

Section 2.2 – Governance

APPENDIX 16

POLICY 2.2.8 – LEGAL REPRESENTATION FOR ELECTED MEMBERS AND EMPLOYEES**OBJECTIVE**

Under the *Local Government Act 1995*, the City's 'good government' powers allow it, in appropriate circumstances, to pay for the Legal Representation Costs of an individual Elected Member or Employee.

This Policy sets out guidelines to assist the Council in determining when it is appropriate to pay Legal Representation Costs.

This Policy does not cover legal representation provided to, or on behalf of, the City.

Explanation of Key Terms

Approved Lawyer is to be:

- (a) a 'certificated practitioner' under the *Legal Practice Act 2003*; and
- (b) approved in writing by the Council.

Elected Member or Employee means a current or former Commissioner, Elected Member, or Employee of the City.

Legal Proceedings may be civil, criminal or investigative (including an inquiry under any written law).

Legal Representation is the provision, to or on behalf of an Elected Member or Employee, by an Approved Lawyer of Legal Services that are in respect of:

- (a) a matter or matters arising from the performance of the functions of the Elected Member or Employee; and
- (b) Legal Proceedings involving the Elected Member or Employee that have been, or may be, commenced.

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Legal Representation Costs are the costs, including fees and disbursements, properly incurred in providing Legal Representation.

Legal Services includes advice, representation or documentation that is provided by an Approved Lawyer.

Payment by the City of Legal Representation Costs may be either by:

- (a) a direct payment to the Approved Lawyer (or the relevant law firm); or
- (b) a reimbursement to the Elected Member or Employee.

GUIDELINES**1 Statements of principle**

The City may pay all or part of the Legal Representation Costs of an Elected Member or Employee when it is satisfied that the Payment is in the interests of the City.

2 Payment criteria

There are three major criteria for determining whether the City should pay the Legal Representation Costs of an Elected Member or Employee. These are:

- (a) the Legal Representation Costs must relate to a matter that arises from the performance, by the Elected Member or Employee, of his or her functions;
- (b) the Legal Representation Costs must be in respect of Legal Proceedings that have been, or may be, commenced; and
- (c) in performing his or her functions, to which the Legal Representation relates, the Elected Member or Employee must have acted in good faith, and must not have acted unlawfully or in a way that constitutes improper conduct.

3 Examples of Legal Representation Costs that may be approved

3.1 If the criteria in clause 2 are satisfied, the City may approve the Payment of Legal Representation Costs:

- (a) where proceedings are brought **against** an Elected Member or Employee in connection with his or her functions – for example, an action for defamation or negligence arising out of a decision made or action taken by the Elected Member or Employee;
- (b) for involvement in a statutory or other inquiry that requires information to be given, or to which information is given, by an Elected Member or Employee in connection with his or her functions; or

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- (c) to enable proceedings to be commenced and/or maintained by an Elected Member or Employee to permit him or her to carry out his or her functions – for example, where an Elected Member or Employee seeks a restraining order against a person using threatening behaviour.

- 3.2 The City will not approve the Payment of Legal Representation Costs to an Elected Member or Employee for a defamation action, or a negligence action, instituted by the Elected Member or Employee.

4 Application for payment

- 4.1 An Elected Member or Employee who seeks assistance under this Policy is to make an application(s) for Payment of Legal Representation Costs.

- 4.2 The application:

- (a) is to be made in writing to the Council; and
- (b) is to give details of:
 - (i) the matter for which Legal Representation is sought;
 - (ii) how that matter relates to the functions of the relevant Elected Member or Employee;
 - (iii) the lawyer (or law firm) who is to be asked to provide the Legal Representation;
 - (iv) the nature of Legal Representation to be sought (such as advice, representation in court, preparation of a document etc);
 - (v) the estimated cost (if known) of the Legal Representation; and
 - (vi) why it is in the interest of the City for Payment to be made;
- (c) is to contain a declaration by the applicant that he or she has acted in good faith, and has not acted unlawfully or in a way that constitutes improper conduct in relation to the matter to which the application relates; and
- (d) so far as possible, is to be made before seeking the Legal Representation to which the application relates.

