC involved in the incident were clearly arrested by members of the SIAD during the incident.

267. The reason for the application of handcuffs to the arrested persons was put to relevant members of the SIAD at interview¹⁴⁶, and they stated that the use of handcuffs was done for the purpose of gaining control of arrested persons who were resisting the detention process and to ensure that they were not able to further interfere in the detention process.¹⁴⁷

268. It is common practice for law enforcement officials to apply handcuffs to arrested persons. This course of action is taken to gain control of the arrested person and to provide an increased level of safety to both the arresting officer and the person being arrested. While the relevant members of the SIAD are not law enforcement officers, they were lawfully exercising the power of arrest provided to them under the Act. Accordingly, it is considered appropriate that they have access to the same freedom of action that is required by law enforcement officers when undertaking the arrest process. The relevant members of the SIAD have substantial experience¹⁴⁸ in detaining persons and it is considered that such experience clearly demonstrates that they have been properly trained in the use of relevant restraint techniques.

269. The use of handcuffs to restrain arrested protesters was a decision that was made on a logical basis and was reasonable in the circumstances.

Finding 11:

It is found that the use of handcuffs to restrain arrested protesters was reasonable in the circumstances.

Reasonableness of search procedures

270. As part of assessing the reasonableness of any response by the SIAD personnel involved in the search of members of the SIPC that were trespassing on the SITF it is necessary to consider that the arrested persons were found trespassing on a secure defence facility, at a time when there was a heightened Counter-Terrorism and SAFEBASE alert levels in place. These factors are provided weight when considering the reasonableness of the search procedures used by members of the SIAD.

¹⁴⁵ *Defence Security Manual*, 2:63 'Identification, Search and Seizure Regime' (Ver 1-02 Aug 2013), para 63.21; 63.96-98.

¹⁴⁶ Soldiers 1 and 2

¹⁴⁷ Soldier 1

Soldier 2

Soldier 1

271. The only significant variation between the process used by [Soldiers 1 and 2] in conducting the searches of the persons they had arrested is that [Soldier 2] applied restraints to the legs of one person he arrested¹⁴⁹ and [Soldier 1] removed the trousers of both persons he arrested as part of the search procedure he used.

272. Section 72G of the Act states that in conducting a search of a person a ‘defence security official’ must not subject the person who is the subject of the search to unreasonable or unnecessary indignity. As members of the SIAD are not ‘defence security officials’ appointed in accordance with the provisions of the Act, section 72G is not directly applicable to the actions of the SIAD members on 2 Oct 14. However, it is considered that while not directly applicable, section 72G is useful in providing some guidance and assistance in assessing the reasonableness of the search process initiated by members of the SIAD.

What constitutes ‘indignity’?

273. While section 72G¹⁵¹ introduces the concept of ‘indignity’ as being relevant for the conduct of any search initiated under that section the term is not defined under the Part VIA definitions, nor in the wider Act. The term ‘indignity’ used within the Act has not been judicially considered. While the term is used regularly in judgements delivered by courts of varying jurisdictions, a judicial definition of the term has not been able to be located although it is widely used in both the criminal and civil jurisdictions.

274. In the circumstances it is considered reasonable to rely on a common-usage definition of the term, specifically, “*slighting or contemptuous behaviour, a humiliating affront, insult or injury*,”¹⁵² and this common definition of the term has been used for the purposes of this Inquiry.

275. The action of arrest, be it by a law enforcement official, a member of the ADF or a citizen, will always have the potential to be considered behaviour that may give rise to a feeling of offence in the arrested person. The search process undertaken by [Soldiers 1 and 2] while no doubt confronting for the arrested persons was done in a manner that did not cause any significant injury to them¹⁵³, was not done in a public area, was conducted by persons of the same sex, did not involve invasive internal body search procedures and was undertaken using the minimum force necessary in the circumstances.

The removal of clothing

276. It is considered that the only aspects of the search procedures applied by the SIAD members to arrested protesters that may reach the threshold of ‘indignity’ is the removal of clothing of the arrested persons.

277. Based on the evidence provided at interview by [Soldiers 1 and 2]¹⁵⁴, which is supported by the observations of [Soldier 3]¹⁵⁵, it is found that the arrested persons were

¹⁴⁹ [Soldier 2]
[Soldier 1] (1st search); Q194 (2nd search).

¹⁵¹ *Defence Act 1903* (Cth).

¹⁵² *The Macquarie Concise Dictionary*, The Macquarie Library Pty Ltd, 2nd ed.

¹⁵³ Annex D. Statement from VICPOL [Soldier 1] [Soldier 2] “medical assistance was refused”.

[Soldier 1]
[Soldier 2]
[Soldier 3]

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resisting a lawful arrest¹⁵⁶ and, at the point of arrest, members of the SIAD had no knowledge of, nor was it reasonable to expect they would have knowledge of, the arrested persons future intentions.

278. In such circumstances it is considered reasonable that the relevant SIAD members reacted to the resistance being directed towards them. The lack of any formal complaint to law enforcement concerning the use of force by [Soldiers 1 and 2] during the search process, and the subsequent refusal of any medical assistance by the arrested persons, suggest that the response of the relevant SIAD members to the resistance they encountered from the arrested persons was measured.

279. While the actions of [Soldier 1] in removing the trousers of arrested persons may have been confronting for such persons, it is noted that he had provided a series of warning to relevant persons to cease resisting his attempts to conduct a pat-down search of them.¹⁵⁷ It was only after resistance continued that he took action to cut articles of their clothing. On the balance of probabilities it is found that he took this action to ensure that the relevant arrested persons did not have any weapons or other offensive items in their possession. While [Soldier 2] was able to undertake a search of the persons he arrested without deeming it necessary to cut their clothes off that does not demonstrate that [Soldier 1] actions were not justified in the circumstances. Reasonable minds can vary as to what is required to be done in response to the same set of circumstances.

