



Australian Government

Defence Honours and Awards Appeals Tribunal

Newton and the Department of Defence re: Mallett [2022] DHAAT 2 (21 March 2022)

File Number(s) 2021/007

Re **Mr George Newton on behalf of Mr Robin Mallett**
Applicant

And **The Department of Defence**
Respondent

Tribunal Mr Stephen Skehill (Presiding Member)
Air Commodore Anthony Grady AM

Hearing Dates 13 December 2021
19 January 2022
10 February 2022

DECISION

On 21 March 2022 the Tribunal decided:

- (a) to set aside the decision that Mr Mallett not be recommended for the Australian Defence Medal and to substitute therefor a recommendation that Mr Mallett be awarded the Australian Defence Medal; and
- (b) to affirm the decision that Mr Mallett not be recommended for the Anniversary of National Service Medal 1951–1972.

CATCHWORDS

DEFENCE AWARD – Australian Defence Medal – eligibility criteria – initial enlistment period not met – reasons for cessation – limited exceptions to mandatory period of efficient service – no discretion.

DEFENCE AWARD – Anniversary of National Service Medal 1951–1972 – eligibility criteria - registered and called up for National Service – minimum period of service for each category – reasons for discharge - no discretion.

LEGISLATION

Defence Act 1903 – Part VIIIC – Sections 110T, 110V(1), 110VB(2), 110VB(6)
Defence Regulation 2016 Section 36

Australian Defence Medal

Commonwealth of Australia Gazette S48, Australian Defence Medal Regulations Letters Patent, dated 30 March 2006

Commonwealth of Australia Gazette G00629, Australian Defence Medal Regulations 2006 Amendments of Letters Patent dated 5 August 2020

Australian Defence Medal Determination 2020 (No 1) dated 12 May 2020

Australian Defence Medal Determination 2021 dated 16 March 2021

Australian Defence Medal Regulations 2006 CDF Instrument of Delegation dated 23 September 2018

Anniversary of National Service 1951-1972 Medal

Commonwealth of Australia Gazette S483, Anniversary of National Service 1951-1972 Medal - Letters Patent and Regulations, dated 7 December 2001

Commonwealth of Australia Gazette S409, Anniversary of National Service 1951-1972 Medal Regulations, Declaration and Determination, dated 30 October 2002

National Service No. 52 of 1965 - An Act to Amend the National Service Act 1951-1964

Anniversary of National Service 1951-1972 Medal Regulations 2001 – Instrument of Delegation, dated 23 September 2018

Introduction

1. The Applicant, Mr George Newton (a lay Veterans' Advocate) on behalf of Mr Robin James Mallett, seeks review of a decision dated 10 December 2020 by Mr Wayne Parker, Manager Service and Campaign Awards in the Directorate of Honours and Awards of the Department of Defence (the Directorate), that Mr Mallett is not eligible for the award of either the Australian Defence Medal (the ADM) or the Anniversary of National Service Medal 1951-1972 (the ANSM).¹

Mr Mallett's service

2. Mr Mallett was conscripted and enlisted in the Australian Regular Army Supplement (National Service) (ARAS) (NS) on 27 September 1966 for a period of two years. Mr Mallett was discharged on 8 February 1967 under subsection 35B (3) of the *National Service Act 1951* (as amended by the *National Service Act 1965*) (the NS Act), as 'Unsuitable for further service – non disciplinary'.² As a result, Mr Mallett served 135 days.³

3. Mr Mallett has not been issued any awards for his service with the ARAS (NS).

Decision under review

4. On 22 August 2020, Mr Newton of the Mackay Veterans Advocacy Service wrote to the Directorate seeking an investigation of Mr Mallett's discharge and his eligibility for the ADM and ANSM.⁴ Copies of the letter to the Directorate and accompanying correspondence were sent to the Minister for Defence, the Chief of the Defence Force, the Commonwealth Ombudsman, and the Member for Fairfax, Mr Ted O'Brien MP.⁵

5. In a letter dated 15 October 2020, Mr Newton was advised by Mr Robert Curtin, Chief of Staff to the then Minister for Defence Personnel, the Hon Darren Chester MP, that Mr Mallett was not eligible for the ADM for his National Service, but may be eligible for the ANSM 'noting he fulfilled his service obligation'.⁶

6. On 10 December 2020 however, Mr Parker found that Mr Mallett had not rendered sufficient qualifying service towards medallic recognition.⁷ It appears from the Defence

¹ Newton Application to Tribunal dated 29 April 2021.

² *National Service Act 1951* as amended by the National Service Act of 1965.

³ Mallett, Robin James, Unit Personnel Record.

⁴ Correspondence from Mr George Newton to the Directorate OBO Mr Robin Mallett dated 22 August 2020.

⁵ Ibid.

⁶ Letter dated 15 October 2020 from Chief of Staff of the Minister for Defence Personnel to Mr Newton included within Mr Newton's Application to the Tribunal.

⁷ DH&A letter to Mr Newton dated 10 December 2020.

Report prepared for this review that the Directorate was not consulted in the preparation of the advice from Mr Curtin.

Tribunal Jurisdiction

7. Pursuant to s110VB(2) of the *Defence Act 1903* the Tribunal has jurisdiction to review a reviewable decision if an application is properly made to the Tribunal. The term *reviewable decision* is defined in s110V(1) and includes a decision made by a person within the Department of Defence to refuse to recommend a person for an award in response to an application. Regulation 36 of the *Defence Regulation 2016* lists the defence awards that may be the subject of a reviewable decision. Included in the defence awards listed in Regulation 36 are the ADM and the ANSM. Therefore, the Tribunal has jurisdiction to review decisions in relation to these awards.

The Australian Defence Medal

8. The eligibility criteria for awarding the ADM are contained in paragraph 4(1) of the *Australian Defence Medal Regulations 2006* (the ADM Regulations)⁸ as amended in 2020. They are as follows:

“4 Award of the Medal

(1) The Medal may be awarded to a member, or former member, of the Australian Defence Force who after 3 September 1945 has given qualifying service that is efficient service:

a) by completing an initial enlistment or appointment period; or

b) for a period of not less than 4 years service; or

c) for periods that total not less than 4 years; or

d) for a period or periods that total less than 4 years, being service that the member was unable to continue for one or more of the following reasons:

(i) the death of the member during service;

(ii) the discharge or termination of the member as medically unfit;

(iii) the discharge or termination of the member due to a prevailing discriminatory Defence policy, as determined by the Chief of the Defence Force;

⁸ Commonwealth of Australia Gazette, No S48, Australian Defence Medal Regulations, dated 30 March 2006.

