Australian Government

Defence Honours and Awards Appeals Tribunal

DHAAT/OUT/2024/123

Foreign Affairs, Defence and Trade Committee
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Committee members

I attach a supplementary submission to the Committee from the Defence Honours and Awards Appeals Tribunal. This is provided in response to those parts of the submission from the Department of Defence that propose amendments to the *Defence Act 1903* as it relates to the Tribunal.

The Tribunal was not aware that Defence would be raising those proposals in its submission to the Committee. Had it known this, the Tribunal's original submission to the Committee would have included the material contained in the attached supplementary submission.

In summary, the position of the Tribunal is that the principal Defence proposals:

- would abolish the current significant rights of appeal for the majority of those ADF members, veterans and families and others who currently seek external merits review of Defence decisions to refuse to recommend the issue of defence honours and awards;

- would allow Defence to make such decisions immune from the discipline of external merits review, which the Tribunal considers would be unreasonable;

- are put forward without any reasoned justification and, more importantly, the Tribunal cannot perceive how they could be justified;

- involve counter-intuitive and significant non-sequiturs; and

- would represent poor public policy in the absence of open and substantive consultation with, and support from, key stakeholders in the ADF and veteran community.

Additionally, the Tribunal notes that the Defence submission contains a number of factual errors and omits to mention numerous matters of clear relevance to a proper consideration of the proposals it advances.

The Tribunal would of course be happy to discuss these matters with the Committee at any time.

Yours sincerely

Stephen Skehill
Chair
Defence Honours and Awards Appeals Tribunal

20 September 2024

Response of the Defence Honours and Awards Tribunal to Defence proposals for amendments to Part VIIIC of the *Defence Act 1903*

Part VIIIC of the *Defence Act 1903* establishes the Defence Honours and Awards Appeals Tribunal and confers on it two functions:

- to conduct merits review of decisions by Defence refusing to recommend an ADF member or veteran for a defence honour or award; and
- when directed to do so by the Minister, to inquire into and report to the Minister on matters related to defence honours and awards.

What Defence proposes

In its submission to the Committee, Defence proposes that Part VIIIC be amended so that the current rights of appeal to the Tribunal for review of adverse Defence decisions would be limited in the following ways:

1. decisions relating to honours, operational and service awards would only be reviewable *for a period of 20 years from when the service occurred or when the relevant operation ceased*;
2. applications to the Tribunal for review of a decision relating to eligibility for a Defence honour could only be made by someone who is or was more senior in the chain of command or who witnessed the relevant action, and could no longer be made by an ADF member or veteran or their family;
3. the Tribunal should only be able to make recommendations to the Minister about whether a reviewable decision for a defence honour or award was consistent with the eligibility criteria at the time the reviewable decision was made, so that the current power of the Tribunal to make recommendations to the Minister on matters arising out of a review would be abolished;
4. Imperial awards should be removed from the list of honours and awards in respect of which Tribunal applications may be made; and
5. the only foreign award decisions that should be reviewable are those where Defence has a delegation to make decisions on eligibility.

The Tribunal agrees with proposal four, as it is a simple matter of good-housekeeping, since Australian policy is to no longer put Australians forward for Imperial awards.

The Tribunal also agrees with proposal five, as the current provisions in relation to foreign awards are too widely drafted.

However, Defence knows, but does not acknowledge in its submission, that the Tribunal is opposed to or has significant concerns with each of the other proposals. The Tribunal's analysis of them is set out below.

The Tribunal would support other amendments not mentioned by Defence. These are set out in the Tribunal's previous submission to the Committee.

What the Defence proposals would mean in practice

The practical effect of the Defence proposals, if implemented, would be to abolish and curtail current and significant rights of ADF members, veterans and families and others to seek external and independent merits review of Defence decisions refusing to recommend an ADF member or veteran for a defence honour or award.

The magnitude of this reduction of current rights can be readily observed by assessing how the Defence proposals would have impacted applications for review previously lodged with the Tribunal, had they been in effect.

The original Defence proposal to limit all applications to service rendered within the preceding 20 years and to preclude ADF members, veterans and families from making applications relating to defence honours would have rendered invalid 95 per cent of the applications decided by the Tribunal between 2020 and 2023.

