



Australian Government

Defence Honours and Awards Appeals Tribunal

**APPEAL OF TERRENCE JOHN KERLIN
INTO HIS ELIGIBILITY FOR THE DEFENCE LONG SERVICE
MEDAL AND THE NATIONAL MEDAL**

DECISION UNDER REVIEW

The decision of the Directorate of Honours and Awards of the Department of Defence made on 28 May 2008 that Mr Terrence John Kerlin is not eligible for the Defence Long Service Medal and the National Medal.

DECISION OF THE TRIBUNAL

The Defence Honours and Awards Appeals Tribunal set aside the decision under review and substituted its decision to recommend that Mr Kerlin be awarded the Defence Long Service Medal.

RECOMMENDATION

For the reasons set out in the Appendix to this Decision and Reasons, the Tribunal recommends to the Directorate of Honours and Awards of the Department of Defence that Mr Kerlin be awarded the National Medal.

DATE OF DECISION

6 July 2011

THE TRIBUNAL

For the purpose of this appeal the Tribunal was constituted by:

Ms Christine Heazlewood (Chair)
Air Commodore Mark Lax OAM, CSM (Retd)

REASONS FOR DECISION

Introduction

1. The Defence Honours and Awards Appeals Tribunal (the Tribunal) is established under the Defence Act 1903. Its functions are set out in Section 110UA of the Act. Those functions include reviewing a decision refusing to recommend a person or group of persons for a defence award. After conducting a review, the Tribunal may make a decision affirming the original decision, substituting a new decision or referring the matter to a person for reconsideration.
2. In June 2006, December 2006 and April 2008, Mr Kerlin, a member of the Australian Army and Army Reserves from 26 February 1964 until 14 May 1980, applied to the Directorate of Honours and Awards of the Department of Defence (Defence) for the award of the Defence Long Service Medal (DLSM) and the National Medal (NM). In response to each application, Defence determined that Mr Kerlin did not meet the eligibility criteria for the award of the DLSM or NM because he had not served for the period prescribed in the applicable medal regulations.
3. On 23 April 2009, Mr Kerlin wrote to the Tribunal requesting review of the decision of Defence. In his letter to the Tribunal, Mr Kerlin stated that he: ‘... remained in the Army Reserve, after Vietnam, to study for promotion and for training of existing reserve members and recruits so as I would reach the required level of service to qualify for the DLSM and NM’ and that his service was as an Instructor, rather than a trainee.
4. The decision in regard to Mr Kerlin’s application for the DLSM and NM was made by Defence most recently on 28 May 2008. The Tribunal’s role is to conduct a merits review of Defence’s decision, to consider Mr Kerlin’s application for the medals afresh and to make a decision as to his eligibility for the DLSM and NM. The Defence honours and awards the Tribunal can review are set out in the Defence Force Amendment Regulations 2011. The NM is not included in the awards the Tribunal can review, and thus the Tribunal has no power to review the Defence decision that Mr Kerlin is not eligible for the NM.
5. The Tribunal had before it Mr Kerlin’s application for review and the written submissions from Defence received on 4 May 2010 and 10 November 2010. Copies of Mr Kerlin’s service records were provided to the Tribunal by the Central Army Records Office.
6. On 30 August 2010 the Tribunal commenced its review by speaking with Mr Kerlin. Subsequently the Tribunal received further written submissions from Mr Kerlin, and additional records and a submission from Defence.
7. The Tribunal sought to locate Army Directives regarding ARES Service in the early 1970s, the period in contention. After a lengthy and exhaustive search of the Australian Archives, the Australian War Memorial, the Army History Unit, Central Army Records

Office and Defence Records, with the exception of Financial Instructions, no further official documentation could be located.¹

THE DEFENCE LONG SERVICE MEDAL

8. The DLSM was instituted by Her Majesty The Queen by Letters Patent on 26 May 1998, to 'recognise long and efficient service in the Permanent and Reserve forces'. The *Defence Long Service Medal Regulations* were set out in the Schedule attached to the Letters Patent. Regulation 3 (as amended) states:

(1) The Medal may be awarded to a member, or former member, of the Defence Force (the member) who:

(a) ... ; or

(b) has given:

- (i) qualifying service for a period of at least 15 years or periods that, in total, amount to at least 15 years; and*
- (ii) at least 1 day's qualifying service on or after 14 February 1975; and*
- (iii) all of the qualifying service before 20 April 1994; and*
- (iv) qualifying service, none of which can be recognised for the Defence Force Service Awards Regulations, either be reason of its length or its character.*

Paragraph 2 provides that the medal must not be awarded to a member who has completed qualifying service for the DFSM.

