

CHAPTER 6

LEGAL ISSUES

The distinction between terms used for military discipline jurisdiction, medal recognition and veterans' entitlements

6.1 In submissions and evidence, post-Armistice veterans relied extensively on these main legal and related arguments for the award of the Australian Active Service Medal (AASM) 1945–75 and the Returned from Active Service Badge (RASB):

- a. Service in Korea up to 19 March 1956 is *qualifying service* under the VEA for the highest level of veterans' entitlements. Warlike service in general is qualifying service for these entitlements. Therefore they maintain that post-Armistice service in Korea (at least up until that date) was warlike service.
- b. They claim that this effect of the VEA (a Commonwealth Act) takes precedence over the executive instruments which authorise the creation and awarding of medals.
- c. Those serving in Korea post-Armistice were treated as being on 'active service'. They claim that this and other similar terms are only used in relation to a war. Therefore they contend that the relevant Australian authorities must have regarded the war period as extending beyond the Armistice.
- d. They put the view that the Korean War has never ended. The Armistice was only a temporary ceasefire. The peace conference failed and there has been no formal treaty. Therefore they assert that technically, the parties are still at war.
- e. The three health studies sponsored by DVA in 2003–2005 looked at veterans of the Korean War. This included those who served up to 19 March 1956. So did the Nominal Roll for the Korean War, which was used for these studies and published by DVA. The veterans argue that therefore the Korean War was taken by the Government to extend up to that date. If the 1953–1956 veterans are treated as not having served in the Korean War, then the results of the studies are invalid.

6.2 Some advocates of a higher level of recognition for post-Armistice service have focussed their arguments in an intensively legalistic way. They seem to embrace the position that the AASM and RASB should be awarded at once as a matter of legal right, drawing on the perceived relevance of Federal legislation, and that officials who raise other important considerations of precedent and public policy are somehow in breach of their duty to apply Federal legislation. For example, one submission sought to limit consideration to the following questions:

“... in order to reach a quick resolution, the Review Panel must be instructed to properly address principally, if not solely, the following:

- a. Were they Allotted for Duty, as legally defined, to the Korean Operational Area as legally defined, between 28 July 1953 and 19 April 1956?
- b. Were they on Operational Service, as legally defined?
- c. Were they on War Service, as legally defined?
- d. Were they on Active Service as legally defined?
- e. Was there [sic] service there during a Period of Hostilities, as legally defined?
- f. Did they serve on the posted strength of a unit in the Korean Operational Area, as legally defined, for the specified period?
- g. Did those who died during Operational Service, as legally defined, were [sic] War-Caused deaths as legally defined.
- h. Did they therefore legally meet the criteria for award of the Returned from Active Service badge, ie that they were legally on active service... ?
- i. On the evidence, and on the arguments presented, did they therefore legally meet what most reasonable persons would accept as warlike service in particular circumstances and historical precedents then existing."

6.3 The Working Party has considered these arguments in depth. They are so important to the outcome of the Review that the Working Party commissioned an independent legal advising from Professor Robin Creyke of Phillips Fox, Canberra.

6.4 Professor Creyke holds the Alumni Chair of Administrative Law at the Faculty of Law, Australian National University (ANU), where she has taught administrative and constitutional law for over 17 years. She is a member of the Administrative Review Council, the body which monitors the Commonwealth's administrative law framework; a Commissioner with the ACT's Independent Competition and Regulatory Commission; the President of the Australian Institute of Administrative Law; Special Counsel with Phillips Fox Lawyers in its Corporate and Government Group; and Interim Director of the ANU's Centre for International and Public Law. She has co-authored the first book on veterans' law—*Veterans' Entitlements Law in Australia*.

6.5 In preparing her advice, Professor Creyke had full access to all submissions and evidence, and all the other relevant source material, held by the Working Party. This Chapter is largely based on Professor Creyke's advice, which is reproduced in full, exactly as provided to the Working Party, in Appendix 7.

