

## Section 2.2 – Governance

**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 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.

**2 Examples of Legal Representation Costs that may be approved**

2.1 If the criteria in clause 1 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; or
- (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.

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- 2.2 This policy does not relate to situations where legal proceedings are commenced by an elected member or employee and there is a presumption that the City will not pay for legal representation costs in these circumstances. However this policy does not preclude such a request being submitted and considered by the Council for extenuating circumstances where the elected member or employee is the subject of threatening behaviour by another person.
- 2.3 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.

**3 Application for payment**

- 3.1 An Elected Member or Employee who seeks assistance under this Policy is to make an application(s) for Payment of Legal Representation Costs.
- 3.2 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); and
    - (v) the estimated cost (if known) of the Legal Representation.
  - (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.
- 3.3 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 7 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 7.

3.4 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.

**4 Legal Representation Costs - limit**

- 4.1 Unless otherwise determined by the Council, payment of Legal Representation Costs in respect of a particular application is not to exceed \$5,000.
- 4.2 An Elected Member or Employee may make a further application to the Council in respect of the same matter.

**5 Council's powers**

- 5.1 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.
- 5.2 A condition under clause 5.1 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.
- 5.3 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).
- 5.4 The Council may at any time revoke or vary an approval, or any conditions of approval, for the payment of Legal Representation Costs.
- 5.5 The Council may, subject to clause 5.6, 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.

5.6 A determination under clause 5.5 may be made by the Council only on the basis of, and consistently with, the findings of a court, tribunal or inquiry.

5.7 Where the Council makes a determination under clause 5.5, 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 7.

**6 CEO's powers**

6.1 In cases of urgency, the CEO, subject to clause 6.2, may exercise, on behalf of the Council, any of the powers of the Council under clauses 5.1 and 5.2, to a limit of \$2,000, where a delay in approving an application would be detrimental to the legal rights of an elected member or employee.

6.2 Where the CEO is the applicant, the powers in clause 6.1 are to be exercised by the Director Corporate Services and Resource Management.

6.3 An application approved by the CEO under clause 6.1, or by the Director Corporate Services and Resource Management under clause 6.2, 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 5.4.

**7 Repayment of Legal Representation Costs**

7.1 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 5.7; 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.

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

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|------------------------|---------------------------------------|
| Previous Policy No:    | A2-12, EM15                           |
| Amendments:            | CJ213-06/99, CJ001-02/01, CJ136-06/04 |
| Issued:                | July 2004                             |
| Related Documentation: |                                       |

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13 December 2004

Date:

Your Ref:

72559



Enquiries:

Our Ref:

Mr Clayton Higham  
Acting Chief Executive Officer  
City of Joondalup  
90 Boas Avenue  
JOONDALUP WA 6027

Dear Mr Higham

#### LEGAL REPRESENTATION BEFORE THE INQUIRY

I refer to Policy 2.2.8 – Legal Representation for Elected Members and Employees.

I am a current employer who has been issued with a summons to appear before the Inquiry into the City of Joondalup and wish to make an application for legal funding pursuant to Policy 2.2.8 for the forthcoming Inquiry.

I declare that the matters indicated in the Terms of Reference relate to functions of my position as an officer of the City in the role of Manager Audit & Executive Services. It is envisaged that the nature of the legal representation will be legal advice, representation before the Inquiry Panel hearing, and cross examination of witnesses giving evidence to the Inquiry.

At its meeting held on 10 September 2004, the Joint Commissioners resolved that:

- 1 the Joint Commissioners DETERMINE that, notwithstanding Policy 2.2.8 relating to legal representation of elected members and employees in recognition of the special nature of an Inquiry and the duty that the City has to current employees, the City undertakes to provide legal assistance for current employees to the extent that they have acted within the scope of their functions and duties;
- 2 the legal assistance in 1 above is expected to be provided for all employees through the services of one law firm and extends to appearing on behalf of the City at the Inquiry to the extent necessary to assist employees with their evidence if this is necessary and if the Presiding Member of the Inquiry gives permission for this to occur;