9. Qualifying service is defined in Regulation 5 as:

Service in the Defence Force is qualifying service if:

(a) where the service was given as a member of the Permanent Forces or the Reserve Forces - the member;

- (i) fulfilled the requirements specified in directions given by the Chief of the Defence Force; and*
- (ii) gave efficient service;*

10. The Chief of the Defence Force provided Directions under the Regulations on 13 April 2000. He directed that all service before 20 April 2000 that would have been classified as efficient under the Defence Force Services Awards Regulations may be classified as qualifying service for the DLSM. On 25 November 1983, the then Chief of the General Staff, General P.H. Bennett, directed that: '... the period which the person shall be required to undergo training or render service in the capacity of a member of the Australian Army Reserve shall be ... 26 days, comprising such periods of continuous training and home

¹ This search took over six months to ensure completeness.

training as are directed by the proper military authority'.² In this case, the Tribunal has not been provided with any direction by the proper military authorities.

11. The Defence Instructions (General) 2007 (the Instructions) defines 'efficient service' as:

Efficient service-means any service in the Permanent or Reserve Forces of the ADF as determined by the Chief of the Defence Forces (CDF). Although what constitutes 'efficient service' may need to be determined on a case-by-case basis, as a guide, all service in the ADF is normally considered to be efficient except for'

The exceptions include periods of leave or suspension without pay as well as any period where a member has received a formal warning because of inefficiency concerns or a period of service for another Australian Government body. Also a member may not be efficient if they are absent without leave for longer than 24 hours or for periods of detention.

12. Paragraphs 10, 11 and 12 of the Instructions refer to members in the Reserve. Paragraph 10 provides that, for long service awards including the NM, determined periods of training equate to qualifying service.

13. The enlistment year is defined in the Instructions as 'means for the purposes of determining whether a member of the Permanent or Reserve Forces has rendered service throughout a year, the period of 12 months that commenced on the day that the member became a member of the Permanent or Reserve Forces or on any anniversary of that day'.

14. There are no other requirements in the Regulations or Defence Instructions for the award of the DLISM.

15. When considering the eligibility criteria for the award of the DLISM and NM, the Tribunal reviewed the basis on which the medals had been created and the circumstances in which they had been awarded. It paid heed to the integrity of the Australian system of honours and awards and the consequential impact any finding or recommendation might have on that system.

Defence Records of Mr Kerlin's Service

16. Defence records indicate that Mr Kerlin served in the Citizen Military Forces (CMF), Australian Regular Army (ARA) Supplement (as a National Serviceman) and the Australian Army Reserve (ARES) during the following periods:

CMF	26 February 1964 to 31 August 1965	1 year 6 months, 7 days
ARA Sup	28 September 1965 to 27 September 1968	3 years 0 months
ARES	29 January 1969 to 14 May 1980	11 years, 3 months, 17 days

² Defence Force Service Awards Regulations – Determination for the Purposes of Regulation 3 (periods of service), 25 November 1983.

17. In 1965, Mr Kerlin transferred from the CMF to the ARA to undertake service in Vietnam. For this service, he was awarded the Australian Active Service Medal 1945-75 with Clasp Vietnam, Vietnam Medal, and the Republic of Vietnam Campaign Medal. Following completion of his Vietnam tour, he returned to the Reserves. Mr Kerlin's records indicate he applied for and was accepted into the ARES from 29 January 1969 to 14 May 1980 when he was discharged at own request. Mr Kerlin served for a total period of 15 years, 294 days.

18. Mr Kerlin's personnel record indicates that he was granted leave from attending the 1970 annual camp and on 26 October 1970 he was classified 'non efficient 1969/70'. At all other times Mr Kerlin's service was classified as efficient.

19. Mr Kerlin has not applied for nor been granted the Defence Force Service Medal (DFSM).

Summary of the Arguments of Mr Kerlin

20. Mr Kerlin told the Tribunal that while he took a period of leave for the birth of his son (DOB 23 September 1969), and was granted leave from a two-week camp in February 1970, he still completed his required number of days of service in both 1969 and 1970. Mr Kerlin also contends that attendance at camp was not a prerequisite for granting a long service award, nor was a declaration of 'efficient' by his commanding officer, and as such, he is eligible for both the DLSM and NM.