(iv) the member ceased service in the Permanent Force or Reserves of the Defence Force and mistreatment by a member of the Defence Force or an employee in the Department of Defence was a significant contributing factor. "[...]"

9. While not in force at the time of the decision under review, the Australian Defence Medal Determination 2021, dated 16 March 2021, determined that policies relating to the following topics that were in effect before the specified dates are to be prevailing discriminatory Defence policies for the purpose of subparagraph 4(1)(d)(iii) of the Regulations:

- (a) Transgender - before 1 June 2010.*
- (b) Homosexuality - before 24 November 1992.*
- (c) Pregnancy (female) - before 7 January 1975.*
- (d) Marriage (female) - before 1 January 1970.*
- (e) Retention after marriage (female) - before 21 March 1984.*

10. Mr Mallett did not serve for the minimum specified period, did not die during his service, was not medically discharged and makes no claim to fall within any of the above Defence discriminatory policies under subparagraph 4(1)(d)(iii).

11. Accordingly, if he is to qualify for the ADM at this time, he must rely upon subparagraph 4(1)(d)(iv) – that is, it must be shown that he *ceased service in the Permanent Force or Reserves of the Defence Force and mistreatment by a member of the Defence Force or an employee in the Department of Defence was a significant contributing factor.*

The Anniversary of National Service 1951-1972 Medal

12. The ANSM was established under Letters Patent on 10 July 2001, as promulgated in *Commonwealth of Australia Gazette S483 - Anniversary of National Service 1951-1972 Medal Regulations 2001, (the ANSM Regulations)* dated 7 December 2001.⁹

13. Regulation 4 provides:

“(1) The Medal may be awarded for service under the National Service Act 1951, between 1951 and 1972.

(2) The service for which the Medal may be awarded is:

- (a) Service under the National Service Act 1951 for which a person was called up, or for which a person volunteered, that satisfied the requirements applicable to that person under that Act; or*
- (b) Other service that discharged a person’s liability to perform the*

⁹ *Commonwealth of Australia Gazette S483 - Anniversary of National Service 1951-1972 - Letters Patent and Regulations*, dated 07 December 2001.

service mentioned in paragraph (a) and that has been determined by the Governor-General to be service for which the Medal may be awarded.

(3) The other conditions for the award of the Medal are as determined by the Governor-General on the recommendation of the Minister.

(4) The Medal may be awarded only for service that fulfils the conditions for the award of the Medal.”

14. The eligibility criteria for awarding the ANSM, relevant to Mr Mallett’s service, were amended on 30 October 2002 by *Commonwealth of Australia Gazette S409, Anniversary of National Service 1951-1972 Medal Regulations, Declaration and Determination*.¹⁰

15. The Governor-General, on recommendation from the Minister for Defence determined under subregulation 4 (3) of the Regulations that ‘other conditions’ were as follows:

- (i) The Medal may be awarded to a person who was registered and was called up for national service under the National Service Act 1951 and completed not less than 90 days service between 12 April 1951 and 24 November 1959 as such a member;*
- (ii) The Medal may be awarded to a person who was registered and was called up for national service under the National Service Act 1951 and completed not less than 2 years full time service between 1 January 1965 and 7 October 1971 as such a member;*
- (iii) The Medal may be awarded to a person who was registered and was called up for national service under the National Service Act 1951 and completed not less than 18 months full-time service between 8 October 1971 and 5 December 1972 as such a member;*
- (iv) The Medal may be awarded to a person who was registered and called up for national service under the National Service Act 1951 and was serving on 5 December 1972 as such a member;*
- (v) The Medal may be awarded to a person who was registered under the National Service Act 1951 and elected to meet his or her obligations under that Act by completing part-time service in the Citizen Forces and completed such service;*
- (vi) Service as described in subparagraphs (i), (ii), (iii), (iv) or (v) of this Instrument may be deemed by the Chief of the Defence Force or a delegate of the Chief of the Defence Force to have been established if it was terminated due to the death, illness or injury or other disability due to*

¹⁰ *Commonwealth of Australia Gazette S409, Anniversary of National Service 1951-1972 Medal Regulations, Declaration and Determination dated 30 October 2002.*

service.

(vii) *Service as described in subparagraphs (i), (ii), (iii), (iv) or (v) of this Instrument may be deemed by the Chief of the Defence Force or a delegate of the Chief of the Defence Force to have been established if it was terminated due to grounds of exceptional hardship, under the National Service Act 1951.*

(viii) *The Medal may not be awarded to the following categories:*

- a. *A person who was exempt from registering for national service under the National Service Act 1951 by reason of being a member of the permanent defence service;*
- b. *A person who was registered under the National Service Act 1951 but did not serve as such a member including a person may have been called up for such service but did not serve as such a member;*
- c. *A person who was discharged for disciplinary reasons during a period of national service under the National Service Act 1951.*

16. Mr Mallett's period of service does not qualify him for the ANSM under any of subparagraphs 4(3)(i) to (v); he makes no claim of exceptional hardship under subparagraph 4(3)(vii), and he is not rendered ineligible under subparagraph 4(3)(viii).

17. Accordingly, if he is to qualify for the ANSM at this time he must rely upon subparagraph 4(1)(d)(vi) – that is, it must be shown that his service *was terminated due to the death, illness or injury or other disability due to service.*

Mr Newton's application to the Tribunal

18. In his application to the Tribunal, Mr Newton stated:

"It is not in question that Mr Mallett did not complete 2 years full time, the records clearly show his length of service, it is a question of injustice committed by Commonwealth Government and the Chief of the Defence Force. Mr Mallett marched out of 3TB¹¹ as member of the Australian Army NS to complete his Full-Time service, allotted to the RA Signals service. His service whilst a member of the ADF was exemplary as shown by his service records. Mr Mallett's service records are proof of his ability to meet all the requirement of service in the Australian Defence force, there are no reports of misconduct, insubordination, failing to attend parades, or accepting the discipline of Military life."

¹¹ 3 Training Battalion.

19. Mr Newton further stated:

“If one was to believe the degrading and humiliating report by Officers of questionable Integrity and Professional Standards at 3 TB, then Mr Mallett should not have been allowed to continue his service from the date that report was written. Chief of Defence Force terminated Mr Mallett’s service on the grounds “Unsuitable for further service -non Disciplinary”, unfortunately those six words are indelibly printed on the records of tens of thousands of National Servicemen like Mr Mallett forever.”