280. It is found that the arrested persons did not suffer any ‘indignity’ when arrested and searched. The actions taken by [Soldier 1] in removing an arrested persons clothing to undertake a search of the person were based on logical decision-making and were reasonable in the circumstances.

Finding 12:

It is found that the search of the arrested person was reasonable in the circumstances.

COC response to search procedures

281. [redacted] is an experienced senior officer within [redacted] and it was considered appropriate to question him concerning his views on the reasonableness of the response to the incident by members of the SIAD.

282. [redacted] stated at interview that while the actions of the SIAD members may have been justified in the existing security environment, the use of hoods to blindfold arrested persons and the cutting of their clothing for search purposes, “*could have been better handled.*”¹⁵⁸ A review of the evidence provided by [redacted] suggests that one of the primary issues of risk that he identified was the potential for any perceived “heavy handed”¹⁵⁹ response to the incident to generate adverse media comment for Defence.¹⁶⁰

[redacted]
[redacted]
[redacted]
[redacted]
[redacted]

Conclusions

283. Based on the evidence provided by relevant SIAD members¹⁶¹ it is found that arrested persons were actively resisting the arrest and search procedures that SIAD members were undertaking.

284. The SIAD members had identified themselves as members of the ADF¹⁶², had placed the relevant persons under arrest, had a reasonable belief that it was necessary to search the arrested persons and used a minimum of force¹⁶³ to do so. The application of minimum force during the arrest and search procedure is supported by the lack of any complaint by the arrested persons to either civilian or military law enforcement agencies concerning their treatment on 2 Oct 14.

285. The SIAD members responded to the incident in a professional and lawful manner. [REDACTED]

[REDACTED] It is noted that relevant SIAD members had considerable experience in arrest and detention procedures gained from operational experience¹⁶⁴ and the procedures used during the arrest of persons on 2 Oct 14 drew on techniques proven to be effective.¹⁶⁵ While detention procedures used in an operational environment may not be directly transferable to a non-operational environment, they cannot help but influence the procedures utilised by relevant SIAD members in the circumstances of the arrest and search of arrested persons.

286. It is found that the SIAD response to the incident was reasonable in the circumstances.

PREVENTING A 2015 ‘CONVERGENCE’ INCIDENT

287. Based on the previous behaviours of the SIPC it is likely that they will again protest at the SITF in 2015 (and probably later). In such circumstances, even if there is an increased CIVPOL and contracted security presence, it is still possible that members of the SIAD may have involvement with SIPC members who trespass onto the SITF. To be prepared for any such possible encounters, [REDACTED] develop a set of SOPs to address dealing with the arrest of unauthorised persons found on the SITF.

288. Regardless of whether legislative amendments are made to clarify the powers of arrest and search that ADF members have, SOPs should be developed that address the ‘on the ground’ issues associated with the arrest and search of unauthorised persons found on the SITF. These SOPs should take into account the existing legislative and common law provisions, and issues identified in this Report. Amongst other matters, best identified by a subject matter expert supported by a suitability qualified legal officer, the SOPs should specifically address the following:

- a. The wearing/non wearing of ADF uniforms if contact with suspected trespassers is likely;
- b. Appropriate mechanisms for ADF members to maintain their protected identity status if involved in possible arrest activities;

¹⁶¹ [REDACTED] Soldiers 1, 2 and 3
[REDACTED] Soldier 2
[REDACTED] Soldier 1
[REDACTED] Soldier 1

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- c. Immediate/early notification to suspected trespassers that they are being confronted by an ADF member;
- d. Persons suspected of trespassing should be asked whether they have permission to be on defence premises;
- e. Persons arrested by an ADF member should be informed of their arrest and the reason for it;
- f. What search procedures may be applied to any persons arrested and how these are undertaken;
- g. What search procedures are to be used if an ADF member is required to search a member of the opposite sex; and
- h. While limited questioning may be required depending on the specific circumstances, such questioning should not take the form of what could be reasonably considered an ‘interrogation’.

289. Legal advice should be obtained as part of developing any SOPs and final SOPs should be assessed by a suitably qualified legal officer prior to being adopted.

Recommendation 5:

It is recommended that [REDACTED] develop detailed SOPs:

- **that address relevant issues associated with the arrest of persons found to be on the SITF without authorisation; and**
- **are assessed by a suitably qualified legal officer prior to being adopted by the [REDACTED]**

GENERIC ARREST AND SEARCH SOPs

290. While developing appropriate SOPs to address specific incidents that may occur at the SITF will mitigate risks associated with incidents at this facility, it is considered that similar circumstances, as experienced by members of the SIAD, may be encountered by any ADF member who is involved in the detention of unauthorised persons found on Defence premises.

291. Regardless of whether legislative amendments are made to clarify the powers of arrest and search that ADF members have, generic SOPs should be developed that address the ‘on the ground’ issues associated with the arrest and search of unauthorised persons found on Defence premises. These SOPs should take into account the existing legislative and common law provisions, matters identified in paragraph 288 and issues identified in this Report.

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292. In order to remove, as far as possible, circumstances that are attractive to media outlets reporting on any future responses to incursions at defence facilities consideration should be given to ensuring that, amongst other things, generic SOPs also:

- a. do not require the removal of clothing to effect a search of any persons placed under arrest by ADF members;
- b. do not require the application of blindfolds/hoods to any persons arrested; and
- c. ensure, as far as possible, that CIVPOL elements are present with any ADF members undertaking arrest activities.

