

EXPLANATORY STATEMENT

Issued by the authority of the Chair of the Defence Honours and Awards Appeals Tribunal

Defence Act 1903

Defence Honours and Awards Appeals Tribunal Procedural Rules 2021

Part VIIIC of the *Defence Act 1903* (the Act) establishes the independent Defence Honours and Awards Appeals Tribunal.

Section 110XH of the Act provides that:

- (1) After consulting the other Tribunal members, the Chair may, by legislative instrument, make procedural rules (not inconsistent with this Part) in relation to the practice and procedure to be followed by or in relation to the Tribunal.
- (2) Without limiting subsection (1), the procedural rules may provide for the following:
 - (a) the constitution of the Tribunal for Tribunal proceedings;
 - (b) how the work of the Tribunal is to be allocated between the Tribunal members;
 - (c) the nature or form of Tribunal proceedings (for example, whether proceedings are to take the form of a hearing, and whether a hearing is to be in public or private);
 - (d) the circumstances in which a person may be represented by a lawyer or other person in a Tribunal proceeding;
 - (e) how applications are to be made to the Tribunal;
 - (f) requiring lodgement with the Tribunal of material relating to the making of reviewable decisions that are the subject of applications to the Tribunal;
 - (g) how evidence is to be given, or submissions are to be made, to the Tribunal;
 - (h) how people are to be summoned to attend before the Tribunal;
 - (i) any other matters that the Chair considers necessary or convenient.
- (3) The procedural rules must be complied with in relation to Tribunal proceedings.

The Procedural Rules determine the Tribunal's procedure. Prior to the making of this instrument, the Procedural Rules were set out in the Defence Honours and Awards Appeals Tribunal Procedural rules which sunset on 30 September 2021. There have been no substantive changes to the Procedural Rules in the making of this new instrument.

As required by Section 110XH, members of the Tribunal were consulted in its making, but due to the non-substantive changes in the new instrument, no further consultation was required.

The establishment of the Tribunal as a statutory body under the *Defence Act 1903* allows the Tribunal to review applications from individuals and organisations for Defence honours and awards which have been previously considered by the Commonwealth (the Australian Defence Force (ADF) or Department of Defence, collectively referred to as Defence). The Tribunal is able to review a decision concerning an application for a defence award, or foreign award and may affirm a decision, revoke a decision, substitute a new decision or refer

the matter to a person determined by the Tribunal, for reconsideration in accordance with any directions of the Tribunal. The Tribunal may also make any recommendations to the Minister that the Tribunal considers appropriate and that arise out of, or relate to the Tribunal's review of a decision in relation to a defence award or foreign award.

In respect of defence honours the Tribunal is able to review a decision concerning a nomination for a defence honour (other than an honour in the Military Division of the Order of Australia) and may make any recommendations to the Minister that the Tribunal considers appropriate that arise out of such a review. This may include recommend to Government that a decision be affirmed, or set aside and replaced with a new decision.

Further, the Tribunal is the final avenue of appeal on the merits concerning applications for Defence honours and awards. However, questions of law may continue to be taken to the courts and complaints may be made to the Commonwealth Ombudsman.

The Act also enables the Tribunal to inquire into and make recommendations in respect of matters that have been referred to the Tribunal by the Minister for Defence.

The Procedural Rules are a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

The Procedural Rules commence on the day after which they are registered on the Federal Register of Legislative Instruments.

Authority: Section 110XH of the *Defence Act 1903*

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Defence Honours and Awards Appeals Tribunal Procedural Rules 2021

1. The *Defence Honours and Awards Appeals Tribunal Procedural Rules 2021* are compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

ATTACHMENT

Details of the *Defence Honours and Awards Appeals Tribunal Procedural Rules 2021*

Part 1 Preliminary

Rule 1 – Name of Procedural Rules

This rule provides that the title of the Procedural Rules is *Defence Honours and Awards Appeals Tribunal Procedural Rules 2021*.

Rule 2 – Commencement

This rule provides for the Procedural Rules to commence the day following registration.

Rule 3 – Authority

This rule sets out that the Procedural Rules are made under section 110XH of the *Defence Act 1903*.

Rule 4 – Definitions

This rule sets out definitions of key terms used in the Procedural Rules.

Rule 5 – Schedules

This rule makes provision for the repeal of *the Defence Honours and Awards Appeals Tribunal Procedural Rules 2011*.

Rule 6 – Forms

This rule provides that the Chair may approve forms for the purpose of correctly submitting an application for a review of a reviewable decision, or making a submission to an inquiry, or for the purpose of a Summons.

The rule also provides that the approved forms must be published on the website of the Tribunal at <https://www.defence-honours-tribunal.gov.au/>

Part 2 Review of reviewable decisions by Tribunal

Division 2.1 Applications for review

Rule 7 – Making applications

This rule sets out that an application for a review of a reviewable decision must be in accordance with an approved form.