6.6 The Working Party's consideration of the key issues is as follows.

The significance of veterans' entitlements

6.7 Full veterans entitlements were an important part of the conditions of service arrangements for Korean service. There is plenty of evidence for four points:

- a. the Government felt a moral and contractual obligation to maintain the special benefits for Korean service, which included veterans' entitlements;

- b. it was difficult to maintain the strength of the forces in Korea after the Armistice because of factors including manpower shortages, the introduction of National Service, and emerging Defence commitments in South East Asia;
- c. the Government saw these entitlements during the War, and increasingly after the Armistice, as an important recruiting inducement (noting the experience of the Canadian Army after their special entitlements were removed); and
- d. the Government deferred a decision on removing the package of 'special benefits' for Korea until well after the time when (in the Treasury view) it would have been justified.

6.8 Thus there were strong non-operational incentives for the Government to maintain veterans entitlements in Korea for as long as possible, regardless of operational conditions.

6.9 Department of Defence representatives pointed out in the public hearings that the Clarke Review had found that "the retention of repatriation benefits after the Armistice was not based on operational considerations". The representatives went on:

"So we've always read Clarke as saying that service after 27th of July 1953 was in fact peacetime service, but the retention of the repatriation benefits was based on a contractual agreement that the Government felt it had and couldn't [avoid]."

6.10 Professor Creyke's advice confirms that there is no legal linkage between service for veterans' entitlements and service for medals, and that the relative status of the VEA and the medal instruments are not relevant to the argument (see Appendix 7). She concludes:

"The meaning of these various terms and expressions [to describe levels of service under the VEA] often overlap... Until relatively recently, there appears to have been little consistency in policy as to when one or more of these terms would be adopted. Although the terms and expressions often have a core of meaning in common, it is necessary to distinguish between them. There is no Principle of law for treating the concepts as equivalent. This is confusing and can lead to false expectations. In particular, although there are similarities between terms used in the *Veterans' Entitlements Act 1986* (Cth) and in the criteria for eligibility in the Regulations for award of medals, there is no necessary connection between the two."¹

6.11 The Working Party considers that as a matter of law, there is no logic in the argument that because post-Armistice Korean service was recognised as eligible under the VEA, it must also be recognised as warlike for medal purposes. The Mohr Review also highlights this separation (see Chapter 4). However, we understand how the lay person could have difficulty understanding the apparent inconsistency.

6.12 Chapter 5 also makes it clear that by convention, there is no nexus between the cessation dates for hostilities, veterans' entitlements and medals and the date on which a peace treaty (if any) comes into force.

¹ Appendix 7, paragraphs 286–287.

‘Active service’

6.13 In submissions and evidence, veterans have correctly pointed out that the term ‘active service’ was in common use to refer to Army service in Korea. In the disciplinary context, the term was confined to the Army. It was used on discharge certificates, on charge sheets for offences, and in initial briefings of personnel. One veteran gave a vivid account of his induction to the active service regime upon his night-time arrival in Korea in mid-1955:

“... our draft was met by the Duty Officer and Orderly Sergeant. In my opinion, the Duty Officer was quite affected by alcohol, was wearing side arms, and with his hand on the holster, loudly and for some reason, angrily, stated ‘that we were now in an active service area, and if we disobeyed a lawful command, we could be shot’. As an impressionable 20 year old, I had no difficulty in believing him.”

6.14 Other veterans provided evidence in similar vein. For example:

“I met a friend last Saturday there at [name] Memorial Club I hadn’t seen for 52 years, and he went to Korea in 1954. Now he was telling me one little incident where he was on guard duty and he happened to fall asleep, because they worked seven days a week, there was no weekends off or anything. And he was caught and he was charged. And he said, on his charge sheet—this is in 1954, after the ceasefire—‘whilst on active service’. And he stressed that point. And he said, ‘I came back and wasn’t entitled to a Returned from Active Service Badge, and yet I was charged “whilst on active service”.’ So we don’t know how the Government got this, that they weren’t on active service.

