



No. 18 of 2023

REPORT OF THE REMUNERATION TRIBUNAL

2023 Review of Remuneration for Official Visitors of Correctional Institutions

INTRODUCTION

1. Section 14 of the *Remuneration Act 1990* (SA) (**Act**) provides that the Remuneration Tribunal (**Tribunal**) has jurisdiction to determine the remuneration, or a specified part of the remuneration, payable in respect of certain offices, if such jurisdiction is conferred upon the Tribunal by any other Act or by the Governor by proclamation.
2. Section 20B of the *Correctional Services Act 1982* (SA) (**CS Act**) confers jurisdiction upon the Tribunal to make determinations of remuneration, allowances and expenses for Official Visitors of correctional institutions (**Official Visitors**).

BACKGROUND

3. Following amendments to the CS Act in 2021, the Tribunal made its inaugural Determination of remuneration for Official Visitors. The Tribunal determined full-day and half-day rates of pay. In 2022, having received an application from the Department for Correctional Services (**DCS**), the Tribunal included expenses for Official Visitors in its Determination.

PROCEDURAL HISTORY

4. Section 10(2) of the Act provides that prior to the Tribunal making a Determination affecting the remuneration of a particular person, or persons of a particular class, the Tribunal must allow that person, or the persons of that class, a reasonable opportunity to make submissions orally or in writing to the Tribunal.
5. Section 10(4) of the Act provides that the Minister responsible for the Act may intervene, personally or by counsel or other representative, in proceedings before the Tribunal for the purpose of introducing evidence, or making submissions, on any question relevant to the public interest.

6. On 28 April 2023, the Tribunal wrote to Official Visitors, the Honourable Premier of South Australia (**Premier**), as the Minister responsible for the Act, and the Minister for Police, Emergency Services and Correctional Services, notifying of the Tribunal's intent to conduct a review of its previous Determination in relation to Official Visitors. The Tribunal invited written submissions with a closing date of 26 May 2023.
7. In addition, on 28 April 2023, a notification of the review was placed on the Tribunal's public website.

THE REVIEW

8. The Tribunal received the following submissions.

Department for Correctional Services Initial Submission

9. DCS advised it has been able to observe and review the progress and functionality of the scheme, which commenced over twelve months ago.
10. DCS provided three examples of inconsistencies it contended applied to the rates charged by Official Visitors.
11. The first being that DCS provide Official Visitors with a report from the Prisoner Complaints Advice Line, which lists complaints for a one-month period. DCS submits there have been irregularities in rates charged with some Official Visitors charging a half-day rate to review the report, whilst others charge a half-day rate for a range of administrative functions, including review of the report.
12. The second inconsistency relates to the rates charged for self-initiated research.
13. The third inconsistency relates to what appears to be an isolated occasion where one Official Visitor sought reimbursement for an event they were invited to as a guest. DCS submitted that given the event did not relate to the performance of the Official Visitors role as described under the CS Act, remuneration was not provided.
14. DCS proposed a fixed allowance per week be provided for preparation for an upcoming site visit, including self-initiated research and reading material. DCS consider the current half-day rate (\$258) to be an adequate session per week to focus on preparatory tasks.
15. DCS further advised that the 'DCS Standard Operating Procedure 120 – Official Visitors Scheme' states the General Manager or delegate officer has responsibility to support the Official Visitor in the performance of their functions. Given the various resources provided through the scheme, DCS proposed a fixed allowance for completion of necessary functions required as a result of a site visit. DCS considers the current half-day rate (\$258) to be an adequate session per site visit to finalise and complete any necessary follow up.
16. In previous submissions made to the Tribunal, DCS sought a determination of expenses consistent with standard public sector employment provisions, referring to Commissioner Determination 3.2 (Employment Conditions – Remuneration – Allowances and Reimbursements) as one reference point to determine reasonable allowances and expenses. DCS again proposed to use public sector conditions as a basis to determine reasonable allowances and expenses that Official Visitors may incur through travelling as part of carrying out their duties, being:
 - when Government transport is available (fleet vehicle), that transport is to be the first preference. However, where the Official Visitor is satisfied that there are grounds for the use of a private motor vehicle despite Government transport being available,

submissions must be made the Executive Director detailing those grounds prior to the actual use of the private motor vehicle by the Official Visitor; and

- the payment of the allowance per kilometre travelled for the use of a private motor vehicle for purposes related to the Official Visitors functions will occur where prior notification has been made.