20. Mr Newton added that:

“Mr Mallett received correspondence from the then Minister for Veterans' Affairs and Defence Personnel dated the 15 October 2020 and signed by the Ministers Chief of Staff Robert Curtin. In this letter the Minister states that he has been advised that Mr Mallett may be eligible for the Anniversary of National Service Medal 1951-1972, noting that he (Mr Mallett) fulfilled his National Service Obligations. (Mr Newton’s emphasis) The Minister for Veteran's Affairs and Defence Personnel in his letter to Mr Mallett has unequivocally stated that Mr Mallett has fulfilled his National Service Obligations, it is then reasonable to state that Mr Mallett is eligible for the Anniversary of National Service Medal 1951 -1972.”

21. Mr Newton concluded that:

“In deciding with this appeal as with the Inquiry into the Refusal to Issue Entitlements to, Withholding and Forfeiture of Defence Honours and Awards the Appeal members are again asked to reverse the decisions of the past, that we as a community now have the knowledge to say were Decisions of Injustice, brought down by a lack of professional respect for National Servicemen.”

22. The Tribunal notes for the record that, in its view, the Tribunal’s former *Inquiry into the Refusal to Issue Entitlements to, Withholding and Forfeiture of Defence Honours and Awards*, in which the Tribunal recommended that medals forfeited by veterans pursuant to a 1946 Army instruction relating to forfeiture for disciplinary reasons be restored to the veteran or gifted to the family where those medals had otherwise been earned, is of no relevance at all to the present matter, and it will be given no further consideration in these reasons for decision.

Defence Report

23. The Defence Report provides the following analysis:

“The response to matters addressed to the Minister for Defence in Mr Newton’s letter dated 22 August 2020 was provided by the Chief of Staff to the Minister for

Veterans' Affairs and Defence Personnel on 15 October 2020, under cover of MC20-003099."¹²

*"On 1 July 2021, Mr Newton submitted his completed application to the Tribunal for a review of Defence's decision to not recommend Mr Mallett for the ADM and ANSM. As a result of this appeal to the Tribunal, Defence reviewed the decision from 2020 and re-assessed Mr Mallett's eligibility for the ADM and ANSM."*¹³

"In accordance with subparagraph (ii) of paragraph 4(1)(d) of the ADM Regulations, the ADM may be awarded if a member's service is terminated prior to completing an enlistment period due to being medically unfit for service. Similarly, in accordance with item (vi) of the ANSM Determination, service may be deemed to have been established if it was terminated due to death, illness or injury or other disability due to service."

*"Prior to his discharge, Mr Mallett underwent medical and psychological review. This was part of a normal administrative process which was triggered once training staff deemed him to be 'Unsuitable'. No evidence was located to suggest that Mr Mallett was being considered for a medical discharge at the time of his discharge from the ARAS (NS)."*¹⁴

"Further, a number of entries within Mr Mallett's Central Medical Record, detailed as follows, support the above finding:

- A. RMO statement on Mr Mallett's Attendance and Treatment Card, dated 23 November 1966 – "Not a medical problem";*
- B. Psychologist Report, dated 24 November 1966 - [...] "is intellectually below the required standard for efficient training." [...]; and*
- C. Final Medical Board Form, dated 06 February 1967 and Result of Final Medical Board, dated 14 February 1967 – "Non-Medical Discharge".*

24. Defence further stated:

"In relation to the ANSM, paragraph (vii) of the ANSM Determination, provides that service may be deemed to have been established if it was terminated due to grounds of exceptional hardship. Though not defined in the legislation, the term 'exceptional hardship' was identified in Parliament in 1981 as being comparable to discharge on compassionate grounds. Such circumstances were not evident in Mr Mallett's case."

¹² DH&A letter to the Tribunal dated 13 August 2021.

¹³ Tribunal Working Papers.

¹⁴ DH&A letter to the Tribunal dated 13 August 2021.

“Mr Newton’s reference to Ministerial correspondence stating that Mr Mallett may be eligible for the ANSM as he had fulfilled his obligation is acknowledged. The advice initially provided by Defence to the Minister’s office was based on an interpretation of Subsection 35(B)(7) of the NS Act made in isolation from the provisions of the ANSM Regulations or ANSM Determination. Defence regrets that this advice was not consulted with the Directorate of Honours and Awards at the time.”

“Subsection 35B(7) of the NS Act states “ A national serviceman discharged in accordance with a sentence of a service tribunal or as provided by this section (35B) is not liable to render further service under the NS Act.”

“While for the purpose of the NS Act Mr Mallett was no longer liable to render further service, he had not fulfilled his obligation in accordance with the requirements of paragraph (ii) of the ANSM Determination which states “the Medal may be awarded to a person who was registered and was called up for national service under the National Service Act 1951 and completed not less than 2 years full time service between 1 January 1965 and 7 October 1971 as such a member.”

25. After reassessing Mr Mallett’s eligibility (against the 2021 eligibility criteria) in light of his application to the Tribunal, Defence confirmed the decision of 10 December 2020.
26. It stated that the decision to not recommend Mr Mallett for the ADM was made for the following reasons:

“There is no evidence to show that Mr Mallett completed his initial enlistment period of two years, or served for periods that totalled not less than four years.

Additionally, there is no evidence to show that the reason for his discharge was due to any of the exceptions at paragraph 4(1)(d) of the Regulations.”

It further stated that the decision to not recommend Mr Mallett for the ANSM was made for the following reasons:

“There is no evidence to show that Mr Mallett completed not less two than two years’ service.

There is no evidence to show that the reason for Mr Mallett’s discharge was as a result of being medically unfit to complete his NS obligation as a result of illness, injuries, or other disabilities due to service.”¹⁵

¹⁵ DH&A letter to the Tribunal dated 13 August 2021.

Mr Newton's comments on the Defence report

27. Although Mr Newton provided his comments dated 29 September 2021 on the Defence Report, they were nearly word for word the same as his Tribunal application. The Tribunal Secretariat telephoned Mr Newton who confirmed that he wished that his document of 29 September 2021 to be considered as his comments on the Defence Report.

Tribunal hearings

28. To view the Tribunal hearings in context, it is appropriate that we set out some further detail about Mr Mallett's service.

29. Mr Mallett was conscripted for National Service in 1966 and was required to attend for an interview and medical examination which took place on 5 July 1966. On that occasion, as well as the usual physical examination, he underwent "Psychological Tests" recorded on a form NS 24 (Rev 4/65). He was found to be fit for enlistment.

30. He was then enlisted on 28 September 1966 for two years and, on the following day, underwent further psychological testing which was recorded on a form SCR 1. It is not possible to ascertain from the file who conducted this testing and many of the annotations on the form have no obvious meaning. Legible text on the form did however record that Mr Mallett was considered to be a "tense anxious youth with inferiority feelings", that he was judged to have a "good attitude" to the Army and "wants to succeed", and that he was in the tester's opinion "pretty borderline material at best". Clearly, however, these results were not such as to prevent Mr Mallett's enlistment and posting.

