

Australian Institute of Administrative Law Seminar 28 November 2018

Thank you for the invitation to speak at your lunchtime seminar, and to Peter Sutherland, thank you for the opportunity to meet after the various editions of your seminal text on veterans' entitlements and military compensation law have followed me as I moved from sessional member of the VRB to full-time Principal Member. I am also very happy to be surrounded by those who practise in administrative law. It is certainly an area in which I have a deep interest, and one which I entered into after a career in criminal law.

Interestingly, I started off my administrative law career in a specialist tribunal; the Guardianship Board of South Australia, which also operated as the State's mental health review tribunal. As I left my role there in the context of my move to NSW, the Guardianship Board was beginning its journey to become part of a new super tribunal: the South Australian Civil & Administrative Tribunal (SACAT). Similarly, my appointment to NSW Civil & Administrative Tribunal (NCAT) came about a month after the Guardianship Tribunal of NSW became the Guardianship Division of NCAT.

So, if you like I am returning to an administrative body which remains a stand-alone tribunal, rich in history and context. Indeed, a veteran's right to seek review of decisions regarding entitlements extends back over 100 years, when the *War Pensions Act 1914* provided for a 3-person review board. The first external appeals tribunals were established in 1929 following strong advocacy from ex-service organisations about the need for an independent right of appeal.

It is in this important historical setting that I am extraordinarily humbled to assume the role of leading the VRB as it enters its next phase and continues to adapt to the needs of the veterans to whom it provides a critical service, recognising the changing nature of conflict and the changing face of the veteran.

For those who may not be aware, the VRB operates all over Australia. There are approximately 42 members based in all locations with the exception of the Northern Territory. The membership comprises Senior Members; generally lawyers with significant relevant experience; Services Members; men and women who have served, or are currently serving in the Army, Navy or Air Force; and Members; people with a diverse range of experience including in the community, public service, academia and professional sectors. When conducting VRB hearings, each category of membership is represented on a 3-member panel.

The VRB has 2 operational registries in Sydney and Brisbane. The National Registry is located in Sydney, and the National Registrar, Katrina Harry, assists me in the performance of my duties.

The Board reviews certain decisions under the *Veterans' Entitlements Act 1986* and certain determinations under the *Military Rehabilitation & Compensation Act 2004*. The parties to the proceedings are the applicant (commonly a veteran or current serving member of the ADF); and the Commission (the Repatriation Commission or Military Rehabilitation and Compensation Commission).

Approximately 80% of applicants are represented by lay advocates from ex-service organisations. Lawyers are prohibited from appearing at VRB hearings, however, there is no barrier to their provision of written submissions in support of an applicant's case. Furthermore, whilst not common, lawyers are not prevented from participating in directions hearings or events in the VRB's ADR program, about which I will later discuss.

The Board's statutory objective is to provide a mechanism of review that is fair, just, economical, informal and quick; and

- is proportionate to the importance and complexity of the matter; and
- promotes public trust and confidence in the decision-making of the Board.

The objective aligns with those of a number of other boards and tribunals across the states and Commonwealth. Today, I propose to talk about the transformation that has occurred at the VRB over the last few years, in addition to the new initiatives introduced or trialled this year. Each of these reforms has been designed to further meet the Board's objective of being fair, just, economical informal and quick.

At the outset, I would like to emphasise that I cannot take the credit for the perhaps the largest change that has occurred at the Board in recent times; the introduction of its ADR program. But rather, I need to credit my predecessors for the bold and brave steps taken to create and pursue this important reform, which has resulted in applicants having considerably more input and control over the outcome of their applications, and has significantly reduced the time taken to finalise their matters.

By way of background, in 2015, a trial of Alternative Dispute Resolution was started at the VRB. The success of the trial led to it becoming a permanent feature of the Board, complete with legislative amendments incorporating a suite of ADR mechanisms and case management powers. A previous lack of powers meant that there were limitations on the Board's ability to properly manage matters, accounting for an average time taken to finalise applications of 12 months or longer.

The legislative changes saw the ability of the Board to conduct directions hearings, allowing jurisdictional issues to be resolved efficiently, for example, determining whether an application has been lodged within time; whether a particular decision is reviewable or not. Also, ensuring matters are 'hearing-ready', thereby reducing the risk of adjournment at the substantive hearing before a 3-member panel.