Recommendation 6:

It is recommended that the ADF centrally develop SOPs that address generic issues associated with the arrest of persons found to be on the Defence premises without authorisation and these SOPs are promulgated.

COUNTERING ADVERSE PUBLICITY

293. One of the primary aims of the SIPC and other issue-motivated groups is to generate media coverage for their activities and, as far as possible, generate media reporting that leads to criticism of ADF activities.

294. While the actions of the members of the SIAD were lawful, they had the effect of providing a platform for members of the SIPC to generate media interest in the incident and, as identified by ██████████ at interview, provide an avenue for others to generate adverse media coverage related to the ADF.¹⁶⁶

295. It is uncontroversial that the arrested persons were not acting lawfully when they were arrested and members of the SIAD applied their training and experience to the circumstances they encountered. However, the blindfolding of arrested persons and the removal of clothing by members of the SIAD, while justifiable in the circumstances, has the potential to provide uniformed comment and criticism to be levelled at Defence.

296. Regardless of the appropriateness of any response to the incursion of the SITF perimeter, a perception may exist that the response from ADF members was “heavy handed”. This was certainly a possible perception that was referred to by ██████████¹⁶⁸ In the circumstances, the views of experienced Officers such as these carry weight.

297. In order to remove, as far as possible, circumstances that are attractive to media outlets reporting unfavourably on any future ADF responses to non-violent incursions at defence facilities including provisions such as those identified in paragraph 292 in relevant SOPs will mitigate against adverse publicity risks.

██████████

DOCUMENTATION AUTHORISING ARREST AND SEARCH

The *'Powers of Arrest and Search'* document

298. A document titled, *'Powers of Arrest and Search'*¹⁶⁹ ('the document') was provided by Soldier 1 to all members of the SIAD.

299. At interview, Soldier 1 stated that the document was produced by him by modifying a similar document that had been prepared by the former OIC SAID () in preparation for the 2013 SIPC and that he provided the document to other members of the SIAD.

300. Soldier 1 was questioned concerning the legal accuracy of the document and was unsure whether any relevant advice had been taken concerning the matters included in the document.¹⁷⁰ He stated that he believes the document summarises the powers that are held by members of the ADF concerning a person found to be trespassing on Commonwealth land. Soldier 1 stated that it was his belief that any member of the ADF has the power to detain an unescorted person on a military establishment.¹⁷¹

301. At interview, Soldier 2 stated that he had been provided and read the relevant document. He believed that the contents of the document had been discussed between members of the SIAD however, he was not able to recall the specifics of any conversations or discussions that occurred between members of the SIAD concerning the content of the document. From his perspective it was simply a document that outlined powers available to ADF members and from his perspective it was a "basic document" and "common sense".¹⁷²

302. At interview Soldier 3 confirmed that they had also been provided a copy of the relevant document.

303. was questioned at interview concerning his understanding of the contents of the document and stated that in circumstances where an ADF member encountered a person trespassing on defence premises the member would be able to detain the person by using either verbal or physical means, and question them on who they are and why are they are on defence premises. In the event that any person encountered was not cooperative, the ADF member has the power to detain them. stated that the powers available to an ADF member also extend to searching the person for weapons.¹⁷⁶

304. was questioned at interview concerning his understanding of the contents of the document and stated that if an ADF member encountered a person on defence premises and believed they were trespassing the member may arrest the person.¹⁷⁷

¹⁶⁹ See Enclosure 3, Tab A.

Soldier 1
Soldier 1
Soldier 2
Soldier 3

305. The genesis of the document was explored at interview with [REDACTED] and he stated that he had no previous knowledge of the document and was not in a position to provide informed comment on the accuracy of the contents without receiving advice on the issues raised in it.¹⁷⁸

306. The genesis of the document was explored with [REDACTED] Legal Officer and it was confirmed that the document promulgated by [REDACTED] Soldier 1 does not form part [REDACTED] standing orders, was not endorsed by a suitably qualified legal officer and appears to be a SIAD locally produced document. Key [REDACTED] cannot recall previously seeing the document.¹⁷⁹

307. Regardless of the origin and status of the document, it is clear that each member of the SIAD had differing views on the range of powers they held and how they should be exercised. Further, the actions of relevant members of the SIAD did not comply with the purported powers expressed in the document. For example, the document states that, “*you are not to detain the person*” however, the physical act of arrest clearly requires the detention of a person and this occurs immediately a person is placed under arrest. Further, the document states that, “*you are not to question the person after you have arrested them*” however, all arrested persons were questioned by relevant SIAD members.

308. Notwithstanding the differing opinions within the SIAD on when and how purported arrest and search powers should be exercised and the non-compliance with the terms of the document, these issues have not been pursued. It is considered that the contents of the document do not accurately reflect the actual powers available to ADF members and it was not issued by a competent issuing authority. In such circumstances, there is little to be gained in exploring compliance issues further. The document should not be used, or relied upon, for providing guidance or instructions to ADF members exercising any powers of arrest or search.

309. It is accepted that the document was promulgated by [REDACTED] Soldier 1 in an attempt to inform SIAD members of their powers should it be necessary to detain persons entering the SITF. While the intention behind the preparation and promulgation of the document was sensible, the content of the document is based upon an uncertain interpretation of powers held by ADF members and does not address the complexities of any arrest and search process that may be encountered. The content of any such documentation should be settled by a legal officer prior to it being relied upon. From the evidence available to the Inquiry this was not done. The document should be removed from distribution within [REDACTED] and not relied upon.