Rule 8 – What Tribunal may do with applications

This rule sets out how the Tribunal may use the application.

- (1) It may do so to conduct its own research into the reviewable decision.
- (2) The Tribunal's research may include giving the application for comment to
 - (a) a person or organisation considered by the Tribunal to be appropriate; and
 - (b) a person or organisation the subject of adverse comment in the application.
- (3) The grounds on which the Tribunal may decide that a person or organisation is appropriate include:
 - (a) that the person or organisation has the capacity to assist with the review of a reviewable decision; and
 - (b) that the person or organisation has an interest in the reviewable decision.

Rule 9 – Report by Secretary

This rule provides details about the role of the Secretary in providing information to the Tribunal in relation to a review of a reviewable decision.

- (1) The Tribunal may give an application to the Secretary.
- (2) The Secretary may give the application for comment to
 - (a) a person in the Department, or
 - (b) a person in the Defence Force
- (3) The Secretary must give the Tribunal a report within 30 working days after the day the Secretary receives the application, or 60 working days if the decision relates to a defence honour;
- (4) This sub rule specifies what the Secretary's report to the Tribunal must include:
 - (a) the findings on questions of fact and the reasons for the decision;
 - (b) a reference to the evidence on which the findings were based;
 - (c) a copy of the relevant unclassified evidence
 - (d) other unclassified documents under the Department's control or in the Department's possession that are relevant to the reviewable decision.
- (5) This sub rule states that the Secretary must, in preparing the report referred to in sub-rule (4):
 - (a) prepare a list of all classified documents under the Department's control or in the Department's possession that are relevant to the reviewable decision;
 - (b) give the list to a Tribunal member who holds a security clearance for accessing the documents within 30 working days after the day the Secretary receives the application; and
 - (c) if a Tribunal member who holds a security clearance for accessing a document on the list requests access to the document — give that Tribunal member a specified number of copies of the document within 10 working days after the day the Secretary receives the request.
- (6) This sub rule allows for the Tribunal to approve additional time for the Secretary to prepare the report.

Rule 10 – Applicant may respond to report

This rule sets out what the Tribunal needs to do following receipt of the Secretary's report as per sub rule 9 (3), including:

- (1) (a) giving a copy of the report to the applicant within 10 working days; and

- (b) advising the applicant that they may give the Tribunal a written response to the report within 20 working days.
- (2) The Tribunal may approve a request by the applicant for more time to prepare the response.

Rule 11 – Other documents held by Department

This rule provides that should the Tribunal believe, on reasonable grounds, that there is more evidence than that provided under sub rule 9 (4) or sub rule 9 (5) (a), it can direct the Secretary:

- (a) to give the Tribunal a specified number of copies of a document identified by the Tribunal within a specified time; and
- (b) to search for further documents; and
- (c) to give the Tribunal a specified number of copies of the further documents within a specified time.

Rule 12 – Other documents held by other persons or organisation

This rule provides that a person or organisation other than the Department must comply with a request by the Tribunal to provide a specified number of copies of a document within a specified time.

Division 2.2 Conduct of reviews

Rule 13 – Review hearing may be public or private

This rule provides that the hearing of a review may be held in public or privately, Namely that:

- (1) Subject to a direction of the Chair or the presiding Tribunal member under subrule (2), a hearing of a review of a reviewable decision must be conducted in public.
- (2) The Chair or the presiding Tribunal member may direct that the hearing be conducted:
 - (a) in private; or
 - (b) partly in public and partly in private.
- (3) For subrule (2), the grounds on which the Chair or the presiding Tribunal member may decide that the hearing be conducted wholly or partly in private include the following:
 - (a) that the matter under review is sensitive;
 - (b) that privacy is required to ensure fairness to a person involved or mentioned in the review;
 - (c) that the review involves matters of national security.
- (4) The Chair or the presiding Tribunal member may give directions as to who may be present at a hearing that is conducted wholly or partly in private.

Rule 14 – Review may be conducted without a hearing

This rule provides that the Chair may direct that a review may be conducted without a hearing, but only when the Secretary and the applicant have agreed that the review may be conducted without a hearing.

Rule 15 – Making oral submissions at review hearing

This rule provides details on how to make, and who may make, oral submissions at a Tribunal hearing. Namely, that

- (1) The Tribunal:
 - (a) must agree to a request by an applicant to make an oral submission at the hearing of the review; and
 - (b) may invite another person to make an oral submission at the hearing of the review; and
 - (c) may direct that an oral submission be made in person or by audio link or audiovisual link.
- (2) The Tribunal may agree to a request by an applicant that the applicant be represented at the hearing of the review by another person, including a legal practitioner.

Rule 16 – Secretary must assist Tribunal

This rule states that the Secretary must use his or her best endeavours to assist the Tribunal in relation to the review.