There is now the ability to dismiss those applications where an applicant has failed to appear or failed to progress their application. Used sparingly, and in appropriate circumstances, they ensure that matters proceed in a timely manner and the Board can properly manage its listings.

ADR at the VRB is conducted by both Board members and Conference Registrars. There are a number of different ADR mechanisms available, usually starting with the Outreach; a 15-30 minute initial discussion between the Board Member/Conference Registrar and the veteran and/or advocate, specifically developed in response to their expressed needs. Its success can be measured by the fact that applications proceeding through ADR are finalised on average after only 1.5 Outreaches.

Other mechanisms include a Case Appraisal or a Neutral Evaluation; a non-binding written opinion by a Board member about the merits of the case and prospects of success; enabling veterans to make informed decisions about their applications. And finally, Decisions on the Papers; where a favourable decision is able to be made by the Board without the need for a hearing. The flexibility of the model means that a Case Appraisal can in effect turn into a Decision on the Papers, if the Board Member carrying out the Case Appraisal is of the view (and I am

likewise of the view) that the available evidence is sufficient (and sufficiently reliable and probative) so as to enable a favourable decision to be made.

Another mechanism which is beginning to be further utilised is the Conference. Unlike an Outreach, a Conference involves both parties: the applicant and his/her advocate as well as a representative of the Repatriation or Military Rehabilitation and Compensation Commission. The Conference is facilitated by a VRB member or Conference Registrar who assists the parties to reach agreement on issues relevant to the application. It is proving to be highly effective in generating outcomes in a non-adversarial manner. It brings both parties to the table; a practice which has not traditionally been the case at the VRB, with the Commission generally not appearing or providing written submissions in VRB hearings.

Conferences are producing excellent results, with terms of settlement being achieved in the majority of cases. The Conference model gives veterans the opportunity to explain their case face-to face; - an opportunity they may not have had when the original claim was being considered. It also enables the Commission to explain information and evidence, including complex calculations or documents that may be difficult to understand in the absence of verbal explanation; and which may have traditionally led to adjournments and/or multiple directions to be issued. Importantly, both parties participate in the Conference prepared and willing to reach agreement with a view to resolving the matter.

The Conference model is ideally suited to those matters where a veteran may be at risk, and where undue delay to proceedings would have an adverse effect on the veteran's health and/or financial situation. For example, veterans with a terminal illness seeking an Extreme Disablement Adjustment to their rate of pension, or those incapacitated from work and seeking review in relation to incapacity payments.

The results of the ADR program are outlined in the VRB's annual report. For those applications that enter into the ADR program, the average time taken to finalise applications is approximately 4 months. In the last financial year, 82.6% of matters in the ADR program were finalised (without the need for a hearing) within 4.5 months. This represents an 8-month reduction in the total time taken, as prior to the introduction of ADR, it would take on average 12 months for a veteran's appeal to be finalised.

ADR has now been rolled out to every Board location in Australia, with the exception of Queensland. It will be made available in that State following the imminent implementation of the Board's new case management system.

Importantly, I see VRB ADR as a living program. It is a flexible and agile model which is continuously being refined and improved according to the specialised needs of its users, with a focus on talking to the veteran (or advocate) with a view to resolving issues in a fair, just and timely manner.

Indeed, the value of verbal dialogue is key to two further recent initiatives I have introduced since assuming the role of Principal Member:

- (1) thinking more flexibly about eliciting evidence, as outlined in the revised Evidence Practice Direction; and
- (2) an oral reasons trial.

Turning firstly to the new approach to eliciting evidence. As you can appreciate, medical evidence forms an important part of any application for review by the VRB. For example, the applicant may contend that he or she has a medical condition that is related to service, and/or that the level of impairment or incapacity as a result of a service related condition has been incorrectly assessed.

Commonly, by the time the application for review is before the VRB, there may well be several medical reports. They may include reports provided by the applicant's treating doctor/s, assessments arranged by the Department of Veterans' Affairs, and reviews of reports and supporting material by Departmental medical officers or contracted medical advisers. All of the medical evidence is provided to the VRB in documentary form. Often, by the time a matter reaches hearing at the VRB, there may well have been a large number of assessments undertaken and reports prepared.