Summary of the Arguments of Defence

21. Defence submitted that Mr Kerlin had not completed 15 years qualifying service or periods that, in total, amount to 15 years as required by the DLSM and NM Regulations. An entry on 26 October 1970 in Mr Kerlin's Service record states that he was classified by his Commanding Officer as 'non efficient 1969/70'³ and this reduced Mr Kerlin's total period of efficient service by one year. In its supplementary submission Defence agreed that Mr Kerlin's enlistment years for 1969/70 were 29 January 1969 to 28 January 1970 and 29 January 1970 to 28 January 1971.

22. Mr Kerlin's Commanding Officer had deemed him 'non efficient 1969/70' because Mr Kerlin did not attend an annual camp, a continuous period of training and thus he did not meet the training commitment for efficient service. Therefore, Defence contended Mr Kerlin has only completed 14 years and 294 days service and is ineligible for the award of the DLSM and NM.

The Service and Pay Records

23. The Tribunal considered the evidence available in Mr Kerlin's Service and Pay Records which appear to differ with regards to periods of qualifying service. Mr Kerlin's Reserve enlistment year from 29 January 1969 to 28 January 1970 meant he had to complete 26 days service within those dates. The entry of Mr Kerlin's Commanding Officer into

³ AMF Routine Orders, Serial G 24, 42 RQR, 26 October 1970 and Mr Kerlin's Record of Service.

Mr Kerlin’s service record appears to be written for the financial year 1 July 1969 to 30 June 1970 rather than his enlistment year. However, Mr Kerlin’s Army Reserve pay records show that he completed the following Reserve Days for which he was paid:

Enlistment Year 29 January 1969 to 28 January 1970	39.18 Days
Enlistment Year 29 January 1970 to 28 January 1971	32.07 days

24. This makes it possible for Mr Kerlin to have completed his required number of days of qualified and eligible service for both enlistment years 1969 and 1970, despite being classed as ‘non efficient’ in-between. The effect is illustrated in figure 1.

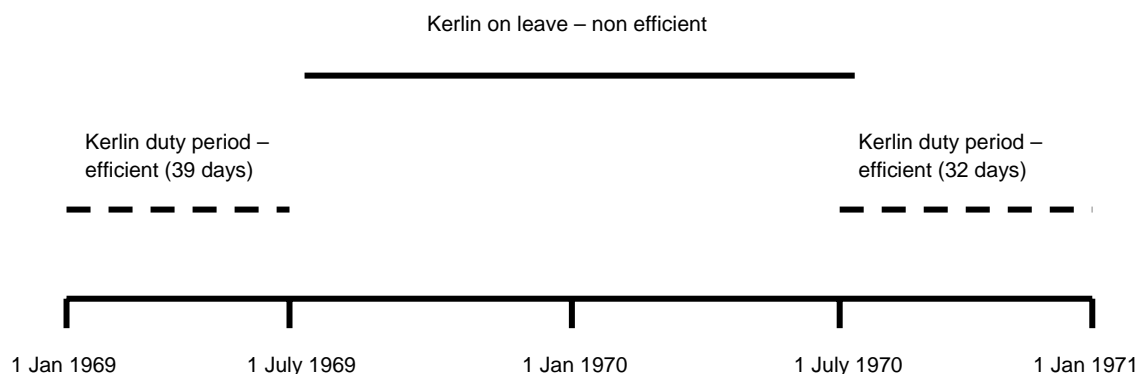


Figure 1 – Mr Kerlin’s Service January 1969 - December 1970

Qualifying Service – CMF

25. Mr Kerlin’s service was from 26 February 1964 to 31 August 1965 a period of one year, six months and seven days. Defence argued that Mr Kerlin had served for one year only because he did not complete the second enlistment year. The Regulations state that the DLSM may be awarded if the person has given qualifying service for periods ‘that, in total, amount to at least 15 years’.

26. For Mr Kerlin’s service to be qualifying service it must fulfil the requirements specified in directions given by the Chief of the Defence Force and be efficient. According to the Instructions any service is efficient apart from a number of exceptions which include ‘periods of suspension with out pay’. The exceptions imply that a person did not have to serve for an enlistment year to have given qualifying service. If a person had been suspended without pay for a period less than one year the remainder of the year would be efficient service. The Tribunal concludes that an incomplete year of service may still be qualifying service.

27. The Tribunal is satisfied that Mr Kerlin’s service with CMF for the period one year, six months and seven days is qualifying service.