31. Mr Mallett was posted initially to 3 TB. He gave testimony that, during his time at 3 TB no one in his chain of command ever offered any critical comment on his performance of his assigned duties.

32. On 1 November 1966 a Captain from B Coy 3 TB wrote to the CO of 3 TB as follows:

UNSUITABLE SOLDIER

....

1. Conduct: Fair, but he cannot relate orders into actions. He is very slow.
2. Attitude Towards Military Training: Not known, he does not appear bright enough to have an attitude.
3. Potential: A training liability.
4. Training Missed: Nil
5. Recommendation for Disposal: Recommend discharge, this man does not have the mentality to become an effective soldier.

34. The CO of 3 TB annotated, but did not date, that minute as follows:

I CONCUR - to see RMO and OC 20 Psych Unit.

35. At some stage, again without dating, the RMO wrote on the minute “Not a medical problem”.

36. At around the same time, Mr Mallett was posted from 3 TB to the School of Signals at Ingleburn.

37. Mr Mallett’s testimony was that, at the School of Signals, he performed general duties and that, again, no one in his chain of command ever offered any critical comment on his performance of his assigned duties – indeed, he said that it was rather the opposite.

38. On or about 24 November 1966, Mr Mallett again underwent psychological testing, this time by the OC 20 Psych Unit. A form SCR 1A was partially completed, and a form AAF – A 245 reported as follows:

An educationally backward recruit who is intellectually below the required standard for efficient training. Further he is tense and anxious and suffers from inferiority feelings. His personality is such that he will quickly break down in a stress situation. He is both uneconomic to employ and a potential administrative liability.
Recommendation: That he be discharged.

39. Some time after that a message was sent to the School of Signals requiring Mr Mallett to report for discharge on 8 February 1967 on the basis that he was “Unsuitable for further service – non-disciplinary”. As originally written, that message stated that:

It is to be explained to Sig Mallett that his discharge was approved due to a Psych report ...

40. However, that text was amended to read:

It is to be explained to Sig Mallett that his discharge was ordered due to a report submitted on him whilst he was at 3 TB under recruit trg. Also explain to soldier that his performance at his present unit had no bearing whatsoever on his discharge being ordered.

41. Mr Mallett gave testimony that his Commanding Officer at the School of Signals told him that he was to be discharged for reasons of which he was unaware. He said that, in discussion, they concluded that it was probably because of his low level of educational achievement – he had left school at age 13 when in the 7th class and without passing the subjects required therein.

42. Mr Mallett said that he was unaware of the actual reasons for his discharge or the comments made about him as set out above until more than 50 years later when Mr Newton had sought access to his file with a view to securing the award of the ADM and ANSM.

43. Mr Mallett said that he was never counselled about any perceived inadequacy in his performance, was not told of aspects that he needed to improve, and was offered no mentoring or further training.

44. Mr Mallett's application was the subject of an initial hearing by the Tribunal on 13 December 2021.

45. The Tribunal noted that section 110VB(6) of the Defence Act provides that, in reviewing a reviewable decision, the Tribunal is bound by the eligibility criteria that governed the making of the reviewable decision.

46. The Tribunal raised the possibility that, if Mr Mallett was not found to meet the eligibility criteria at this time, he could later seek to have the basis of his discharge changed to a medical discharge so that he might thereby qualify for the ADM, and possibly the ANSM. Mr Newton subsequently advised that Mr Mallett would not seek to do that as he denied that he was in any way medically impaired.

47. As noted above, if Mr Mallett is to qualify for the ADM at this time, he must rely upon subparagraph 4(1)(d)(iv) – that is, it must be shown that he *ceased service in the Permanent Force or Reserves of the Defence Force and mistreatment by a member of the Defence Force or an employee in the Department of Defence was a significant contributing factor*.

48. The Tribunal thus asked the Defence representatives present at the hearing whether there was any evidence to justify the adverse statements made about Mr Mallett that clearly led to his discharge, noting that there were annotations on the relevant forms that bore no readily apparent meaning. The Tribunal further asked the Defence representatives whether, if there were no such evidence, discharge in those circumstances would amount to “mistreatment” within the meaning of subparagraph 4(1)(d)(iv).

49. The Defence representatives asked to be allowed to take those questions on notice and undertook to respond within a week. The Tribunal agreed to this course of action, and did not further pursue at that time the question of ANSM eligibility under subparagraph 4(1)(d)(vi) in the expectation that the Defence explanation of the evidence underlying Mr Mallett's psychological tests might throw light on whether he had an injury or disability due to service.

50. Accordingly, the Tribunal adjourned the hearing pending receipt of the Defence response to the questions it asked to be allowed to take on notice.

51. Defence did respond within the agreed time frame on 17 December 2021, but its response did not address either of those questions.

52. Instead, Defence asserted that:

- CDF Directive 10/2020 was a “legal authority” for awarding the ADM;
- that Directive required that the ADM might only be awarded for mistreatment where a formal review or Restorative Engagement had been conducted and the reviewer had advised that mistreatment was a significant contributing factor to a member’s early cessation of service;
- if Mr Mallett wished to claim the ADM on the basis of mistreatment he would need to initiate such a review; and
- Defence was unable to provide any further advice until such a review was completed.

53. Defence then went on to request that the Tribunal review “be placed on hold” until Mr Mallett requested a formal review and it was completed.

54. The text of CDF Directive 10/2020 is as follows:

INTRODUCTION

- 1. The Australian Defence Medal (ADM) recognises Australian Defence Force personnel who have completed either an initial enlistment period, or four years service, whichever is the lesser.*
- 2. Some former Defence members were unable to complete the qualifying service because they suffered mistreatment in Defence and ceased service as a consequence.*
- 3. Paragraph 4(1)(d)(iv) of the Australian Defence Medal Regulations 2006 (the Regulations) permits the award of the ADM where a member ceased service in the Permanent Force or the Reserves of the Defence Force and mistreatment by a member of the Defence Force or an employee in the Department of Defence was a significant contributing factor.*

PURPOSE

- 4. The purpose of this Directive is to provide clarification and guidance for award administrators and external bodies following amendments to the Australian Defence Medal Regulations. This Directive supersedes and replaces CDF Directive 04/2015 which is hereby cancelled.*

ADMINISTRATION

- 5. Applicants seeking the award of the ADM under paragraph 4(1)(d)(iv) of the Regulations should initially be re-directed to a formal review mechanism through current or future reparation or redress schemes or formal claims for compensation and the application placed in abeyance until such time as the case has been formally reviewed.*
- 6. The ADM may only be awarded under paragraph 4(1)(d)(iv) of the Regulations where a formal review or Restorative Engagement has been conducted through the formal review mechanisms, and advises that mistreatment by a member of the Defence Force or an employee in the Department of Defence was a significant*

contributing factor to a member's early cessation of service. This advice will be passed through the Defence Response Unit to the delegate.