Recommendation 7:

It is recommended that the SIAD document titled, ‘*Powers of Arrest and Search*’ should:

- **not be used, or relied upon, for providing guidance or instructions to ADF members exercising any powers of arrest or search; and**
- **be removed from distribution within [REDACTED]**

¹⁷⁸ [REDACTED]

██████████ Standing Orders, Volume 4 “Security” – Annex G

310. ██████████ Standing Orders, Volume 4 “Security”, Annex G specifies the “*Legal Powers of ADF members conducting duties such as guard, sentry, watchman or escort*”. This Annex makes reference to, and provides some explanation of, the powers of arrest held by members of the ADF under the Act. It also makes reference to the powers of search that are purportedly held by members of the ADF in certain circumstances. Specifically, it states that:

“Once a person has been arrested, the Defence member may conduct a search of the person’s clothing and any personal items, but only for the purposes of ensuring the arrested person does not have any weapon that may harm either themselves or another person, or is evidence which might be destroyed by the arrested person.”¹⁸⁰

311. As this document forms part of Standing Orders issued by ██████████ it is considered that this document should be the document relied upon to outline powers of arrest and search provided to SIAD members.

312. While it is likely that the contents of this document were considered by a range of relevant decision-makers prior to issuing, it has not been able to be confirmed that the contents of Annex G were reviewed and approved by a suitably qualified legal officer.¹⁸¹ Notwithstanding the complexity of the issues addressed, it is unclear what advice was received on the content of Annex G. This issue was raised with ██████████ Legal Officer who confirmed that ██████████ Legal has a copy of Annex G in their information management system however, it could not be confirmed that it had been approved for issue by a suitably qualified legal officer.

313. While the need to conduct a “search” of an arrested person may be a conceptually straight forward matter, the legalities associated with searching detained persons in a non-operational environment are not as straight forward as may appear at first blush. For example, Annex G is silent on issues such as:

- a. what constitutes a search;
- b. does the power to search extend to the removal of clothing;
- c. how are members of the opposite sex searched, where and by who;
- d. does the power of search extend to the conduct a “strip search” and when may this be considered necessary (and who decides);

314. The above list is not intended to be exhaustive of the types of issues that can arise or identify all possible eventualities that may arise during the conduct of a search on a detained person. Rather, they identify a range of issues that civilian law enforcement officers face on a daily basis in dealing with detained persons, Australia-wide. While a potentially complex area of law to operate within, these matters are ones which law enforcement organisations have developed detailed procedures to address within appropriate legislative frameworks.

¹⁸⁰ Enclosure 3, Tab B - ██████████ Standing Orders, Volume 4 “Security”, Annex G.

¹⁸¹ ██████████

315. If ADF members are to exercise the power of search, then detailed procedures should be established to identify the appropriate actions that may be taken in any particular circumstance. Accordingly, it is considered that the contents of Annex G should be reviewed and expanded upon in this regard. Infringing upon the rights and liberties of persons without more clearly defined procedures is considered high-risk action by Defence.

Recommendation 8:

It is recommended that the content of [REDACTED] Standing Orders, Volume 4 “Security”, Annex G should be reviewed by an appropriately qualified legal officer and, subject to their advice, amended and/or reissued.

ARRESTED PERSONS ALLEGATIONS OF MISTREATMENT

316. [REDACTED] Person 1 [REDACTED] Person 2 [REDACTED] Person 4 and [REDACTED] Person 3 refused to be formally interviewed as part of the Inquiry process however, they did provide written statements to the inquiry concerning their treatment by members of the SIAD during the incident.

317. The allegations made by the arrested persons that require consideration are that:

- a. during the arrest process the arrested persons were told “*welcome to the bag motherfucker*” and asked “*do you want to go for a swim*”;
- b. during the incident ADF members stood on the heads and backs of arrested persons causing injury and said to them, “*If you move we will kick you in the face*”;
- c. arrested persons were slapped around the head, dragged, picked up and dropped on the ground when they didn’t respond to questions from ADF members; and
- d. [REDACTED] Person 1 was threatened with rape, specifically that he was told by an ADF member, “*I’ll shove this stick up your arse.*”

318. [REDACTED] Soldiers 1 and 2 were the SIAD members directly involved in the arrest and search of the arrested persons. [REDACTED] Soldier 3 while not involved directly, witnessed the events unfolding. Each of these persons was questioned at interview and through supplementary questioning concerning any assaults, threats or inappropriate comments they may have made, or witnessed being made, and the specific allegations made by the arrested persons were put to each of them.

SIAD response to allegations

319. [Soldiers 1 and 2] denied the allegations identified at paragraph 317. [Soldier 3] denied witnessing any such behaviour by any SIAD member.¹⁸⁴ At interview, [Soldier 2] did admit to using language to the effect of, “*put your fucking hands behind your back. Stop resisting*” during the arrest of one of the arrested persons.¹⁸⁵ There is little doubt that the commands used by [Soldiers 1 and 2] in dealing with the arrested persons were delivered in an authoritative manner. In the circumstances, the use of authoritative commands and intimidating tone would be expected. The language [Soldier 2] admits to using is not considered inappropriate in the circumstances.

Assessment

320. In the statements provided to the Inquiry by the arrested persons, their individual observations of alleged mistreatment generally support the allegations made by other arrested persons. This may be a result of them providing a truthful recollection of events, being an embellishment or as a result of a conspiracy to provide a common set of facts that support their version of events.

321. The evidence provided by [Soldiers 1 and 2] is similar in so far as they deny any alleged mistreatment of the arrested persons during the arrest and search process. Specific allegations of mistreatment were put to them at interview and denied. Like the version of events provided by the arrested persons, this may be because of any number of reasons.

