

Submission 070

Mrs Lynette Silver

From: Lynette Silver [mailto:lynnettsilver@hotmail.com]
Sent: Wednesday, 22 June 2011 01:10
To: DHA Tribunal
Subject: Enquiry via website

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Comment: RE PROPOSED AWARD FOR ALBERT CLEARY

I submit that, as Cleary does not qualify under the guidelines for the MID (or, rather its present-day equivalent) that was recently announced, he certainly does not qualify for any further gallantry award. Cleary was not executed for escaping. Although he was tethered by a length of rope to a tree for four days to prevent any further escape attempt (there being no place to confine him), and subjected to some very brutal treatment, he died from dehydration and weight loss after contracting dysentery/acute enteritis (the illness that was rampant at the camp and which killed almost every POW at Ranau), exacerbated by ill treatment.

Death from illness, neglect and ill-treatment cannot be regarded, in my view, as 'execution'. If it is, then any escaped POW who was recaptured and died in custody from illness and ill treatment must also have been 'executed'.

Furthermore, any evidence given by survivor Keith Botterill in relation to Cleary's treatment cannot be wholly relied upon, as Botterill confessed shortly before his death that he had lied under oath in order to secure a conviction against three guards, one of whom was entirely innocent of any maltreatment to Cleary. That he had deliberately lied was made publicly known in 1998.

All of this information is readily available and should have been made known to the Tribunal, either by Mr Bradford as part of his submission or as the result of further basic research.

Cleary's story is tragic, but he was simply one of many hundreds who suffered at the hands of the Japanese in Borneo. His high profile has certainly brought him to the attention of the public. However, the historical facts clearly demonstrate that, based on the relevant guidelines, there are insufficient grounds to award him an MID, let alone use this as a basis on which to consider him for any additional gallantry award.

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Contact Form URL: <http://defence-honours-tribunal.gov.au/contact-us/>

GUNNER ALBERT CLEARY'S NOMINATION FOR A POSTHUMOUS VICTORIA CROSS

Please note: 'Posthumous MID' has been used throughout this submission, in preference to the modern-day equivalent, Commendation for Gallantry, as the former term was the one used in WW2, when determining the eligibility of an award for POWs who were killed while trying to escape.

This submission does not deal with the issue of Gunner Albert Cleary's eligibility to be considered for a Victoria Cross, as he clearly does not meet the criteria for this prestigious award. Rather, it argues that the evidence available in regard to his treatment as a POW, and on which any decision made by the Tribunal for any award must rely, is flawed, as the deponents supplying this evidence lied under oath.

BACKGROUND:

Following the publication of my book, Sandakan A Conspiracy of Silence in 1998, I was contacted by Mr John Bradford, of Adelaide, seeking my support for a gallantry award for Gunner Albert Cleary, who died at Ranau in Borneo on 20 May 1945.

I do not support, in general, the concept of retrospective awards and, as I did not consider that Cleary, who had died of dysentery, exacerbated by ill treatment and neglect following an escape attempt, qualified for either a posthumous MID or a VC, I told Mr Bradford that, while I appreciated his sentiments, I did not support his proposal.

When a bid made in 1999 to obtain a VC for Cleary failed, Bradford contacted me again, asking me to canvass Borneo POW relatives to ascertain if they would support the notion of Cleary being nominated for an award as a 'representative' POW. I did as he asked and could not find anyone to support a proposal to single out one particular POW, since so many had died in similar circumstances.

In the latter half of 2000 Bradford contacted me once more, to say that he had discovered that POWs executed for trying to escape in WW2 were entitled to be considered for a posthumous MID, and asking for assistance with names of escapees executed. Despite my firmly held views on retrospectivity, I conceded that if some POWs had received posthumous MIDs and others had been overlooked, it could be argued that here was an exception to the rule, especially since an execution is a clear cut matter.

I gave him the names of Harvey and McKenzie, shot dead at Sandakan for escaping, and also suggested that Wally Crease, who had tried to escape with Cleary and had been shot on the run during a second attempt, might qualify. I told him that, in my view, Cleary did not, as he was not killed trying to escape, nor was he executed.

On 31 December 2000, Mr Bradford emailed me asking for more names. On 1 January 2001, I replied that, according to the official history, 27 Australian POWs had been executed for escaping, and sent him the names of nine, whom I and my colleague Mrs Di Elliott already knew. The next day he asked me for assistance with an article he wished to have published in the Adelaide Advertiser to further his cause. On 9 January he forwarded it and, as there were a number of factual errors, I emended his text and returned it to him.

Shortly afterwards he located a file at the Australian War Memorial listing the names of 18 Australians who had been executed for escaping and whose posthumous MIDs had not been approved at the time.

I understand that Mr Bradford made no headway with his quest, until after the formation of the Honours and Awards Appeal Tribunal.

I did not know that a hearing was being held in 2009, as it was held without a call for public submissions at the direction of Dr Mike Kelly, MP. I also did not know that Mr Bradford, the only deponent, had appeared at this hearing, or that he had added the name of Albert Cleary to the list, until he contacted me again on 14 February 2011, to say that a hearing had been held, that the report was on the Honours & Awards website, and that a press release would be issued shortly.

In a letter to me dated 10 May 2011, Senator Feeney informed me that, during the course of the inquiry, the Tribunal panel members interviewed Mr Bradford and asked if there was anyone else the Tribunal should contact in relation to this matter. No name of an individual or organisation was forthcoming.

