

RIFLE COMPANY BUTTERWORTH - RECOGNITION OF SERVICE: REPORT OF REVIEW AND RECOMMENDATIONS

Executive Summary

In summary, this Report concludes that Rifle Company Butterworth's operational deployment has been, and continues to be, wrongly classified as 'peacetime service', with adverse consequences for members of the Group and possibly other Australian service veterans.

On the basis of the documentation provided to this reviewer, the Commonwealth's current position appears to have arisen from a series of failures by various decisionmakers since at least 1972 to identify significant errors of fact and misrepresentations of the nature of the RCB service deployment at issue.

In particular, the 1972 recommendation by officials to the incoming government that RCB deployment in defence of Butterworth air base could be misrepresented - by the Government, for overtly political purposes - as 'training', remains at the heart of this matter.

It is self-evident that for Australian forces, qualifying 'Warlike Service' may take place in peacetime where it occurs outside Australia, as it did in the case of the RCB.

Further, the analysis shows continuing failure by advisers and Ministers to apply the relevant criteria for correctly determining the nature of RCB service, and reliance on irrelevant later criteria for that purpose, continue to undermine the Commonwealth's current position in relation to the status of RCB veterans.

Analysis of the more recent decisions by relevant Ministers shows that the decisions at issue have been based on previous incorrect advice by officials of the Australian Public Service, (in particular, the Nature of Service Branch and its predecessors within the Department of Defence), and previous decisions by relevant Ministers which were similarly flawed.

In addition, this review has found numerous instances in which Ministerial decisions in relation to RCB service, and APS practice, failed to take into account the relevant statutory and policy criteria for lawful decisionmaking by Australian officials, including the

requirement to afford procedural fairness to the representatives of the RCB Review Group affected by Ministerial decisions.

As a consequence, it is this review's conclusion that the Commonwealth's current assessment of RCB Group's service in Malaysia is open to legal challenge on several grounds.

Recommendation

This review's recommendations are as follows:

1. That the RCB Review Group consider making a formal approach to the relevant Ministers - the Hon Andrew Gee MP (Minister for Veterans' Affairs and Minister for Defence Personnel) and ultimately to the Hon Peter Dutton MP (Minister for Defence) if necessary, seeking reconsideration of the RCB's service status as assessed historically by various responsible Commonwealth Ministers.
2. That the Rifle Company Butterworth Review Group consider requesting the responsible Minister to provide a statement of reasons for the currently operating decision, as made by the previous Minister for Veterans' Affairs, to regard RCB service as not 'warlike service'. In particular, the statement is required to show the matters which were considered, and not considered, by the Minister in making the currently operating decision, the conclusions reached, and the evidence on which the conclusions were justified. Specifically, the statement should give an account of the weight accorded, if any, to the 'Incurred Danger Test' established by relevant legislation.
3. That the Rifle Company Butterworth Review Group consider requesting the responsible Minister to set aside previous decisions and determinations made by various Ministers relating to RCB operational deployment from 1970 to 1989 (for the purpose of protecting RAAF assets at Air Base Butterworth (ABB) during the Malaysian Counter Insurgency War, and to make a fresh decision according to law.
4. That the Rifle Company Butterworth Review Group seek specific recognition and determination by the responsible Minister on behalf of the Australian government, for all relevant present and future administrative purposes, that RCB's operational deployment in Malaysia qualifies as 'Warlike Service', not as 'training', on the basis that RCB's service has hitherto been classified, wrongly, as 'peacetime service' due to previous failures by various APS advisers and Ministerial decisionmakers to identify and correct significant errors of fact and misrepresentations as to the nature of the RCB service deployment - whether due to the flawed application of Government policy or inadvertently.

Rationale and Findings

The various decisions post 1972 to regard RCB service in protecting RAAF assets at Butterworth as 'peacetime service', similar to garrison duty in Australia, has denied those troops (9,000 RCB members and 12,000 RAAF personnel) eligibility to Commonwealth repatriation benefits under the Veterans' Entitlements Act, and the award of the Australian Active Service Medal (AASM).