- 4.3 The application is to be accompanied by a written statement by the applicant that he or she:

- (a) has read, and understands, the terms of this Policy;

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- (b) acknowledges that any approval of Legal Representation Costs is conditional on the repayment provisions of clause 8 and any other conditions to which the approval is subject; and
 - (c) undertakes to repay to the City any Legal Representation Costs in accordance with the provisions of clause 8.
- 4.4 An application is also to be accompanied by a report prepared by or on behalf of the CEO or, where the CEO is the applicant, by the Director Corporate Services and Resource Management.
- 5 Legal Representation Costs - limit**
 - 5.1 Unless otherwise determined by the Council, payment of Legal Representation Costs in respect of a particular application is not to exceed \$5,000.
 - 5.2 An Elected Member or Employee may make a further application to the Council in respect of the same matter.
- 6 Council's powers**
 - 6.1 The Council may:
 - (a) refuse;
 - (b) grant; or
 - (c) grant subject to conditions, including a financial limit,an application for payment of Legal Representation Costs.
 - 6.2 A condition under clause 6.1 may include a financial limit and/or a requirement to enter into a formal agreement, including a security agreement, relating to the payment, and repayment, of Legal Representation Costs.
 - 6.3 In assessing an application, the City may have regard to any insurance benefits that may be available to the applicant under the City's Councillors and Officers insurance policy (or its equivalent).
 - 6.4 The Council may at any time revoke or vary an approval, or any conditions of approval, for the payment of Legal Representation Costs.
 - 6.5 The Council may, subject to clause 6.6, determine that an Elected Member or Employee whose application for Legal Representation Costs has been approved has, in respect of the matter for which Legal Representation Costs were approved:
 - (a) not acted in good faith, or has acted unlawfully or in a way that constitutes improper conduct; or

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(b) given false or misleading information in respect of the application.

6.6 A determination under clause 6.5 may be made by the Council only on the basis of, and consistently with, the findings of a court, tribunal or inquiry.

6.7 Where the Council makes a determination under clause 6.5, it may also determine that all or part of the Legal Representation Costs paid by the City are to be repaid by the Elected Member or Employee in accordance with clause 8.

7 CEO's powers

7.1 In cases of urgency, the CEO, subject to clause 7.2, may exercise, on behalf of the Council, any of the powers of the Council under clauses 6.1 and 6.2, to a limit of \$2,000.

7.2 Where the CEO is the applicant, the powers in clause 7.1 are to be exercised by the Director Corporate Services and Resource Management.

7.3 An application approved by the CEO under clause 7.1, or by the Director Corporate Services and Resource Management under clause 7.2, is to be submitted to the next meeting of the Council which may exercise any of its powers under this Policy, including its powers under clause 6.4.

8 Repayment of Legal Representation Costs

8.1 An Elected Member or Employee whose Legal Representation Costs have been paid by the City is to repay the City:

(a) all or part of those costs – in accordance with a determination by the Council under clause 6.7; or

(b) as much of those costs as are available to be paid by way of set-off – where the Elected Member or Employee receives monies paid for costs, damages, or settlement, in respect of the matter for which the City paid the Legal Representation Costs.

8.2 The City may take action in a court of competent jurisdiction to recover any monies due it under this Policy.

Previous Policy No: A2-12, EM15
 Amendments: CJ213-06/99, CJ001-02/01
 Issued: March 2001
 Related Documentation: Delegated Authority Manual

LEGAL REPRESENTATION FOR ELECTED MEMBERS AND EMPLOYEES

LOCAL GOVERNMENT OPERATIONAL GUIDELINES

NUMBER

JUNE 2004

DRAFT



Department of Local Government
and Regional Development
Government of Western Australia

LEGAL REPRESENTATION FOR ELECTED MEMBERS AND EMPLOYEES

1. Introduction

In today's society there is an increased risk of legal action threatened or being taken against individual elected members and employee when there is a perception they have not carried out their allocated function in the correct and appropriate manner or it is anticipated that such a threat will cause a change to a vote or a recommendation.

There is also the unfortunate situation of elected members and employee being caught up in an inquiry into their local government and they are of the view that they may be compromised without legal representation.

If people are exposed or not protected from threats or not given proper legal representation then it is very likely that their performance and behaviour will be adversely influenced. Accordingly, it is appropriate and prudent for local governments to assist elected members and employees by adopting policies to fund or partly fund the cost of providing protection against legal action where functions are being performed in good faith. At the same time, it is important to make it very clear that such assistance will not be given in inappropriate situations.

This guideline is to assist Councils when make decisions or adopting policies on the local government providing financial assistance for elected members or employees when they, as individuals, have legal action taken against them or where they are involved in an inquiry into the local government and they require legal representation to protect their standing as an elected member and employee.

A Model Policy is included in this guideline for consideration by Council.

2. Legislation

Section 9.56 of the *Local Government Act 1995* (the Act) provides protection from actions of tort for anything an elected member or employee has, in good faith, done in the performance or purported performance of a function under the Act or under other written law. However, the legislation does not preclude people attempting to take action against individual elected members or employee of a local government.

Section 3.1 of the Act provides that the general function of a local government is to provide for the good government of persons in its district. Section 6.72 provides that money held in the municipal fund may be applied towards the performance of the functions and the exercise of the powers conferred on the local government by this Act or any other written law.