I find this most odd, as the principal reason for Bradford's email of 14 February 2011 was to ask me about documentation relating to the death of Crease, who had been removed from the list, as the Tribunal stated he had died from malaria. Bradford also asked for my assistance in providing proof of the actual cause of death, should the Tribunal wish to contact me - a request to which I agreed.

I admit to being rather nonplussed that there was any doubt about Crease's death. The trial paperwork, which I assumed had been used to give Cleary his award, also contained a statement made to the court that Crease had been shot during his second escape attempt. This information is also recorded in Don Wall's book, *Sandakan The Last March*, published in 1988, and in my book.

However, I subsequently discovered that Bradford had no idea that any paperwork, at all, existed in regard to Cleary's and Crease's escape attempt and that he had included Cleary's name without the expectation that he would receive any consideration for an award.

In an email dated 25 February 2011, he stated;

'I could not advocate retrospective recognition for Albert Cleary simply because, to the best of my knowledge, there was no paperwork on which to base a case. So although I mentioned his name in my submission, I was surprised to find his name among those to receive retrospective recognition, but not that of Crease'.

In response to questions recently put to the Tribunal, to clarify how a decision was made in regard to Cleary's award, the Tribunal cited paragraph 48 of its report, which shows that the evidence, relied upon by the two-person Tribunal, was a brief statement at the Australian War Memorial, stating that Cleary had 'died after being subjected to cruel treatment by his captors', and a hand-written note on Cleary's service record. This notation, which actually states 'refer to war crimes trial of Kitamura, who was executed for the murder of Gnr Cleary', was paraphrased by the Tribunal in its Report as 'murdered by a Japanese officer'. The trial documents referred to in this notation show plainly that there were three accused, and that all were Formosan civilians.

The official statement by Senator Feeney regarding the posthumous MIDs was not released until 6 March 2011. In the meantime, Mrs Elliott and I had looked at the Report on the website and found that there were several other anomalies, including decisions to award, or not award, MIDs, not supported by all the available evidence.

The Tribunal also concluded it was unlikely further Far East POWs would be identified as being eligible for the posthumous MID.

In the ten years that had passed since Mrs Elliott and I gave Mr Bradford the names of twelve men whom we knew had been executed while escaping, we had come across many more. After two more hours basic research, this list grew to about 50 – more, if 'dying in custody' from illness, ill treatment and neglect, as was the case with Cleary, is deemed to be an 'execution'. A thorough examination of archival files is likely to reveal many others.

However, as we are not satisfied with the way in which the posthumous MID inquiry was held, or with the degree of rigor applied to the research, we will not be making these names available to any politician to forward to the Tribunal, as has been suggested on several occasions, until we have confidence in the Tribunal and the system.

On 8 March 2011, two days after the press announcement regarding the posthumous awards was made, I sent emails and letters to the Minister for Defence, Minister for Veterans' Affairs and Senator Feeney. I also sent an email to Honours and Awards, and to other interested parties. These letters/emails criticised some of the decisions made by the Tribunal, and also pointed out that Cleary had not been executed for escaping and that perjury had been committed by the Australian witnesses at the war crimes trial dealing with his death.

Two months later I received a letter from Senator Feeney. None of the other correspondents made any acknowledgment. No one asked for any information regarding the perjury although, indirectly, this formed the basis of the 'evidence' on which the Tribunal had relied to award Cleary a posthumous MID.

That the Australian witnesses had perjured themselves at the 'Cleary' trial was no secret. It was first made public in 1998, with the publication of my book, the same publication that also revealed that Crease had been shot on the run. This book, since 1998, has been the main source of reference for both the Department of Veterans' Affairs and the Office of Australian War Graves. For the whole of that time it has never been out of print and is currently into its fourth edition.

THE PERJURY:

I first met POW survivor Keith Botterill through his good friend Maureen Devereaux, in the latter part of 1993. We developed an immediate rapport, as I had a good grasp of the Borneo POW story. I had known about Sandakan and the death marches since the age of 12, when Walter Wallace, who had gone to the same primary school as my father and had escaped from Sandakan in 1943, published a book about his experiences and the marches. At the end of our first conversation, Botterill remarked 'Do you know, you are the first person I have ever talked to who knows what I am talking about'.

From this small beginning I became a close friend, and more especially a trusted confidante. As I had no personal or emotional involvement, Botterill told me things he had never told anyone else, with the exception of Maureen Devereaux and John 'Lofty' Hodges, the commando who had rescued him and with whom he had been reunited in 1975.

During the time that I knew Botterill, we had many many conversations which I did not record, and sixteen interviews at which I took notes, as he did not like speaking into a tape recorder. Some of these interviews were at my request. Others he instigated, having remembered something that he wanted to tell me. I was summoned to his sickbed on occasion: it was almost as if he were afraid he might die before he set the record straight.

Botterill spoke to me about Cleary on several occasions. At no time did he ever claim that the guards had killed him, not even when he was totting up the number who had been killed after he arrived at Ranau.

During a discussion on the Ranau Camp and rice carrying in February 1995, Botterill stated that, of those who had survived the march to Ranau, the following were killed:

*approximately 20 members of rice carrying parties who could not keep up and were shot
* ten, who were sick, shot at Number 1 Jungle Camp.
*two others, who were murdered – one 'shot on the run' (Crease) and one bayoneted (Richie Murray)

He made no mention of Cleary.

A short account of Cleary's escape and subsequent death was also included in Don Wall's book. There is no reference in it to any guard being directly responsible for Cleary's death. In all his interviews and conversations, Botterill always identified the dysentery, poor food, exposure and lack of medical treatment as the cause of Cleary's death. This combination accounted for the deaths of most POWs at Ranau Camp, which Botterill referred to as 'a death camp'.