“We were also constantly reminded by our Officers and Senior NCO’s that we were on Active Service, that we were only on a ‘cease-fire’ condition and that any lapse of military discipline would result in punishment much more severe [than] under AMR & Os... any infraction of rules resulted in much more severe punishment than would have been the case in, say, Japan.”

“My discharge certificate states the number of days I was on Active Service. I have a further certificate stating that ‘a grateful nation expresses its thanks for contributing to Australia’s effort in the Korean War’.”

“The Department [of Defence] knew that we were on Active Service because it was written on our orders.”

“It should be noted that any soldier who was charged with an offence was charged, ‘Whilst on Active Service’, therefore, the liabilities of Active Service were incurred and applied, but tangible recognition was not—tangible recognition being the exclusion of the issue the Active Service Medal and Badge.

“If they played up and went out on the street after curfew of a night and the Military Police caught them and brought them in, they were charged with ‘Whilst On Active Service’. And I know that, because I used to write out their charge-sheets and help take them in to the RSM and they were all marked ‘on active service’. Everybody that went through was ‘in good conduct and military discipline, you did remain out after curfew’ and ‘on active service’.”

6.15 A post-Armistice Army veteran wrote:

“When any soldier was killed after 1953, he was classified as killed on active service.”

6.16 Use of the particular term ‘active service’ appears to have been confined to the Army. At that time, the Army disciplinary code only applied within Australia. The stricter disciplinary regime for overseas deployment was still derived from British legislation which applied to soldiers ‘on active service’.

6.17 Correspondence between the three Service Departments and the Department of Defence in 1952 makes it clear that ‘active service’ was an issue for the Army only, and was for the purpose of applying the overseas disciplinary regime.² The Department of the Navy wrote:

“As far as this Department is concerned, no necessity is seen for the declaration regarding active service... It is understood that the Army Disciplinary Code necessitates the declaration, whereas the Naval Discipline Act meets all requirements.”

6.18 The Department of Air wrote:

“... the R.A.A.F. in relation to its disciplinary code is governed by the Imperial Air Force Act at all times. The difficulties which, it is understood, the Department of the Army envisages apparently relate to the fact that the Imperial Army Act does not apply to the Australian Military Forces at all times.”

6.19 A 1965 Department of Defence record reads in part:

“... a proclamation in 1942 declared that persons subject to military law serving in the Commonwealth and the Territories were ‘on active service’. This proclamation was issued to overcome certain difficulties experienced in administering the disciplinary code under war conditions and did not vary the conditions of service prescribed as necessary to qualify for the Returned from Active Service Badge.”³

6.20 Similarly, on 10 March 1966 the Minister for Defence replied to a representation partly in the following terms:

“Members of the Australian forces which were part of the Australian contingent in Korea were declared as being on ‘active service’ until 1957 when the decision was taken to withdraw them. The definition of ‘active service’ under the Defence Act is distinct from ‘war service’. Service personnel may be declared to be on active service although not engaged in operations against an enemy. This was the case with personnel serving in Australia during the 1939–45 War as well as those in Korea after hostilities ceased... The definition of active service in areas where there is no action against hostile forces is imposed for administrative reasons to enable the more effective handling of such matters as discipline and the administration of the Forces as a whole.”⁴

6.21 The Departmental brief of 9 March 1966 accompanying the reply comments further on the definition of ‘active service’ in the then section 4 of the Defence Act. It distinguishes as follows between paragraph 4 (a) (which refers to operations against an enemy) and paragraph 4 (b) (which refers to the Governor-General’s power to declare that a force is on active service):

² National Archives of Australia, A705, 90/1/194.

³ Department of Defence file 167/1/51, original on file 66/301/234.

⁴ Department of Defence file 167/1/51.

“Whereas (a) applies more to active operations of war or of a warlike nature (b) is an administrative measure taken when forces are overseas to allow more effective control. Powers of discipline are much wider when troops are declared to be on active service.”