It is this reviews finding that RCB's service has been classified, wrongly, as 'peacetime service', due to previous failures by various APS advisers and Ministerial decisionmakers to identify and correct significant errors of fact and misrepresentations as to the nature of the RCB service deployment - whether due to flawed application of Government policy or inadvertently.

It is relevant that the origins of the present situation stem from the Whitlam Government's 1972 election undertaking to withdraw all Australian forces then deployed in SE Asia.

It is self-evident that 'Warlike Service' can be provided - and has often been provided - overseas, in time of peace in Australia.

In the case of RCB service in Malaysia, it is evident that a series of Commonwealth decisionmakers and advisers have applied a later definition of 'Warlike Service' which did not obtain during the period of RCB service, and have failed or refused to apply the 'Incurred Danger' test which properly applied to that service.

Until 1972, Australia, under international treaty obligations, had a leading role in deterring Communist expansion in SE Asia, in particular in Malaysia.

In 1973 the Commonwealth's Defence Committee *recommended* to the incoming Government that a rifle company be retained at Butterworth. The Defence Committee Secret Minute 2/1973 para 28(e) refers.

'When the Australian Battalion is withdrawn, the requirement for a company for security duties at Butterworth will be met by providing the unit, on rotation, from Australia. This could be presented publicly as being for training purposes.'

It is noteworthy that the most recent reply by Defence officials to the RCB Review Group continues to misrepresent was clearly the Committee's *advice* to the Government on the proposed RCB deployment as 'training'.

Further, the advice provided to the Government by Defence Committee's Secret Minute 2/1973 para 28(e) is also incorrectly referred to as 'a decision' of the Committee.

The records show that RCB was an operational deployment of an Australian infantry combat Rifle Company in Malaysia during the Malaysian Counter Insurgency War (1968-1989). RCB's role was to protect and defend the strategically-deployed RAAF assets (personnel, families, aircraft, facilities including the Integrated Air Defence System (IADS)) at ABB against a recognised Communist insurgent threat.

In accordance with the recommendation of the Defence Committee in its Minute 2/73 of 11 Jan 1973, the RCB deployment was continued by the Australian Government on a three-monthly rotation. RCB's protection role continued until the Peace Accord was signed between the Malaysian Government and the communist insurgent leader Chin Peng in December 1989.

In summary, the documentation shows that the incoming Government, acting on the Defence Committee advice, effectively misrepresented the true purpose of the RCB deployment, due

to the sensitivities of both the Australian and Malaysian Governments concerning the deployment of Australian troops in Malaysia.

In this respect, it appears to be the case that the Whitlam Government's concern to achieve its election policy of a 'Fortress Australia' (which sought the return of all overseas troops to Australia), and the Malaysian Government's concern for its independent foreign policy position on neutrality and the presence of foreign troops, provided the fundamental justifications for the Defence Committee's advice to government that the provision of an Australian unit for ensuring security at Butterworth "*could be presented publicly as being for training purposes*".

In short, the Defence Committee's secret 1973 advice to the incoming government amounted to a recommendation that the government should effectively and deliberately mislead the Australian people as to the nature and extent of Australia's military involvement in the Malaysian Insurgency.

It is our view that the Defence Committee's proposal of deliberate misrepresentation of the nature of RCB service, subsequently advocated to other Ministers by at least some officials and adopted by later Ministerial decisionmakers, has continued to undermine all subsequent decisionmaking concerning the original RCB service deployment.

Ministers Failed to Respect Administrative Law principles

It is this review's opinion that successive advisers and decisionmakers, including Commonwealth Ministers, have failed to observe the generally-mandated Australian Administrative Law requirements for sound discretionary decisionmaking.