Although Cleary had been tethered to a tree to prevent any further escape attempts after Crease escaped a second time, he was untied before his death and placed in a ditch away from the guard hut, as the stench from his dysentery had become so bad. He remained there until the next day when, close to death, his mates were allowed to take him to a nearby creek to wash him. He died in the POW hut about 10 minutes later.

It was obvious, in 1995, that Botterill's health was failing. He had emphysema and, as the months passed, he became increasingly frail. As his health deteriorated, his need to tell me everything he could remember increased. He spoke candidly about camp collaborators, of the death of his friends Richie Murray and Allan Quailey, of Ronnie Sullivan and 'Alby' Alberts being murdered on day four of the last rice carrying trip, of having to break the arms of the dead to fit them into the narrow graves, of the terrible dysentery in the camp, so hideous that at times the memory of the smell became overwhelming and he had to talk about something else.

In late 1995, I obtained a copy of the trial documentation for Cleary's death. Three guards were on trial. On reading through it, which I did several times, I was struck by the inconsistencies in Botterill's testimony, particularly the time frame, which had been glossed over in the precis of evidence, and the insistence by Kawakami and Kitamura, two of the accused, and other witnesses, that the third guard, Suzuki Saburo, was not involved as he was at Paginatan, not at Ranau, at the time. I was struck by the fact that neither of the co-accused had produced any witnesses to give them an alibi, and yet both were fiercely defending Suzuki.

I also discovered that what Botterill told Wall and myself was at odds with his evidence to the court in 1946. The time frame was exaggerated and did not fit with his rice carrying schedule, and other details also differed. With the defence witnesses adamant that Suzuki Saburo was not at Ranau, when Botterill and Moxham insisted he was, I phoned Keith on 11 December 1995.

I told him that I had read through the transcripts of the Cleary trial five or six times, and there was something very wrong with the evidence.

The following is summarised account of the phone call. .

KB: 'You know don't you?'

LS: 'Yes, but I need you tell me'.

KB: 'Well, you can put this in your book, but you can't use it until I'm dead. I don't want to answer questions from journalists about it'

I gave the necessary undertaking.

He then told me that he and Moxham had lied at the trial to 'get' the guards and to also 'stitch up' Suzuki, who was at Paginatan, 40 kilometres away. Their perjury was motivated by revenge, as Suzuki and Kawakami had only received a gaol sentence for the murder of the sick at Number 1 Jungle Camp. Kawakami had also killed Richie Murray, Botterill's best mate. He was not being tried for this murder, as the hard evidence had been obtained from a 'stool pigeon', whom investigators had infiltrated into the cells of suspects, in order to obtain information. As the investigators did not want to break the cover of their informant, they told Botterill and Moxham they would 'get the Japs' at the Cleary trial.

In his testimony, Botterill stated that Crease and Cleary had escaped in early March. This was retracted while under cross examination by the defence counsel, who realised that there was a problem with the time frame. However, Botterill now claimed they he had muddled the dates, and that after escaping on 25 February, Cleary had been recaptured on 2 or 3 March: dates that allowed Botterill to claim he had seen Cleary detained for 4-5 days in the guard house and then 8 days tethered to the tree.

This was clearly impossible, as he had already told the court that since rice carrying trip 2, which began on 28 February, he been out of the camp for five days out of seven each week, for the next five weeks, carrying rice.

Botterill had also used the dates of various rice carrying trips to create his false time line. When the defence counsel queried these dates, the prosecutor re-examined Botterill, who reverted to his original statement that Crease and Cleary had escaped in early March.

Botterill has stated on many occasions that he had gone on five of the six rice trips – trips 2-6 inclusive. The outward journey was three days. After stopping at Paginatan overnight, the party returned. This trip took two days. The next two days they rested at Ranau, and then went on the next trip. Botterill was certain that his first rice trip, rice trip number 2, left Ranau on 28 February. As they were a week apart, the other four trips left on 7, 14, 21 and 28 March.

As part of his confession to me, Botterill confirmed the following time frame:

Trip 2: left Ranau 28/2 arr Paginatan 2/3 left Paginatan 3/3 arr Ranau 4/3 days off 5/3 and 6/3

(Crease and Cleary escaped on 3 March, the day before Botterill returned - a date he finally settled on at the trial)

Trip 3: left Ranau 07/3 arr Paginatan 9/3 left Paginatan 10/3 arr Ranau 11/3 days off 12/3 and 13/3

(At around noon on 12 March, the day after Botterill arrived at Ranau from Paginatan, he to the POW hut from burial detail to find Cleary had been recaptured. He was given the log treatment at intervals, at one end of the POW hut, over the next two days. At around noon the next day (13th), shortly after Botterill returned from a wood chopping detail, Crease was recaptured. Attention now turned to Crease who was badly beaten and given severe log treatment as he was considered to be the ringleader)

Trip 4: left Ranau 14/3 arr Paginatan 16/3 left Paginatan 17/3 arr Ranau 18/3 days off 19/3 and 20/3

(Early on the morning of 14 March, Crease asked to get a drink of water. While the roll was being called, he absconded. Botterill left immediately afterwards with the rice party. He returned on 18 March to find the POW hut encircled with barbed wire and a new guard hut constructed. Cleary was tethered to a tree by a rope near this hut. He was wearing a loin cloth. The bruises from his beating were now clearly visible. He was suffering from dysentery and was in a very poor way. The guards no longer touched him for fear of catching

dysentery, limiting their abuse to spitting, urinating and an occasional prod with a rifle butt. On 19th, the stench was so bad that he was released and ordered to lie in a ditch, away from the guard house. The following day, 20 March, when he was near death, the other POWs were allowed to carry him to the creek, where they washed him before taking him back to the hut. He died about ten minutes later.