- 3 the legal assistance in 1 above is only to be accessed after an employee has signed a declaration to the effect that:
  - (a) he or she has acted in good faith and has not acted unlawfully or in a way that constitutes improper conduct in relation to matters that are the subject of the terms of reference of the Inquiry and;
  - (b) that he or she is aware that the legal assistance will be terminated if it becomes apparent to the Lawyer appointed by the City that he or she has acted improperly outside the scope of their proper functions and duties;
- 4 in addition to the legal assistance provided in 1 above, employees continue to have access to Policy 2.2.8;
- 5 the Human Resources Manager be advised of this determination and provided with an opportunity to withdraw (in writing) his previous application under the Policy if he wishes to do so;
- 6 the Chief Executive Officer be requested to arrange for McLeod's to undertake to provide the legal assistance in 1 above and that this is advised to Counsel Assisting the Inquiry;
- 7 the arrangements and conditions applying to legal assistance to employees is advised to Counsel Assisting the Inquiry with the request that Council Assisting reviews the decision contained in the letter at Attachment 1 to JSC32-09/04 that the officers are not capable of being jointly represented;
- 8 in addition, the co-operation of the Inquiry is sought so that staff can be advised in advance, where this is possible, if questioning is anticipated to relate to the possibility that staff have acted improperly outside the scope of their proper functions and duties so that the staff have the opportunity to make alternative arrangements.

Whilst I have every confidence in Mr McLeod I am concerned at the potential for a conflict of interest emerging if I continue to be represented by McLeods, for example between my own interests and those other employees of the City who may have been or could potentially be called as a witness. If this were to occur it could in my view significantly impact on the level of representation provided and result in further costs being incurred. This possibility was outlined in Mr Staude's advice dated 30 August 2004 with the agreement allowing the three current employees called as witnesses to be represented by the same legal practitioner being seen as a compromise.

I would therefore seek to engage the services of Mr Richard Hooker as my instructing solicitor subject to his availability and the granting of leave by Mr McIntyre. Mr Hooker has an hourly rate of \$300 and a daily rate of \$2,500.

On 13 December 2004 I received advice from Municipal Insurance Broking Services that I have been granted indemnity pursuant to Policy 05CH005534, subject to the terms and conditions of the Policy, including payment of a \$5,000 excess. The indemnity is also subject to the following conditions:-

1. The itemised accounts are sent to ACE within a week of being rendered by the lawyer to the Insured.
2. ACE is at liberty to direct the Insured to query any lawyer's accounts and to ask the lawyer for any accounts to be faxed.
3. ACE reserves the right to ask for funds advanced to be repaid by the Insured if:
  - 3.1 it turns out that the Inquiry does not involve an allegation that the Insured committed a Wrongful Act; or
  - 3.2 the Wrongful Act was not committed in the Insured's capacity as an Insured (that is, acting properly in his or her capacity as a Councillor or an employee); or
  - 3.3 the allegation was first made against the Insured before 30 June 2002.

I declare that to the best of my knowledge I have acted in good faith and have not acted unlawfully or in a way that constitutes improper conduct in relation to the matter to which this application relates.

I have read and understand the terms of Policy 2.2.8. I acknowledge that any approval of legal representation costs is conditional on the repayment provisions of clause 7 and any other conditions to which the approval is subject. I undertake to repay to the City any legal representation costs in accordance with the provisions of clause 7.

Please find attached my signed declaration pursuant to clause 3.3.

Yours sincerely



KEVIN ROBINSON  
Manager Audit & Executive Services

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

**DECLARATION PURSUANT TO CLAUSE 3.3**

I KEVIN BARRY ROBINSON of 38 MARK STREET, COMO  
(name) (address)

in the State of W.A. do make the following undertaking –

- (a) I have read and understood the terms of Policy 2.2.8 – Legal Representation for Elected Members and Employees;
- (b) Acknowledge that any approval of Legal Representation Costs is conditional on the repayment provisions of clause 7 and any other conditions to which the approval is subject;
- (c) Undertakes to repay to the City any Legal Representation Costs in accordance with the provisions of clause 7; and
- (d) I have to the best of my knowledge acted in good faith, not acted unlawfully or in any way that constitutes improper conduct in relation to the matter to which this application relates.

Clause 7 of the Policy states that 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 5.7; 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;

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

Kevin Robinson

Signature of Applicant

13.12.04

Date

[Signature]

Signature of Witness

13/12/04

Date

13 December 2004

Date:

Your Ref:

72559



Enquiries:

Our Ref:

Mr P Schneider  
Director Corporate Services and Resource Management  
City of Joondalup  
90 Boas Avenue  
JOONDALUP WA 6027

Dear Mr Schneider

**LEGAL REPRESENTATION BEFORE THE INQUIRY**

I refer to Policy 2.2.8 – Legal Representation for Elected Members and Employees.