In particular, we find that as persons affected by a decision, the RCB Review Group were (and continue to be) entitled to procedural fairness, in relation to their various submissions to Government, in that the members have not been given a reasonable opportunity to comment on any relevant material adverse to those submissions. This failure occurred on a number of occasions, and is well documented.

It is also evident that Ministers and officials have on various occasions failed to take account of all relevant considerations, and were influenced by irrelevant considerations in making the subject decisions concerning the RCB members.

Further, it also appears to be the case that in making the subject decisions concerning the RCB, Ministers have failed to exercise a discretionary power in a considered manner, as required by law, but have instead made discretionary decisions influenced by a rule or policy, either without regard or without sufficient regard to the merits of the RCB's particular case.

In short, our finding on reviewing the documentation is that Ministerial decisions on the status of RCB service as 'not warlike service', in the context of the Malaysian insurgency during RCB members were actively deployed to secure the air base at Butterworth, amounts to an improper exercise of a power which is so unreasonable that no reasonable person could have exercised the power in that way and with that result.

Our considered view is to the effect that the RCB Review Group has grounds to seek a Ministerial review of the currently operant determination of their service status.

Ministers Failed to Act in Accordance with Ministerial Standards

It is also our contention that in their dealings with the RCB matter, successive Commonwealth Ministers have failed to observe elements of the Ministerial Standards (as variously titled), which from 2007 to 2021 have required that, as a matter of principle, Ministers will act ‘with due regard for lawfulness, integrity, fairness, accountability, responsibility, and the public interest’.

In particular, we note that the Standards require Ministers to observe ‘fairness’ in making official decisions - that is, to act ‘honestly and reasonably, with consultation as appropriate to the matter at issue, taking proper account of the merits of the matter, and giving due consideration to the rights and interests of the persons involved, and the interests of Australia’.

Further, we note that the Standards require Ministers to ensure that their decisions, and the decisions of those who act as their delegates or on their behalf, are open to public scrutiny and explanation.

In our view, the continued refusal by Ministers to provide access to their decisionmaking documentation, or to any explanation of the process concerning RCB service status, constitutes a *prima facie* breach of elements of the Ministerial Standards.

We note that it is for the Prime Minister of the day to ensure observance of the Standards by Government Ministers.

APS Officials to Act in Accordance with the ‘APS Code and Values’

It is relevant that APS officials, in advising Ministers, were required as a duty of their employment to observe the Values as set out in Section 10 of the *Public Service Act 1999*, in particular to provide the Government with advice that is frank, honest, timely and based on the best available evidence.

Further, that duty is imposed by the APS Code of Conduct (Section 13 *Public Service Act 1999*), requires APS employees to act ‘with care and diligence’, and in compliance with all applicable Australian laws, including any instrument made under an Act. We note that a similar duty was imposed on APS officials by the direct precursor to that legislation, the *Guidelines on Official Conduct*, from 1979, and by previous versions of the *Public Service Act 1922*.

In this context, it is relevant the criteria for sound decisionmaking by Commonwealth officials, and for reviewability of official decisions, are set down by the *Administrative Decisions (Judicial Review) Act 1977*.

It is our contention that APS officials in advising Ministers had a legal duty by virtue of their APS employment to ensure that advice provided by APS officials to a Minister, in the context of that Minister making a reviewable decision, in fact excluded irrelevant considerations and errors of fact or interpretation.

While we have not been in a position to review the relevant documentation, it appears to be the case that one or more Ministers involved in making a discretionary decision about the status of RCB service in Malaysia were not so advised.

It is our recommendation that the RCB Review Group should recommend to the relevant Minister that, in reviewing the history of the various Ministerial decisions on RCB service status, the Minister should seek to ascertain whether APS officials knew, or should have known, that those decisions (and related Government policy on this matter) were based on the original misrepresentation of the facts of RCB deployment in Malaysia, and whether the responsible Minister at the time was so advised.

H K Whitton

Public Sector Ethics Consultant

Brisbane

24 September 2021