RCBRG comments on Defence Submission 096d of 28 April 2023

The text contained in the boxes is the RCBRG response to the Defence text immediately preceding it.

Defence responses to remaining questions identified as 'undertaking further work' in Defence Supplementary Submission EC23-000372 of 31 Jan 23 and topics raised at or subsequent to the Inquiry Hearings on 3/4 April 2023

28 Apr 23

INQUIRY INTO MEDALLIC RECOGNITION FOR SERVICE WITH RIFLE COMPANY BUTTERWORTH

1. Remaining questions identified as 'undertaking further work' in Defence Supplementary Submission EC23-000372 of 31 Jan 23.

Rules of Engagement:

8(r) (i) Is the inherent right of self-defence (including the ability to employ lethal force) an artefact of Rules of Engagement/Law of Armed Conflict/National/International/Other Law? (ii) Is an Australian civilian, for example, able to deploy lethal force in self-defence (subject to similar provisos/limitations just as the Rifle Company Butterworth could?)

Defence has no information to provide in relation to these questions.

A quick google search turned up the Commonwealth Criminal Code, in particular ss 10.4 and 10.5. These sections deal with Self-defence and Lawful Authority.[1]

2. Topics raised at or subsequent to the Inquiry Hearings on 3/4 April 2023.

a. Threat/Expectation of Casualties

During the period of service at Butterworth the relevant assessment of threat was that conducted by the Joint Intelligence Organisation (JIO). JIO reports include the term 'unlikely'. For example, JIO Study No. 14/74 Issued Sep. 1974 included the assessment that

[1] www.ag.gov.au/crime/publications/commonwealth-criminal-code-guide-practitioners-draft/

‘it is unlikely that any threat to Air Base Butterworth will arise from an external overt military attack on Malaysia’.

For current operations, Military Threat Assessments (MTA) provide assessments of the threat to ADF personnel and capabilities. MTAs express threat in levels – Very Low to Very High. Defence refers to our response to question 6(b) in submission 096b of 31 January 2023
concerning Military Threat Assessments.

No one has raised the issue of “an external overt military attack on Malaysia” so the only reason that Defence might include this here is to try to confuse the issue. The case raised by the veterans over many years is the threat posed to ADF at Air Base Butterworth by the communist terrorists of the Malaysian Communist Party – an internal, as opposed to external, threat.

On the expectation of casualties it is worth noting that this should include not just physical casualties but also psychological casualties. What psychological casualties could be expected from sending personnel out each night to a possible incursion, from advising personnel that there is a threat from armed CT that they must meet, from having personnel carry the live ammunition to meet that threat, from having personnel stand-to in order to meet an expected attack and from being shot at by poorly trained Malaysian forces?

We know of veterans who were denied disability pensions for psychological harm arising in part from service with RCB because that service could not have the more favourable reverse onus of proof applied to it.

If a current Military Threat Assessment would provide an assessment expressed from very low to very high it must be asked why Defence repeatedly refused to provide one for RCB to the Tribunal. Surely this would have been a strong argument from Defence to support its case. It is open to the Tribunal to draw the conclusion that Defence did not do so because such an assessment would not support their case. We draw again the Tribunal’s attention to the assessment conducted by the RCBRG and reviewed by an industry expert that assessed the threat to RCB as Very High.

b. Substantially more dangerous

Defence acknowledge the use of ‘substantially more dangerous than peacetime service’ in submissions to Government and letters to individuals in the period 2011-2013. No information has been identified to explain why the term ‘substantially’ appeared in these documents.

Defence has a problem with using unnecessary adjectives that alter the meaning and intent of legislation and government policy to suit its own agenda.
The Federal Court and the Tribunal itself have taken up the issue of these types of altering adjectives and have condemned them repeatedly.

Use of such adjectives to curtail the intent of Parliament, legislation and policy is reflective of Defence’s conviction that *it alone* should be the arbiter of nature of service, and more specifically medallic recognition. For instance, Defence has bemoaned political intervention and the findings of previous reviews that have interfered with what it considers:

"…essentially an ADF matter on how the service by its members should be recognised."[2]

This attitude is reflected later in this Defence paper in relation to the Tribunal's current inquiry.

c. Clarke review

Defence has not identified any further relevant documents relating to the Clarke review.

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subsequent to the Inquiry Hearings on 3/4 April 2023

d. Australian Treaty Series 1971 No 21.

Further to the documents identified, Defence has located and refers the Tribunal to Australian Treaty Series 1971 No 21.

Five Power Defence Arrangements [1971] ATS 21 (austlii.edu.au)

e. Veteran submissions and information

Defence acknowledge and note the additional information and submissions provided by veterans to the Tribunal at, or subsequent to, the Inquiry hearings of 3/4 April 2023.

Defence acknowledge and note but do not contest the submissions made by veterans at the hearings.

f. Definitions

Defence acknowledge the Tribunal's view on the meaning and intent of the term 'aligned' in the 1993 Cabinet Document recommendation related to the award of medals.
Defence's view, as detailed in previous submissions, remains that the 1993 Cabinet definitions for "warlike" and "non-warlike" do not apply directly to the terms within the medal regulations.

