

JUDICIAL ENTITLEMENTS PANEL

Advisory opinion to the Attorney-General
January 2019

Contents

Background	3
Relevant legislative provisions	3
Attorney-General request for an advisory opinion.....	3
Current entitlement.....	4
Methodology	4
Advisory opinion	10
Reasons	10
Attorney-General's factors	10
Magistrate's usual place of residence being metropolitan or regional	11
Distance as a condition for eligibility	12
Feasibility of a magistrate's commute	13
Other considerations	14
"Requirement" to live away from home.....	14
Incurring costs.....	15
Eligibility ceases upon the magistrate returning home	15
Quantum.....	16
Conclusion	16

Background

Relevant legislative provisions

The *Judicial Entitlements Act 2015* (JE Act) established a new structure and process for the determination of salaries, allowances and conditions of service for Victorian judicial officers.

The Judicial Entitlements Panel (Panel) was established by the JE Act and consists of three members who are appointed by the Governor in Council, on the recommendation of the Attorney-General. The inaugural panel was appointed on 15 June 2016 for a period of four years.

The Panel's members are:

- Mr Bruce Hartnett AM, Chairperson
- Ms Kathleen Townsend, Member, and
- Ms Ilona Charles, Member.

Section 27 of the JE Act provides that the Attorney-General may request that the Panel give an advisory opinion in relation to an entitlement or a term and condition of office, including any restrictions, for judicial officers, judicial registrars and non-judicial members of the Victorian Civil and Administrative Tribunal (VCAT). This report is the first advisory opinion provided to the Attorney-General under the JE Act.

Attorney-General request for an advisory opinion

On 26 October 2018, the Panel received a request for an advisory opinion pursuant to section 27 of the JE Act from the then Attorney-General, the Hon Martin Pakula MP, in relation to the following matter:

Whether the living away from home allowance for magistrates, as currently provided in a certificate issued pursuant to section 15 of the *Judicial Remuneration Tribunal Act 1995*,¹ dated 24 February 2012, should be extended to apply to magistrates living away from home on a temporary basis, whether in a regional or non-regional area.

Pursuant to section 27(3)(b) of the JE Act, the Attorney-General requested that the Panel takes into account the following factors in giving its advisory opinion:

- a) whether there is any basis for the availability of the allowance to depend on the magistrate's usual place of residence being metropolitan or regional

¹ The JE Act repealed the *Judicial Remuneration Tribunal Act 1995* (JRT Act) and abolished the Judicial Remuneration Tribunal. Certificates issued under section 15 of the JRT Act are taken to be an entitlement certificate under the JE Act.

- b) whether it would be appropriate for the relevant entitlement certificate to specify conditions for eligibility for the allowance based on the distance between a magistrate's ordinary place of residence and the location of the law court that they are directed to sit at, and
- c) that magistrates may be required by the Chief Magistrate to sit at certain locations that are not feasible to commute to on a daily basis.

The request did not seek the Panel's advisory opinion in relation to the quantum of the living away from home allowance. Accordingly, the Panel has not considered the quantum of the allowance in this report.

Pursuant to section 27(3)(c) of the JE Act, the Attorney-General requested that the Panel deliver its advisory opinion by 31 January 2019.

Current entitlement

The current entitlement to a living away from home allowance for magistrates is in the Attorney-General's certificate 1/2012 issued pursuant to section 15 of the JRT Act on 24 February 2012 (Certificate 1/2012). That certificate states:

Magistrates required to live away from home on a temporary basis in a regional area for extended periods (longer than 21 days and less than 3 years) receive a living away from home allowance in the amount of \$394 a week for a period of up to but not exceed three years (for the period living away from home) and that adjustment of such allowance be linked to CPI.

Such allowance represents assistance with additional rental and food costs incurred by the Magistrate whilst living away from home.

This certificate is taken to be an entitlement certificate under the JE Act.

Methodology

Section 16(3) of the JE Act provides that, when carrying out its functions, the Panel is required to act in an independent, impartial and timely manner.