The current revised Defence proposal to instead allow appeals in relation to length of service awards up to the date of death of an ADF member or until what would have been their 100th birthday would still have rendered invalid the majority of the applications decided by the Tribunal during those years.

Quite apart from the magnitude of these effects, it is remarkable how they would impact on different categories of ADF personnel and different types of ADF service. As detailed below, in the view of the Tribunal it is counter-intuitive and a logical non-sequitur that:

- the more dangerous the service and the more valorous the service, the more current rights of appeal would be abolished; and

- the more complex the required decision-making, the more Defence decision-making would be rendered immune from independent merits review by the Tribunal.

What service should be eligible for consideration in a Tribunal review

Under the Act as it stands, an application for review can be made to the Tribunal in respect of a Defence decision refusing to recommend a defence honour, defence award or a foreign award in recognition of any service on or after the commencement of the Second World War on 3 September 1939.

While this might at first glance be thought to be a generous position and that ADF personnel should be expected to pursue their claims to defence honours and awards on a more timely basis, it is very frequently the case that applications are not made by ADF members, veterans,

families and others until many years and often decades after the service in question was rendered. There may be many good reasons why applications are not made at a time closer to that service – for example:

- it may only be after a full career that a former member reflects on what they have achieved;

- serving members may not be prepared to take action that they think may be perceived as a challenge to more senior officers who have either not put them forward for recognition or who have refused an application for recognition;

- service-related mental health problems may mean that a member or veteran is unable to cope with the process of seeking recognition for a considerable time;

- equally the emergence of service-related mental health problems may itself give rise to a focus on recognition (and those problems may be worsened if an application cannot be made and any refusal independently reviewed in a thorough and trauma informed way); and

- some families may only become fully aware of the bravery displayed or service rendered by a member or veteran only after their death.

In its original submission to the Committee, the Tribunal noted that:

- in 2017, the Tribunal had recommended that a limitation period be introduced with effect from 3 September 2020 for claims for medallic recognition with respect to veterans of the Second World War, which would have been 75 years after the cessation of hostilities. This was because of the difficulties encountered in obtaining and corroborating reliable contemporaneous evidence relevant to consideration of service of such an age. The Tribunal's proposal would have allowed a three-year transition period for any un-submitted applications for recognition of Second World War service to be brought forward. The Tribunal's report also recommended that consideration be given to adopting an appropriate limitation period with respect to subsequent conflicts; and

- in 2020, shortly before his retirement, the former Chair of the Tribunal wrote to the then Minister for Defence Personnel suggesting that, alternatively, the legislation could be amended to preclude, after an appropriate transitional period, applications for review of decisions relating to defence honours and foreign awards for service prior to 1975, which would coincide with the introduction of the Australian honours and awards system.

The logic underlying the Tribunal's recommendation to 'close the books' on Second World War service because of evidentiary difficulties might also be applied to service in the Korean War, but certainly would not apply to the Vietnam War or any later conflict. The logic underlying Mr Sullivan's alternative proposal to 'close the books' on all service prior to 1975 can, in the Tribunal's view, only be viable if there is a transition period of suitable length to

allow all potential applications related to earlier service to be lodged. Given that not-insignificant numbers of applications for review in relation to Vietnam are still forthcoming and are quite readily resolved on the basis of contemporary records and the reliable oral evidence of surviving veterans of that conflict, it would be unreasonable to summarily deprive those and later veterans of their current rights of review. The Tribunal believes that a transition period of some two to three years would be essential before any 1975 cut-off came into effect.

In contrast, Defence proposes that applications for review of defence honours or operational service medals should be confined to service rendered in the preceding 20 years or during an operation with an end date within the preceding 20 years. And, while Defence does not refer in its submission to any transition period at all, it has earlier suggested to the Tribunal a period of only six months that could be arbitrarily shortened or abolished by ministerial decision.

The rationale behind the Tribunal's previous suggestions clearly does not support the Defence proposal and the Defence submission offers no justification for selecting a 20-year (or any other) period to limit current rights of appeal to the Tribunal.