322. In the circumstances, where it is necessary to decide upon what occurred when there are conflicting versions of events, the evidence of [Soldier 3] is particularly persuasive in assessing whether the allegations made by the arrested persons can be sustained on the balance of probabilities. He was not directly involved in interaction with the arrested persons and had the opportunity to observe the conduct of [Soldiers 1 and 2] who were intimately involved in dealing with the arrested persons, as well as the behaviour of the arrested persons.

323. [Soldier 3] presented as a forthright and reliable witness, and answered questions directly and without any evasiveness. The specific allegations of mistreatment made by the arrested persons were put to him at interview and he stated that he did not witness any such behaviour by [Soldiers 1 and 2].¹⁸⁶ He is considered a reliable and credible witness. [Soldier 2] made admissions that were potentially detrimental to his position. These admissions were made openly and without any evasiveness on his part and support his credibility.

324. It is noted that despite the allegations of mistreatment made by the arrested persons in both the media and their statements to the Inquiry, the arrested persons have not made any complaint to VICPOL and have declined to be interviewed as part of the Inquiry.

[Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]

Conclusions

325. On the balance of probabilities it is found that the allegations of mistreatment made by the arrested persons are not able to be substantiated. Should any formal complaint of mistreatment be made by any of the arrested persons that allege possible criminal conduct by any SIAD member such complaint should be referred to the ADFIS and/or CIVPOL for investigation.

Finding 13:
It is found that the allegations of mistreatment made by the arrested persons are not able to be substantiated.

Recommendation 9
Should any formal complaint of mistreatment be made by any of the arrested persons that allege possible criminal conduct by any SIAD member such complaint should be referred to the ADFIS and/or CIVPOL for investigation.

TOR DETAILED FINDINGS

Actions prior to 2 October 2014

How did it become known, and by whom, that members of the Swan Island Peace Convergence (SIPC) would be conducting their annual protest during the period 27 September 2014 to 3 October 2014?

326. The planned conduct of the 2014 protest activity by the SIPC was widely known prior to the convergence being initiated on 27 Sep 14. The intention to conduct the 2014 convergence was published on the web pages of the SIPC and other peace activist internet sites.

327. The intended 2014 convergence was known to the [REDACTED] SIAD, VICPOL [REDACTED].

Once it became known that SIPC would be conducting their annual protest during the period 27 September 2014 to 3 October 2014, what preparatory actions were taken by the Swan Island Army Detachment (SIAD) command including:

328. In preparation for the conduct of the protest by members of the SIPC a range of preparatory and planning meetings were held between members of the SIAD, VICPOL and [REDACTED]¹⁸⁷ At these meetings plans to manage the protest activity were formulated and it was decided that there would be a VICPOL presence at the SITF during the period of the protest. Ten (10) members of VICPOL were located at the SITF (8 x water police and 2 x motorcycle police).¹⁸⁸ Primacy of response to protest

[REDACTED] Soldier 2 Soldier 1 Soldier 3
[REDACTED] Soldier 1 Soldier 3 [REDACTED]

activities was the responsibility of VICPOL, as had been the case in respect to previous protests conducted at the SITF.¹⁸⁹

329. [REDACTED]

Meetings/briefing conducted involving SIAD command and/or CIVPOL, including who attended those meetings/briefings.

330. Three (3) planning and preparation meetings were conducted in order to prepare for the 2014 SIPC. The meetings were conducted in location at Swan Island on 8 Aug 14, 2 Sep 14 and 24 Sep 14.

331. These meeting were conducted between members of the SIAD, representatives of VICPOL, [REDACTED] and civilian contractors contracted to provide security services to the SITF.

Details of any security plan including the plan for ‘actions on’ in the event that the perimeter is breached:

332. A security plan for the SITF is not maintained by the SIAD. Responsibility for the security of the SITF is vested in [REDACTED].

333. Responsibility for responding to any security breaches at the SITF is the responsibility of VICPOL and civilian security contractors located at the SITF during the period of the 2014 SIPC.

334. The SIAD had a ‘be prepared’ task of assisting VICPOL elements in responding to a breach of the SITF perimeter. Any response by members of the SIAD was only to be initiated if VICPOL elements were not able to effectively deal with any incident. In such circumstances, the focus of any SIAD response was to protect sensitive ADF infrastructure that is located within the SIAD area of responsibility at the SITF.

Details of briefings, training or orders provided to defence members at SIAD including those who were to form part of any necessary response to protest activities. Who provided any briefings, training or orders?

335. No additional or specialised training was conducted by members of the SIAD in order to prepare for the 2014 SIPC.

336. Briefings and orders related to preparation for the 2014 SIPC were provided by the OIC, SIAD to other members of the SIAD. These orders and briefings were provided verbally with the exception of an instruction sheet identifying ‘Powers of Arrest and Search’ which was provided by the OIC, SIAD to all SIAD members.

Soldier 2 Soldier 3
Soldiers 1, 2 and 3

SENSITIVE: PERSONAL

What advice (including advice from [REDACTED] and/or specialist advice) was requested/obtained during any of the above preparatory actions? Who requested the advice? Who provided any advice and content of the advice?

337. No formal advice was requested or obtained by the SIAD in preparing for the 2014 SIPC.

338. Preparatory action taken by the SIAD was backbriefed to the [REDACTED] by OIC SIAD.

The extent to which any assessment included a review of actions that occurred in SIPC's protest actions in 2013?

339. Previous actions of groups associated with the SIPC formed part of contingency planning undertaken by the SIAD. While it was clear that primacy of response to the actions of the SIPC was the responsibility of VICPOL, [REDACTED]

Incident of 2 October 2014

Circumstances as to how, when (time) and by whom did it become known that protestors were in the vicinity of SIAD and/or that protestors had breached the perimeter.