Section 16(4) of the JE Act provides that the Panel may inform itself in any manner it sees fit, and is not bound by the rules of evidence.

Section 31(2) of the JE Act provides that the Panel must take into account, to the extent they are relevant, the factors listed in section 31(1) of the JE Act.² The Panel also took into account the factors set out in the Attorney-General's request for the advisory opinion.

² These factors are:

- a) the importance of the judicial function to the community
- b) the need to maintain the standing of the judiciary in the community
- c) the need to attract and retain suitably qualified candidates to judicial office
- d) the level and nature of conditions of service of judicial officers in other Australian jurisdictions
- e) movement in the Consumer Price Index

The Panel conducted the following consultations in drafting the advisory opinion:

- The Panel invited the Secretary of the Department of Treasury and Finance (DTF) to make a submission providing relevant economic and remuneration information in Victoria and any other information the Secretary considered appropriate, in accordance with the requirement under section 30(1) of the JE Act.
- The Panel wrote to the Chief Magistrate and the President of the Children's Court of Victoria seeking a submission, and requested that the Chief Magistrate and the President notify affected judicial officers that they could make written submissions, in accordance with the requirement under section 30(2) of the JE Act.
- The Panel sought information from Court Services Victoria (CSV), the Victorian Public Service Commission (VSPC), and other Victorian, interstate and Commonwealth agencies regarding the entitlements and conditions of service of judicial and other comparable officers.

In December 2018, the Panel refused a request by the Chief Magistrate for an extension of time for the court to lodge its submission. The Panel was unable to agree to the Chief Magistrate's request as it would have required the Panel to request an extension of time from the Attorney-General. The Magistrates' Court subsequently provided a submission to the Panel.

The Panel received the following written submissions:

Jurisdiction	Description	Submission date
Magistrates' Court	Submission	14 January 2019
Children's Court	Submission	24 December 2018
Secretary of DTF	Submission	18 December 2018

The Panel also reviewed prior submissions made by the Magistrates' Court in May 2017 to the Panel's Own Motion Recommendation Report, as it also contained submissions from the Magistrates' Court regarding the living away from home allowance.

The following are summaries of the submissions received by the Panel.

Magistrates' Court of Victoria (May 2017 Submission)

The Magistrates' Court provided a submission in May 2017 to the Panel's Own Motion Recommendation Report. Although this submission was not responsive to the Panel's advisory opinion, the Panel considered that the earlier submissions of the Magistrates' Court were relevant to the Panel's consideration of its advisory opinion, and considered the earlier submission.

-
- f) the level and nature of conditions in other public offices in Victoria
 - g) how any proposed own motion recommendation affects the total remuneration packages of judicial officers
 - h) relevant economic and remuneration factors in Victoria, including the capacity of the State to meet any proposal for more generous conditions of service
 - i) any other relevant matter.

The submission included three anonymised case studies, one of which stated that although the allowance appeared to that magistrate to have been created for Melbourne magistrates who are required to sit in the country, the living away from home allowance had been paid to country magistrates who were required to sit in Melbourne.

The submission otherwise largely raised concerns regarding the quantum of the living away from home allowance, which is outside the scope of this advisory opinion.

Magistrates' Court of Victoria (January 2019 Submission)

The Magistrates' Court provided a submission to the Panel in January 2019. The Magistrates' Court also provided to the Panel a report from PricewaterhouseCoopers (PwC Report), a report from Adjunct Professor David Caple AM of David Caple & Associates Pty Ltd (Caple Report), and the terms of reference entitled 'Investigation, Analysis, Risk Assessment and Report on the Work, Occupational Health and Safety of the Operations of the Magistrates' Court of Victoria'.

The submission explained that magistrates are assigned for different periods of time to court locations which can require them to live away from home. Candidates for the magistracy are made aware of this requirement prior to appointment. The Magistrates' Court submitted that magistrates whose principal place of residence is outside Melbourne are not entitled to the allowance. Based on the material contained in the PwC Report and the Caple Report, the Magistrates' Court submitted what it considered should form part of the entitlement certificate relating to the living away from home allowance. In summary form, the Magistrates' Court submitted that the proposed entitlement certificate should include:

- a) payment of a daily fee for meals and incidentals;
- b) accommodation (including payment of outgoings) provided by the Magistrates' Court at its cost; and
- c) reimbursement of categories of expenses relating to the relocation of the magistrate and his or her family to the new location.