6.22 Significantly, it was not until October 1957 (after the last Australian troops had left the CCK) that the British Government wrote to the Australian Government²:

“... proposing to bring ‘Active Service’ in Korea to an end on 31st October, 1957, in respect of United Kingdom forces attached to the Commonwealth Liaison Mission in Korea and suggesting that the Commonwealth may wish to take parallel action”.

6.23 In this exchange at a public hearing, Department of Defence witnesses commented on the confusion that arises over the use of the term ‘active service’ in the context of military discipline:

“Garry Nehl:

The other thing, of course, is that it’s extremely unfortunate that the AASM has the words ‘Active Service’ in it, because there is a widespread, generally-held perception—right throughout the whole Australian community—that ‘active service’ is not just disciplinary action relating to the 1881 Imperial [Army] Act to enable discipline while overseas, but it means active service. And even in World War Two—in which my father served—the War Memorial published a whole range of publications every year, and there’s one called *Active Service*. So this is one of the difficulties we’ve got in trying to satisfy the people who are interested in some resolution.

“Witness:

‘Active service’ can also be a perception, too. And in the case of Butterworth, they perceive they had active service on the basis that Communist terrorists were still operating in Malaya. They were up there to protect the Butterworth base as a ready reaction force. They had certain Rules of Engagement. They patrolled with live ammunition, weapons; but it’s considered peacetime service.

“Now we’ve explained to people who make submission that it should be active service for the Active Service Medal on the basis... And their submissions always surround this word: ‘We were placed on “active service”’. We explained I think quite fully and quite reasonably to them that it is purely a term within the Defence Act. It did not put you on active service from another meaning of (you know) in active pursuit of objectives. In other words, to go out and hunt these people down. But people will also put that barrier down in front of their eyes as well, and don’t want to see any further.

“Garry Nehl:

We here fully understand what’s involved, and I can assure you that everybody who served in Korea post-Armistice strongly and firmly and deliberately believe they were on active service. And they say, ‘Here’s my discharge certificate and on the back it says: “One year and 23 days’ active service”’.

“Gordon Jones:

And it’s very difficult—well, we haven’t tried to do that, but it would be very difficult to try and explain to them that it’s on that certificate only because it relates to how many days you were under that disciplinary instrument. Because it doesn’t sound like a very rational argument, does it?”

6.24 The legal advice to the Working Party (Appendix 7) confirms that the use of this term has no bearing on the status of service for medal and badge recognition. As Professor Creyke points out:

“In any event, since the expression no longer appears in either the VEA or in the Regulations governing the award of either the AASM 1945–75 or the ASM 1945–75, having ‘active service’ is not relevant for the purposes of award of those medals.”⁵

...

“Awardees of the AASM 1945-75 need not, however, have actually experienced casualties. As the Defence submission to the Mohr report noted:

... the AASM is in recognition for having served in a warlike area of operations, not necessarily having rendered combat duties, if you like, or active service. It is purely recognition in that area which has been declared a warlike area of operations.”⁶

...

“The reason for designation of service as ‘active service’ was discussed in the Clarke report as follows:

The proclamation was necessary under s 4 of the Defence Act 1903 in order to place Army personnel serving anywhere in Australia on *active service*, whilst they were on war service, for the purpose of invoking increased powers of military discipline under the Imperial Army Act 1881. (emphasis added)”⁷

...

“... to argue that being on ‘active service’ for disciplinary purposes should translate into being on ‘active service’ for other purposes is mistaken.”⁸

6.25 The same applies to other similar phrases which were in use for various purposes post-Armistice. For example, accidental injuries to aircrew were recorded by the RAAF as injuries ‘on war service’, probably for veterans’ entitlements. This has no bearing on the status of service for medal and badge recognition.