3. Determining a Suitable Policy

Where legal action is threatened or commenced against an elected member or employee as a result of them undertaking their duties so that the local government could fulfil its general function, expenditure from the municipal fund to defend that action

is justified. Each Council should have in place a policy setting out the rules where it will meet the costs for legal actions initiated against elected members and staff.

3.1 Legal Costs that will be funded

As stated earlier the use of a local government's funds must be justified on the basis that the expenditure will *"provide for the good government of persons in its district"*. Therefore, in formulating a policy on legal representation the Council must take into account the need to satisfy itself that the expenditure can be justified as providing that good government.

Each local government must have a clear set of principles or policy directives to help them deal with a situation where a member or employee is defending or will need to defend a legal action against them.

The degree of complexity of an appropriate policy may vary widely but generally could include the following matters:

- under what circumstances financial support would be provided (eg legal action taken in connection with the performance of a member's or employee's duties; had not acted illegally, dishonestly or in bad faith etc);
- who would make the decision regarding whether financial support would be provided (eg Council, CEO);
- who would provide the legal services (eg the local government's lawyers, other);
- what limits, if any, would be placed on expenditure;
- how applications would be made for assistance;
- what obligations a member or employee receiving assistance should have (eg obligation to disclose anything that might affect representation; an obligation to act reasonably);
- whether contingent authorisation in urgent cases would be provided for and by whom;
- under what circumstances financial support would be withdrawn (eg person having acted illegally, dishonestly or otherwise in bad faith); and
- provisions for the recoup of money already provided under the Policy where financial support is withdrawn.

Council should consider whether it wishes to delegate to the CEO the authority to approve expenditure under its Policy. The Department recommends that any delegated authority be limited to the sum of \$5,000 and only in those situations where a delay in approving an application will be detrimental to the legal rights of the elected member or employee. Council must remember that any decision taken by the CEO is taken on its behalf and is a decision for which it is responsible.

3.2 Legal Costs that will not be funded

Local government elected members and employees may be subject to public criticism they consider unfair. Under such circumstances elected members or employee may seek to redress the situation by taking legal action.

The Department strongly believes that based on legal advice it has received there is no justification under the "good government" provisions for a local government funding

legal action such as defamation or negligence that is initiated by members or employees. If members and employees wish to take such action then they must finance it themselves.

In relation to public criticism about a local government legal precedent dictates that it is fundamental to public scrutiny that organisations governed by elected bodies be open to criticism by members of the community. The threat of civil action for defamation against any person who publicly criticises a local government will have an inhibiting effect on freedom of speech and inevitably lessen a local government's accountability to its community. The Department submits that the use of municipal funds to pay for a legal action on behalf of the local government in these circumstances could not be justified on legal, moral or ethical grounds.

In summary, the Department strongly recommends that Councils not provide legal assistance to elected members or employees who wish to initiate their own action for defamation or negligence.

Such a stance needs to be clearly reflected in the adopted policy.

4. Adopting a Policy

A model policy is attached for consideration.

In considering the policy all relevant people are encouraged to study and thoroughly understand the implications and likely consequences of adopting the policy.

If in such deliberations any individual or Council identifies improvements the Department would be delighted to consider them and, if appropriate, the model will be amended.

Please contact the Department on -----

MODEL POLICY

LEGAL REPRESENTATION FOR ELECTED MEMBERS AND EMPLOYEES

POLICY OBJECTIVE

To allow the *City/Town/Shire*, in appropriate circumstances, to provide financial assistance to elected members and employees towards the cost of legal representation, where legal proceedings have been, or may be, commenced against them in relation to matters arising from the performance of their functions.

Financial assistance will not be provided for the payment of legal representation for a defamation action, or a negligence action, initiated by an elected member or employee.

This Policy does not cover legal representation provided to, or on behalf of, the *City/Town/Shire*.

EXPLANATION OF KEY TERMS

Approved lawyer is to be:

- (a) a 'certified practitioner' under the Legal Practitioners Act 1893;
- (b) from a law firm on the *City/Town/Shire's* panel of legal service providers, unless the Council considers that this is not appropriate – such as where there is or may be a conflict of interest or where a law firm from the panel does not have the specific expertise that is required; and
- (c) approved in writing by the Council.

Legal proceedings may be civil, criminal or investigative (including an inquiry under any written law).

Legal representation is the provision, to or on behalf of an elected member or employee, by an approved lawyer of legal services that are in respect of;

- (a) a matter or matters arising from the performance of the function of the elected member or employee; and
- (b) legal proceedings that have been, or may be, commenced.

Legal representation costs are the costs, including fees and disbursements, properly incurred in providing legal representation.

Legal services includes advice, representation or documentation that is provided by an approved lawyer.