The Magistrates' Court submitted that the Panel could, and should, include a determination of the quantum of the allowance in its opinion. The submission (together with the PwC Report and the Caple Report) strongly argued for the quantum of the allowance to be determined on a case by case basis.

The PwC Report contains advice from PwC to the Magistrates' Court regarding the correlation between the living away from home allowance and the occupational health and safety (OHS) of magistrates. PricewaterhouseCoopers, in conjunction with Caple and Associates Pty Ltd, was engaged by the Magistrates' Court to provide OHS advice on the work undertaken by magistrates. The PwC Report explains what a living away from home allowance is in the context of Commonwealth taxation legislation, and the conceptual differences between the allowance and a travel allowance. PwC argues that there is a direct connection between the allowance and the Magistrates' Court's responsibility for managing the OHS risks for magistrates, principally due to additional stressors that exist when a magistrate is directed to sit at a different court location for up to three years. The Panel acknowledges the significance and effect that the stressors identified by PwC would likely have on many magistrates.

The stressors were grouped by PwC into three categories:

- emotional and wellbeing stressors;

- financial stressors; and
- enhanced administrative and workload burdens.

In PwC's opinion, the most direct way to mitigate the health and safety risks for magistrates who are required to work away from their principal place of residence is to provide a living away from home allowance which ensures the magistrates is, effectively, not out of pocket.

The PwC Report records that PwC was provided by the Magistrates' Court with options to resolve the apparent regional accommodation issues. Whilst PwC endorse one of the proposed models, the Panel has not been provided with any information about the proposed models.

PwC proposed that the allowance should include four elements:

- accommodation;
- food and drink;
- an unspecified allowance for "additional disadvantages"; and
- reimbursement of relocation costs.

In PwC's view, the entitlement certificate should not contain any specific rates of payment for any of the four categories. Instead, PwC proposed that the accommodation and "additional disadvantages" elements of the allowance should be individually agreed between the relevant magistrate and the Magistrates' Court. The food and drink component should be collectively agreed between the magistrates and the Magistrates' Court. The quantum of the reimbursement of relocation costs is unclear, but the Panel assumes it would be reimbursement at cost.

Adjunct Professor Caple is an independent OHS consultant and, in conjunction with PwC, was engaged by the Magistrates' Court to provide OHS advice on the work undertaken by magistrates. The Caple Report contains seven testimonials from magistrates about their experiences of living away from home and the costs they incurred. Three of these testimonials were included in the Magistrates' Court's 2017 submission to the Panel. Many of the case studies recorded concerns about the quantum of the allowance. As is stated above, the quantum of the allowance is not part of this advisory opinion.

The Caple Report suggested that the "one size fits all" approach to the allowance was the primary source of stress for magistrates, because individual circumstances differ between magistrates. The Caple Report identifies, and the Panel agrees, that driving excessive distances everyday has OHS risks. The Panel also agrees with the Caple Report that relocation will provide a safer outcome to driving excessive distances.

The Caple Report explained that when appointed, magistrates are based either in Melbourne or in a suburban court. Regional based magistrates relocate to Melbourne. The Caple Report's conclusion is that the allowance should be assessed on a case by case basis.

In respect of Case Studies 4, 5, 6 and 7, the Panel notes that it is apparent that either magistrates are not aware of the precise terms and conditions of the allowance. For example, two case studies state that magistrates are not permitted to rent out their principal place of residence whilst living away from home. The Panel is not aware of any such restriction in any entitlement certificate. Similarly, one submission states that the allowance is only for two years, not three. This may be a

reference to the allowance as it stood prior to Certificate 1/2012. Certificate 1/2012 expressly records that the allowance is payable for assignments up to three years in duration.