340. At approximately 0645 hrs on 2 Oct 14, a member of the SIAD ([REDACTED] Soldier 2) was listening to commercial radio station 3AW. As a result of commentary made on the radio broadcast he became aware that persons associated with the SIPC had allegedly entered the SITF and were preparing to be interviewed on the radio.

341. [REDACTED] Soldier 2 immediately alerted the OIC, SIAD ([REDACTED] Soldier 1) of this situation. [REDACTED] Soldier 1 then alerted other members of the SIAD and VICPOL elements located at the SITF. Based on evidence provided to the Inquiry it is reasonable to conclude that such notification occurred within a matter of minutes of the radio broadcast being heard by [REDACTED] Soldier 2

What immediate actions were taken, and by whom, upon notification that protestors were in the vicinity of SIAD and/or that protestors had breached the perimeter? What was CIVPOL's involvement at this time? Were CIVPOL notified? If so, when and how?

342. OIC, SAID ([REDACTED] Soldier 1) notified members of VICPOL located at the SITF that it had been reported that persons associated with the SIPC had breached the SITF perimeter. VICPOL elements responded by commencing a search of the SITF and adjacent waterways.

343. Concurrent with VICPOL activity, [REDACTED] Soldiers 1, 2 and 3 [REDACTED] Soldiers 1 and 2 [REDACTED] Soldier 3 undertook this patrolling in one motor vehicle. Concurrently, [REDACTED] Soldier 3 commenced patrolling the area in another motor vehicle.

SENSITIVE: PERSONAL

Circumstances surrounding the discovery and identification of protestors inside the perimeter including, at each point that protestors were discovered/identified, the following:

How, when, and who discovered the protestors, how many protestors were discovered/identified, where the protestors were located when discovered, what were the actions of protestors prior to and upon discovery?

344. While conducting a vehicle-mounted patrol [redacted] Soldier 3 identified a group of four (4) persons that he believed were the persons associated with the SIPC who had gained access to the SITF. He was the first member of the SIAD to make contact with this group of persons and this contact was made [redacted]

345. Upon identifying this group of persons, [redacted] Soldier 3 made mobile telephone contact with [redacted] Soldier 1 and advised him that he had identified a group of four (4) persons who were walking along a formed road and taking photos of ADF facilities. [redacted] Soldier 3 maintained observation on the group.

346. [redacted] Soldiers 1 and 2 responded by moving to [redacted] Soldier 3's location, while concurrently advising staff at the [redacted] that four (4) 'intruders' had been located. When [redacted] Soldiers 1 and 2 reached the location of the identified group of persons, the group had split into two groups of two persons each.¹⁹³

Actions taken upon discovery of protestors inside the perimeter including:

347. VICPOL responded to the incident by commencing a search of the SITF and adjacent waterways while [redacted] Soldiers 1, 2 and 3. [redacted] This patrolling was undertaken by motor vehicle. [redacted] Soldiers 1 and 2 were mounted in one vehicle, [redacted] Soldier 3 in another.¹⁹⁴

348. [redacted] Soldier 3 [redacted] Upon identifying the persons, [redacted] Soldier 3 made telephone contact with [redacted] Soldier 1 and advised him that he had identified a group of four (4) persons who were taking photographs of ADF facilities.¹⁹⁶

349. [redacted] Soldiers 1 and 2 responded by moving to [redacted] Soldier 3's location, while concurrently advising staff at the [redacted] that four (4) 'intruders' had been located. Upon [redacted] Soldiers 1 and 2 reaching the location of the identified group of persons, the group then split into two groups of two persons each.¹⁹⁷

[redacted] Soldier 1
[redacted] Soldier 1 [redacted] Soldier 3
[redacted] Soldier 1 [redacted] soldier 2 [redacted] Soldier 3
[redacted] Soldier 1
[redacted] Soldier 3
[redacted] Soldier 1 [redacted] Soldier 3

SENSITIVE: PERSONAL

350. [Soldiers 1 and 2] supported by [Soldier 3] subsequently detained, arrested and searched the four (4) 'intruders' before handing them over to elements of VICPOL for further processing.

The nature and circumstances of the arrest, search and detention of protestors including behaviour of the protestors during arrest, search and detention. What was said to the protestors immediately prior to and during the process of arrest and during the conduct of searches/detention?

351. In all arrests undertaken, relevant ADF members identified themselves as such and called on the identified persons to 'stop'. This command was ignored by the identified persons.

352. During both the initial arrest process and subsequent searching, all arrested protestors resisted arrest and search by relevant members of the SIAD.

353. Relevant SIAD members made it clear to arrested protestors that they were members of the ADF, that they were arresting the persons for trespass on defence property and were conducting a search of the arrested persons to ensure they were not in possession of offensive weapons.

354. While it is clear that the situation was tense and fast-moving and it is likely that strong language was used by both [Soldiers 1 and 2] during the arrest process this is not considered particularly noteworthy. A clear parallel can be drawn with law enforcement officers who use loud and aggressive language when initially confronting suspects in an attempt to gain immediate control of persons of interest and establish their authority. Such action by [Soldiers 1 and 2] is considered reasonable in the circumstances.

355. The only evidence provided to the inquiry that would substantiate allegations made by some of the arrested persons that threats and inappropriate comments were made by ADF members was provided in statements to the Inquiry by the arrested persons. These allegations were denied by [Soldiers 1 and 2] [Soldier 3] who was not directly involved in the arrest and/or search of arrested persons observed the interaction between the arrested persons and [Soldiers 1 and 2]. His evidence on the circumstances of this interaction is clear and unambiguous. He did not witness any behaviour by [Soldiers 1 or 2] that would substantiate the allegations made by the arrested persons.