Qualifying Service – ARA Sup

28. The record shows and Defence accepts that Mr Kerlin gave three years qualifying service as a national serviceman.

Qualifying Service –ARES

29. Mr Kerlin served in the ARES from 29 January 1969 to 14 May 1980, a period of 11 years, three months and 17 days. Defence argued that Mr Kerlin's period of service was 10 years because his last year of service was incomplete and in the financial year 1969/70 Mr Kerlin's service was rated by his Commanding Officer as 'non efficient'. Once again, for Mr Kerlin to have given qualifying service he must fulfil the requirements specified in directions given by the Chief of the Defence Force and be efficient.

30. For the reasons set out above, the Tribunal is satisfied that an incomplete year of service may still be qualifying service and that the period 29 January 1969 to 14 May 1980 should be included when assessing whether Mr Kerlin has given qualifying service.

31. The Tribunal examined the Australian Military Forces Financial Instructions for the Citizen Military Forces dated 1963 and the two subsequent Amendments in 1965 and 1966. These instructions cover the responsibility of a commanding officer, periods of training, training requirements and pay scales. No other pertinent records, regulations or instructions that referred to Reserve force training that were applicable in 1969-70 could be located.

32. Paragraphs 22-24 of these Financial Instructions cover the annual training program in accordance with Military Finance Regulation 172(8). The Instruction covers the maximum obligatory and voluntary training days and camp training for the purposes of pay. With respect to camp training, the requirement was for '14 days obligatory continuous camp training' **within a financial year**.⁴ The Tribunal concluded that Mr Kerlin was classified as non efficient in the financial year 1969/1970 by his commanding Officer for the purposes of pay only.

33. During the period Mr Kerlin served in the ARES, a member must have completed at least 26 days training or service. Paragraph 10 of the Instructions states that the required number of days of training or service per year is calculated at the anniversary of the enlistment of the member. The Determination of 25 November 1983 simply states that the member must undergo training or render service for 26 days. This determination is made pursuant to Regulation 3(2) which refers to the training or service rendered throughout a year. Regulation 3(3) provides that for the purposes of sub-regulation (2) 'year' means the period of 12 months that commenced on the day the person became a member of the Defence Force.

34. Consequently, Mr Kerlin satisfied the minimum number of reserve duty days (26) for both enlistment years 1969/70 and 1970/71. Mr Kerlin's qualifying service is 11 years 3 months and 17 days if that service is also efficient.

35. Defence has argued that Mr Kerlin did not have efficient service in 1969/1970 as his Commanding Officer certified him as 'non efficient' because he did not attend the annual camp. The definition of efficient service in the Regulations states that it is efficient if it is

⁴ Emphasis added.

deemed so by the Chief of the Defence Force. In the Instructions the definition of efficient service is any service in the ADF with a number of exceptions. Those exceptions can be categorised as periods without pay or periods when the member's conduct indicated that the member had been inefficient. In Mr Kerlin's case he was classified as 'non-efficient' because he did not attend the annual camp, although he had been granted leave not to attend.

36. The Tribunal could find no requirement in either the Determinations or the Instructions that a member had to attend the annual camp to be classified as efficient, and not attending the annual camp with leave does not fall within the exceptions outlined in the Instructions. The Tribunal was not provided with, and could not find any directions by the proper military authority that a member must attend the annual camp. The Tribunal concluded that Mr Kerlin had provided efficient service in both enlistment years and consequently he gave qualifying service for 11 years, 3 months and 17 days in the ARES.

37. Mr Kerlin's qualifying service was more than 15 years in total. He served at least one day's qualifying service after 14 February 1975 and all of his service was before 20 April 1994. None of Mr Kerlin's service has been recognised for the DFSA and therefore Mr Kerlin satisfies the requirements to be awarded the DLSSM.

DECISION

The Defence Honours and Awards Appeals Tribunal set aside the decision under review and substituted its decision to recommend that Mr Kerlin be awarded the Defence Long Service Medal.

THE NATIONAL MEDAL

1. Because Mr Kerlin had applied to the Tribunal before the Tribunal was given jurisdiction under the Defence Act to review the decisions of Defence, the Tribunal had considered whether Mr Kerlin was eligible to be awarded the National Medal (NM). The Tribunal was given its legislative powers from 5 January 2011 before the Tribunal had made a recommendation. The Tribunal no longer has jurisdiction to consider Mr Kerlin's eligibility for the NM. Given the similarity of the issues considered in relation to both the DLSM and the NM the Tribunal was of the opinion that it would be appropriate in this particular case to set out its reasoning in relation to the NM. The Tribunal notes that Defence is not bound to follow the Tribunal's reasoning in relation to the NM and so it has simply made a recommendation.