7. Only those persons delegated under Australian Defence Medal Regulations 2006 Instrument of Delegation may recommend or suggest the awarding of the ADM under paragraph 4(1)(d)(iv) of the Regulations.

IMPLEMENTATION

8. This Directive is effective immediately and will remain extant until amended or withdrawn by me.

9. This Directive is sponsored by the First Assistant Secretary People Services. This Directive is to be reviewed by 1 October 2022 or if arrangements significantly change.

55. The Tribunal was not satisfied with this response from Defence. It accordingly convened a directions hearing which was held on 19 January 2022.

56. On that occasion the Tribunal advised Defence that it would not play “second fiddle” to an unidentified administrative process that did not possess the statutory powers of the Tribunal to resolve Mr Mallett’s application for review and that, accordingly, the Tribunal would not defer its consideration of that application.

57. The Tribunal also informed Defence that, on its initial analysis, it perceived multiple and significant legal defects in both the Defence response and the CDF Directive. It thus stated (and subsequently confirmed in writing) that, when the hearing was resumed, it would:

“require Defence representatives, consistent with Defence’s obligations (under the Model Litigant principles and the Tribunal’s Procedural Rules) to assist the Tribunal in its consideration of an application for review, to provide:

- *submissions on and responses to questions about:*
 - *the legal status of the CDF Directive 10/2020;*
 - *whether that Directive is consistent with sections 110UB and 110VB(7) of the Defence Act, Regulation 4(2) of the Australian Defence Medal Regulations and general principles of administrative law;*
 - *the meaning of the term “mistreatment” in the Australian Defence Medal Regulations;*
- *expert evidence and responses to questions about:*
 - *the meaning of annotations made on Mr Mallett’s file by psychologists;*

- *the compatability of those annotations and the conclusions drawn from them with the view expressed on that file by the medical practitioner consulted prior to Mr Mallett's discharge; and*
- *responses to other questions that might be asked by the Tribunal of relevance to the issues under consideration by the Tribunal."*

56. At the resumed hearing on 10 February 2022, Defence was represented by:

- Ms Petrina Cole, Director, Honours and Awards;
- Mrs Catherine Morris, Assistant Director, Current Entitlements, Honours and Awards;
- Miss Mellissa Jones, Special Counsel, Defence People Group;
- Captain Jo Bastian RAN, Director, Defence Response Unit;
- Dr Darrell Duncan, Director, Strategic Clinical Assurance, Joint Health Command;
- Mr Geoff Gallas, Director, Health Policy Programs and Assurance, Joint Health Command;
- Ms Vicki Brown, Special Counsel, Joint Health Command;
- Mr Justin Davidson, Senior Executive Lawyer, Australian Government Solicitor.

57. The Tribunal commenced by asking whether the CDF Directive was made in exercise of any statutory power, and thereby a "legal authority" governing the award of the ADM. Mr Davidson, Senior Executive Lawyer, Australian Government Solicitor, agreed that it was not, and that it was simply an administrative document.

58. The Tribunal noted that, while the CDF Directive was stated to provide "clarification and guidance", it was nevertheless expressed in directive or coercive language and stated that the ADM "may only be awarded" on the grounds of mistreatment when certain specified conditions were met. Noting that the Directive was stated to be applicable to "award administrators and external bodies" and that the Tribunal was clearly an "external body", the Tribunal asked whether Defence maintained that the CDF Directive was binding on the Tribunal. Mr Davidson readily, and we believe correctly, conceded that it was not. Section 110UB of the Defence Act expressly provides that the Tribunal is not subject to direction from anyone in relation to the performance of its functions unless provide by that Act or another law of the Commonwealth.

59. The Tribunal notes in passing that, while Defence officers appointed as delegates of the Governor-General may be subject to direction by the Governor-General in the performance of their functions as delegates, in its view they cannot be directed in that regard by the CDF under the Directive. The Tribunal understood Mr Davidson to agree with this proposition in discussion on the scope of the Directive when properly viewed as an administrative document.

60. In order to assist it in ascertaining whether the Directive nevertheless contained anything that the Tribunal might wish to voluntarily adopt, the Tribunal then sought submissions on whether the Directive could:

- impose new eligibility criteria, or whether that could only be done by amendment to the ADM Regulations and not by the CDF;
- define or otherwise clarify the meaning of the existing eligibility criteria, or whether that could only be done by regulations made under section 110VB(7) of the Defence Act and not by the CDF; or
- specify other conditions for the award of the ADM, or whether that could only be done by the Governor-General on the recommendation of the Minister under Regulation 4(2) of the ADM Regulations and not by the CDF.

61. Mr Davidson did not seek to argue that the CDF Directive was wholly or even partially legally valid and effective in any of these contexts, saying only that Defence needed to reflect on the Directive more broadly and would give careful consideration to these issues.

62. The Tribunal then asked whether Defence maintained the position set out in its response that it was necessary for Mr Mallett to make a new and specific application to enable the issue of eligibility on the ground of mistreatment to be considered. Mr Davidson said that Defence was no longer of that view.

63. In light of the above, the Tribunal considers that the CDF Directive is a fundamentally flawed document that should not only be ignored by the Tribunal but withdrawn by the CDF.

64. The Tribunal then sought Defence submissions on the meaning of the term “mistreatment” in the ADM Regulations.

65. Mr Davidson did not argue that it conveyed any technical or “trade” meaning in the Defence context, and agreed that it should be given its usual meaning in ordinary English usage. He said it would clearly cover bullying, physical or psychological abuse and similar, but argued that it would not be apposite to describe reasonable management or command action taken in relation to the employment of a serving military member. He said that, read in context, it was addressed to wrongful conduct that unfairly deprived a member of the opportunity to continue to serve and thereby qualify for the award of the ADM. He said that it could apply not only to discharge initiated by the service itself, but also to discharge sought by the member provided that such was sought because of conduct by an ADF member of a departmental officer that met a threshold of seriousness which made it unfair for the member to be deprived of the opportunity to qualify for award of the ADF. He said that the concept was not confined to “chronic treatment”.

66. The Tribunal does not disagree with these submissions by Mr Davidson and adopts them for the purposes of resolving the present application for review.