Rule 17 – Making the Tribunal's decisions available

This rule states that the Tribunal must give the Secretary and the applicant a copy of its decision within a reasonable period after it has made the decision, including when the decision includes a recommendation to a Minister. Where the Tribunal makes a recommendation to the Minister, it must also give the Minister a copy of the decision within a reasonable period after it has made its decision.

Rule 18 – Publication of Tribunal decisions

This rule states that if a hearing of a review was considered in public, the Tribunal must publish the decision on its website. If a hearing of a review was conducted in private or without a hearing, the Chair must decide whether to publish the decision on its website.

The Tribunal's published decision must not contain classified material.

The Chair may decide not to publish the name of a person to whom an honour or award relates or any other information that is likely to identify that person.

Part 3 Inquiries by Tribunal

Division 3.1 Submission to inquiry

Rule 19 – Public call for written submissions

This rule provides that, once the Minister directs the Tribunal to conduct an inquiry:

- (1) The Tribunal may call for written submissions to an inquiry.
- (2) Unless the Chair decides otherwise, the call for written submissions must be published:
 - (a) in a newspaper circulating nationally; and
 - (b) in any other manner the Chair decides is appropriate.
- (3) The closing date for written submissions must be at least 20 working days after the day of the first publication of the call for written submissions.
- (4) The Tribunal may accept a written submission after the closing date.

Rule 20 – Making submissions to inquiry

This rule provides that a written submission to an inquiry must be in accordance with an approved form.

Rule 21 – What Tribunal may do with written submissions

This rule provides for the Tribunal's powers in relation to a written submission to be the same as its powers in relation to an application mentioned in rule 8.

Division 3.2 Conduct of inquiries

Rule 22 – Inquiries to be public

This rule provides details on how a hearing of an inquiry must be conducted. Namely that:

- (1) Subject to subrule (2), a hearing of an inquiry must be conducted in public.
- (2) The Chair may direct that the hearing of an inquiry be conducted:
 - (a) in private; or
 - (b) partly in public and partly in private.
- (3) For subrule (2), the grounds on which the Chair may decide that the hearing be conducted wholly or partly in private are those mentioned in subrule 13(3).
- (4) The Chair may give directions as to who may be present at a hearing which is conducted wholly or partly in private.

Rule 23 – Tribunal may invite person to make oral presentation

This rule provides details on whom and how a person may make an oral submission at a hearing. Namely that:

- (1) The Tribunal may:
 - (a) invite a person to make an oral submission at the hearing; and
 - (b) direct that the person make the oral submission in person or by audio link or audiovisual link; and

- (c) agree to a written request by the person that the person be represented at the hearing of the inquiry by a person who is not a legal practitioner.
- (2) In paragraph (1) (c) 'legal practitioner' has the same meaning as in sub rules 15 (3) (a) and (b).

Division 3.3 Tribunal report on inquiry

Rule 24 – Publication of report on inquiry

This rule provides details on when the Tribunal will publish a report of an inquiry. Namely that:

- (1) The Tribunal must publish on its website a copy of its report within 20 working days after the day it gives the report to the Minister under paragraph 110W (2) (b) of the Act.
- (2) The published report must not contain classified material.

Part 4 General provisions relating to operation of Tribunal

Rule 25 – Procedure of Tribunal

This rule provides that:

- (1) Subject to the Act and the Regulations, the procedure of the Tribunal is at the discretion of the Tribunal.
- (2) The Tribunal must conduct its proceedings with as little formality and technicality, and with as much expedition, as the requirements of the Act and the Regulations and a proper consideration of the matters before the Tribunal permit.
- (3) The Tribunal is not bound by the rules of evidence but may inform itself on any matter in any way it considers appropriate.

Rule 26 – Summons

Section 110XC of the Act authorises the Tribunal to summon a person to attend before the Tribunal. This rule provides that:

- (1) a summons must be in the approved form; and
- (2) the service of the summons must be made by giving a copy to the person, and showing the person the original summons.

Rule 27 – Oath or affirmation for witnesses

This rule provides that except in special circumstances, the Tribunal must require a person who gives evidence before the Tribunal to take an oath or make an affirmation.

Rule 28 – Recording of Tribunal proceedings

This rule provides details of the recording of tribunal proceedings. Namely that:

- (1) The Tribunal may:
 - (a) record a Tribunal proceeding; and
 - (b) make a transcript of the recording for its own purposes.

- (2) If the Tribunal records a Tribunal proceeding, the Tribunal must:
 - (a) tell persons attending the proceeding that their evidence will be recorded; and
 - (b) give a person who gives evidence at the proceeding an electronic copy of the person's evidence on request.

Rule 29 – Adjournment

This rule provides that the Tribunal may adjourn a Tribunal proceeding at any time.

Rule 30 – Tribunal powers in relation to documents

This rule allows the Tribunal to

- (1) retain a document given to the Tribunal for as long as the Tribunal considers necessary; and
- (2) make copies or take extracts from the documents.