The nature and circumstances surrounding the use of any restraints and/or blindfolds/hoods.

356. Subsequent to the arrest of the arrested persons and prior to them being handed over to VICPOL, members of the SIAD secured them by the use of handcuffs (cable ties), applied blindfolds (hessian sand bags) and searched the arrested protestors.

357. After the arrest of each protester, they were then placed under physical control on the ground, handcuffs and blindfolds were then applied.

358. An initial 'pat down' search was conducted by the SIAD member dealing with each arrested protester, with particular attention being paid to possible concealment areas in the arrested persons groin area. In two separate instances, persons arrested by [Soldier 1] had their trousers removed by being cut with a pocket knife in order for a more detailed search to

SENSITIVE: PERSONAL

be conducted. This action was taken by [Soldier 1] after a number of warnings to cease resistance were provided to the arrested person being searched. [Soldier 2] searched the persons he arrested by lifting and/or lowering their pants/underwear to search for offensive items. While he conducted a detailed search he did not deem it necessary to cut their clothes and remove them.

359. The reasons provided by [Soldiers 1 and 2] for the conduct of the searches was to ascertain if the arrested persons had possession of any weapons or other offensive items that may pose a threat to the SIAD members or other persons.

How, when and who briefed SIAD command and CIVPOL of the discovery of protestors and any arrest, search and detention.

360. VICPOL elements were collocated with SAID elements at the SITF during the period of the SIPC. Initial notification to VICPOL elements that persons associated with the SIPC were believed to be within the perimeter of the SITF was undertaken by [Soldier 1] and occurred within minutes of SIAD members becoming aware of the situation at approximately 0645 hrs on 2 Oct 14.

361. [Soldier 1] made initial contact with the [] COC at approximately 0800 hrs on 2 Oct 14 to report the incident and the SIAD response.

The nature and circumstances of the handover/takeover of protestors to CIVPOL.

362. The first group of arrested protestors were left under the control of [Soldier 3] once they had been secured and searched by [Soldiers 1 and 2]. VICPOL had been advised of the relevant location and responded to the situation within a period of approximately 7 – 8 minutes. VICPOL arrested the protestors and commenced processing them in accordance with VICPOL SOP.

363. The second group of arrested protestors were moved from the scrub area to a formed road where VICPOL was waiting. VICPOL then arrested the protestors and commenced processing them in accordance with VICPOL SOP.

Actions taken by SIAD command/CIVPOL when informed of the discovery and arrest of protestors inside the perimeter

364. VICPOL commenced a search of the SITF and subsequently identified four (4) persons within the facility. These persons were arrested by VICPOL and members of the SIAD had no role in this matter.

365. The OIC SIAD ([Soldier 1]) was intimately involved in the arrest and search of arrested persons. [Soldier 1] responded to the initial identification of persons within the perimeter and had a very high level of situational awareness and involvement in the incident from this point on.

Context management issues

Whether there were other issues surrounding the operational or work environment which may have contributed to the alleged incident on 2 Oct 14.

366. It is considered that the VICPOL force element was not postured to deal with the incursion into the SITF. A failure by security contractors and VICPOL to identify and detain trespassers on the SITF necessitated the involvement of SIAD members in what was a CIVPOL responsibility.

367. While it is considered appropriate for any ADF member to be prepared to respond reasonably to any incident that threatens ADF infrastructure and facilities, in a situation where it is known that incursions may be likely, civilian security contractors and CIVPOL elements should be prepared to manage such an incident without relying on supplementation by ADF members.

368. If the situation escalates to a point where ADF members have to become involved in any search for trespassers, CIVPOL members should remain with ADF members and be responsible for exercising powers of arrest and search. ADF members should not be tasked to operate independently and should only be required to provide assistance to CIVPOL in circumstances where CIVPOL is unable to effectively deal with any situation.

Whether there was any failure on the part of any person to prevent the alleged incident on 2 Oct 14.

369. No failure by any ADF member to prevent the incident has been identified. While, with the benefit of hindsight, matters could have been dealt with in a manner that drew less media attention to the incident, any criticism of actions by ADF members would be unreasonable in the circumstances as they were responding to an unknown threat that materialised in a high-threat environment.

Whether the conduct of any person in reporting or not reporting the actions taken as a result of the incident has been inappropriate and whether there was any knowledge of such conduct by the supervisors or the superiors of that person and, if so, to what degree.

370. No conduct by any person has been identified that is considered inappropriate in the circumstances.

Whether relevant members have been provided with access to adequate support services (such as counselling, medical or legal assistance).

371. All ADF members involved in the incident have been provided with access to adequate support services. This was confirmed with all members at interview.

Whether there are any systematic issues highlighted as a result of alleged incidents on 2 Oct 14 which should be addressed at a unit, single Service or Australian Defence Force level.

372. The general power of arrest provided to ADF members under section 72P of the Act is considered appropriate to be maintained in order to deal with situations related to unauthorised access to defence facilities. However, it is considered that a power of search and seizure should be included within the legislative powers provided to ADF members exercising an arrest in accordance with section 72P. This would require amending the Act.

373. The document titled '*Powers of arrest and search*' promulgated by Soldier 1 in an attempt to inform SIAD members of their powers should it be necessary to detain persons entering the SITF was not endorsed for use by the [REDACTED]. The document does not address the complexities of any arrest and search process that may be encountered and should not be relied upon. The document should be removed from distribution within [REDACTED].

374. The [REDACTED] Standing Orders, Volume 4 "Security", Annex G titled "*Legal Powers of ADF members conducting duties such as guard, sentry, watchman or escort*" makes reference to the powers of search that are purportedly held by members of the ADF in certain circumstances. It is considered that Annex G does not currently address the complexities that may be encountered in possible arrest and search situations. Accordingly, it should be reviewed by a subject matter expert and an appropriately qualified legal officer and, subject to their advice, amended and/or reissued.