I am a current employer who has been issued with a summons to appear before the Inquiry into the City of Joondalup and wish to make an application for legal funding pursuant to Policy 2.2.8 for the forthcoming Inquiry.

I declare that the matters indicated in the Terms of Reference relate to functions of my position as an officer of the City in the role of Director Planning and Community Development Services. It is envisaged that the nature of the legal representation will be legal advice, representation before the Inquiry Panel hearing, and cross examination of witnesses giving evidence to the Inquiry.

At its meeting held on 10 September 2004, the Joint Commissioners resolved that:

- 1 the Joint Commissioners DETERMINE that, notwithstanding Policy 2.2.8 relating to legal representation of elected members and employees in recognition of the special nature of an Inquiry and the duty that the City has to current employees, the City undertakes to provide legal assistance for current employees to the extent that they have acted within the scope of their functions and duties;
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- 3 the legal assistance in 1 above is only to be accessed after an employee has signed a declaration to the effect that:
  - (a) he or she has acted in good faith and has not acted unlawfully or in a way that constitutes improper conduct in relation to matters that are the subject of the terms of reference of the Inquiry and;
  - (b) that he or she is aware that the legal assistance will be terminated if it becomes apparent to the Lawyer appointed by the City that he or she has acted improperly outside the scope of their proper functions and duties;
- 4 in addition to the legal assistance provided in 1 above, employees continue to have access to Policy 2.2.8;
- 5 the Human Resources Manager be advised of this determination and provided with an opportunity to withdraw (in writing) his previous application under the Policy if he wishes to do so;
- 6 the Chief Executive Officer be requested to arrange for McLeod's to undertake to provide the legal assistance in 1 above and that this is advised to Counsel Assisting the Inquiry;
- 7 the arrangements and conditions applying to legal assistance to employees is advised to Counsel Assisting the Inquiry with the request that Council Assisting reviews the decision contained in the letter at Attachment 1 to JSC32-09/04 that the officers are not capable of being jointly represented;
- 8 in addition, the co-operation of the Inquiry is sought so that staff can be advised in advance, where this is possible, if questioning is anticipated to relate to the possibility that staff have acted improperly outside the scope of their proper functions and duties so that the staff have the opportunity to make alternative arrangements.

I currently seek to retain the services of Mr McLeod of McLeods.

In terms of my legal representation before the Inquiry it should be noted that there may emerge issues that will involve a multiplicity of City officers whereby representation will not be possible by the one legal practitioner. At this point in time it is difficult to be more precise.

Notwithstanding clarification is currently being sought by Mr McLeod from Counsel Assisting on the matters and documents on which it is proposed I be examined on. It is envisaged that this will enable a more accurate assessment to be made of the likelihood of any potential conflict of interest that may arise in terms of my representation by McLeods.

I declare that to the best of my knowledge I have acted in good faith and have not acted unlawfully or in a way that constitutes improper conduct in relation to the matter to which this application relates.

I have read and understand the terms of Policy 2.2.8. I acknowledge that any approval of legal representation costs is conditional on the repayment provisions of clause 7 and any other conditions to which the approval is subject. I undertake to repay to the City any legal representation costs in accordance with the provisions of clause 7.

Please find attached my signed declaration pursuant to clause 3.3.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Clayton Higham', with a stylized, flowing script.

CLAYTON HIGHAM  
Acting Chief Executive Officer

enc

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

**DECLARATION PURSUANT TO CLAUSE 3.3**

I CLAYTON HIGHAM of 5 SIMON CL. KALAMUNDA  
(name) (address)

in the State of WEST AUSTRALIA do make the following undertaking –

- (a) I have read and understood the terms of Policy 2.2.8 – Legal Representation for Elected Members and Employees;
- (b) Acknowledge that any approval of Legal Representation Costs is conditional on the repayment provisions of clause 7 and any other conditions to which the approval is subject;
- (c) Undertakes to repay to the City any Legal Representation Costs in accordance with the provisions of clause 7; and
- (d) I have to the best of my knowledge acted in good faith, not acted unlawfully or in any way that constitutes improper conduct in relation to the matter to which this application relates.


Clause 7 of the Policy states that 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 5.7; 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;

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

  
\_\_\_\_\_  
Signature of Applicant

14/12/04  
\_\_\_\_\_  
Date

  
\_\_\_\_\_  
Signature of Witness

14/12/04  
\_\_\_\_\_  
Date