Payment by the *City/Town/Shire* of legal representation cost may be either by:

- (a) a direct payment to the approved lawyer (or the relevant firm); or
- (b) a reimbursement to the elected member or employee.

1. Payment Criteria

There are three major criteria for determining whether the *City/Town/Shire* will pay the legal representation costs of an elected member or employee. These are:

- (a) the legal representation costs must relate to a matter that arises from the performance, by the elected member or employee, of his or her functions;
- (b) the legal representation cost must be in respect of legal proceedings that have been, or may be, commenced; and
- (c) in performing his or her functions, to which the legal representation relates, the elected member or employee must have acted reasonably and in good faith, and must not have acted unlawfully or in a way that constitutes improper conduct.

2. Examples of legal representation costs that may be approved

2.1. If the criteria in clause 1 of this policy are satisfied, the *City/Town/Shire* may approve the payment of legal representation costs:

- (a) where proceedings are brought against an elected member or employee in connection with his or her functions – for example, an action for defamation or negligence arising out of a decision made or action taken by the elected member or employee; or
- (b) for involvement in a statutory or other inquiry requiring information to be given, or to which information is given, by an elected member or employee in connection with his or her functions.
- (c) to enable proceedings to be commenced and/or maintained by an elected member or employee only in circumstances so as to permit him or her to carry out his or her functions – for example, where an elected member or employee seeks a restraining order against a person using threatening behaviour;

2.2 The *City/Town/Shire* will not approve the payment of legal representation costs to an elected member or employee for a defamation action, or a negligence action, instituted by the elected member or employee.

3. Application for payment

3.1 An elected member or employee who seeks assistance under this policy is to make a written application.

3.2. The written application for payment of legal representation costs is to give details of:

- (i) the matter for which legal representation is sought;
- (ii) how that matter relates to the functions of the elected member or employee making the application;
- (iii) the lawyer (or law firm) who is to be asked to provide the legal representation;
- (iv) the nature of legal representation to be sought (such as advice, representation in court, preparation of a document etc; and

- (v) an estimated cost of the legal representation.
- 3.3 As far as possible the application is to be made before seeking the legal representation to which the application relates.
- 3.4 An application for payment of legal representation costs is to be accompanied by a written statement by the person making the application that he or she;
- (a) has read, and understands, the terms of this Policy;
 - (b) acknowledges that any approval of legal representation costs is conditional on the repayment provisions of clause 9 and any other conditions to which the approval is subject; and
 - (c) undertakes to repay to the *City/Town/Shire* any legal representation costs in accordance with the provisions of clause 7.
- 3.5 An application is also to be accompanied by a report prepared by, or on behalf of, the CEO.

4. Legal representation costs – Limit

Unless otherwise determined by Council, payment of legal representation costs for each elected member or employee in respect of a particular matter is not to exceed \$5,000.

5. Council's powers

- 5.1 The Council may:
- (a) refuse
 - (b) grant; or
 - (c) grant subject to conditions,
- an application for payment of legal representation costs.
- 5.2 Conditions under clause 5.1 may include, but are not restricted to, a financial limit and/or a requirement to enter into a formal agreement relating to the payment, and repayment, of legal representation costs.
- 5.3 The Council may at any time revoke or vary an approval, or any conditions of approval, for the payment of legal representation costs.
- 5.4 The Council may at any time determine that an elected member or employee whose application for legal representation costs has been approved has, in respect of the matter for which legal representation costs were approved:
- (a) not acted in good faith, or has acted unlawfully or in a way that constitutes improper conduct; or
 - (b) given false or misleading information in respect of the application.
- 5.5 Where the Council makes a determination under clause 5.3, the legal representation costs paid by the *City/Town/Shire* are to be repaid by the elected member or employee in accordance with clause 7.

6. Chief Executive Officer's powers

- 6.1 In cases where a delay in the approval of an application will be detrimental to the legal rights of the applicant, the CEO may exercise, on behalf of the Council, any of the powers of the Council under clause 5.1 and 5.2, to a limit of \$5,000 in respect of each application.
- 6.2 An application approved by the CEO under clause 6.1 is to be submitted to the next ordinary meeting of the Council which may exercise any of its powers under this Policy, including its powers under clause 5.3.

7. Repayment of legal representation costs

- 7.1 An elected member or employee whose legal representation cost have been paid by the *City/Town/Shire* is to repay the *City/Town/Shire*:
- (a) all or part of those costs – in accordance with a determination by the Council under clause 5.3;
 - (b) as much of those costs as are available to be paid by way of set-off – where the elected member or employee receives monies paid for costs, damages, or settlement, in respect of the matter for which the *City/Town/Shire* paid the legal representation costs.
- 7.2 The *City/Town/Shire* may take action in a court of competent jurisdiction to recover any monies due it under this Policy.