Cleary died on 20 March – day before the next rice trip. Botterill helped bury him outside the POW cemetery as the Japanese said he was a 'criminal' and could not be buried with the others. This information enabled me to identify the sole body, exhumed from outside the cemetery, as that of Cleary. It had been buried in Labuan War Cemetery as 'unknown'.)

Trip 5: left Ranau 21/3 arr Paginatan 23/3 left Paginatan 24/3 arr Ranau 25/3 days off 26/3 and 27/3

Trip 6: left Ranau 28/3 arr Paginatan 30/3 left Paginatan 31/3 arr Ranau 1 April task ended.

(Botterill later told me that two POWs named Sullivan and Alberts had been murdered near Segindai, on the return trip. Segindai is on day 1 of the return journey from Paginatan – that is, 31 March. Death records for both these men show that they died on 31 March 1945. This time frame also dovetails with the movement of POWs from the Paginatan sub camp to Ranau, and the murder of Noel Parker on 29 March. Botterill stated that the rice carrying party and the Paginatan group passed each other and that, on his return journey on 1 April he had seen Parker's body at the side of the track, just to the west of Muruk village).

Botterill explained during his confession that they had lied to make sure they 'got' the guards responsible for the murders of the sick and his friend Murray. Although Suzuki took no part in Cleary's torture, he and Moxham were out for revenge for his other misdeeds and put him in the frame with the others.

As I did not take Botterill through his muddled testimony line by line, apart from establishing a time frame, it is impossible to determine precisely what ill-treatment Crease and Cleary suffered, and at whose hands. However, both withstood the torture and Crease, although subjected to the log treatment and given a more severe bashing than Cleary, managed to escape a second time. He was later shot west of the camp. Using this information I was able to identify the 'unknown' POW, whose body was found buried in a shallow grave to the west of the camp, as that of Crease.

After this escape, Cleary was tethered to the tree. His rations were reduced but Botterill told the court that a kind guard did what he could to give him extra food. The dominant word used by Botterill to describe Cleary's condition, on all occasions, is 'dysentery' .

In further reference to his perjury at the trial, Botterill asked me if I were shocked by his disclosures. I replied that I understood why he had done it, but I now had a problem as I had been relying on his sworn statements. As he had lied under oath, I did not know what I could trust:

His response was that there was no problem, as he would tell me everything he had lied about.

He then told me about the two Bird trials, held on 28-31 May 1946. The accused was a guard, who had all but kicked Arthur Bird, an ill POW, to death in July 1945. There were no inconsistencies in any evidence at this trial, or anything produced by way of rebuttal to suggest that the kicks had not contributed greatly to Bird's death. Despite this, the court decreed that the guard was 'not guilty'. When the verdict was announced, an outraged Moxham and Botterill immediately briefed fellow survivor, William Sticpewich, who was not there at the time. According to Botterill he had a fantastic memory and was therefore 'the best liar' Botterill had ever met. At the retrial, held the next day, Sticpewich gave evidence as

a third eyewitness. However, although a new panel found the accused guilty of murder and sentenced him to death, the sentence was not confirmed, on the basis that no one can be tried twice for the same crime.

NOTE: Despite the many inconsistencies in Botterill's evidence at the Cleary trial, the panel handed down a guilty verdict against all three accused on 28 May 1946.

Almost immediately, the same panel members sat in judgement on the first Bird trial where, on 29 May, they handed out an equally inexplicable 'not guilty' verdict, for which they were criticised by the Judge-Advocate General, who could not understand how such a decision had been reached, when evidence of guilt was clear-cut.

MRS DEVEREAUX: Botterill also confessed his perjury at the Cleary trial to Mrs Devereaux on several occasions, and to us both in September 1996, over lunch at Auburn R S L Club. Mrs Devereaux's statement in regard to Botterill's confessions to her is attached. Note that she was extremely distressed and very angry by the terrible details of Cleary's treatment, until Botterill confessed that he had lied.

In January 1997, a few days before Botterill died, Mrs Devereaux visited him in hospital, where he again raised the subject of his perjury, seeking absolution from her for what he had done.

TIM BOWDEN: In 1983 Tim Bowden interviewed Botterill for a program "Prisoners of War, Australians Under Nippon" These interviews were later published in book form by Professor Hank Nelson. Although there is no mention of either Crease or Cleary, in either the tapes or the book, the transcript notes from Bowden's interviews reveal the following remarks by Botterill.

When asked by Bowden if he harboured any grudges against today's Japanese, Botterill replied that he 'got all the revenge he wanted in [the] war trials'.

Bowden also questioned him about Kitamura, who had beaten Botterill on several occasions and was on trial for Cleary's death. Botterill didn't want to talk about him, remarking that he was a mongrel and a pig, and 'I got him hung'.

JOHN HODGES: In 1995, I gave Hodges copies of some of the transcripts of evidence of the Cleary Trial, including the three warrants of execution. These papers were returned to me when Hodges went into a nursing home in 2009. They are in pristine condition, apart from a notation on one of the sheets. On top of the warrant of execution for Kawakami, Hodges had written 'This is the guard that killed Richie Murray. Keith got revenge for his mate'.

He had not annotated any remarks on the warrants of the other two accused.