67. The Tribunal next turned its attention to the question of whether there was, in the reports of the psychologists, any evidence to justify the comments made and conclusions reached about Mr Mallett, leading to his discharge.

68. Mr Geoff Gallas, Director, Health Policy Programs and Assurance, Joint Health Command has a wealth of relevant experience. But, notwithstanding the breadth and depth of that experience, he advised the Tribunal that he was unable to offer any evidence about the “Psychological Tests” conducted at Mr Mallett’s pre-enlistment interview of 5 July 1966 or the results obtained – he said that the annotations made at the time meant nothing to him and that the oldest available manual shed no light on them. He agreed, however, that whatever the results, they were clearly not sufficient to preclude Mr Mallett’s enlistment and posting.

69. Mr Gallas was, however, able to considerably assist the Tribunal in relation to some, but not all, of the annotations on the SCR 1 form that recorded the results arrived at during Mr Mallett’s enlistment medical on 5 September 1966. He said that various of the annotations written on the form SCR 1 indicated that the psychologist in question had rated Mr Mallett as:

suitable as general dutyman, preferably in a non-fighting unit

and

low average ability – efficient private soldier suitable for posting to fighting unit

and

moderately good tradesman, for example motor transport driver.

70. Again, it should be noted that the reservations inherent in these opinions and assessments did not preclude Mr Mallett’s enlistment and posting.

71. Mr Gallas was able to go some way to explaining the annotations made on the 24 November 1966 SCR 1A form.

72. He confirmed to our satisfaction that the form did in fact relate to Mr Mallett despite Mr Newton questioning that because it was not fully completed.

73. He was also able to advise us that the testing methodology that the OC 20 Psych Unit had used was known as the MMPI.¹⁶ He said that the annotations on the form would allow him or the Tribunal, by “googling” MMPI, to identify the issues that the OC 20 Psych Unit had regarded as significant in reaching their opinion, because of the various letters and numbers that had been written on the form. However, he said that neither he nor the Tribunal could go further to interpret in a meaningful way the scores the OC 20 Psych Unit had attributed to those issues - he said that it was therefore possible to find out what the “labels” noted by the OC 20 Psych Unit stood for, but that it was not possible to interpret the scores awarded.

74. This left the Tribunal in the difficult position of knowing what conclusion the OC 20 Psych Unit had reached, but not their underlying reasoning. This difficulty was exacerbated by the fact that the SCR 1A report contains no statements of facts that might have shed some light on those conclusions.

75. The Tribunal then asked Dr Darrell Duncan, Director, Strategic Clinical Assurance, Joint Health Command whether the RMO’s annotation “Not a medical issue” contradicted the opinion of the OC 20 Psych Unit. He said that it did not. In his view, the psychologist had concluded that Mr Mallett had an inherent incapacity to perform at the requisite level but this did not equate to saying that there was a “medical issue”. He said that a “medical issue” was to be understood as a condition that was amenable to medical treatment, but that an inherent incapacity such as an intellectual deficit was not so amenable and was thus not a medical issue.

76. The Tribunal asked Dr Duncan whether, if the psychologist’s conclusions were correct, Mr Mallett should have been medically discharged. It posited the situation of a recruit who was found, post enlistment, to have such limited lung capacity and flexibility that they could not perform the strenuous duties of an ADF member. Dr Duncan said that, if such a recruit could not be deployed to other duties within their physical capacity, they would likely be medically discharged. The Tribunal then asked why a recruit found to have insufficient intellectual capacity would not similarly be medically discharged if other appropriate duties could not be identified. While the Tribunal found Dr Duncan’s response in this regard to be less than convincing, it has nevertheless concluded that it is not necessary to further pursue that issue for present purposes.

77. The Tribunal asked Dr Duncan whether the psychologist’s conclusions meant that Mr Mallett had a “disability” within the meaning of the ANSM Regulations and, if so, whether that disability should be regarded as “due to service” given that it had not been found to exist at enlistment and that there was nothing other than service that would

¹⁶ The Tribunal understands that the Minnesota Multiphasic Personality Inventory (MMPI) is a standardised psychometric test of adult personality used by Psychologists and other mental health professionals, amongst other things, to screen candidates during personnel selection processes. The test was developed in the US in 1943.

apparently have given rise to it. Dr Duncan said that lack of intellectual ability was not a disability. He also said that there was no evidence that Mr Mallett's condition had changed over the period of his service. Instead, he said, there had simply been a difference in assessment between the two psychologists and that an assessment at enlistment necessarily involved a margin of error because a recruit's suitability for service had not been tested at that time.

78. The Tribunal noted Mr Mallett's evidence that he had not been told the reasons for his discharge, had not been counselled about his performance, had not been told what more he needed to do to secure his military future, and been offered no mentoring or training to assist him to overcome any perceived shortcomings. The Tribunal thus asked whether those factors could amount to "mistreatment".

79. Mr Gallas said that, while such steps might be ideal in an ideal world, that was not the situation in the 1960s, particularly as the Army was at that time having to cope with an extra-ordinary influx of conscripts and had not been resourced to the level necessary to allow those types of steps to be taken. He said that it was difficult for him to comment on whether or not that was unfair. He said that, while it was not express, it is possible to the OC 20 Psych Unit in concluding that Mr Mallett would break down under pressure had somehow considered whether there was a likelihood of improvement. The Tribunal was not convinced that the OC 20 Psych Unit had in fact done so.

Tribunal Analysis – ADM

80. There is no question that Mr Mallett's discharge was brought about as a result of the minute of 1 November 1966 written by the captain from B Coy 3 TB to the CO of 3 TB, the SCR 1A form and AAF – A25 form completed by the OC 20 Psych Unit, and the decisions made in consequence of them. These documents and decisions require detailed consideration.

81. The minute of 1 November 1966 states as follows:

1. *Conduct: Fair, but he cannot relate orders into actions. He is very slow.*
2. *Attitude Towards Military Training: Not known, he does not appear bright enough to have an attitude.*
3. *Potential: A training liability.*
4. *Training Missed: Nil*
5. *Recommendation for Disposal: Recommend discharge, this man does not have the mentality to become an effective soldier.*

82. The minute does not state on what basis the author reaches that conclusion. The assertion that Mr Mallett *cannot relate orders into actions* is not supported by any document on Mr Mallett's file and the author does not say whether this is his personal observation or

an opinion formed in light of (unrecorded) reports to him from subordinate officers in M Mallett's chain of command. Mr Mallett's evidence is that, while he was at 3 TB, no one ever expressed to him any criticism of his performance of his duties. A contrary but unreasoned assertion cannot be assumed by the Tribunal to be necessarily correct.