Tristan Colmer, Official Visitor Initial Submission

17. Mr Colmer provided a written submission dated 18 May 2023. He was appointed as an Official Visitor on 19 January 2022. His role involves inspecting prisons in South Australia and investigating complaints from prisoners. As a result of the various functions Mr Colmer undertakes he travels across South Australia.
18. Mr Colmer noted that the previous Determination of the Tribunal provides the sole remuneration for Official Visitors as they do not receive any superannuation payment or leave entitlements in the role. He advised that Official Visitors are expected to be informed about a broad range of legislation, internal DCS policies, international treaties and Commonwealth National Preventative Mechanism (**NPM**) issues. From his perspective the volume of the work has far exceeded the forecast of a one day a month commitment.
19. He submits that Official Visitors are expected to form part of the Commonwealth Ombudsman's NPM group, which produces a large volume of material. Furthermore, to engage in this effectively is another significant time commitment, which adds a quasi-secondary role on top of Official Visitor responsibilities.
20. Mr Colmer drew the Tribunal's attention to the fact that Australia is suffering high levels of inflation, with the cost of living increasing substantially. He notes wage growth for Official Visitors has not kept up with these increases and therefore seeks that the Tribunal re-determine the reimbursement rates for Official Visitors to reflect the current economic environment. Mr Colmer requested that the Tribunal consider the qualifications required for the role, the potentially dangerous nature of the role and specialised knowledge base required to perform the role.
21. In relation to motor vehicle allowances, Mr Colmer submitted that all kilometres when performing Official Visitor duties should be reimbursable. He noted that a key principle of the United Nations Optional Protocol for the Convention Against Torture (**OPCAT**) is that inspections or attendances at prisons should be both announced and unannounced. Furthermore, whilst Official Visitors have access to cab vouchers through DCS, they would not contact DCS if they were planning a surprise inspection.
22. The current Determination provides \$1.00 per kilometre for intra-day official travel where the total travelling distance on a single day is expected to be 100 kilometres or more as measured by return trip from the Official Visitor's principal place of residence to the place or places of duty for that day. Mr Colmer submits that this is a disadvantage to Official Visitors who are metropolitan based and that with the current price of petrol fluctuating between record prices, he is of the view that travel costs should be reimbursable.
23. In relation to submitting invoices to DCS for reimbursement, Mr Colmer advised that DCS has taken a narrow view of Official Visitor's roles when reviewing invoices, with DCS frequently referring to section 20D of the CS Act.
24. Mr Colmer submits that Official Visitors should be able to seek reimbursement for administrative work, research, educational opportunities, subject matter development,

engagement with the NPM network and attending DCS workshops and related conferences incurred as a result of Official Visitor duties.

25. Mr Colmer sought to make oral submissions, so a hearing was conducted on 8 June 2023.
26. In oral submissions, Mr Colmer discussed the recruitment process, including the induction and set up of the Official Visitor scheme. He advised that the CS Act is very broad, providing Official Visitors with large powers of investigation and access.
27. Mr Colmer advised that site visits vary substantially due to the different characteristics of each site.
28. When asked who has oversight of Official Visitors, Mr Colmer advised that ultimately it is the Minister.
29. On request, Mr Colmer also provided information in relation to the invoicing system. He advised that each Official Visitor has an ABN and invoices DCS, generally at the end of each month. There is inconsistency in how tasks and activities are invoiced. Originally, he would invoice for the work undertaken on each day; for example, there may be three separate days when he has undertaken tasks following a site visit and therefore he would bill three half day rates. However, DCS have advised that in those instances he should bundle the tasks together and bill one half day rate. This is now the practice that he has adopted.
30. Mr Colmer advised that an overarching allowance could be provided to remunerate Official Visitors for time throughout the year that is administrative, with there then being rates for conducting visits.
31. Mr Colmer advised that the time commitment to undertake the role is quite substantial, prisoners know their rights and internal policies and therefore Official Visitors need to keep up to date.
32. Official Visitors also meet periodically with each other for 1-3 hours at a time. Mr Colmer advised he is hesitant to charge a full day rate for such meetings and therefore will ensure he completes work on that day as well so he can bundle it together when invoicing.
33. The Tribunal asked Mr Colmer whether its original assessment of the Official Visitor role being comparable to a level LEC4 in the South Australian public sector was accurate. He advised it likely was, however, someone in the Crown Solicitor's Office would be working on a salary basis and would have leave entitlements, superannuation and the security of having a fixed income.
34. He explained the Official Visitor role further in that it is a dual role as Official Visitors have an underlying obligation to achieve the functions under section 20D of the CS Act, they are part of the Commonwealth network of NPMs and state appointed NPMs are expected to be involved with that network. He recognised their engagement in this regard is limited and there were difficulties in charging the state for work that the Commonwealth Ombudsman asks them to undertake.