Case study 3 referenced a policy dated September 2013 which appeared to the Panel to provide more detailed information about how either CSV or the Magistrates' Court implemented the allowance. The Panel requested a copy of the policy from the Magistrates' Court but it was not provided by the time the Panel was required to deliver their opinion to the Attorney-General.

Children's Court of Victoria

The President of the Children's Court provided a submission to the Panel in December 2018. The submission highlights that the current entitlement was, at the time of its introduction, designed for magistrates who are assigned to sit in regional areas.

The submission used a case study of an existing Magistrate who resided in a regional area who was assigned to sit at the Children's Court in Melbourne due to the magistrate's skills and expertise. The submission stated that because of the magistrate's family circumstances, the magistrate commuted to and from the region to Melbourne and stayed at a Melbourne hotel for two nights of the week. The submission stated that the magistrate was ineligible for the living away from home allowance but had the travel been reversed (a Melbourne magistrate assigned to sit at the Children's Court in a regional area), the magistrate would have been entitled to the allowance.

The Children's Court submitted that there is no justifiable basis for the availability of the allowance to depend on whether the magistrate is metropolitan or regional-based. The submission stated that the allowance should be available where living away from home costs are necessarily incurred and where it is not feasible for the magistrate to travel daily to and from their principal place of residence and the court location.

The submission also stated that if the Panel agreed with the Children's Court submissions, it would be appropriate to 'back-date' the entitlement.

Secretary of the Department of Treasury and Finance

The JE Act requires the Panel to invite a public service body Head nominated by the Minister to make a submission to the Panel providing:

- a) information about relevant economic and remuneration factors in Victoria; and
- b) any other relevant information that the nominated public service body Head considers appropriate.

The previous Attorney-General, the Hon Martin Pakula MP, as the then Minister responsible for the JE Act, nominated the Secretary to the Department of Treasury and Finance (Secretary DTF) on 27 September 2016 as the public service body Head for the purposes of section 30(1) of the JE Act.

The Secretary DTF made a submission to the Panel on 18 December 2018 in response to a written invitation from the Panel. The submission provides an update on the economic outlook for Victoria since the Secretary DTF's July 2018 submission to the Panel's Own Motion Recommendation Report. The submission records that the State's *Budget Update* which was published in December 2018 projects economic growth at a rate of 2.75 per cent over the forward estimates and wage growth at a rate of 2.75 per cent in 2018-19.

The submission makes comment on the *Victorian Public Service Enterprise Agreement 2016* (VPS Agreement) and the conditions afforded to VPS employees when working away from their normal work location. The submission makes clear that the VPS Agreement, as with most other agreements in the Victorian public sector, do not differentiate between the location of the employee (whether metropolitan or regional).

Advisory opinion

In accordance with the Attorney-General's request for an advisory opinion pursuant to section 27 of the JE Act, the Panel's opinion is that the living away from home allowance for magistrates, as currently provided in the certificate issued pursuant to section 15 of the JRT Act on 24 February 2012, should be extended to apply to magistrates living away from home on a temporary basis in both regional or metropolitan areas.

The Panel considers that:

- a) there is no basis for the availability of the allowance to depend on a magistrate's principal place of residence being metropolitan or regional
- b) it would not be appropriate for the relevant entitlement certificate to specify conditions for eligibility for the allowance based on the distance between a magistrates' principal place of residence and the location of the law court that they are directed to sit at
- c) appropriate conditions for eligibility for the allowance include that:
 - i. it is not feasible for the magistrate to commute from their principal place of residence to the location that they are directed to sit at on a daily basis
 - ii. the magistrate must change their principal residence
 - iii. the magistrate is directed, rather than volunteers, to sit at the location
 - iv. the magistrate incurs living away from home costs
 - v. eligibility for the allowance ceases when the magistrate returns home or changes location such that it becomes feasible to travel to the location of the law court.