ADDITIONAL CORRECTIONS:

Before his death, Botterill also corrected a long standing, and oft-repeated statement, that on rice trip 6, fifteen of the twenty POWs had died. This reported death toll had led to the rice carrying being viewed as a form of 'disposal' and not the life saving journeys that they actually were. As long as a POW could carry the heavy rice sack, he had an infinitely better chance of survival. Not only did it get him out of the dysentery-ridden camp, but also afforded opportunities to steal some of the rice, raid native gardens, trade with the villagers and kill and eat dogs.

I questioned this death toll when I discovered that, if this statement were true, there were far too many bodies recovered from Ranau, and not enough along the track.

Botterill admitted that one or two men had been killed on average on each of the rice carrying trips, with the exception of the last, when they had lost five. Asked why he had not

taken steps to correct this gross misconception, he replied ' Some stupid journalist got it the wrong way round, and I couldn't be bothered trying to fix it. Besides, it made the story sound better.'

INCONSISTENCIES IN BOTTERILL'S ACCOUNTS OF CLEARY'S TREATMENT AND DEATH, 1945-1996:

His first sworn statement before Mr Justice Mansfield, 14 November 1945.

In this statement Botterill gave a brief description of the log torture, but did not mention any beatings. He said that Cleary was chained by the neck for two weeks in the open with little food and had no clothes. During this time he went 'down and down in health'. Just before his death the POWs were ordered to take him into the hut, where he died about 10 minutes later.

His statement as it appeared in the Webb Report (a report tabled in parliament by Mr Justice Webb)

Paragraph 414:

"Two Australians, Crease and Cleary, attempted to escape from Ranau and were recaptured and tortured. Logs were put under their legs and behind their knees. The Japanese then jumped on the logs and made the prisoners scream. Cleary had a chain around his neck and no clothes. He died ten minutes later."

Statements at the Cleary Trial:

Throughout his testimony, Botterill claimed that Suzuki Saburo was involved in Cleary's torture and beatings. Moxham supported this claim by swearing false testimony that Suzuki was not at Paginatan.

As mentioned previously, Botterill's evidence is very confused in regard to the dates and time frame, with conflicting escape and recapture dates. He stated that Cleary was in the hut for 4-5 days, was tethered to a tree by a rope for 8 days, and that he, Botterill, witnessed his deteriorating condition across this time frame.

Under cross examination, he admitted that he had gone on rice carrying trips 2-6, which clearly demonstrated that, during the period of Cleary's escape and recapture, he was out of the camp for most of the time.

When Cleary was close to death, Botterill stated the POWs took him to the hut. A bucket of water was fetched to wash him, but he died within four minutes, before they could attend to him.

Botterill, who had been subjected to the log treatment at Sandakan, also told the court that after 15 minutes the victim's legs become paralysed. After 30 they are completely numb. When released from the log there is considerable pain for the five minutes it take the victim to get to his feet. Pain is experienced for the remainder of the day.

When describing Crease's escape, Botterill claimed that both men had been on the log for 1.5 hours, when Crease saw that the guard was distracted by the morning roll call. He got up off the log, walked backwards between the sleeping platforms, picked up a shirt and leapt out the window. He then got well away before anyone noticed he was missing.

When challenged by the defence lawyer about the impossibility of Crease being able to do this after being on the log for 1.5 hours, Botterill replied that he must have found the stamina because he wanted to escape.

The Ranau Memorial:

Erected by Bruce Ruxton in the mid 1980s, as a memorial to all who died at Ranau and on the death marches, this memorial is situated close to the place where Cleary was 'chained'. It states, incorrectly, that this was for a period of 11 days. Because of the reference to Cleary, the Ranau Memorial is often referred to as 'The Cleary Memorial'. This, and the wording on it, is largely responsible for creating what Mrs Devereaux refers to in her statement as 'the Cleary legend'.

Statements to author Don Wall:

Although, in his book, published in 1988 after the memorial was erected, Wall repeats the claim that Cleary was chained up for 11 days, his account is closer to the final, truthful version.

Wall recorded that Crease and Cleary escaped, were recaptured and were tortured and beaten for two days, when they were untied. Crease was seen stretching himself, then stumbled up a nearby gully. The guards took chase and shot him on the run.

Cleary was chained to a stake. The guards spat on him and urinated on him, but never touched him with their hands because they feared he would catch dysentery. Occasionally they would throw him some scraps. He starved to death and died of a broken heart. Botterill helped untie him and carried him to the creek where he was washed. He died in the hut.

CONCLUSION:

- 1) This case is a prime example of why awards, so long after the event, should not be given retrospectively.
- 2) There is no doubt that Botterill lied under oath at the Cleary trial, in order to secure a conviction for guards whom he considered had not been adequately punished for other crimes.
- 3) As the evidence relied upon to award Cleary a posthumous MID is based on this perjury, the award must be withdrawn. To allow such an award to stand, and then use it to elevate the nominee to a higher order, devalues the award and undermines the integrity of the entire Honours and Awards system.
- 4) There appears to be no legal impediment to withdrawing this MID award. Although Senator Feeney's political adviser, Dr Adam Carr, informed me that it was not possible, politically, to withdraw the award, since the Governor-General had approved it (a statement he later repeated to both myself and Mrs Elliott), it appears that he is mistaken.

On 15 January 1991, the Queen instituted three Australian Decorations – the Star of Gallantry, the Medal for Gallantry and the Commendation for Gallantry (equal to an Imperial MID). This Royal Command, signed by the Queen and the (then) Prime Minister Bob Hawke, was published in the Australian Government Gazette on 4 February 1991 under 'Decoration Regulations', page 3. On page 5, as part of a Schedule for Gallantry Decoration Regulations, paragraph 13.1 states

"The Governor-General may cancel an award of a decoration".