If legislated, the 20-year limitation would mean that rights of review would be abolished for ADF service such as that in Vietnam, Iraq, Somalia, Rwanda, East Timor and the earlier years of the Afghanistan campaign, each of which, in our experience, still remain areas of agitation for some veterans.

The Tribunal understands that the 'end of operation' alternative criterion proposed by Defence was intended to avoid the obvious anomaly of some Afghanistan service being covered and other indistinguishable Afghanistan service being excluded. It is the unanimous view of all the members of the Tribunal that the Defence formulation of this alternative criterion could not have that legal effect for a number of reasons and that, additionally, it would be capable of causing other apparently bizarre and anomalous outcomes for which the Tribunal can discern no defensible policy rationale.

In stark contrast to the 20-year/end-of-operation limitation on appeals against defence honour or operational service award decisions, Defence proposes that applications for review of length of service decisions should be able to be made at any time by a living veteran or by the family of a deceased veteran until the veteran would have achieved their 100th birthday. This effectively means that there would be almost no limitation on appeals in respect of these awards.

The Defence submission offers no justification for such differentiation between honours and operational service awards on the one hand and length of service awards on the other.

More fundamentally, these proposed limitations on rights of appeal illogically fail to have any regard to either the nature of the ADF service in question, or the complexity of associated decision-making.

The abolition and restrictions of current appeal rights by reference to when service was rendered that are proposed by Defence would, in the opinion of the Tribunal be unjust, perverse and counter-intuitive on multiple bases:

- the 100th birthday rule would mean that there would be effectively almost no limitation on current appeal rights for length of service awards;

- conversely, as service became more dangerous and thereby eligible for recognition by an operational service award, the 20-year rule would significantly disadvantage those who had arguably given or risked more on behalf of their country; and

- compounding that effect, as performance on more dangerous service became more worthy of recognition and thereby eligible for a defence honour, the ability to achieve that recognition would be completely denied to ADF members, veterans and families in respect of all service.

It would be similarly unjust, perverse and counter-intuitive, in the opinion of the Tribunal, that, as Defence decision-making on honours and awards becomes more complex and thereby more prone to error, Defence decision-making would be increasingly shielded from independent scrutiny, contrary to the usual expectations of the Commonwealth's generally applicable administrative law regime:

- length of service award decision-making is relatively straightforward with only an extremely minor proportion of eligible cases being appealed, and the points of contention are limited to fairly simple issues such as the computation of time served or the reasons for early discharge, but there will in practical terms be no restriction on current appeal rights;

- operational service award decision-making is notably more complicated, with many more eligibility criteria that can be contentious such as nature of service, temporal and geographic connection and technical questions such as force assignment, and yet all Defence decision-making for service more than 20 years prior would be shielded from independent review; and

- defence honours decision-making is the most complicated involving highly conceptual issues of valour, gallantry, distinguished and conspicuous service, and yet Defence decision-making would be shielded from independent review not only by the 20-year rule but also by the total abolition of current appeal rights for ADF members and veterans and their families.

Who may apply for Tribunal review

At present, there is no limitation on who might apply to the Tribunal for review of a defence decision refusing to recommend a defence honour, defence award or foreign award so long as they were the person, or among a class of persons, who made the original application to Defence for that honour or award.

There is no evidence that this apparently very liberal standing rule has been abused by persons with no real connection to ADF service or ADF personnel, or by other persons making gratuitous applications to the Tribunal.

Indeed, applications for review by persons with no clear connection to an ADF member may produce very desirable outcomes. For example, in *Silver and the Department of Defence re Murray* [2022] DHAAT 14, a military historian with significant expertise on the history of the 8th Australian Division in the Second World War sought a gallantry award for Private Richard Murray who had stepped forward to confess and take the entire blame for the theft of food by himself and others while prisoners of war of the Japanese in Borneo, thereby saving his colleagues from the fate of execution that befell himself. A posthumous award of a Commendation for Gallantry was recommended by the Tribunal and subsequently issued by the Governor-General.

Nevertheless, Defence proposes to totally abolish the current rights of ADF members, veterans and their families (and almost all others) to appeal against a refusal of a defence honour. In purported justification of this very significant removal of existing rights, Defence notes that such persons are not allowed to make an internal nomination of an ADF member for a defence honour.