The Panel was surprised to learn that assignments requiring temporary relocation within the Magistrates' Court are so lengthy. The Panel expected that temporary assignments would normally be expected to range up to 12 to 18 months (for example, to arrange for replacements to backfill in circumstances involving maternity or long service leave). The Panel considers that any assignment beyond this range would normally be considered a permanent relocation, and in that regard, the Magistrates' Court's practice is unusual.

Reasons

Attorney-General's factors

In the request received by the Panel, the Attorney-General nominated three factors that the Attorney-General wished to be taken into account by the Panel in giving this advisory opinion. Those three factors were:

- a) whether there is any basis for the availability of the allowance to depend on the magistrate's usual place of residence being metropolitan or regional
- b) whether it would be appropriate for the relevant entitlement certificate to specify conditions for eligibility for the allowance based on the distance between a magistrate's ordinary place of residence and the location of the law court that they are directed to sit at, and

- c) that magistrates may be required by the Chief Magistrate to sit at certain locations that are not feasible to commute to on a daily basis.

The following section of this report records the Panel's consideration and analysis of the three factors required by the Attorney-General to be considered by the Panel.

Magistrate's usual place of residence being metropolitan or regional

The Attorney-General asked the Panel to consider whether there is any basis for the availability of the allowance to depend on the magistrate's principal place of residence being metropolitan or regional.

The Panel's opinion is that the living away from home allowance should apply to magistrates living away from home on a temporary basis whether that is in a regional or metropolitan area. The Panel has not been able to identify any basis for the availability of the allowance to depend on a magistrate's principal place of residence being in a regional area or the metropolitan area. The Panel therefore considers that availability for the allowance should not depend on the magistrates' principal place of residence being metropolitan or regional.

Certificate 1/2012 restricts eligibility for the living away from home allowance to magistrates who are required to live away from home *in a regional area*. The Panel acknowledges that the restriction in Certificate 1/2012 to living in a regional area is likely to have been unintended, as the certificate might not have contemplated that a regional magistrate could be required to work in a metropolitan area.

It is possible that a magistrate might be required to live away from home, whether it is to a location that requires a move within or between metropolitan and/or regional areas. The Panel considers that any attempt to define 'metropolitan' or 'regional', as was suggested in some of the submissions, would add unnecessary complexity to the eligibility conditions for the allowance. The difficulties of pre-empting how regional and metropolitan communities will change in the future also makes defining these concepts unnecessary.

The Children's Court and the Magistrates' Court supported changing the eligibility conditions for the allowance to ensure magistrates are eligible whether their principal place of residence is in a regional or metropolitan area. The Panel is aware, however, from Case Study Number 2 in the Magistrates' Court's 2017 submission (included again in the 2018 Magistrates' Court's submission) that, notwithstanding the apparent restriction in Certificate 1/2012, the allowance has been paid to regional magistrates who are required to sit and live away from home in Melbourne.³

The Panel reviewed policies regarding living away from home, travel and relocation allowances that are applicable to judicial officers and other executives in Victoria and interstate. These comparable policies are generally not dependant on the location or principal place of residence of the person being metropolitan or regional. Rather, eligibility for such allowances is generally dependant on change in the person's principal place of residence as a result of the assignment by their employer or the relevant court.

The VPS Executive Employment Handbook (Handbook) provides that a VPS executive who is living away from home may receive an allowance that reimburses additional costs incurred for

³ Magistrates' Court of Victoria, Submission to the Judicial Entitlements Panel, 15 May 2017, page 45.

living in another place, for a short-term assignment.⁴ The Handbook explains that a person is considered to be living away from a usual of residence if, but for a change in residence in order to work temporarily for the employer, the person would have continued to live at the former place. The Panel endorses the Handbook's criterion.

Distance as a condition for eligibility

The Attorney-General asked the Panel to consider whether it would be appropriate for the relevant entitlement certificate to specify conditions for eligibility for the allowance based on the distance between a magistrate's ordinary place of residence and the location of the law court that they are directed to sit at.

The Panel considers that it would not be appropriate for the relevant entitlement certificate to specify conditions for eligibility for a living away from home allowance based on the distance between a magistrates' principal place of residence and the location of the law court that they are directed to sit at.

