SENATE FOREIGN AFFAIRS, DEFENCE AND TRADE REFERENCES COMMITTEE

Suicide by veterans and ex-service personnel

ADMINISTRATIVE APPEALS TRIBUNAL

Senator Back asked the following question at the hearing on 6 February 2017:

Senator BACK: I just want to pursue the alternative dispute resolution process a bit further. Could you give us an estimate of how many personnel are currently trained in this process from your side?
Ms Leathem: We do have a cohort of dedicated conference registrars. I would have to potentially clarify this, but I think at the moment there are probably 22—around that amount. But that is also supplemented by district registrars that we do have in some locations who are also trained in alternative dispute resolution and also by some members. So, if we do have a situation where our conference registrars are fully occupied, we have some ability to allocate other people. In Sydney, for example, we have four dedicated conference registrars, but we also have some additional people that we can use in the event that we have an increase in listings.

The answer to the honourable senator's question is as follows:

As at 6 February 2017, the AAT engaged 22 persons whose primary duties are to undertake conferences or other alternative dispute resolution (ADR) processes and a further eight persons who undertake this work as a part of their duties or from time to time as required. All of these persons have been trained in conducting ADR processes. A majority are accredited mediators under the National Mediator Accreditation Standards. Members who have been trained in ADR also occasionally conduct ADR processes.

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Senator Lambie and Senator Kakoschke-Moore asked the following questions at the hearing on 6 February 2017:

Senator LAMBIE: Are DVA adhering to the model litigant rules when running cases at the AAT?
Ms Leathem: I can only make a general comment in relation to that. I do not preside at conferences or at hearings. We rely on our conference registrars and our members to keep us informed if there are any difficulties that might be arising in terms of respondents or their representatives. My understanding is that wherever we would encounter any issues with a particular representative or with an agency we do provide feedback and we engage in discussions with the departments or with representatives, but I am not aware of any particular issue.
Senator LAMBIE: Can you take on notice and check out whether DVA are adhering to the model litigant rules when running cases at the AAT, please.
Senator KAKOSCHKE-MOORE: Following on from Senator Lambie's questioning about whether DVA adheres to the model litigant rules or not, I would be interested to know—you can take this on notice—how many times the AAT has approached the department with concerns that perhaps the model litigant rules are not being adhered to. Is that something that you would be able to get for us?
Ms Leathem: We could have a look whether there has actually been any formal contact or correspondence provided. We would probably need to do that for a specific time period.
Senator KAKOSCHKE-MOORE: Say, for the last financial year?
Ms Leathem: Yes.

The answers to the honourable senators' questions are as follows:

The President and Registrar of the Administrative Appeals Tribunal have not been advised of any concerns that representatives of the Military Rehabilitation and Compensation Commission or the Repatriation Commission may not generally be complying with the obligation to act as model litigants in cases before the Tribunal. In the period from 1 July 2015 to 6 February 2017, the Tribunal did not approach the Department of Veterans' Affairs with any concerns about the conduct of representatives in veterans' entitlements and military compensation cases. We note, however, that one decision was published in this period in which a member of the AAT stated that he felt certain conduct may not have been consistent with the model litigant obligations: see Re Larter and Military Rehabilitation and Compensation Commission [2017] AATA 67.

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Senator Lambie asked the following question at the hearing on 6 February 2017:

Senator LAMBIE: I just have a question on notice. If matters go through the AAT, is it correct to say that non-parties like journalists can access a veteran's personal documents—their medical documents, lawyer-client privileged documents—that were not reported in that veteran's initial AAT case? You know how the AAT makes a decision and puts all that down and just puts in parts of the medical reports. The AAT is very, very good. They just put in lines out of medical reports to say why that decision was made, why they do or do not agree with that, but they do not put the whole report in. They very rarely put the whole report in there. What I am asking you is: if that whole report is not in that initial AAT ruling document, why is it that journalists can still go behind the scenes and receive all the veteran's psychological reports and all their legal client-privileged stuff with their lawyer? That is what I want to know, if you could take that on notice.
Ms Leathem: If the matter has already been publicly heard and determined, then we have a particular process whereby non-parties can seek access to material. They have to complete a non-party access to tribunal documents form. Generally speaking, then, subject to confidentiality restrictions, the AAT can usually allow a non-party to inspect the evidence before the AAT. It does not necessarily mean only things referred to in the decision. It is the evidence that has actually been filed with the tribunal and the transcript of any hearing that has already been held. However, before that happens, the material would always be referred to a member, and the member might make a judgement that the parties need to be informed and could possibly make submissions or the member might even potentially hold a hearing in relation to that matter before they would make a decision about if and which documents might be released.
Senator LAMBIE: What if the AAT made a decision where, had that decision gone through, that would have caused great harm to that person and their family?
Ms Leathem: That is why the member might make a call to invite submissions from the parties so that they can actually explain what the impact might be on them and express any views they have about the release of material. The member does have the ability, if they think it is appropriate, to make a section 35 order where they would withhold some material or perhaps redact material. But ultimately it is a determination for a member to make, balancing up the competing interests between public access and confidentiality and privacy of the parties.