6.26 There is also no evidence that the terms ‘Killed in Action (KIA)’ or ‘Wounded in Action (WIA)’ were used in Army records after the Armistice.⁹

6.27 We are also acutely aware, however, of the unfortunate confusion that has arisen in the minds of reasonable people as a result of the ordinary English meaning of ‘active service’: ‘The performance of military duty in the field in time of war.’¹⁰ Ironically, the only places where this phrase is still used officially are the titles of the AASM and the RASB.

6.28 The Working Party therefore considers that no conclusion can be drawn from the use of these expressions, as to the appropriate level of recognition of post-Armistice service. The argument that, of itself, the use of ‘active service’ and other such phrases in this context justifies the award of the AASM, does not stand up.

⁵ Appendix 7, paragraph 123.

⁶ Appendix 7, paragraph 39.

⁷ Appendix 7, paragraph 128.

⁸ Appendix 7, paragraph 141.

⁹ Report by Major T Kemp, based on data held at the Central Army Records Office.

¹⁰ Macquarie Dictionary.

Status of hostilities in Korea

6.29 In both submissions and evidence, many veterans supported their case with the view that technically, the Armistice was no more than a ‘ceasefire’ or an ‘armed truce’, and the War was ongoing. It had never been formally resolved—just suspended. These quotations indicate how various witnesses saw it.

“From the date of the Armistice to the present date, a state of war continues to exist. This state of war has never gone away. There has been no surrender by either side and no permanent peace treaty has ever been signed by either country. The Armistice signed by US Lieutenant General William K Harrison and his counterpart from the North’s Army, General Nan Il, was only ever intended as a temporary measure. A conference in Geneva in 1954, which was designed to thrash out a formal peace accord, ended without agreement. Accordingly the border bristled with artillery and troops.”

“An armistice was signed on the 27 July 1953 which was never ratified and the situation became an armed truce against a massive force that was never defeated and had the potential to explode at any second.”

“So there was a ceasefire signed, only a temporary ceasefire signed on the 17th of July—the 27th of July, I should say. It was only a temporary ceasefire and no-one thought it will ever hold. And what was initially thought was, that it was just a means of the Chinese for building up their armoury again for another stoush, like they did when they started talking at the first ceasefire—that was after the battle of Kapyong.”

“... while a cessation in fighting had occurred it was treated by all participants on the United Nations Forces as temporary only, and that hostilities could recommence at any moment.”

“... an armistice agreement was signed at Panmunjom on 27th July 1953. This agreement did not formally end the war ... but was more of a cease fire or truce which was to be formalised at a later date. On the 15th June 1954, the Geneva Conference failed to settle the Korean dispute, the result of which was that the truce signed on the 27th July 1953 ceased to be in force and the divided country was formally at war again.”

“At that time, it wasn’t long after the Armistice had been signed (as we stated), which was the ceasefire that was never, ever consolidated, and nothing was there to say that it could not flare up. And we always maintained that approach to it, that it could break out again, because it was never consolidated and we still remained as prior to the signing of the ceasefire.”

“... the Armistice as such was really at that point in time just a ceasefire. But from then to this day it’s still their intent that they would like to cross over that little bit of real estate and give the people on the other side a hard time. So that’s why I said, you had to be alert if you were on patrol.”

6.30 There is some technical uncertainty around the issue, as the following exchange indicates:

“Garry Nehl:
Tell me, was the Korean War a war?”

“Witness:
I couldn’t really answer that question from the point of view of...”

“Ian Crawford:
It’s a very important issue.

“Witness:
I know there’s often arguments about whether a declaration of war had been made. I don’t know. And certainly it was a UN action and it no doubt operated under Chapter VII of the UN’s Charter, so...

“Ian Crawford:
Australia was responding to a call by the United Nations.

“Garry Nehl:
Yes. But was it a war? Because it’s a fairly significant issue, isn’t it.

“Witness:
I think it’s like saying, ‘Was the Vietnam War a war’, as well.