What Defence omits to mention is that while Defence does not allow serving personnel or veterans to self-nominate, it does accept applications for defence honours from anyone including serving and former ADF members and takes decisions on those applications, which are then reviewable by the Tribunal. The internal Defence nomination process is therefore not the only current pathway to seeking and achieving a defence honour.

Defence has previously acknowledged that a nomination is an 'application' and that an adverse decision is able to be appealed to the Tribunal by the nominator. However, as nominations come from serving ADF members, it may be a 'courageous' nominator who would take the potentially career-limiting step of challenging a nomination refusal made at the upper levels of the Defence hierarchy.

More significantly, the internal Defence nomination process is not one that carries any assurance that all ADF personnel who deserve medallic recognition will actually be recognised. The Tribunal is aware of cases in which:

- nominations have been wrongly down-graded;
- nominations for comparable service have not been put forward because of a commander self-imposing an informal 'quota';
- one nomination has been put forward in preference to another for comparable service only because the text of the former was thought to 'read better';
- a commander has reportedly refused to nominate anyone in their command no matter how superlative their service on the basis that, no matter how well they may perform, they are 'just doing their job'; and

- exemplary service has simply not been drawn to the attention of potential nominators.

The Tribunal accepts that the nomination process is worthwhile and desirable, but it is simply not a complete answer that assures that all deserving service is appropriately recognised. Two recent cases before the Tribunal starkly illustrate its inadequacy:

- on 13 November 1965, Warrant Officer Ronald Swanton was fatally wounded while trying to save a wounded comrade, and Warrant Officer Kevin Wheatley was then killed while trying to save the dying Swanton. Wheatley was nominated for and received the Victoria Cross for his actions; Swanton was not nominated for any medal and received nothing in recognition of his closely comparable service. Following an application for review lodged in 2023, the Tribunal recommended on 8 November 2023 that Warrant Officer Swanton should now be recognised by the Medal for Gallantry. That recommendation is currently before the Minister.

- on 7 July 2009, Sapper Rohan Conlon who had been trained in Combat First Aid and another sapper who had done similar training each rendered vital first aid to comrades who had suffered severe injuries when an improvised explosive device was triggered under the vehicle in which they were travelling. The other Sapper was nominated for and received a Commendation for Distinguished Service. Mr Conlon was told that he was similarly nominated but that his nomination did not progress because the other nomination 'read better'. Mr Conlon subsequently applied to Defence for recognition of both his service on 7 July 2009 and other service on 9 August 2009. In response to that application, Defence decided to recommend him for a Commendation for Distinguished Service for his actions on 7 July 2009 and that was granted by the Governor-General. However, Defence refused to recommend him for recognition of his actions on 9 August 2009. Mr Conlon applied to the Tribunal for review of that decision. A Tribunal recommendation on 6 March 2024 that the citation for Mr Conlon's Commendation for Distinguished Service be amended to recognise what it assessed as his distinguished service on both dates is currently before the Minister.

Accordingly, the Tribunal considers the purported justification put forward by Defence for abolishing defence honour appeal rights by anyone other than an eyewitness or a person in the chain of command to be wrong and unsustainable.

Again, and as noted above, it would in the opinion of the Tribunal be unjust, counter-intuitive and perverse if, as performance on more dangerous service became more worthy of recognition and thereby eligible for a defence honour, the ability to achieve that recognition were denied to ADF personnel, their families and others who may have a clear interest in circumstances where the nomination process does not assure an appropriate outcome.

Tribunal powers of recommendation

The Defence analysis advanced in support of its proposal to confine the capacity of the Tribunal to make recommendations to the Minister in relation to matters arising out of a Tribunal review is deeply flawed. Moreover, it discloses a very concerning misunderstanding of both the relevant facts and the relevant law.