The Panel also considered the duration of travel time as a potential condition of eligibility, as it is also an objective measure of travel similar to distance. The Panel considers that it would also not be appropriate for the relevant entitlement certificate to specify a minimum travel time as a condition for eligibility.

The submissions received by the Panel did not address distance as a potential condition of eligibility. The Caple Report noted the existence of OHS risks associated with driving excessive distances and only one of the case studies made reference to distance travelled from the magistrate's home to their work location. The case study did not suggest that distance should be a condition of eligibility.

Of the comparable policies reviewed by the Panel, only one policy specified a minimum travel distance as a condition of eligibility for receipt of a living away from home allowance.⁵ None of the comparable policies reviewed by the Panel contained a minimum travel time as a condition of eligibility for receipt of a living away from home allowance. The VPS Agreement also does not contain a distance or travel time condition of eligibility. Instead, eligibility for reimbursement of residential relocation expenses is conditional on the employer's consideration of whether it is reasonable and necessary for the employee to relocate their residence, as a result of a relocation of their work location.

In most comparable policies, eligibility for an allowance is dependent on whether it would be impractical or unreasonable to commute to a particular location on a daily basis.⁶ The Panel observes that the practicality or reasonableness of a commute to a particular location is not always dependant on distance or travel time, but can vary according to individual circumstances. For example, while it might be reasonable to expect a person to commute on a daily basis between

⁴ Chapter 5.6, *Employment Conditions*, Victorian Public Service Executive Employment Handbook: <https://vpssc.vic.gov.au/html-resources/victorian-public-service-executive-employment-handbook/5-employment-conditions/>.

⁵ See, e.g., Minister for Education and Industrial Relations (QLD) *Directive No. 11/11*, 1 September 2011, which prescribes payments to be made to Queensland public service employees for transfer from one location to another, other than within the same city or area and greater than 100 kilometres from the person's residence to the new centre (by the most direct route).

⁶ See, e.g., Minister for Education and Industrial Relations (QLD) *Directive No. 11/11*, 1 September 2011, item 3.

Geelong and Melbourne (a distance of approximately 75km), it might not be reasonable to expect a person to travel the same distance crossing the Melbourne CBD, as this would take longer, particularly during peak traffic hours.

The Panel considers that feasibility to commute, rather than travel distance or travel time, should be the central principle to determine eligibility for the allowance.

Feasibility of a magistrate's commute

The Attorney-General asked the Panel to take into account that magistrates may be required by the Chief Magistrate to sit at certain locations that are not feasible to commute to on a daily basis.

The Panel considers that eligibility for the allowance should depend on whether it is feasible for the magistrate to commute from their principal place of residence to the location that they are directed to sit at on a daily basis. This is consistent with the Panel's opinion that eligibility for the allowance should not depend on a minimum travel distance or travel time, and should not be limited to any geographical or regional restrictions.

The 'feasibility to commute' between a magistrate's principal place of residence and their work location should be determined by taking into consideration whether it would be:

- impractical for the magistrate to continue to reside at their principal place of residence
- unreasonable to require the magistrate to do so.

As is stated above, practicality and reasonableness are eligibility criteria for living away from home allowances consistent with comparable policies.⁷

The Panel's view is that the proposed feasibility criterion should be determined by the Chief Magistrate or President of the Children's Court (as applicable), in consultation with the affected magistrate. If the Chief Magistrate or President determines that the affected magistrate's commute is feasible, the affected magistrate would not need to relocate their residence, and would be ineligible for the allowance. If the Chief Magistrate or President determines that the affected magistrate's commute is not feasible, and the affected magistrate relocates their residence because it is impractical for the magistrate to continue to reside at their principal place of residence or it would be unreasonable for the magistrate to be required to reside at their principal place of residence and work at the relevant court location, the affected magistrate will be eligible to receive a living away from home allowance.

In other words, a magistrate cannot live at their principal place of residence and claim the allowance.