2. The NM was established on 14 February 1975 by Letters Patent by Her Majesty, The Queen, as one of the original elements of the indigenous Australian system of honours and awards. The medal recognises 15 years eligible service in organisations approved by the Commonwealth Government that protect life and property at some hazard to their members. The ADF is one such eligible organisation. Eligibility for the NM was set out in the Schedule attached to the Letters Patent, the *National Medal Regulations*. For Service prior to 20 April 1982, the NM may be awarded to a member who has, on or after 14 February 1975 and before 20 April 1982, completed 15 years eligible service as a member of the ADF, either continuous or aggregated. Service may be completed in either the Reserve or Regular forces or a combination of both.

3. Regulation 16 provides that a person may be awarded the NM if that person has given eligible service for periods that in total amount to 15 years and has served at least one day after 14 February 1975. Regulation 19 defines eligible service as:
 - (a) *it is service by a member to fulfil the primary function of the organisation; and*
 - (b) *throughout the period of that service, the member:*
 - (i) *has maintained a level of training sufficient to fulfil the duties of a member for the primary function of the organisation; and*
 - (ii) *has maintained a level of physical fitness sufficient to fulfil the duties of a member for the primary function of the organisation; and*
 - (iii) *has been ready to perform, and, as required, has performed, the duties of a member for the primary function of the organisation; and*
 - (c) *the member has served the organisation diligently.*

4. Paragraph 19(4) defines ***served an organisation diligently*** as:

... a person has served the organisation diligently if, in the opinion of the chief officer of the organisation:

 - a. *the service given by a person has been conscientious and of good standard; and*
 - b. *in the performance of the service, the person showed good conduct as a member of the organisation.*

The NM does not refer to efficient service as being a requirement.

Primary function

5. Mr Kerlin's service record demonstrates that except for the period when he took leave without pay, his service with the organisation was efficient. Mr Kerlin fulfilled the primary function of the organisation. To be classified efficient Mr Kerlin must have maintained the appropriate level of training, been physically fit, and been ready to perform those duties. Hence the Tribunal finds Mr Kerlin satisfies the requirements relating to the primary function of the organisation.

Diligently

6. For the same reason that the Tribunal found that Mr Kerlin fulfilled the primary function of the three organisations, the Tribunal finds that Mr Kerlin served the organisation diligently.

Fifteen years eligible service

7. The Tribunal has found that Mr Kerlin has given 15 years qualifying service in relation to the DLSM and for the same reasons finds that Mr Kerlin has given 15 years eligible service in relation to his application for the NM. At least one day of that service was after 14 February 1975. The Tribunal finds that Mr Kerlin satisfies the requirements for the NM.

Dual Award Eligibility

8. Clause 21 of the NM Regulations provides that a period of qualifying service for the DLSM before 20 April 1982 may be counted as a period of eligible service for the NM. Mr Kerlin applied for both the NM and the DLSM for concurrent service before 20 April 1982. Mr Kerlin can be awarded both the DLSM and NM.

The Transitional Provisions

9. Finally the Tribunal considered whether the transitional provisions in the Schedule to the Defence Legislation Amendment Act (No. 1) 2010 applied to this matter. Clause 2 of the Schedule provides:

*If the old Tribunal had started dealing with a review or inquiry before the commencement but had not completed the review or inquiry by the commencement:
(a) the new Tribunal is to complete the review or inquiry, and take any related action, in accordance with the amended Act;*

10. According to the definitions, 'the old Tribunal' was the Tribunal established under the executive powers of the Commonwealth in 2008. 'The new Tribunal' is the Tribunal established by Section 110U of the *Defence Act 1903*. 'Commencement' is the date of commencement of the Schedule.

11. Mr Kerlin's application was received by the old Tribunal but not finalised before 5 January 2011 the date of commencement. The new Tribunal completed the review of Mr Kerlin's application and therefore took action in accordance with the Defence Act. Section 110VB(2) gives the Tribunal the power to set aside the decision under review and 'substitute a new decision (being a decision to recommend a person or group of persons for a defence award or a foreign award)'.

12. The Tribunal finds that the transitional provisions apply to Mr Kerlin's application and it has the power to set aside Defence's decision and substitute a new decision.

RECOMMENDATION

For the reasons set out in the Appendix to this Decision and Reasons, the Tribunal recommends to the Directorate of Honours and Awards of the Department of Defence that Mr Kerlin be awarded the National Medal.