Defence says that the Tribunal has made recommendations about 'nature of service'. That is simply incorrect. The Tribunal has never done so. Defence cites the report of the Tribunal's *Inquiry into medallic recognition for service with Rifle Company Butterworth* in support of its contention. However, a plain reading of that report makes clear that it contains no such recommendation. Quite apart from the fact that it was an inquiry rather than a review of a reviewable decision, the Tribunal expressly stated that it considered the Governor-General's decision (on the advice of Defence and the then Minister) to determine RCB service to be 'non-warlike' under the Regulations governing the Australian Service Medal to be correct. It said nothing about any nature of service determination that might have been made in relation to RCB service.

Defence says that the Tribunal has made recommendations about discharge of members from the ADF. That is simply incorrect. The Tribunal has never done so. In support of its contention Defence cites the case of *Newton and the Department of Defence re Mallett* [2022] DHAAT 2. However, a plain reading of the Tribunal's reasons clearly indicates that it made no recommendation about Mr Mallett's discharge from the ADF. Instead it made a decision that Mr Mallett met the applicable eligibility criteria for the award of the Australian Defence Medal, and in particular the criterion that *the member ceased service in the Permanent Force or the Reserves of the Defence Force and mistreatment by a member of the Defence Force was a significant contributing factor.*

Defence says that Nature of Service determinations are separate from medallic recognition. That is correct. But they are not unrelated.

The facts are that there are three mutually exclusive classifications of ADF service – 'peacetime', 'non-warlike' and 'warlike' – and:

- the Minister can make an administrative determination that service is 'warlike' or 'non-warlike' and such a determination affects ADF conditions of service such as remuneration, allowances and leave entitlements;

- separately, the Minister can make a statutory determination under the *Veterans' Entitlements Act 1986* that service is 'warlike' or 'non-warlike' and such a determination affects repatriation and other entitlements under that Act; and

- separately again, the Governor-General, on the advice of the Minister, can make a declaration under various Regulations that service is 'warlike' or 'non-warlike' and such a determination affects medallic entitlement for the Australian Service Medal or the Australian Active Service Medal.

These determinations are all separate – making one does not necessarily mean that any other must be made. And the effects that each can achieve only come about when the applicable determination is actually made.

But, as is apparent, each regime hinges on the concepts of service that is 'warlike' or 'non-warlike' and this means that the determinations are not unrelated.

As detailed in the RCB inquiry report:

- in 1993 Cabinet approved definitions of the terms 'warlike' and 'non-warlike' (and, inferentially, 'peacetime');

- Cabinet further decided that, upon declaration by the Minister of an ADF deployment as 'warlike' or 'non-warlike', enhanced conditions of service would apply to those deployed;

- those same definitions were to be incorporated into the *Veterans' Entitlements Act 1986*;

- recommendations for the award of medals would be aligned to those same definitions;

- there has been no subsequent Cabinet decision to the contrary;

- there has been no properly informed ministerial decision to the contrary; and

- despite this, Defence argued unsustainably that RCB service that had been declared by the Governor-General to be 'non-warlike' should be accepted by the Tribunal to be 'peacetime' service.

More recently, the Directorate of Honours and Awards has informed the Tribunal that in administering the *Australian Conspicuous Service Decorations Regulations,* which create honours that are only available for service in 'non-warlike' situations, it has interpreted the term 'non-warlike' to mean 'other than warlike' and thus to include service that is either 'non-warlike' or 'peacetime'.

In the RCB inquiry report, the Tribunal made reference to the inconsistency of the Defence positions with the extant Cabinet-approved definitions and the apparent lack of coordination between the Nature of Service Directorate and the Directorate of Honours and Awards. The Defence submission to the Senate Committee reinforces the Tribunal's concerns about these fundamental problems within the Department's position on medallic recognition.

The facts are that all the recommendations that the Tribunal has made, over and above deciding the individual case before it, have been closely confined to matters arising from the eligibility criteria in issue. For example:

- in some cases where the Tribunal concluded that an ADF member had performed creditably but did not meet the statutory eligibility criteria for the honour they sought, the Tribunal has recommended that consideration should be given to issuing a commendation under the ADF's non-statutory scheme for such;

- in a particular group of cases, the Tribunal recommended that consideration should be given to cases in which it seemed clear that awards had been issued without the eligibility criteria being met; and

- in another case, the Tribunal recommended that the Minister should consider amendment of the Regulations governing the Defence Long Service Medal to allow it to be awarded where a member did not serve for the required period because they were discharged for service-related medical reasons, so as to align with the comparable provision in the Regulations governing the Australian Defence Medal.