“Witness:
I think perhaps, in terms of aiding your reflections for this particular matter, where we’re talking about essentially from the period from the 26th of... well, from the signature of the Armistice, it wasn’t a war from that period onwards.

“Garry Nehl:
But it was a war before?”

“Witness:
Well, I think you’d need to get an international lawyer to comment upon that particular one and I wouldn’t feel comfortable commenting upon it. But certainly, the period that we are interested in, I think it’s safe to say that it’s not a war—as we would colloquially understand it.

“Garry Nehl:
We’re constantly being told that the war is still going, there’s no peace treaty been signed.

“Witness:
What you’re saying is, and the argument as I understand it is, that from the signature of the Armistice it wasn’t really an Armistice, it was an Armistice in name only. It was really a ceasefire, and the implications are that the warlike nature—if I can use that general non-specific term—still endured. That’s essentially the argument, as I understand it.”

6.31 Some witnesses also pointed out that the failure of the parties to comply with Article 60 (to implement what might these days be described as a peace process) meant that the Armistice was technically defunct, and that (by implication) a state of war pertained by default.

“Just let’s clarify the Armistice situation first. And this is a big bugbear with a number of Associations that I hear. The first thing they say: ‘Armistice finished’. The Armistice is a temporary cessation of hostilities. In Article 60 of this particular Armistice ... [it] says that within 90 days, both belligerent parties come together and operate and put the question of Korea together and the removal of forces from it. And we all know that that has not been done to this day, so many decisions have been made by many people and many Associations in past reviews—and I speak specifically of the CIDA Report, where they said... consider the Korean issue and they come up and they put. [After the Armistice]. Area dead, finished. They didn’t go on to even consider what went on.”

6.32 Department of Defence witnesses commented at a public hearing on how far this kind of argument could be taken:

“You mentioned that the Armistice was signed in July 1953, but the argument is that the war still exists today because it’s only an Armistice. A peace treaty was not signed with Japan until 1952 and Japan opted out of the war by a conditional surrender.” [Note: The Working Party notes for purposes of historical accuracy that the Japanese surrender was unconditional.] “Now that surrender didn’t necessarily mean that they didn’t consider themselves at war. And it has been an argument for a long time that the [Second World] War didn’t end until 1952. So BCOF (I think) is a good example, because those people have been arguing that very point: even though they didn’t get qualifying service under the VEA like these people did in Korea, they still have that argument about ‘The war was still on’.”

6.33 The Working Party asked Professor Creyke to include advice on the legal status of the hostilities in Korea before and after the Armistice. She found that:

“Under the prerogative powers provided for in the Commonwealth Constitution s 61, the Governor-General may declare a conflict to be a 'state of war'. A 'state of declared war' is a conflict between state parties which has been declared by the Governor-General to be a war. No declaration that Australia was at war was made by the Governor-General in 1950 in relation to the conflict in the Korean peninsula. More importantly, no 'declared state of war' existed for the period of the Armistice, since during an armistice hostilities cease.”¹¹

...

“An armistice is a 'temporary suspension of hostilities by agreement of the parties, as to discuss peace; a truce'. It is not a termination of hostilities or the end of the state of war. Since during an armistice there is no 'fight', nor a 'campaign' and hostilities are generally suspended, there can be no 'conventional combat operations'. It follows that the 'conventional combat operations' element of 'warlike operations' does not apply to an armistice.

“... Nor does an armistice involve 'peace enforcement' since no peace agreement has yet been reached. The armistice is a prelude to peace negotiations. During an armistice, combat activities are not conducted. There has been a cessation of hostilities. It follows that this element of 'warlike operations' could not apply to the Armistice.”¹²

...