Feasibility should be assessed in accordance with an individual's particular circumstances, subject always to whether it would be impractical for the magistrate to continue to reside at their principal place of residence, and unreasonable for the magistrate to be required to do so.

Both the PwC Report and one of the case studies enclosed in the Caple Report supported, at least implicitly, 'practicality' being part of the eligibility conditions. The PwC Report stated, in the context

⁷ See, e.g., Minister for Education and Industrial Relations (QLD) *Directive No. 11/11*, 1 September 2011, item 3.

of the original introduction of living away from home allowances, that the allowance was “*only payable where it has been impossible or impractical for employees to return to their usual residence when undertaking their duties.*”⁸ The PwC Report further stated that the practicality of the commute had been a criterion for payment of a living away from home allowance since the introduction of the concept of a living away from home allowance in 1945. Case Study 4 stated that the allowance is payable “*when undertaking work when not practical to commute from your normal residence.*”

The Children’s Court’s submission to the Panel provided an example of a magistrate who was assigned to the Melbourne Children’s Court but resided in a regional area. In the example, the magistrate commuted to and from Melbourne, staying overnight in Melbourne two nights per week. In the Panel’s view, the magistrate in the Children’s Court’s example would not be eligible for the living away from home allowance because the magistrate did not move their principal place of residence to take up the assignment in Melbourne.

The Panel’s view, however, is that were the conditions of eligibility for the allowance different to what they presently are, the example magistrate in the Children’s Court’s submissions to the Panel may have been able to move their residence to Melbourne for the duration of their court-directed assignment and become eligible for receipt of the allowance. However, that magistrate would not have been eligible for the allowance unless the magistrate lived somewhere other than their principal place of residence. The Panel’s view is that these types of cases underscore the need for changes to the conditions of eligibility of the allowance.

Other considerations

“Requirement” to live away from home

The Panel considers that eligibility for the allowance should depend on whether the magistrate is required to sit at a certain location, rather than whether the magistrate requests to sit at that location.

The Panel’s review of comparable policies suggests that in most cases an allowance is not payable where the judicial officer requests to sit at a particular law court or in a particular region.⁹ The Panel agrees that a living away from home allowance should not be payable to a magistrate who requests to sit at a particular location, under any circumstances. The Panel considers that a living away from home allowance should only be payable to magistrates who do not choose themselves to move their home. Where a magistrate requests or volunteers to work at a certain location, the magistrate should not be compensated for costs that the magistrates incurs as a result of the magistrates’ own choice.

The Panel is aware that the Magistrates’ Court conducts an expression of interest (EOI) campaign prior to assigning magistrates to sit at particular court locations. If the EOI does not result in sufficient interest to fill all vacancies, the Chief Magistrate will direct a magistrate to sit at a particular law court or in a particular region. The direction can be against the Magistrates’ wishes and cannot be resisted other than by resignation. The Magistrates’ Court’s 2018 submission states

⁸ PricewaterhouseCoopers Report dated 10 January 2019, [18].

⁹ Minister for Education and Industrial Relations (QLD) *Directive No. 11/11*, 1 September 2011, item 6, Queensland Department of Justice and Attorney-General, *Magistrates entitlements*, June 2010, definition of ‘transfer’, item 2 of Schedule L.

that, prior to appointment, magistrates are told of the requirement to sit in regional locations if directed by the Chief Magistrate.

In the Panel's view, the lodging of an EOI should not constitute a magistrate making a request to sit at the relevant location. Where a magistrate lodges an EOI, the magistrate is acting in response to a call for interest from the Court. The act of the EOI lodgement is responsive and is not a request to sit at a particular location. The Panel considers it likely that requests from magistrates are not lodged in response to EOIs and are more likely to occur intermittently and irregularly. In addition, magistrates who express an interest (as opposed to request) to sit in a particular area should not be penalised by being rendered ineligible for the allowance.