The answer to the honourable senator's question is as follows:

Section 35 of the *Administrative Appeals Tribunal Act 1975* sets out the principle that it is desirable:

- that hearings of proceedings before the Tribunal should be held in public, and
- that evidence given before the Tribunal and the contents of documents received in evidence by the Tribunal should be made available to the public and to all the parties.

Consistent with this principle, after a public hearing has been held, the AAT will usually allow a non-party, including a journalist, to access the documents that were before the AAT and any transcript of the hearing that is held by the AAT. This is subject to the AAT making any order under section 35 to prohibit or restrict the publication or disclosure of any information.

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Senator Gallacher asked the following question at the hearing on 6 February 2017:

CHAIR: I will just fire one in. If there are 3,000 cases that go to the VRB, how many of those end up coming to you?
Ms Leathem: It depends on which year you are looking at. We have been having a declining number of applications over the past 10 years or so. If we look, for example, at the 2015-16 financial year, we had a total of 486 lodgements in—
CHAIR: So, if 3,000 go to the VRB and 48 per cent get accepted or varied, out of the 1,500 or thereabouts, 400 come to you?
Mr Matthies: The figure of 486 applications, in total, relate to all decisions that are reviewable under legislation that is administered by the Minister for Veterans' Affairs. That will include matters that go through the VRB as reviewable decisions under the Military Rehabilitation and Compensation Act or the Veterans' Entitlements Act, as well as applications that come directly to the AAT from the Repatriation Commission in relation to service pensions as well as the Safety, Rehabilitation and Compensation Act and the Military Rehabilitation and Compensation Act. Matters that are dealt with by the Military Rehabilitation and Compensation Commission come directly to the AAT. I can do a quick addition at least for 2015-16. A number of applications came to the AAT from decisions that were reviewed by the VRB.
CHAIR: Do you have any idea of their success rate?
Ms Leathem: It is important to understand that with the applications that come before the AAT, we have what is called a case management strategy that uses conferencing and we do have—
CHAIR: Do you settle them before they get heard?
Ms Leathem: We do have a number of matters, over 70 per cent, that resolve or finalise before they actually proceed to a hearing before a member. Some of those consent decisions involve setting aside or revising the decision that has been made. Some of them might involve affirming the decision. There are a variety of different that could be finalised. But if we look in terms of—
CHAIR: Do you produce a statistical summary?
Ms Leathem: We do.
CHAIR: Can our secretariat obtain that easily?
Ms Leathem: We can tell you the proportion of applications in relation to which we have changed the decision under review. In the 2015-16 year, it was 49 per cent in relation to veterans and military compensation and it was 32 per cent in relation to the SRC Act matters that came before us.
Mr Matthies: Just to add to the answer, in terms of 2015-16, we had 242 applications through review of decisions that went through the VRB.

The answer to the honourable senator's question is as follows:

The Administrative Appeals Tribunal (AAT) finalised 288 applications for review of decisions of the Veterans' Review Board (VRB) in 2015–16. The AAT varied or set aside the VRB's decision in 154 applications (53%):

- by way of a decision made in accordance with terms of agreement reached by the parties under section 34D or 42C of the *Administrative Appeals Tribunal Act 1975* (AAT Act) in 121 applications, and
- by way of a decision made under section 43 of the AAT Act following a hearing in 33 applications.

In three of the 154 applications, the applicant was the Military Rehabilitation and Compensation Commission seeking review of the VRB's decision. The claimant was the applicant in relation to all other applications.