“... service during the Armistice did not involve those indicia established at law for 'warlike operations'. That in turn means that this key criterion for the award of the AASM 1945–75 is not present for those members of the Forces who served during the Armistice.”¹³

6.34 The Working Party concludes that the narrow legal question of whether the Korean War was technically ongoing adds little value to the debate about the recognition of service. For what it is worth, we accept that service during an Armistice can hardly (from a purely legal standpoint) be characterised as warlike. By definition, an Armistice means a suspension of full-scale hostilities, whatever random violations have occurred in the meanwhile. It also follows that we reject the criticisms which have been levelled—often in quite intemperate terms—at responsible public officials who have based their decisions on the existing formal criteria of eligibility.

6.35 At the same time, we acknowledge that uncertainty surrounding the Armistice was a powerful factor in the prevailing tension and stress experienced from mid-

¹¹ Appendix 7, paragraph 46.

¹² Appendix 7, paragraphs 49–50.

¹³ Appendix 7, paragraph 51.

1953—what one witness tellingly described as ‘the Sword of Damocles’. This aspect is further explored in Chapter 5.

The DVA health studies

6.36 Several veterans argued that their inclusion in the nominal roll for the DVA health studies (see Appendix 9, Bibliography) confirmed that the Government regarded them as having been involved in ‘the Korean War’ beyond July 1953.

6.37 For example, one veteran commented as follows on the broad definition of ‘Korean War veterans’ for these studies:

“Therefore, by legal definition, all those persons involved in conducting those studies must support the proposition that all of those *Korea War Veterans* who served in Korea between the dates 27 June 1950 – 19 April 1956 (inclusive), were *Allotted for Duty* in the *Korea Operational Area* and therefore by legal definition were on *War Service* (by legal definition), were on *Active Service* (by legal definition), and any deaths during that period were *War-caused Deaths* (by legal definition) and that such service was *Hazardous* (by legal definition).

“... they did NOT consider that those who served after 27 July 1953 constituted a group different from those who served between 27 June 1950 and 27 July 1953...”

“... any findings by the Working Party which do not support the 3 matters now raised... would also cast serious doubts on the validity and methodologies of the dramatic statistical findings of the 3 separate Korean War Veterans Study Reports.”

6.38 Another witness stated:

“Well, I know there’s been some discussion and I’ve seen it in the submissions of the acceptance of ‘operational’ and ‘qualifying’ service and that various surveys which the Department of Defence have carried out—or the Department of Veterans’ Affairs and Defence—with regard to Korean health surveys and mortality surveys would indicate that service post-ceasefire—members who’ve served post-ceasefire—have been seen as subjects to that survey and therefore have been seen to be no different to those who served in Korea pre-ceasefire. And therefore it does appear to me as a—I wouldn’t say completely objective observer, but hopefully you know, a sensible one—that there is no logic or indeed argument that can be made for the non-acceptance of that service as has been submitted to you for recognition for the Returned [from Active] Service Badge and the appropriate campaign medal.”

6.39 In the public hearings, the Working Party followed up the question of how the survey group was selected. This is the relevant extract of evidence.

“Ian Crawford:

You’ll appreciate that we’re examining the identification of the people after the Armistice. And the fact that they have been included in the various studies is being used as an argument by some of the veterans—some of the submissions—that they were recognised as veterans of the Korean War; here’s the title in these studies; why aren’t we recognising them the same way with the medals? Could you explain the logic that was used at the time to include the people after the Armistice in the health studies, as well as the people before the Armistice?

“Witness:

Look, I must be honest with the Committee and say that I’m not sure we thought through that in any great detail. We took a point in time and said, ‘OK, well, look, this is still what we think of as the Korean War. Let us look at all of these people’. We did come to know that many of those people had served—or some of those people had served—after the Armistice and that there were different phases of the War which were quite different: the early phase (with the very rapid retreat, and then the very rapid advance, and the subsequent retreat) was quite

different in terms of exposures to what we call the 'static' phase which was largely confined to trench warfare. And then that 'static' phase gradually led on to a post-Armistice phase. I must confess, I don't think we thought through in any great depth where we should draw the line in terms of whether or not it was active service, or operational service, or hazardous service. We drew a fairly arbitrary line and said, 'Well, we'll make this where we'll look at it'. Now, I'm not an expert on the history of the Korean War, but my understanding is that even though the Armistice was signed, there were still sporadic exchanges of unpleasantness between the two sides that continued after that time.