Should this occur (paragraph 13.2) 'the name of the person to whom the award was made shall be erased from the Register and the person shall return the decoration to the Registrar.'

5) Botterill's confessed perjury renders as totally irrelevant the question of whether Cleary is entitled to either a posthumous MID or a Victoria Cross.

The Tribunal cannot allow perjured evidence, which sent three guards to the gallows in 1946, and was used to award Cleary a posthumous MID, to now be used to try and elevate their alleged murder victim, to the exalted status of a Victoria Cross.

Lynette Silver

6 March 2012.

My name is Maureen Devereaux – of 4 Juniper Place, Baulkham Hills, NSW 2153.

In my search for information re the incarceration and death on 12-6-45 of my brother JOHN BARNIER at Sandakan, I became closely associated with Keith Botterill who had remembered “Barney”.

The Botterills lived in the adjoining suburb of Seven Hills and we became good friends and I a confidant of Keith’s. I often drove him to our Sandakan Relatives’ gatherings and ceremonies and also to many of his media interviews. He frequently came here too, knowing my longing for details of the Sandakan tragedy. He seemed an extremely uptight person keeping so many horrific happenings, endurances and sights bottled up in his memory. Suddenly he would blurt out some terrible event that he had witnessed or endured. Each divulgence seemed a release for him in his constant emotional suffering.

So many of his graphic stories are etched indelibly in my mind. His description of the now Cleary legend was so vivid that my ^{whole} body cried – how he was tied to a log and inflicted with ghastly punishments, tortures and inhumanities – and how he did not succumb sooner to such devilish treatment – then the final image of the poor creature lying midst the filth and foulness of his dysentery and with a stench that even kept the guards away then – but how his mates carried him gently and washed him in the creek – and then at last he gained release through death.

I was very upset, distressed AND angry by these accounts. Then Keith confided how he and Bill Moxham at the War Trials had agreed that Suzuki and the worst guards must pay for their heinous crimes – and they planned “to stitch them up” and collaborated their stories to ensure the culprits got their due deserts – and in vindication for their mates who had perished through barbaric and brutal acts and utter degradation.

Keith seemed greatly relieved by his confession that he’d had to lie under oath. I felt proud of him and Moxham. They were fulfilling the orders of Captain Jeffery at Ranau in March 1945 – “If any of us get out of here, this atrocity must be reported”.

Often I drove Keith for meetings with historian Lynette Silver in her research re Sandakan. On one special occasion I remember Keith divulging his awful secret to her too – and then asking if she was shocked.

That untruth was always a burden for him. Keith was really such a good man and true-blue, but with a huge overload of horrific memories and sorrows for his lost mates.

In the final months of his illness, on one of my hospital visits, he spoke about that lie – as if in confession – and that he could not have done otherwise. I agreed and said I felt sure so would hundreds of relatives of the P.O.W Victims. We are forever indebted to him for helping to lift the Sandakan shroud.

Signed

M Devereaux

29. 2. 12

ADDRESS TO THE AWARDS & HONOURS APPEALS TRIBUNAL

14 MARCH 2012.

Good morning gentlemen,

My name is Lynette Silver. I have spent the past twenty years investigating the fate of prisoners of war sent to Borneo during WW2 and have been a consultant to the Office of Australian War Graves and the Unrecovered War Casualties Unit on various projects relating to this subject since 1995. My work in this field has been officially recognised by awards from both the Australian and Malaysian governments.

I have come to the Tribunal hearing today to argue my case that Gunner Albert Neil Cleary, a high profile POW who died at Ranau on 20 May 1945, after a failed escape attempt, is not eligible for consideration for any gallantry award, as the only official documentation available, on which any decision can be based, is perjured evidence.

I had hoped that, by now, those in a position to take some action in this matter would have quietly done so, so that my speaking out in public would not be necessary. Having expended an enormous amount of energy and time to ensure that the sacrifices of our POWs in Borneo would not be forgotten, to be here today gives me no joy, for I have great empathy with Cleary, especially as I located his grave in Labuan War Cemetery, where he had been buried as "unknown".

In the course of my POW investigations, I became a close friend of Keith Botterill, one of the six out of almost 2500 to survive the death camps in Borneo. While collecting material for my book, Sandakan A Conspiracy of Silence, I interviewed him at length over an extended period, making detailed notes of 16 discussions with him, some of which ranged across several hours. Before he died, in January 1997, I had many other conversations with him on various aspects of his time as a POW.

After the publication of my book in 1998, I was approached by Mr John Bradford, seeking my support to obtain a posthumous award for Cleary. While I appreciated Bradford's sentiments, I explained that I could not support his proposal, as Cleary was simply one of many who was tortured or who suffered and died at the hands of the Japanese. I also do not support, in general, the conferring of any posthumous WW2 awards when so many years have elapsed and when all eyewitnesses are dead.

However I respected Bradford's point of view, and we have never had a cross word.

After a failed attempt to have Cleary considered for a Victoria Cross, and unable to obtain support to have him honoured in some way as a 'representative' for Borneo's POWs, Mr Bradford told me that he was seeking to have posthumous MIDs awarded to POWs killed while escaping. In spite of my views on retrospective awards, I conceded that, since some escaped prisoners, killed while escaping, had received such an award, a case could perhaps be made to recognise those who had been overlooked.