This approach is consistent with a comparable policy from Queensland, where a Queensland magistrate is not ordinarily entitled to living away from home expenses where the magistrate requests the transfer on health or compassionate grounds.¹⁰ This is also consistent with the VPS Agreement, which limits eligibility for residential relocation expenses to employees whose work relocation arises because of promotion or transfer as a result of an advertised vacancy or redeployment.

However, the Panel considers that, outside the EOI campaign, a magistrate who voluntarily requests to sit at a particular law court or in a particular area should not be eligible for a living away from home allowance.

Incurring costs

The Panel considers that a living away from home allowance should only be paid to magistrates that incur living away from home costs. The allowance should not be provided to magistrates in circumstances where a magistrate does not incur living away from home expenses.

The Panel's view is that a taxpayer, if required by the ATO, must show to the ATO that any money required to be spent in a particular way, was spent that way.¹¹ The comparable policies, other than CSV's policies, reviewed by the Panel also generally require varying levels of substantiation or documentary evidence.¹² In the Panel's view, where magistrates are being compensated for the additional costs they incur as a result of living away from their home, each magistrate must ensure they can substantiate the incurring of these additional costs if required to do so.

In any event, the Panel understands that this is consistent with the existing practice of the Magistrates' Court.

Eligibility ceases upon the magistrate returning home

The Panel expects that a magistrate who was directed by the Chief Magistrate to sit at a particular court location for a period of up to three years would return to the magistrate's principal place of residence upon the expiry of that term.

¹⁰ Minister for Education and Industrial Relations (QLD) *Directive No. 11/11*, 1 September 2011, item 6.

¹¹ See, eg, Australian Taxation Office, *Income tax: what are the reasonable travel and overtime meal allowance expense amounts for the 2017-18 income year?* TD 2017/19, 3 July 2017.

¹² Minister for Education and Industrial Relations (QLD) *Directive No. 11/11*, 1 September 2011, item 5. See also, Queensland Department of Justice and Attorney-General, *Magistrates entitlements*, June 2010, item 2.3 of Schedule A.

The Panel considers that upon the magistrate's three-year assignment, the entitlement to a living away from home allowance should cease because the magistrate will not meet the Panel's suggested criteria because upon returning to the magistrate's principal place of residence, the magistrate will not be living away from home and will not be incurring any additional costs.

The Panel understands this is consistent with the existing practice of the Magistrates' Court.

Quantum

The Panel expresses no opinion on the quantum of the allowance, as it was expressly excluded from the Attorney-General's request for this advisory opinion. The Panel does, however, note that the purpose of the allowance is not an indemnity of all costs incurred by all magistrates. Instead it is intended to cover reasonable additional costs that a magistrate would incur.

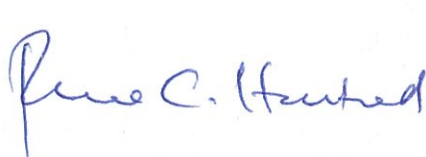
The Panel also takes this opportunity to repeat an observation made in its previous report. In the Panel's 2018 Own Motion Recommendation Report, Observation 3 was that:

The Panel urges Court Services Victoria and the Magistrates' Court to undertake a review of the issue of the costs associated with the court assignments of magistrates, noting that magistrates should not be put at a financial disadvantage due to the cost of relocating or living away from home where it is required for their work.¹³

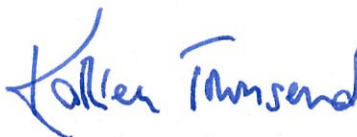
The Panel further observes that it would be expected that accommodation costs of Melbourne would be higher than all other areas of Victoria. Therefore, the proposed review should include consideration as to whether the living away from home allowance should be higher for those living away from home in Melbourne, as opposed to living away from home in other locations.

Conclusion

The Panel proposes that a new or amended entitlement certificate be issued by the Attorney-General as soon as practicable, consistent with the Panel's advisory opinion.



Bruce Hartnett AM
Chairperson



Kathleen Townsend
Member



Ilona Charles
Member

¹³ Judicial Entitlements Panel, Own Motion Recommendations to the Attorney-General August 2018 Report, tabled in the Victorian Parliament on 20 September 2018, 39.