375. It is highly likely that the SIPC or other issue-motivated groups will continue to protest at the SITF and there may be other incursions onto that facility. Accordingly, specific SOPs should be developed by [REDACTED] as a matter of urgency to address such possible eventualities at the SITF.

376. All ADF members, regardless of service, are provided specific powers of arrest under the Act for a range of offences. Regardless of whether the current legislative regime is maintained, or a wider set of more detailed powers are provided under the Act, it is considered appropriate that the ADF develop a set of generic SOPs that address the detention, arrest and search of persons reasonably suspected of trespassing on Defence facilities. These generic SOPs should then be promulgated to all Defence members so they are aware of their powers and responsibilities, and how relevant powers are to be exercised if required. Training related to operating under generic SOPs should be conducted for all ADF members and this could be undertaken at minimal cost as part of the annual force preservation training cycle.

WITNESS ASSESSMENTS

377. The credibility and reliability of all witnesses was assessed both during their interviews and when examining their evidence. Credibility was assessed on how their statements fitted with other evidence, internal inconsistencies in their evidence, evasiveness, likely personal benefit or self-protection, the likelihood of their evidence being correct, and demeanour.

ADF members

[REDACTED]

378. [REDACTED] is currently the [REDACTED] and was in this role at the time of the incident. He was the person who ordered that the QA into the incident be conducted.

379. He was interviewed in person on 10 Nov 14 and presented as being well prepared for interview and provided detailed information concerning his involvement in issues related to incident. He had no direct involvement in planning related to preparation for the 2014 SIPC and was not involved in the immediate response activities undertaken by the SIAD. As would be expected from his appointment, [REDACTED] was involved in a strategic role. [REDACTED] presented as considered, articulate and forthright in the interview and is regarded as a reliable and credible witness.

[REDACTED]

380. [REDACTED] He was interviewed by telephone on 11 Nov 2014 and presented as being well prepared for the interview despite being involved in a HOTO process at the time of interview. He had no direct involvement in planning related to preparation for the 2014 SIPC and was not involved in the immediate response activities undertaken by the SIAD. He presented as an articulate and forthright and is regarded as a credible and reliable witness.

[REDACTED]
Soldier 1

381. [REDACTED] Soldier 1 is the acting OIC, SIAD. He was interviewed in person on 5 Nov 14 and seemed well prepared for the interview. [REDACTED] Soldier 1 presented as a highly capable [REDACTED] and fully engaged during the interview process. He provided his evidence in a clear, sincere and logical manner. [REDACTED] Soldier 1 appeared somewhat frustrated that the SIAD was required to participate in the incident and that it was not able to be managed by VICPOL. He is considered a credible and reliable witness.

[REDACTED]
Soldier 2

382. [REDACTED] Soldier 2 is a member of the SIAD. He was interviewed by telephone On 11 Nov 14 and seemed well prepared for the interview. [REDACTED] Soldier 2 presented as a highly capable [REDACTED] and provided his evidence in a clear, sincere and logical manner. He appeared somewhat frustrated that the actions of the SIAD were under inquiry. He is considered a credible and reliable witness.

SENSITIVE: PERSONAL

Soldier 3

383. Soldier 3 is a member of the SIAD. He was interviewed in person on 6 Nov 14 and seemed well prepared for the interview. Soldier 3 presented as a capable and provided his evidence in a clear, sincere and logical manner. He is considered a credible and reliable witness.

384. is a member of the SIAD. He was interviewed in person on 5 Nov 14 and appeared well prepared for the interview. presented as a highly capable and provided his evidence in a clear, sincere and logical manner. He is considered a credible and reliable witness.

385. is a member of the SIAD. He was interviewed in person on 5 Nov 14 and appeared well prepared for the interview. presented as a highly capable and provided his evidence in a clear, sincere and logical manner. He is considered a credible and reliable witness.

386. was not formally interviewed as part of the Inquiry process. A meeting was conducted with him on 5 Nov 14 in order to gain an understanding of the security and surveillance systems in place at the SITF. was very helpful to the Inquiry and provided detailed information that assisted the Inquiry process. He is considered a reliable source of information.

387. was not formally interviewed as part of the Inquiry process. A meeting was conducted with him on 5 Nov 14 in order to gain an understanding of the security arrangements in place at the SIF and surveillance records that were available to assist the Inquiry. He was very helpful to the Inquiry and provided detailed information that assisted the Inquiry process. He is considered a reliable source of information.

Arrested persons

388. Person 2 Person 1 Person 3 and Person 4 provided written statements to the Inquiry. These persons did not wish to participate in face-to-face interviews. Accordingly, assessing the credibility and reliability of these witnesses was not able to be undertaken. Their statements have been accepted at face-value.

ANNEXES

A. Instrument of Appointment and Terms of Reference

B. Witnesses in Alphabetical Order

1. Inquiry Notification
2. Witness Acknowledgment of Documents
3. Witness Record of Interview
4. Supplementary Questions and Answers (where applicable)

C. Notification Documents

1. A template acknowledgement form to sign and return
2. Instrument of Appointment
3. Privacy Notice
4. Statement of Independence and Impartiality
5. The Rights and Obligations of a Witness to an Inquiry
6. The Terms of Reference applicable to each witness

D. Quick Assessment

E. Legal Advice

Enclosures:

1. References

2. Correspondence with Appointing Officer

- Inquiry Plan
- Extension Requests and Approvals
- Inquiry Update Reports

3. Evidentiary documents