



28 August 2024



REFORM OF ADF SERVICE AND MEDALLIC RECOGNITION REVIEW PROCESS



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About RSL NSW

The Returned and Services League of Australia is a member-based veterans' charity founded in 1916, and is the largest veterans' charity in Australia. Our purpose is to support veterans and their families by connecting them to services to improve their wellbeing and assist former Australian and allied veterans and their families by connecting them to their local community, through camaraderie, mateship, recreation and commemoration of service.

RSL NSW also works alongside State and Federal Governments to improve the wellbeing of veterans and their families through policy development and advocacy.

RSL NSW and its sub-Branches do not own or operate clubs, nor does RSL NSW benefit from the proceeds arising from the sale of alcohol or gambling.





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Introduction

The Defence Honours and Awards System plays a crucial role in the recognition of the sacrifices and contributions made by Australian Defence Force personnel. RSL NSW expresses concern about potential contradictions identified amongst determinations for qualifying periods of medallic recognition. RSL NSW also seeks clarification about eligibility for existing Commonwealth Honours and Awards.

Whilst the Commonwealth of Australia continues to recognise and honour those who have sacrificed their health, and in some cases, their lives, a review analysing the efficiency of the DHAAT should be undertaken to ensure appropriate recognition has been given to our current and former serving personnel.

The Defence Honours and Awards Tribunal and associated systems require ongoing monitoring to ensure consistency, fairness and transparency when determinations in making determinations about the sacrifices made by ADF members.

RSL NSW agrees that matters relating to 'honours and awards should be considered on their merits, and that any and all considerations should not be influenced by the possible impact, real or perceived on veterans' entitlements¹.'

However, consideration must be given to changes in criteria and the potential, perceived, or actual, impacts of changing criteria. Defence must ensure there is support provided to those where adverse decisions are made.

This also requires the ability to understand the perceived, potential or actual psychosocial risks of withdrawing or revoking medals for past theatres through Ministerial Discretion. Mitigating psychosocial risks have been a recurring theme during the Royal Commission into Defence and Veteran Suicide, and ought to extend to Tribunal Hearings regarding Defence Honours and Awards.

This submission has been guided by the Terms of Reference guiding the Senate Inquiry into Defence Honours and Awards System. The submission will address the integrity and efficacy of the Honours and Awards System; the effect of changes in criteria; and potential improvements to the Tribunal.

Not all Terms of Reference have been addressed in this submission.

¹ Ibid, [36].

Recommendations for DHAAT Review

RSL NSW recommends the following to be undertaken with respect to the Defence Honours and Awards Tribunal to ensure consistency, transparency and appropriate recognition of ADF personnel:

1. **Historical Criteria:** *Develop or apply time-relevant criteria specific to the period of service for which the Honour or Award relates.*
2. **Education and Training:** *Educate DHAAT members about the importance of historical context and the evolving nature of military service, with a focus on empathy and understanding.*
3. **Transparency:** *Enhance transparency in the assessment process by offering clear guidelines for accurately evaluating historical cases, while avoiding contemporary biases.*
4. **Retrospective Review:** *Conduct a thorough review of past award decisions, particularly those made before 1999, to ensure they align with the criteria relevant to their respective time periods.*
5. **DHAAT Member Composition:** *Consider introducing one additional member to the Tribunal who is not affiliated with Defence to mitigate any perceptions of biases.*
6. **Mental Health and Emotional Support:** *To provide support for veterans, serving members and their families where perceived adverse decisions are made. It is suggested to do this through government agencies or with assistance from Ex-Service Organisations.*

Integrity and Efficacy of the Honours System

The integrity and efficacy of the Honours and Awards System must be maintained for those who have defended and sacrificed their health and lives for the Commonwealth of Australia. Whilst earning, receiving and wearing of medals is integral to Australian Defence Force personnel and culture, there are potential anomalies which may not uphold the principles of integrity and efficacy in the overall system.

Previous inquiries into the Defence Honours and Awards system have raised concerns highlighting potential anomalies and flaws with its current structure. The 1970 Report² noted that there had not been a proper legal basis for past decisions on forfeiture and restoration, with concern that this remains a contemporary issue (see consideration of 4RAR eligibility for the Australian Active Service Medal 1945-75).

Further raised in 2015, the Commonwealth established the *Inquiry into the Refusal to Issue Entitlements to, Withholding and Forfeiture of Defence Honours and Awards*, to determine whether legal provisions existed resulting in valid withholding and forfeiture of defence honours and awards.

In making any findings and formulating recommendations to improve and evolve the operation of the Tribunal, integrity and efficacy must remain at the forefront of the Honours system.

Progressing through the System

Progressing through the system may be an experience that carries considerable psychosocial risk where current and former serving members are seeking a review of honours and medals to which they may be entitled.