Requests for Further Information

35. On 16 June 2023, the Tribunal separately wrote to the Minister for Police, Emergency Services and Correctional Services, the Chief Executive of DCS and each Official Visitor requesting further information.
36. In this correspondence, the Tribunal explained its jurisdiction and its concerns that the information available to it created uncertainty about the status of Official Visitors as persons

who appeared, in part, to be subject to the direction of the Department but were not regarded as employees. The Tribunal sought clarification of the standing of the Official Visitors.

37. The Tribunal sought advice about whether there is a person or authority who oversees or coordinates the work of Official Visitors. The Tribunal sought clarification about reporting and charging arrangements and observed that the information available to it indicates a lack of structure, control and accountability mechanisms within the overall scheme. These issues made determination of remuneration arrangements difficult. Further, the Tribunal had been advised that there is no overall documented strategy provided to Official Visitors for making visits to a facility and that Official Visitors manage these processes themselves. The Tribunal noted that its role did not extend to determination of the parameters of the scheme or the tasks and activities to be undertaken by Official Visitors.
38. The Minister, after being granted an extension, provided the following documents:
 - A 'Proposed Model', outlining the key elements of the scheme and the schedule of activities as endorsed by the DCS Executive on 14 July 2021.
 - A 'Manual of Practice', provided to the Official Visitors (as a draft). Noting the Official Visitors were encouraged to update and amend it as they wished, DCS was not provided with an updated copy.
 - Job and Person specifications to support further context for the roles, noting these were provided to Official Visitors to review and adjust as they saw fit.
39. The Tribunal requested from the Official Visitors, specific information about their functions and duties as well as copies of invoices that had been provided to DCS for reimbursement. In response, five of the Official Visitors advised of the facilities they are assigned to, which includes prisons, police cells, court cells and holding cells, their time commitment to the role over the past year, which ranged depending on the size and various factors associated with the different facilities, the number of site visits they conducted over the past 6 months ranging from 12 to 27, the average hours of preparatory work required which depended on the site, the activities following site visits which ranged from 2 hours to 3 days and the total billings for the last financial year which were calculated differently by each Official Visitor.
40. The Tribunal requested further information from the Chief Executive of DCS in relation to the invoicing system, the resources DCS provides to Official Visitors to assist them in undertaking their functions, who the Department considers the Official Visitors report to and whether there is any further documentation about the scheme or the role of Official Visitors. No information was provided, but the Tribunal noted that the Department assisted the Minister with his response.
41. Because of the diverse information provided to the Tribunal it requested that the Chief Executive of DCS meet with the Tribunal to discuss the Official Visitor scheme, particularly concerning the structure, control and accountability mechanisms.
42. In a letter dated 7 August 2023, the Chief Executive advised that a response was not provided to the Tribunal's initial letter due to an administrative oversight. Information was also provided in relation to the invoicing system, resourcing provisions and reporting mechanisms under the CS Act. In response to the Tribunal's invitation to meet, the Chief Executive delegated Mr William Kelsey, OCSR Executive Director, to attend and provide clarity, if needed, to the Tribunal. The scheduled meeting was deferred because of Mr Kelsey's personal circumstances. Because of the degree of doubt over arrangements for Official Visitors, the Tribunal renewed its request to meet with the Chief Executive of DCS.