At hearing, issues can arise which relate to diagnosis or clinical onset of an applicant's condition/s, incapacity to work, or level of impairment. If the VRB panel is unable to make a determination on these issues, traditionally the panel will consider adjourning the hearing and requesting the Department to obtain a further medical report. In its direction, the Board will typically pose a series of questions to which the medical practitioner is asked to respond in a written report.

Sometimes, this approach (that is, an adjournment for an indefinite period pending receipt of the report), may not be welcomed by an applicant, especially those applicants that have had multiple prior assessments and have already experienced delay to their matters. It may also be problematic for applicants who are at risk, either financially because they do not have a current stable source of income, or because of the state of their mental health. The prospect of undergoing another assessment, and being asked a further time to recount traumatic events that occurred during their service can cause considerable distress and frustration.

To address these issues, I am encouraging the VRB to look at other ways to obtain the requisite evidence, including making arrangements for a medical practitioner (who has previously provided a written report in relation to the applicant) to give brief oral evidence by telephone during the course of the hearing. Often, it will only be discrete issues that require clarification and can be done simply and effectively during the course of a hearing.

Indeed, as many of you would know, this is a practice regularly used in other tribunals, where medical evidence forms a large component of the material under consideration. Certainly in my experience over many years conducting guardianship hearings, medical practitioners, if given sufficient notice and an indication that their telephone attendance would be required for a short period of time only, are prepared to assist a tribunal in this fashion. Not only does this approach avoid adjournment and delay (particularly as some reports can take a number of months to be produced), it enables the issues to be resolved quickly and informally, consistent with the Board's statutory objective.

The other way in which the Board is responding the needs of its users is a via an oral reasons trial. The legislation permits the Board to give oral or written reasons for decision. However, traditionally, the practise of the Board has been to reserve its decision at the conclusion of the hearing and give its decision and reasons in writing at a later date. The legislation does not stipulate the time

frame in which reasons are to be provided, however, it has been the expectation that they are provided to the parties within 28 days.

I recognise that not all matters will be appropriate for oral reasons. However, the trial has identified certain matters that, prima facie, appear suitable for consideration. As part of the trial, the matters were listed for hearing before a panel of three experienced Board members, tasked with trialling the delivery of oral reasons at the conclusion of the hearing. It included decisions that the panel had decided to set aside as well as decisions it had decided to affirm. Amongst other things, the panel was asked to identify those matters suitable or, conversely, unsuitable and to indicate the reasons why that was the case.

The trial, which commenced in June of this year, has only just been completed and the evaluation is taking place at the present time. However, the preliminary results are positive. Importantly, applicants are getting outcomes a month or more earlier than they might otherwise, and at a time when they have the support of their representative and family in attendance.

From a member's perspective, the giving of oral reasons is a collaboration. Excellent preparation is essential, and although only one of the three panel members delivers the reasons, all three have been involved in their creation and are present for their delivery. This is to be contrasted with the drafting of written reasons, which can happen sometime after the hearing, and in circumstances where there may be challenges to the ability of the three members (who are part-time sessional members sometimes residing in different States and with other work commitments) means that the opportunity for face-to-face dialogue post-hearing may be somewhat restricted. I'm looking forward to the learnings and results of the trial, and how they might inform the VRB's future practices and procedures.

Other recent activity at the VRB has been in relation to technology and the ways it can enhance and assist the Board in its functions and operations. It is imperative that we are accessible to veterans and their families wishing to actively participate in the appeal process. We use video and telephone conferencing technology on a regular basis, providing our services to applicants no matter where they live. This is especially important for those applicants who are current serving members and may be on a posting away from their usual residence. In my view, there is no reason why they should be deprived of the ability to participate in their appeals by virtue of their geographical location. Indeed, the Board has conducted hearings with applicants in the Philippines, Brazil and Afghanistan, just to name a few overseas destinations where applicants may be at any one time.