I immediately supplied him with the names of twelve POWs whom I knew of, including Cleary's co-escapee Wally Crease, who had been shot on the run after a second escape attempt. However, I emphasised that Cleary did not fit the criteria, because he was not killed while escaping, nor had he been executed for attempting to do so. After being subjected to the log treatment, a common form of torture, for his attempted escape, he had died of dysentery, exacerbated by ill treatment and neglect - a fate not uncommon to POWs in Borneo.

I continued to have regular contact with Bradford at this time, and assisted him by editing an article that he wanted published in the press to gain publicity for his cause.

I did not know that, in 2009, Mr Bradford was giving evidence to the Tribunal or, indeed, that any hearing was being held. I note that, in his terms of reference, Dr Mike Kelly, MP, instructed the supposedly independent Tribunal that the hearing was to be held without a call for public submissions. I would respectfully suggest that unless it is believed that matters of national security are at stake, it is vital to have all hearings open to the public, if the government expects Australians to have confidence in the Tribunal and its recommendations.

When Bradford became aware of the Tribunal's decision not to award an MID to Crease, he contacted me again on 14 February 2011, prior to Senator Feeney's official press release on March 6. Although I had not been called by the Tribunal, Bradford was now seeking my assistance to have the panel reconsider Crease's case, before the final recommendations were made public. However, the Tribunal's response to Bradford was that the report would remain unchanged.

I note that, since the Tribunal's formation in 2008, the hearing for the MID enquiry is one of only two not open to the public (the other being a national security issue), and the only one that has relied on the evidence of just one deponent. In all other instances there has been a minimum of five deponents and, in one case, more than 50.

It may surprise those present today to learn of Mr Bradford's reaction to the Tribunal's recommendation to award Cleary an MID. After the decision was announced, he wrote to me saying, 'I could not advocate retrospective recognition for Albert Cleary simply because, to the best of my knowledge, there was no paperwork in existence on which to base a case. So although he was mentioned in my submission, I was surprised to find his name amongst those to receive retrospective recognition.'

I can assure you that paperwork does indeed exist. The transcription of the war crimes trial relating to Cleary's death is available to the public on-line and photo copies of the entire trial have been freely available from National Archives since 1976. The problem is that the two witnesses for the prosecution at this trial, Botterill and fellow survivor Bill Moxham, lied under oath. Their perjured evidence is at the heart of this matter today and one that I will address shortly.

As Bradford had failed to find any documentation to support Cleary's nomination, the question as to how the panel reached a decision in regard to Cleary was puzzling. In response to a recent question put to the Tribunal, a spokesperson referred to paragraph 48 of its Report. This reveals that the evidence relied upon was brief hand-written notation on Cleary's service file and a record held at the War Memorial, stating that 'Cleary had escaped, been recaptured and died after being subjected to cruel treatment by his captors'.

The trial documentation also contains a definitive statement by Botterill that Wally Crease was shot while attempting a second escape. This is also recorded in my book. Yet the Tribunal, in decreeing that Crease was ineligible for a Commendation for Gallantry, the modern day Australian equivalent of an MID, stated that it could find no evidence that he had been shot and that he had died of malaria.

In a letter to me of 10 May 2011, Senator David Feeney had noted that, during the course of the inquiry, the Tribunal panel members interviewed Mr Bradford and asked if there were anyone the Tribunal should contact in relation to this matter, but 'no name of any individual or organisation was forthcoming'.

Had the Tribunal called other witnesses, including myself, we would have pointed to the existence of the trial documentation and also to the glaring inconsistencies in Botterill's evidence, something that did not go unnoticed by the Japanese defence lawyer.

I stress that Botterill, not even in his perjured evidence, has ever claimed that Cleary was 'killed while trying to escape', or indeed, that he was murdered, although this was the charge against the three guards deemed responsible for his death.

Yet the Tribunal's Report states that being killed while trying to escape is the criteria, set down in November 1943 by the Imperial Prisoners of War Committee, for eligibility for consideration for awarding a posthumous MID. Although Botterill spoke often of the log torture meted out to both Crease and Cleary, and the tethering of Cleary to a tree by a rope in order to prevent any further escape attempts, he always said that Cleary died of dysentery and, on one occasion, lack of food and a broken heart.

Senator Feeney, in response to questions put to him on 20 February 2012, stated that Cleary was 'killed as a result of brutal treatment at the hands of his captors'. Yet in a letter to Tribunal Chairman, Professor Dennis Pearce, written the previous February, and just two weeks before the Senator's public announcement of the MID awards, he stated that Cleary had dysentery and was left to lie in his own excrement. He also stated that Wally Crease, whom the Tribunal in its just-released Report had decreed had died of malaria, had 'managed to escape again the next morning but the Japanese guards found him and shot him'.

This letter was actually sent to the Tribunal's chairman at the request of Air Vice Marshal Angus Houston, Chief of the Defence Force, in response to Senator Barnett who, at a meeting of the Senate Estimates Committee in October 2010, had pushed for an enquiry into the possibility of awarding posthumous Victoria Crosses to members of the Royal Australian Navy.

Although the Defence Force does not support the concept of retrospective honours and awards, on 12 February 2011, AVM Houston wrote to Senator Feeney, suggesting that, for 'reasons of transparency, reputation and legitimacy', 'the best way forward' was for Feeney to write to Professor Pearce, inviting him to consider an investigation into individual navy cases of valour. However, Houston also advised that 'as it is difficult and unwarranted to seek unique treatment for Navy personnel . . . the inquiry should involve a wider review of potential VCs.'