83. The minute states that Mr Mallett's attitude to military training is not known. But that is contradicted by the psychologist's report of 29 September 1966 that expressly states that Mr Mallett had a good attitude to the Army and wanted to succeed. Even if the author had not seen that comment, there appears to be no reason why he could not have asked Mr Mallett about his attitude before reaching an adverse conclusion.

84. The minute goes on to state that Mr Mallett *does not appear bright enough to have an attitude* and that he *does not have the mentality to become an effective soldier*. These comments appear to be a gratuitous insult by a person unqualified to assess intellectual capacity. More importantly, they contradict the psychologist's assessment at enlistment that he had the intellectual capacity to perform at least some military roles.

85. The SCR 1A form completed by the OC 20 Psych Unit contains annotations of indeterminate interpretation, as explained by Mr Gallas, but also some very clearly expressed conclusions which are repeated on the AAF – A 245:

An educationally backward recruit who is intellectually below the required standard for efficient training. Further he is tense and anxious and suffers from inferiority feelings. His personality is such that he will quickly break down in a stress situation. He is both uneconomic to employ and a potential administrative liability.
Recommendation: *That he be discharged.*

86. That Mr Mallett had achieved only a low level of education is clear.

87. Whether he was *intellectually below the required standard for efficient training* is however not so clear. The author does not state what that standard was and what standard had been attained by Mr Mallett. The enlistment psychologist had applied intelligence tests and concluded that Mr Mallett was intellectually fit to be trained for certain military roles. The OC 20 Psych Unit does not advance any basis for disagreeing with that assessment founded on Mr Mallett's performance while at 3 TB.

88. The opinion that he was *tense and anxious and suffers from inferiority feelings* was formed by both psychologists but the enlistment psychologist clearly did not think this should preclude enlistment and the OC 20 Psych Unit does not explain whether or how these factors had affected Mr Mallett's performance during training, if at all.

89. The prediction that Mr Mallett's *personality is such that he will quickly break down in a stress situation* is not supported by reference to any evidence said to have emerged during his training, and there is none elsewhere on his file.

90. The recommendation that Mr Mallett be discharged may or may not have been justifiable. But the problem confronting the Tribunal is that the documentation does not allow us to assess whether it was justifiable. The mere fact that it was made by a psychologist does not of itself mean in our view that it is thereby cloaked with infallibility.

91. There is no evidence on the file that the person who ultimately took the decision to discharge Mr Mallett applied an analytical mind to the minute of 1 November 1966 or to the report of the OC 20 Psych Unit to satisfy themselves that the views expressed therein were soundly based on recorded or verifiable facts.

92. Even assuming that it could be established that Mr Mallett had not performed adequately during training, it would not in our view be necessarily the case that this was because of his intellectual capacity. It might equally have been because of some inadequacy in the training he was provided. Mr Mallett's testimony is that no criticism was made to him during training, and the inference from the message to the School of Signals that he was to be told that *his performance at his present unit had no bearing whatsoever on his discharge being ordered* seems to be that the School of Signals had found no cause for complaint about his performance there – either that, or there was a disingenuous motive to avoid Mr Mallett blaming the School of Signals for his discharge.

93. The Tribunal regards all of the above aspects surrounding Mr Mallett's discharge to be unsatisfactory.

94. To those aspects must also be added the facts that:

- He was not informed of any dissatisfaction with his performance and otherwise given the opportunity to demonstrate that he could perform better;
- He was not offered any opportunity for further training or mentoring that might have overcome any perceived deficiency;
- He was not afforded the opportunity to show cause why he should not be discharged, or otherwise afforded natural justice;
- He was not accurately informed of the reasons for his discharge; and
- He was, wittingly or unwittingly, led to believe that he was being discharged because of his low level of educational attainment.

Each of these further facts appear to us to be unsatisfactory.

95. When raised with Defence at hearing, we were told in essence that that was how things were done at the time and that the Army, struggling to cope with a massive influx of national servicemen which it was inadequately resourced to manage, simply did not have the

capacity to tailor individual programs for individual recruits. These factors might make the circumstances of Mr Mallett's discharge explicable or understandable. But, even if that is the case, that does not necessarily mean that his treatment was not wrong or unfair. Accepting that reasonable management or command action taken in relation to the employment of a serving military member is, as submitted by Mr Davidson, not mistreatment, it begs the question whether Mr Mallett's treatment was "reasonable".

96. In relation to whether or not Mr Mallett should have been offered further training, mentoring, counselling or time to demonstrate his capacity. Mr Davidson drew the Tribunal's attention to the following passage from the Federal Court decision in *Bromet v Oddie* [2003] FCAFC 213 at paragraph 110:

The Squadron commander was responsible for the effective utilization of Squadron resources and for training of Squadron personnel. It cannot be seriously suggested that the Air Force should continue to expend resources on training a person who, it believes, will not be able successfully to complete such training. If a commanding officer responsible for resources and training concludes that a particular trainee will not benefit from the expenditure of such resources on further training, then the officer should bring that matter to the attention of his or her own superiors and/or those responsible for postings and career planning such as the DPO. This duty is part of the command function, not a duty conferred by DI (AF) PERS 4-19. In my view, that instruction merely regulates the way in which a commander should perform this aspect of the command function.

97. However, the Tribunal considers that this quotation provides no support at all for the contention that Mr Mallett was not required to be offered further training, mentoring, counselling or time to demonstrate his capacity. Read in the context of the facts of that particular case, it is clear that the Court drew that conclusion about the suspension of an RAAF officer who had already been afforded further training, mentoring, counselling or time to demonstrate his capacity as required by applicable manuals and instructions prevailing at that time. If anything, this case may be thought to undermine the point that Mr Davidson sought to draw from it.

98. The question of whether the unsatisfactory aspects referred to above should be judged to constitute "mistreatment" squarely raises the question of what lens the Tribunal is required to use when assessing whether mistreatment – is it the lens of 1966-67 when the events in question occurred and when such treatment might have been accepted and commonplace, is it the lens of 2020 when the concept of mistreatment was inserted in the ADM Regulations, or is it today's lens when the issue falls to be considered by the Tribunal?

99. At the hearing Mr Davidson agreed to take that question on notice. A written submission was subsequently provided by Defence on 1 March 2022. It was subsequently copied to Mr Newton and Mr Mallett and they were afforded an opportunity to comment on

it. In response Mr Newton made a number of comments but these did not assist the Tribunal as, in essence, they failed to address the substantive question in issue.