"Ian Crawford:
This is what we're trying to establish too.

"Witness:
Certainly, that's the evidence that we were given—that there were times when they were doing things like sniper fire at each other, and they continued to do things like patrolling and that sort of thing. But I'm afraid (I think) your Committee would be better advised to seek a better expert than me on that issue.

"Ian Crawford:
I had raised it with [name] during the studies, and he said an arbitrary decision had been made to do it that way. I was wondering whether there were any deeper reasons for it, because people have used the argument: 'Hey, you included us in these studies, then why aren't we being recognised the same way as everybody else?' So I am inclined to the view that it was an arbitrary decision and there's no basis for their being recognised, other than they're in the total Korean experience.

"Witness:
I think you're right, Ian. And technically—I'm not an expert on these things, but my understanding is technically—the Korean War continues to this day.

"Ian Crawford:
Oh, it does.

"Witness:
And so people who go who are military people... throughout the '60s and '70s and '80s we will have had military people go to Korea for a variety of purposes. Technically, they were military people in a war zone, if you like. We just had to draw some arbitrary point, and we did draw an arbitrary point and it was pretty arbitrary. There were people who came along afterwards and said, 'Hey, we've been left out', and we just said, 'Well look, we're sorry, we have to draw the line somewhere'. I mean, technically you could still be in the Korean War in 2005, I suppose.

"Gordon Jones:
It's interesting, though, that the arbitrary date that was selected... not only is the time which I note is actually acknowledged in the Cancer Incidence Study as being the time when the last ADF units were withdrawn—but it's also the time at which the operational and qualifying service for veterans' entitlements also ceased. That is, the two entitlements, or the two qualifying things, ceased.

"Ian Crawford:
Well, coming out of the Department of Veterans' Affairs, that probably would not be surprising, because that was when the repatriation benefits...

"Garry Nehl:
It will have been the influence in deciding the area to undertake the study.

"Witness:
I think exactly that—I think you're exactly right.

“Garry Nehl:

And what you were saying about the war still being on since the Armistice—it’s in excess of 1,300 people have been killed in the Demilitarised Zone.”

6.40 The Working Party accepts the view of the witness that the target group for the studies was probably selected by DVA on the basis that they were the veterans who were eligible for full VEA benefits. No greater significance should be attached to it than that. We do not accept either of the exaggerated constructions that some have tried to put on this fact: either that the inclusion of post-Armistice veterans proves their service was warlike, or conversely that the findings of the studies are invalid.

6.41 The Working Party has further considered the implications of the 2005 study in Chapter 4.

Conclusion

6.42 The Working Party accepts Professor Creyke’s expert advice on the issues set out at the beginning of this Chapter. There are no grounds under the law for asserting that post-Armistice service in Korea must be recognised as warlike, and there is no legal linkage between service for veterans’ entitlements and service for medals. A higher level of recognition for this service must stand or fall on the reality of what our soldiers, sailors and airmen were required to do and the conditions they experienced (see Chapter 5).

6.43 Although some veterans and their representatives appear wedded to a legalistic approach, the Working Party (having regard to its own legal advice) has come to the view that this approach is unfounded and unproductive. It is time to move on and resolve claims for higher recognition on their merits.

6.44 At the same time, the Working Party acknowledges that there is scope for a reasonable person to be puzzled by the apparent paradox between the legal arrangements for Korean service (in particular the VEA entitlements and the use of ‘active service’ and related expressions) and the policy approach over medals.

6.45 In the absence of evidence revealed elsewhere in our Report, this paradox would not be capable of resolution as a narrow point of law. However, the Working Party considers that the scope for misunderstanding should be dispelled. This issue is examined further in Chapter 8 (Broader Policy Options relating to the Award of Medals).