43. This meeting occurred on 18 September 2023, and included the Chief Executive. The Tribunal sought confirmation about whether the current arrangement constituted an employment arrangement for the purpose of superannuation and workers compensation coverage and how the Official Visitors work is arranged, overseen, how the accountability lines operate and how workloads and outcomes are monitored.
44. DCS advised that the CS Act established each Official Visitor was appointed by the Governor in Executive Council. The CS Act provides an obligation on Official Visitors to report to Parliament and to the Minister, with them being at liberty to raise issues with the Chief Executive. A real emphasis was placed on the independence of the Official Visitors who do not take any sort of direction from the Minister or Chief Executive. The manner in which Official Visitors work is arranged is a matter for them, due to their independence.
45. In relation to the invoicing system, the Tribunal was advised that the legal advice was to the effect that the Official Visitors are not employees. The Chief Executive advised he would seek advice from the Crown Solicitor in relation to the application of normal employment obligations and advise the Tribunal accordingly.
46. The Tribunal repeatedly expressed concern about delays in a response. On 24 November 2023, DCS provided a further submission to the effect that Official Visitors are not considered as employees, independent contractors or consultants. Rather, pursuant to section 20 of the CS Act, Official Visitors are appointed by the Governor on conditions determined by the Governor for a term specified in individual instruments of appointment.
47. As a matter of procedural fairness, the Tribunal invited Official Visitors to provide any further comments in relation to the general approach the Tribunal should take to the remuneration of Official Visitors, allowances, expense reimbursements and any other matters.
48. Two further submissions were received.
49. Official Visitor, La Nina Clayton, outlined the role of Official Visitors, noting that since 2021 Official Visitors have successfully addressed and improved various areas by conducting monthly visits to prisons and the remand centres, monthly meetings between the Official Visitors, meetings with the SA Ombudsman, meetings with the DCS Operational Executive team and meetings with the Minister. Furthermore, that Official Visitors work from home to write reports, field calls, schedule appointments, respond to emails and attend online meetings. Ms Clayton noted the rise in the Australian Bureau of Statistics Consumer Price Index, particularly relating to Adelaide and costs that directly affect Official Visitors such as housing, fuel and electricity. Ms Clayton submitted that remuneration and travel allowances should be increased to be equitable and reasonable for the value that Official Visitors provide.
50. Mr Colmer also provided an additional submission. In relation to the adequacy of the allowances (meals, incidentals and motor vehicle), he submitted that the Official Visitor role requires a significant amount of travel to regional sites, with the largest cost to Official Visitors being fuel for their vehicles. He submitted that the allowances per kilometre should be increased to reflect the increase in the price of fuel in South Australia and further that the meal allowances should be adjusted to reflect the rise in inflation.
51. In relation to remuneration, he noted that it was his understanding that of all jurisdictions in Australia who have implemented OPCAT work, South Australian Official Visitors are the only ones that are not salaried employees. On this basis, the current remuneration arrangement should be replaced with a salaried remuneration, or monthly allowance. He asserted there was a fundamental conflict in an oversight body invoicing the department it oversees, which confused the independence of the role.

52. Mr Colmer submitted that there have been substantial changes in the nature of the work. Initially the role was advertised as a one to two day a month commitment. However, Official Visitors are constantly contacted by DCS, prisons, prisoners, staff and the Commonwealth Ombudsman whilst performing the role and are expected to be consistently available. Furthermore, due to the multifaceted nature of the work, the level of skill and responsibility of Official Visitors is very high. Finally, the conditions in which the work is performed is challenging and dangerous. Mr Colmer also met with the Tribunal on 6 December 2023 and further discussed his submission.

CONSIDERATION AND CONCLUSION

53. The Tribunal made its inaugural Determination in 2021, by setting a half-day rate (\$258) and a full-day rate (\$483) with the operative date set as the commencement date of section 9 of the *Correctional Services (Accountability and Other Measures) Amendment Act 2021* (SA). That Act came into operation on 19 January 2022. When conducting the 2022 review, the Tribunal took the view that it would be appropriate to defer any consideration of an increase to Official Visitors remuneration until the next review in 2023, as this would enable appropriate wage movements to be more accurately assessed.
54. The Tribunal has been disappointed in the extensive delay of the 2023 review.
55. In reaching its conclusions about the remuneration arrangements for Official Visitors, the Tribunal has recognised the unusual arrangements under which these persons operate and the extent to which they report to the Minister and to the Parliament. While the Tribunal has some reservations about the absence of accountability arrangements that would normally apply to persons who are required to review and report on public sector service provisions, these concerns are beyond the jurisdiction of the Tribunal. The remuneration arrangements adopted in this Report and the accompanying Determination cannot deal with matters of accountability and the effectiveness of Official Visitor functions.