Accessibility to the Board is a key priority. I recognise the challenges of participating in hearings and ADR events for some applicants, particularly younger current serving members. As a result, I am considering ways to address this issue, including accessing Board services after the standards hours of operation. I do find it interesting that while people's basis of work has changed, including work hours and times, many courts and tribunals and their registries' operating hours have tended to remain relatively unchanged. Re-thinking and being flexible in relation to parties' access may also open up opportunities for further participation by representatives, including those offering their services on a volunteer or pro bono basis.

The VRB also uses technology to survey stakeholders; online surveys being a common feature. We offer learning and development sessions to members and

Conference Registrars via video-conference and we will soon be podcasting sessions as well. This is a great advancement given the Board's multiple locations and the sessional nature of the membership which means that members may not always be able to attend learning and development sessions in person. I am also looking to collaborate with other agencies and tribunals, to share off-the shelf resources so that we are not reinventing the wheel or duplicating relevant products readily available and of high quality.

In addition, the VRB will shortly be rolling-out its new IT case management system. This will properly support the ADR program and will further enhance the VRB's transformation. Once implemented, the VRB will be in a position to offer ADR to every location in Australia, and will effectively see the end of paper files. The case management system's e-portal will enable veterans to directly upload documents in support of their applications, and check on the status of their appeals online; thereby providing them with further knowledge and input into their application for review. The Department will also be able to furnish material easily and effectively. As well, the Board will have a clearer understanding of the source of any delays in the appeals process.

The issue of delay brings me to my concluding points and the opportunity to share with you my overarching vision for the Veterans' Review Board. As someone who has worked in courts and tribunals, both big and small, I believe firmly in the need to respond to a changing environment and new demands placed on our administrative law systems. A board or tribunal needs to be able to adapt and be flexible as the demographic changes, and where there are increased expectations about getting decisions quickly and informally. In my view, there is no excuse for unreasonable delay. And I believe that being informal and quick is not inconsistent with being fair and just.

Like with other tribunals and boards, delay has detrimental consequences. It can cause a loss of confidence in the process and a criticism of the process being overly formal and legalistic. In the case of the veterans' jurisdiction, it can add to psychological issues that a veteran may already be suffering, and have a consequent impact on the veteran's family and carers.

The introduction of ADR has made significant inroads in addressing this; dealing with applications early, and getting outcomes much earlier. Not only has ADR reduced delay but has also helped to address concerns about the adversarial nature of proceedings and encouraged cooperation between the Board and the parties.

There remains an important place for VRB hearings as well. It is appropriate that certain matters do proceed to hearing before a 3-member panel; where the expertise of a 3-member panel is crucial. For example, the Services Member plays a critical role in leading lines of inquiry about particular experiences and incidents on service, and brings a developed understanding of the realities of service life. The Member brings his or her community or professional experience to the role, while the Senior Member ensures that the principles of natural justice and procedural fairness are applied and upheld, so that the hearing is fair and just.

Significantly, the learnings of ADR are also being brought into the hearing room, using the combined knowledge and skills of each of the panel members. These learnings include being flexible and responsive in terms of how the evidence is

elicited, and encouraging and promoting cooperation and best practise by the parties to ensure that the focus is on the real issues in dispute.

I'm also committed to veteran-centric reform. That is, putting veterans at the front and centre during their appeal journey, and ensuring that that they do not get lost in the process. And I'm a firm believer that advances in technology and different models of communication, rather than de-personalising or isolating the veteran, can actually enable better access for the veteran and a better way to participate in the process. In my view, we need to embrace technology and other forms of modern communication so that the VRB is at the forefront of modern and progressive administrative legal systems.

My other interest is veterans' mental health. As well as presiding over mental health review and guardianship tribunals, I've also been on the board of management of a non-government organisation providing advocacy and support for people with mental illness. I've seen first-hand the effects of mental illness on people and their families. This work has led me to look for better ways of addressing the needs of applicants who come before boards and tribunals. I also see it as critical that a tribunal does not add to or compound an applicant's psychological distress. During my term I'm keen to seek ways to improve how we triage and manage matters involving veterans with mental health concerns.

To conclude, I'm truly honoured to be given the opportunity to respond to these challenges and to work to ensure that the VRB continues to be held in high regard; known for resolving matters in a fair, just, independent and impartial way, and for being accessible and user-friendly to veterans and all who access the VRB's services, both now and into the future.