In light of all of the above, the Tribunal considers that the Defence proposal to limit the Tribunal's power of recommendation is not justified by the Defence submission and, moreover, would be a retrograde step that would hinder potential systemic improvements in the defence honours and awards system.

What standard does the Tribunal apply?

In its submission Defence asserts that the Tribunal considers whether a person under consideration for an honour '*meets the minimum requirements of the eligibility criteria*' as opposed to Defence's '*rigorous vetting process*.' The Tribunal categorically rejects that proposition. Instead, the Tribunal simply applies the law endorsed by the Sovereign and as set out in the applicable Regulations. In doing so, it may take a different view to Defence, and that may be for multiple reasons – Defence may have misapplied or misinterpreted the law, Defence may have failed to have regard to all the evidence, or Defence may have been unable to convince the Tribunal of its reasons for an adverse decision.

The Tribunal finds it hard to understand how Defence can logically make this assertion. For example, in a recent case Defence advised that, '*due to the subjective nature of honours and awards, Defence does not define what constitutes distinguished performance of duties, preferring to rely on the judgement of the chain of command during the nomination process'* and then purported to take later decisions based on definitions adopted by the Tribunal in the absence of any put forward by Defence.

Moreover, if Defence is of the view that the Tribunal is applying an incorrect standard in its decision-making, it would be expected that Defence would advise the Minister to reject any Tribunal recommendation so affected. However, as discussed further below, it appears that Defence has not done so. That of itself suggests that the Defence claim in its submission to the Committee cannot be correct.

Applications to Defence as opposed to applications to the Tribunal

It is particularly significant that while Defence proposes to abolish or severely curtail current rights of appeal to the Tribunal, it proposes no limitation whatsoever on its own ability to accept and decide applications for medallic recognition made to it by any person in respect of any service.

In other words, the Defence proposals would simply create a whole new category of Defence decisions immune from independent external merits review.

That runs counter to overarching Commonwealth policy on administrative review.

There is no basis on which it could be claimed that Defence decision-making on older service was inherently better than its decision-making on more recent service and that it was thereby justifiable to abolish existing appeal rights on older service decisions.

Similarly, there is no justification for the proposition that Defence decision-making on honours applications by veterans and their families would be so good that no right of review was required. Decisions of the Tribunal show any such contention to be unsustainable.

ADF morale, recruitment and retention

Defence states in its submission that '*Research indicates there is a strong correlation between an individual's workplace morale and the recognition they receive'* and that '*Reward and recognition foster a positive working environment and benefit both Defence and our people by providing a return on an individual's or team's effort, dedication and work achievements'*.

The Tribunal agrees with those propositions.

It therefore finds it inconsistent and illogical that Defence should now be recommending that current rights of appeal, demonstrably essential to ensuring that ADF personnel receive the medallic recognition they deserve, should be abolished or severely limited.

Such proposals, if implemented, would appear to be inevitably contrary to Defence morale and, moreover, would likely impact adversely on Defence recruitment and retention, each of which is an area of current concern for Defence.

The Tribunal also suggests that it would be difficult to reconcile the abolition and limitation of current appeal rights proposed by Defence with the statements so recently made by ministers, the ADF hierarchy and the Department of Defence about the need to provide greater care and support to ADF members, veterans and families.

Mental health considerations

It is not uncommon for ADF personnel, current or former, who seek review in the Tribunal to have service-related mental health issues. These applicants may be particularly focussed on having their service recognised by an honour or award for which they believe they are qualified, and tend to be particularly critical of their dealings with Defence in relation to prior attempts to achieve that recognition.

All Tribunal members and staff undertake training in trauma-informed care and are hopefully thereby better equipped to deal appropriately and sensitively with these applicants, while still applying the necessary analytical rigour to the issue of medallic entitlement.