Remuneration

56. The Tribunal remains satisfied that the skills and functions undertaken by an Official Visitor are consistent with the LEC4 Legal Officer function in the South Australian Public Sector. This position is consistent with the inaugural position adopted by the Tribunal in 2021. The Tribunal has used this rate as the starting point but considers that it is appropriate to increase it to recognise that the Official Visitors are not regarded as employees and hence normal superannuation and worker's compensation benefits are not recognised. Accordingly, the Tribunal has increased this amount by 11% to reflect normal superannuation payments. If, in the future, the Government decides to pay superannuation to the Official Visitors, the Tribunal expects to be notified and will review this provision.
57. The Tribunal has noted that the Official Visitors are required to travel extensively to complete their functions, including to parts of regional South Australia, and undertake much of their work in environments which have the potential to be dangerous. Some form of accident compensation insurance is appropriate in these circumstances and would generally be a part of work in these environments. The Tribunal has determined that an additional amount should be payable to allow Official Visitors to meet those costs. Again, if accident insurance arrangements are made for Official Visitors in the future, the Tribunal will review this conclusion.
58. The Tribunal acknowledges the substantial delay in concluding this review and the extent to which this delay is substantially due to delays in obtaining information from DCS.

Consequently, the Tribunal has determined that a degree of retrospectivity is appropriate in this instance. The retrospective payments reflect increases in the LEC4 Legal Officer rate of remuneration that took effect in August 2023.

59. The Tribunal has reviewed the current half and full day payment arrangement and noted DCS' requirement for time worked to be accumulated until a half day is achieved. Such an approach appears inconsistent with normal industrial arrangements and the approach applied by the Government to members of advisory boards. Accordingly, the Tribunal has determined to change to an hourly rate system for the future. This approach recognises that work may be of varying duration and also acknowledges that travelling requirements may involve substantial time commitments in a given day. The Tribunal expects that Official Visitors will continue to provide descriptions of the charges for the work they undertake.
60. The Tribunal notes that Official Visitors are required to travel to prisons throughout South Australia and considers that, if an Official Visitor is required to travel to a location which is greater than 20kms from their principal place of residence, they should be remunerated for that time. A corresponding payment entitlement should apply for return journeys.
61. This revised payment arrangement will apply on a prospective basis.

Allowances and Expenses

62. The Tribunal has determined that where an Official Visitor determines that it is impractical for them to return to their home after a prison visit, or where the Official Visitor determines that they need to travel to a country location in preparation for a prison visit the following morning, the Official Visitors should be entitled to reimbursement for accommodation and appropriate meal allowances.
63. Having reviewed accommodation and meal costs, the Tribunal has decided that if overnight accommodation is required on this basis, reimbursement of up to \$230 per night for accommodation is appropriate as well as the applicable meal allowances.
64. The Tribunal has increased the incidentals allowance to recognise cost of living increases. It has also removed the 'other travel expenses' category as no evidence was provided to the Tribunal to indicate that such expenses remain relevant.
65. The Tribunal has considered motor vehicle usage information provided by both DCS and some of the Official Visitors. It has adopted the position that there are likely to be occasions when usage of a Departmental vehicle represents the most convenient and appropriate means of traveling to a prison. On other occasions it may be more convenient and appropriate for the Official Visitor to use their own vehicle. This may be to facilitate unannounced visits or it may be simply more convenient given locations. It seems to the Tribunal that this is substantially a matter of election on the part of the Official Visitor.
66. The Tribunal is satisfied that the private vehicle cost reimbursement arrangements established in 2022 remain appropriate.

67. The Tribunal notes that travel to some country prison locations may be more efficiently undertaken by air travel. It appears to the Tribunal that this is more efficiently arranged through DCS but that there may be occasions, such as unannounced visits, where the Official Visitor may need to arrange and pay for that travel, including any associated taxi or hire car expenses.



Matthew O'Callaghan
PRESIDENT



Donny Walford
MEMBER



Mark Young
MEMBER

Dated: 13 February 2024