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Senator Kakoschke-Moore asked the following question at the hearing on 6 February 2017:

Senator KAKOSCHKE-MOORE: In your submission you said that the AAT is working with stakeholders to identify strategies for minimising avoidable delays. Can you give the committee some examples of what these avoidable delays are. What strategies have you identified to overcome them?
Ms Leathem: Similarly to workers compensation matters in the tribunal, these veterans appeals matters do tend to take a reasonable amount of time—longer than we would like them to take in some instances. A lot of that time it comes down to the need to obtain further evidence, perhaps medical evidence. Sometimes it can be because of the particular circumstances, and an applicant may request additional time. There might be witnesses involved. What we are always doing is exploring with our own people internally and working with agency partners and also with our users to see whether there might be opportunities to try and expedite that process.
I would say that one of the key things we do, through the conferencing and the use of conference registrars, is we try to keep things on track—so, actually looking at the particular circumstances and using, where appropriate, directions to set some time frames and to make sure that things do progress as quickly as possible. So it is a combination, I think, of both a systemic approach, where you are having a conversation about practice and procedure more generally, as well as the individualised approach for each case—seeing where you might make particular inroads or keep things on track from a case management perspective.
Senator KAKOSCHKE-MOORE: In terms of delays that arise out of a request from either the applicant or the respondent for an extension of time, would we be able to get a breakdown for, say, the last financial year, of how many cases have requested an extension of time to provide a certain document or to comply with a certain request by the tribunal? How many of those requests came from an applicant or their representative, and how many of those requests came from the respondent?
Ms Leathem: I think we may be able to provide information about adjournments. I am not sure we would actually have the data for directions. I will refer to Mr Matthies on this one.
Mr Matthies: We certainly would not have material in our case management system that would enable that to be easily extracted, so it would involve actually reviewing case files to identify that kind of information, and obviously we are then just working from what is available on the file.
Senator KAKOSCHKE-MOORE: Would that apply to adjournments as well? Would you have to go through and look at each individual file to find out?
Mr Matthies: To be certain.
Senator KAKOSCHKE-MOORE: I was just looking to try to establish this to make me feel less worried about whether delays arising from requests for adjournments from the respondents' side are adding to the stress felt by applicants about the length of time it is taking for their claims to be finalised.
Ms Leathem: One option is that we might be able to do a sample of them, rather than necessarily all of the ones across a particular time period, if that would assist the committee.
Senator KAKOSCHKE-MOORE: Yes, that would be great. Thank you.

The answer to the honourable senator's question is as follows:

The Administrative Appeals Tribunal (AAT) has reviewed the files relating to all applications for review of decisions of the following kind that were finalised by the AAT in January 2017:

- decisions made under the *Military Rehabilitation and Compensation Act 2004* by the Military Rehabilitation and Compensation Commission or the Veterans' Review Board;

- decisions made under the *Safety, Rehabilitation and Compensation Act 1988* by the Military Rehabilitation and Compensation Commission; and
- decisions made under the *Veterans' Entitlements Act 1986* by the Veterans' Review Board.

There were 23 matters in the sample. Each matter was reviewed to identify instances in which either the applicant or the decision-maker:

- requested an extension of time to lodge a document or did not lodge a document within a required timeframe; or
- requested a case event be adjourned (or where the conduct of the applicant and/or the respondent led to the adjournment of a case event).

We note that, in some circumstances, the request or delay appeared to relate to an issue largely outside of the party's control: for example, a party was waiting for a third party to provide evidence such as a medical report or other documents.

Of the 23 matters, there was at least one instance of the kinds described above involving the applicant in 18 matters and at least one instance involving the decision-maker in 17 matters.

In relation to instances involving the decision-maker, the majority concerned delays in lodging a document within the required timeframe, generally of less than one week. A small number of requests were made for short extensions to lodge documents. There were also a small number of requests to adjourn case events, most of which were able to be relisted within a short period. One instance, however, involved a need to vacate a hearing which, for a range of reasons, could not be relisted for a period of months. Overall, the instances involving the decision-maker did not lead to substantial delays in progressing applications.

In relation to the instances involving the applicant, there were fewer instances of applicants not lodging a document within the required timeframe. However, applicants made a greater number of requests to extend the time for lodging documents, particularly for evidence. There were also a greater number of requests to adjourn case events made for a range of reasons, including delays in relation to being able to lodge evidence and availability. In general, the length of the delay in lodging documents, the length of the extension requests and the time to relist case events was greater in the instances involving applicants with some lengthy delays experienced in a small number of the matters.