The suggestion that Cabinet intended that the 1993 definitions of "warlike" or "non-warlike" were to be applied directly to and/or operate as an independent test for consideration of whether an operation was to be recommended for a medal, is not in Defence's view supported by:

[2] Barrie, C.A., ADML, CDF, ADF Medals Policy – Where we have been and where we are going, CDF 777/2000, BACKGROUND, paragraph 4.

• the use of the discretionary term ‘may be recommended’ in the column ‘Medals’ in the table at attachment D of the 1993 Cabinet document;

At first blush this Defence point seems plausible. Indeed in federal law, subject to a contrary intention, ‘may’ does signify discretion.[3] That is not the end of the question however.

One of our RCBRG members, Mr Fulcher, has for over 20 years dealt with many enterprise agreements containing similar “may” terms. For instance “the delegate may approve personal leave”. This was understood by all parties to be an enabling clause not a discretionary clause. That is, if the criteria for taking leave was met the delegate did not have the discretion to deny it. We submit that this is the correct interpretation of the ‘may be recommended’ term in the attachment D of the 1993 Framework document highlighted by Defence.

We additionally submit that our interpretation is supported by the High Court of Australia. In *Finance Facilities* (1971) 127 CLR 106 the court found that where a statute says an official ‘may’ confer some benefit subject to preconditions, their satisfaction can create a legal duty to act.[4]

The preconditions in this matter would of course be the definitions of warlike and non-warlike service contained in the 1993 definitions. Meeting those preconditions would require that Defence award the appropriate medal. Discretion is not applicable.

• the contents, recommendations and outcomes of CIDA, Mohr and Clarke reviews subsequent to 1993;

Which specific “contents, recommendations and outcomes” does Defence refer to? Or perhaps Defence just means “the vibe of the thing”[5]?

• Government’s 2001 approval of the ADF Medals Policy and in particular the conditions for the award of the Australian Service Medal including where there was no declaration of “non-warlike”;

This argument by Defence is not supported by the document it draws on. We presume that Defence is referring to paragraph 27 of the ADF Medals Policy. It does indeed provide a list of circumstances that, although not “…the subject of a formal declaration of ‘non-warlike’ by the responsible Minister”, can still be placed in a category “…regarded as non-warlike…”.[6] However, they must be “…declared accordingly under the ASM 1945-75/ASM regulations. Using the 1992 Service agreement [1993 Framework] as a basis [i.e. aligning with it] …”. That is, they must still be declared non-warlike service for the purposes of the medals regulations.

Let’s assume that Defence has this discretion in relation to a range of situations not specifically covered by the 1993 Framework. That would still not detract from the

[3] *Acts Interpretation Act 1901*, s 33(2A).
[4] *Finance Facilities* (1971) 127 CLR 106 (at 134).
[5] Sitch, R., *The Castle*, Miramax Films, 10 April 1997.
[6] Barrie, C.A., ADML, CDF, *ADF Medals Policy – Where we have been and where we are going*, CDF 777/2000, para 19.

requirement to declare as warlike or non-warlike those types of service that do fit within and meet the criteria in the 1993 Framework.

• evidence of successive Government's recommendations to the Governor-General for medal declarations for "non-warlike" service where there was no nature of service classification (nor an independent assessment of service against 1993 definitions) or a classification of "peacetime"; and/or

Defence misunderstands the meaning of medals policy *aligning* with the nature of service classifications in the 1993 Framework. Defence itself has made much of the breaking of the nexus between medals and repatriation benefits. This is simply a reflection of that requirement. There is no requirement for a nature of service declaration before a medal declaration can be made, and vice versa. Although they have the same criteria, they are different processes.

• the process and practice followed by Defence to consider medallic recognition, the outcomes of which have been presented to and accepted by successive Governments.

If Defence's "process and practice" have been faulty and incorrect, leading to it giving erroneous advice to government, that is no justification for continuing to use faulty and incorrect "process and practice". Nor is it an excuse not to correct the outcomes of that faulty and incorrect "process and practice" once the errors are revealed.

The assessment and classification of nature of service occurs prior to or shortly after the commencement of an ADF operation. It may change during the deployment. However, consideration for medallic recognition only occurs at a later date and ultimately is a discretionary decision based on consideration of multiple relevant factors.

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The process and practice for the recommendation for the award of any medal commences on receipt of a request to consider medallic recognition. The consideration of medallic recognition may include a number of relevant factors including a nature of service classification (the outcome of a nature of service assessment and not the assessment itself), the number of ADF members involved, the duration of an operation, existing medallic recognition for that service such as foreign awards and/or existing Australian awards which could be applied to that service. An assessment or an independent test of service against the definitions of "warlike", "non-warlike" or "peacetime" does not occur as part of the consideration for medallic recognition.
Following consideration of relevant factors, Defence may recommend to the Minister that they recommend to the Governor-General that they declare an operation for the purpose of medallic recognition.

Defence argues here that it may consider any number of matters in deciding whether or not to award a medal but explicitly excludes those matters that the government has directed it to consider in the 1993 Framework. Defence has unilaterally decided that the government

should have no say in the award of medals to ADF personnel. This is the same wrong mindset that Defence displayed in the 2001 ADF medals policy document discussed above.

Ray Fulcher
Chair, Rifle Company Butterworth Review Group

8 May 2023