The *Royal Commission into Defence and Veteran Suicide* has highlighted the considerable undertakings needed by Ex-Service Organisations, community groups, Defence, the Department of Veterans' Affairs and state governments to support veterans and their families. These organisations must consider how they mitigate psychosocial risks stemming from decisions made by DHAAT on medallic recognition.

Whilst DHAAT has widely and publicly acknowledged the principles of procedural fairness and administrative decision-making, there must be an ongoing opportunity to ensure that all members subject to review are supported where a decision is adverse to what they seek. Where decisions adversely impact those seeking a review, Government agencies must provide direct support, or provide warm referrals to Ex-Service Organisations.

² Commonwealth of Australia, Defence Military Law Sub-Committee Report 1/1970, *'Forfeiture and Restoration of War Medals'* (Report, 23 April 1970), Directorate of Honours and Awards.

Recommendation:

1. **Mental and Emotional Support:** *To provide support for veterans, serving members and their families where perceived adverse decisions are made. It is suggested to do this through government agencies or with assistance from Ex-Service Organisations.*

Changes in Criteria

Changing criteria of conflicts to determine whether they are ‘non-warlike’, ‘warlike’ or ‘operational’ deployments may impact both entitlements and medallic recognition.

Whilst the Minister for Defence must approve any change to the warlike or non-warlike status of an overseas deployment, consistency in Ministerial decision-making is required to ensure that there are adequate provisions within the conditions of service package to provide:

1. adequate death and disability compensation cover;
2. compensation for the disabilities faced when, at the government direction, ADF members are placed in direct physical danger or threatening situations beyond those normally associated with peacetime service; and
3. certain rewards for rendering the particular type of service.³

It is important to acknowledge that current decisions affecting past matters cannot be influenced by contemporary understandings⁴⁵, as highlighted in *Roe v Minister for Health*. As such, any determinations on past conflicts must give weight to the social, legal, moral and ethical considerations at the date of the theatre, and not have contemporary understandings applied to historic events.

RSL NSW notes that determinations can be made by the Minister for Defence, by way of legislative instruments, and can be made in relation to past, current and future operations. RSL NSW is concerned that where these decisions are made, unintended consequences may occur to those subject to such decisions. RSL NSW believes there may be some call for a review of the effects of revoking or withholding medallic recognition.

³ Commonwealth of Australia, *Report of the Review of Veterans Entitlements* (Report, Clarke Review, January 2003) < <https://www.dva.gov.au/about/accessing-information/what-can-i-access/corporate-information-access/reporting/reviews/clarke-review#report-of-the-review-of-veterans-entitlements-clarke-report> >.

⁴ *Roe v Minister of Health* [1954] 2 All ER 131, Denning LJ.

⁵ *Ibid*, “We must not look at the 1947 accident with 1954 spectacles.”



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Where reform occurs, the Commonwealth must identify any consequential impact that may result and ensure appropriate methods of mitigation are deployed to minimise psychosocial harm.

Recommendations:

1. **Historical Criteria:** *Develop or apply time-relevant criteria specific to the period of service for which the Honour or Award relates.*
2. **Education and Training:** *Educate DHAAT members about the importance of historical context and the evolving nature of military service, with a focus on empathy and understanding.*
3. **Retrospective Review:** *Conduct a thorough review of past award decisions, particularly those made before 1999, to ensure they align with the criteria relevant to their respective time periods.*

Potential Improvements

RSL NSW notes that potential improvements could be made to the Defence Honours and Awards Tribunal. RSL NSW believes current composition of Tribunal members, which comprise of a 6:4 split of former defence personnel, may require consideration.

RSL NSW does not suggest that there are actual conflicts, however the composition of the current Tribunal has caused concern from members about the perceived issue of conflicts arising and automatic decision-making favouring the Commonwealth.

Apprehended bias has been raised as an issue by our members. RSL understands that the test for apprehended bias is broad in its application, with the basic test requiring:

a fair-minded lay observer with knowledge of the material objective facts may reasonably apprehend that the judicial or administrative decision-maker may not bring an impartial and unprejudiced mind to the resolution of the question at hand⁶.

RSL NSW understands that the presence of former Defence Force personnel on the Tribunal is ultimately required due to the technical nature of the decisions, contextual requirements, and the need to ensure continuity across published reasons.

However, the perception does continue to cause concern about impartiality, transparency and apprehended bias. Consideration may be given to adding an additional, non-Defence member to the Tribunal to account for these concerns.

⁶ *Livesey v New South Wales Bar Association* (1983) 151 CLR 288 at 293-294; *Re Polites; Ex Parte Hoyts Corporation P/L* (1991) 173 CLR 78.



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Recommendations:

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2. **Mental and Emotional Support:** To provide support for veterans, serving members and their families where adverse decisions are made. It is suggested to do this through government agencies or with assistance from Ex-Service Organisations.



RSL
NSW