Applicants generally, but particularly those with mental health issues, often express their appreciation of their dealings with both the staff and the members of the Tribunal and, even where the outcome is not what they sought, are thankful that they have been able to have direct conversations and interactions with Tribunal members and receive detailed statements of reasons explaining in detail why their application may not have been successful.

It appears to the Tribunal that there is a real potential that abolishing or severely limiting rights of appeal to the Tribunal in the manner proposed by Defence, may seriously aggravate the mental health of at least some of these applicants.

Stakeholder consultation

The proposals put forward by Defence have not been the subject of any consultation with key stakeholders in the serving and veteran community, notwithstanding the drastic impact those proposals would have on the members of those communities.

The Defence submission does not propose that any such consultation should be held before such proposals are considered by Government. This is notwithstanding that in 2022, Defence and the Tribunal agreed to recommend that '*it is essential that a program of extensive consultation with the veteran community should be undertaken before draft legislation is introduced'.*

The purpose of the Defence proposals

Given that Defence's key proposals for amendments to the Act appear to be so counter-intuitive and lacking in sound public policy justification, the Committee might consider whether their purpose is simply to avoid public accountability through independent merits review by the Tribunal in respect of the most contentious categories of defence honours and awards decision-making.

This is not the first occasion on which Defence has sought to curtail and avoid scrutiny by the Tribunal.

For many years, Defence argued against merits review by the Tribunal. It argued in Tribunal hearings that historic decisions on medallic recognition should be affirmed by the Tribunal without merits review unless the applicant brought forward 'compelling new evidence' or proof of 'maladministration' affecting a previous decision. From 2015, the Tribunal consistently rejected these arguments on the basis that the legislation clearly required the Tribunal to undertake merits review of the reviewable decision that was the subject of the application for review. Merits review clearly requires that all relevant evidence must be considered, no matter whether or not it was available to the original decision-maker, and without regard to whether or not the decision-making process was tainted by defective administration. On occasion, the Tribunal also pointed out that Defence was in breach of its obligations as a model litigant under the *Legal Service Directions*, to assist the Tribunal because of its refusal to engage on the merits of the decisions under review by the Tribunal.

In 2019, the Tribunal recommended to the Minister for Defence Personnel that Ordinary Seaman Edward (Teddy) Sheean should be recognised by the Victoria Cross for his actions in HMAS *Armidale* during a Japanese aerial attack in the Timor Sea on 1 December 1942. Defence argued against that outcome at the Tribunal hearing on the basis that the applicant had not adduced any '*compelling new evidence'* or proof of '*maladministration*'. The Tribunal rejected those arguments and based its recommendation on a review and analysis of all the available evidence.

Having failed to persuade the Tribunal, in an advice that contained errors of fact and law, Defence recommended to the then Minister for Defence that the Tribunal recommendation should be rejected because it did not disclose '*compelling new evidence'* or proof of *'maladministration'*. The then Minister for Defence accepted and acted on that advice. Supporters of Teddy Sheean lobbied long and hard against the Minister's decision, even after it was endorsed by the then Prime Minister.

Eventually the Government, in response to that persistent pressure, decided to appoint an independent ad-hoc panel to reconsider the matter afresh. The panel, having considered all the evidence (including some corroborative but far from compelling new evidence), came to the same conclusion as the Tribunal and Teddy Sheean was then posthumously but very belatedly awarded his richly deserved Victoria Cross.

In an endeavour to learn the lessons from that matter and avoid a repetition of it, the then Chief of the Defence Force and the Chair of the Tribunal agreed to jointly seek the advice of senior counsel on the long-standing difference of views between Defence and the Tribunal. The resultant, very detailed advice confirmed the position of the Tribunal. Since that time, Defence has generally complied with its obligations under the *Legal Services Directions* and made written and oral submissions that address the merits of the decision under review and which the Tribunal has found to be most helpful.

The then Chief of the Defence Force and the Tribunal Chair also agreed that before it briefed the Minister against a Tribunal recommendation, Defence would consult the Chair in an endeavour to ensure that any such brief contained no error of fact or law. That agreement was subsequently recorded in a formally documented protocol. Since that time, Defence has not consulted the Chair as required by it, leading to a presumption that it has not briefed the Minister against any Tribunal review recommendation.