This, gentlemen, is the litany of events that has brought me here today, to state publicly that Botterill and fellow survivor Bill Moxham lied under oath at the Cleary trial. Their perjury was premeditated, and deliberate, and was done in order to secure a guilty verdict against the three accused, one of whom was 40 kilometres away at the time of Cleary's capture and subsequent death. As a result all three guards were hanged.

This perjury came to light in December 1995 when Botterill, who was terminally ill, confessed to me that, in order to secure a conviction against the accused, he and Moxham had lied under oath. He subsequently confessed to perjury at another trial.

Their motivation is understandable. All three guards had simply received gaol terms for murdering POWs, one of whom was a close friend of Botterill, and another, his best mate. It is worth noting that, despite the inconsistencies in Botterill's testimony, and an impossible time frame for the events he claimed were unfolding at Ranau, the panel handed down a guilty verdict on 28 May 1946.

Almost immediately, the same panel members sat in judgement at another trial where, on 29 May, they handed down an inexplicable 'not guilty' verdict against a guard who had kicked an ill POW almost to death.

Botterill's confession that he had perjured himself at the Cleary trial was repeated on several occasions in 1995 and 1996 to another of his close friends, Mrs Maureen Devereaux, and to us both in September 1996. He mentioned it again to Mrs Devereaux, when he was close to

death, seeking absolution from her for what he had done. In a statement submitted to the Tribunal, Mrs Devereaux describes her reaction to Botterill's accounts of Cleary's suffering.

'I was very upset, distressed AND angry by these accounts. Then Keith confided how he and Bill Moxham at the War Trials had agreed that Suzuki and the worst guards must pay for their heinous crimes - and they planned 'to stitch them up' and collaborated their stories to ensure the culprits got their due deserts - in vindication for their mates who had perished through barbaric and brutal acts and utter degradation.'

In my lengthy submission forwarded to the Tribunal at its request before today's proceedings, I also included additional comments made by Botterill and others, indicating that the deaths of his friends had been avenged.

I contend that, because of the perjury committed by Botterill, in particular, none of the details regarding Cleary's treatment and death can be relied upon, particularly the degree of torture he supposedly underwent and the length of time Botterill claimed Cleary was tethered to the tree. His perjury, which included altering the dates of Cleary's escape, recapture and death, greatly exaggerated this time frame.

This perjured evidence, on which the Tribunal indirectly relied in awarding a posthumous award to Cleary, is now being used in an attempt to elevate him to the nation's highest award for gallantry, the Victoria Cross.

All Statements. Although the fact that the witnesses had lied at the Cleary trial has been on public record since 1998, in March last year, two days after the awards were announced, I brought this perjury directly to the attention of the Minister for Veterans' Affairs, the Minister for Defence, Senator Feeney and the Tribunal.

Although urged by senior public servants and others to take the story to the media, I refused to do so, preferring to give those involved the opportunity to quietly withdraw the MID, on the basis that it had been awarded on perjured evidence.

Despite my expectation that someone in authority would have the moral courage to investigate the matter, it was not until three weeks ago that I was invited to submit my evidence to anyone. The Tribunal, which made the request, also asked me to forward copies of any correspondence that I may have had with the Attorney General, as lying under oath to an Australian court is a very serious offence.

I would like to make it clear that I was not under any legal or moral obligation to report Mr Botterill's perjury to the Director of Public Prosecutions - not the Attorney General - especially as I had given a solemn undertaking to a terminally ill man not to reveal this until after his death. His passing in 1997 released me from that promise.

I cannot see any valid reason why I should be expected to have formally reported the perjury to anyone in authority after that time, unless, of course, the Australian government wishes to investigate the question of whether the guards, found guilty and hanged on the strength of this perjured evidence, should be considered for a posthumous pardon.

Cleary's nephew Lindsay Patterson does not support the awarding of a Commendation to his uncle and wants it withdrawn. Neither does he support any move to now consider him for a VC. He has gone on record as saying 'Reading through the criteria for a VC or a Commendation, he doesn't qualify for any of it. I think if [the awarding of a VC] proceeds and turns pear-shaped, Neill's name will be mud.'

I have demonstrated at this hearing this morning that Cleary's posthumous MID, which relies entirely on perjured evidence, was awarded on faulty grounds. I therefore object in the

strongest possible terms to any attempt to upgrade this erroneous award, and further submit that it should be withdrawn.

While such a withdrawal, which could have been effected quietly and without fuss months ago, may be unpalatable from a political point of view, there appears to be no legal impediment to the cancellation of this award. Indeed, an allowance has been made specifically for such an action.

On 15 January 1991, when the Queen instituted the Star of Gallantry, the Medal for Gallantry and the Commendation for Gallantry, the Decoration Regulations decreed that 'the Governor-General may cancel an award of a decoration'. A copy of this Royal Command, signed by the Queen and the then Prime Minister Bob Hawke, appears in the Australian Government Gazette of 4 February 1991.

The decisions the Tribunal makes in regard to this matter go well beyond Albert Neil Cleary himself.

Perjured evidence, used to secure three death sentences, cannot be used in an attempt to elevate a commendation, already recommended for the alleged murder victim, to a Victoria Cross. If it is, the credibility of the entire honours and awards system, already tarnished by the previous flawed decision, is at stake.

Graham Edwards, the former Federal MP and Vietnam veteran who instigated the establishment of the Tribunal, has gone on record, in relation to this matter, stating, 'I would hate to see the credibility of the Tribunal now destroyed by a decision that was flawed, or in error.'

So too, gentlemen, would I.

Lynette Silver
Canberra 14 March 2012.