100. The Defence submission posited that the Tribunal was to apply “a present day lens to what constitutes wrongful treatment - but with a historically contextualised understanding of the conduct”. Defence said this was for two reasons:

First, the present day lens is applied because the purpose of the provision is to ameliorate what may have been the effect of wrongful historical practices, such as discriminatory practices, despite them being potentially widespread or even accepted at the time. Secondly, because the concept of mistreatment has embedded in it an element of deliberate wrongfulness, or intent to harm (such as bullying, assault, psychological or sexual abuse, and so on), the historical context can inform an understanding of the subjective nature of the conduct in question.

101. The Tribunal does not agree that the concept of mistreatment has embedded in it an element of “deliberate” wrongfulness. The Regulation speaks of mistreatment, not wilful or deliberate mistreatment. Indeed, two of the examples given by Defence to illustrate historical conduct that it asserts would be mistreatment clearly do not involve deliberate wrongfulness but simply conformity with attitudes of the time that would today not be regarded as acceptable.

102. The third and most relevant example given by Defence was as follows:

Where there is evidence that a person was dismissed from military service on discretionary grounds, regard would be had to the historical context in differentiating between arbitrary, malicious or capricious decisions to dismiss (which might arguably be called wrongful), genuine but flawed decisions to dismiss (which might be called maladministration but would not be mistreatment) and legitimate management action (which would be neither mistreatment nor maladministration). For example, unsuitability reports are a mechanism to protect both the individual and the organisation from incompetency. Specific roles have a psychological risk attached. It is appropriate to assess the suitability of an individual to perform a particular role, and to exclude them from that role if they are assessed to be unsuitable. The words “not suitable” do not constitute mistreatment when contextualised as a holistic and responsible management response. Similarly, legitimately denying a benefit where there is no entitlement does not constitute mistreatment.

103. The Tribunal is not prepared to adopt the above text as being a necessarily complete, exhaustive and universally applicable statement of when discharge from service can constitute mistreatment. But, even if it were, the Tribunal considers that the treatment afforded to Mr Mallett meets the tests for mistreatment set out in that text.

104. In the Tribunal’s view, it was “arbitrary” to dismiss him on the basis of the minute of 1 November 1966 and the OC 20 Psych Unit’s report when neither of those established or set out a sound factual basis for the conclusions and opinions they advanced, when the person who took the decision to discharge apparently failed to satisfy themselves that there was actually a sound factual basis, when Mr Mallett was not informed of those opinions and offered an opportunity to show cause why he should not be discharged, when he was not accurately advised of the reasons for his discharge, and when he was not offered an opportunity to redress any perceived shortcomings through further training, counselling or mentoring. We cannot categorise a decision to discharge in these circumstances as a “legitimate” management action or, to use the phrase adopted by Mr Davidson at the hearing, a “reasonable” management action. And while we believe it was clearly a flawed decision (at least because of procedural defects), we cannot categorise it as “genuine” when viewed through a present-day lens, notwithstanding that it may have been in accordance with common practice in 1966/67.

105. In our view, applying a present-day lens with a historically contextualised understanding of the conduct, Mr Mallett’s discharge was substantially if not solely caused by mistreatment. Because of the failure to record a factual basis for the opinions formed, we cannot be certain that they were actually wrong. But we have no doubt that the process followed in relation to Mr Mallett’s discharge was both wrong and unfair.

Tribunal analysis – ANSM

106. As already noted, if Mr Mallett is to qualify for the ANSM at this time he must rely upon subparagraph 4(1)(d)(vi) – that is, it must be shown that his service *was terminated due to the death, illness or injury or other disability due to service*.

107. There is no evidence before the Tribunal that he had any illness, injury or other disability. Indeed, it was Mr Newton’s express submission in his email of 11 January 2022 that Mr Mallett “was not sick, ill or injured”. In the absence of evidence of illness, injury or disability, it is unnecessary for the Tribunal to consider the question of connection to service.

Concluding comment

108. There is one last matter that the Tribunal feels obliged to mention. In reaching the decisions recorded herein, the Tribunal has done so solely on the basis of the analysis set out in these reasons for decision. It stresses that it has in no way been influenced, one way or the other, by certain conduct and comments of Mr Newton that it regards as unacceptable.

109. In his written communications prior to and after the lodgement of the present application for review, Mr Newton cast serious aspersions upon the ethical standards of senior officers involved in the decision to discharge Mr Mallett. He did so, however, without advancing any evidence whatsoever for those criticisms. In the absence of such evidence, the Tribunal has no doubt that the officers in question acted in good faith even though, in retrospect, we may not agree with certain actions they took.

110. In the course of the initial hearing before the Tribunal on 13 December 2021, Mr Newton made disparaging personal remarks about one of the Defence representatives then appearing. The Tribunal regards those remarks as both unwarranted and irrelevant, and is grateful to the Defence officers who appeared at that hearing for the assistance they provided.

111. And, in the hearing of 10 February 2022, Mr Newton described the legal and medical evidence and discussion that had taken place as “bullshit” and “garbage” without offering any underlying analysis that would justify those comments. The Tribunal, to the contrary, found the evidence and submissions made by Mr Davidson, Mr Gallas and Dr Duncan to be expert, pertinent and extremely helpful.

112. It may be thought to be hypocritical for Mr Mallett to criticise comments made about Mr Mallett on his file as “vile” when he himself used far more derogatory language in commenting on the actions of not only the officers who made those comments but others who the Tribunal believes have been seeking in good faith and to the best of their abilities to assist the Tribunal to reach the correct and preferable on Mr Mallett’s eligibility for the awards he seeks.

113. The Tribunal welcomes, and often benefits from, critical and robust analysis of the evidence and submissions before it, but it does expect that such will be presented in a respectful manner. Where analysis or submissions are presented by a self-represented applicant or by a lay veteran’s advocate, the Tribunal does not necessarily expect the same standards of decorum that might be expected from a professionally trained barrister or solicitor and is prepared to “cut some slack”. But, even making such allowance, Mr Newton crossed the borders of common decency and respect on each of these occasions. In so doing, Mr Newton did not best serve the interests of his client by introducing unwarranted distraction from the consideration of the merits of his client’s case. The Tribunal suggests that he should give serious contemplation to the manner and tone of his future conduct on behalf of clients such as Mr Mallett, who may be ill-served by conduct such as he displayed on this occasion.

Decision

114. In light to the above, the decision of the Tribunal is:

- a) to set aside the decision that Mr Mallett not be recommended for the Australian Defence Medal and to substitute therefor a recommendation that Mr Mallett be awarded the Australian Defence Medal; and
- b) to affirm the decision that Mr Mallett not be recommended for the Anniversary of National Service Medal 1951–1972.