

Legal Representation for Council Members and Employees

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Department of Local Government
and Regional Development
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Legal Representation for Council Members and Employees

1. Introduction

1 In today's society there is an increased risk of legal action being taken or threatened against individual council members and employees. Council members and employees may require legal advice and representation and expect their local government to provide financial assistance to meet the cost of the advice or representation.

2 For example, council members or employees may be threatened with legal action when an aggrieved party believes that they will not or have not carried out their legislative functions or responsibilities in the correct and appropriate manner. Legal action may also be threatened where it is anticipated that such action will influence a vote or a recommendation.

3 Council members and employees may feel inhibited in undertaking their roles in a full, frank and impartial manner if they do not have an assurance that they are protected from threats and will be given proper legal representation if any legal action is taken against them. Local governments have a legislative duty of care to their employees to provide a safe working environment and morally have the same duty to council members. Accordingly, it is appropriate and prudent for local governments to assist council members and employees by adopting a policy to fund or partly fund the cost of providing legal representation in appropriate circumstances.

4 The Inquiry into the City of Joondalup criticised some council members for making uninformed and ill-advised decisions to pay personal legal expenses of the Chief Executive Officer (CEO). It is therefore important that council adopts a policy on the provision of financial assistance so that it's position is known to the council members, employees and the community in advance of applications for funding being made. Non-elected council committee members may also require assistance and should be considered in any Policy adopted by council.

5 This guideline, and the attached Model Policy, are provided to assist councils when making decisions or developing a Policy. It is important that a council devotes time to understanding the issues outlined in this guideline.

6 If a Policy is adopted and legal representation costs are granted under the Policy it is critical that council has presented to it full and detailed accounts from the lawyer approved to provide the legal representation to ensure that the representation provided complies with the approval given. Repayment of any costs associated with matters not approved should be enforced.

7 This guideline does not address the situation where council members and employees are interviewed during or are required to give evidence to an inquiry into their local government. Determining whether financial assistance is given in these situations is a complex matter and one that will relate to the circumstances and reasons for the inquiry.

2. Legislation

8 Section 9.56 of the *Local Government Act 1995* (the Act) provides protection from actions of tort for anything a council member or employee has, in good faith, done in the performance or purported performance of a function under the Act or under any other written law. However, the legislation does not preclude people taking action against individual council members or employees if they believe that the council member or employee has not acted in good faith.

9 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 6.7(2) 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 the Act or any other written law. Under these provisions a council can expend funds to provide legal representation for council members and employees as long as it believes that the expenditure falls within the scope of the local government's function.

3. Determining a Suitable Policy

10 The Policy should have a clear set of principles or directives to help the council deal with a situation where a council member or employee is defending or will need to defend a legal action or requires advice or representation and is requesting financial assistance. The policy should set out the circumstances under which funding will be provided, the level of funding that will be provided and the processes to be followed by the applicant when making a request.

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

- under what circumstances would financial assistance be provided. For example, where legal action is taken against a council member or employee in connection with the performance of their duties and they have not acted illegally, dishonestly or in bad faith;
- who would make the decision that financial support would be provided (eg council or the CEO);
- who would provide the legal services (eg the local government's lawyers, other lawyers);
- what limits, if any, would be placed on financial assistance;
- how applications would be made for assistance;
- what obligations a council member or employee receiving assistance should have (eg an obligation to disclose anything that might affect representation or to act reasonably);
- whether contingent authorisation in urgent cases would be provided for and who would exercise that authority;
- under what circumstances could financial assistance be withdrawn (eg person having acted illegally, dishonestly or otherwise in bad faith);
- provision for the recoup of money already provided under the Policy where approval is withdrawn; and
- a clear statement that legal representation will not be provided for matters that relate to the personal affairs of a council member or employee (eg under investigation for a matter not related to a legislative function or an employee seeking legal advice on a contract of employment).

3.1 Other circumstances where funding requests may be made

12 Under legislation, any expenditure 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 for that good government.

13 Local government council members and employees will at times be subject to personal public criticism they consider to be unfair. Depending on the circumstances and the veracity of the criticism council members or employees may seek to redress the situation by taking legal action. Legal advice received by the Department suggests that only in exceptional circumstances would a local government be able to justify under the "*good government*" provisions funding the initiation of legal action by a council member or employee.

14 It is important to note that where public criticism is made about the local government, ie the City, Town, or Shire, funding could not be justified. Legal precedent dictates that it is fundamental to public scrutiny that governments be open to criticism by members of the community. The threat of civil action 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.

15 Council members, if asked to vote on such a request, should ask themselves "would a reasonable person, given all the facts, conclude that the expenditure provides for the good government of the persons in the district". If a majority of council members are satisfied, council could, under its general function power, resolve that the local government fund the obtaining of advice or initiation of legal action by the council member or employee.

16 Council members should ensure that they receive appropriate documentation that presents reasons for and against the recommendation when considering an application for such funding as they may be asked to

justify the decision at a future date. Documentation provides a proper decision-making trail that can be used to support the decision.

- 17 As a condition of approval the council may require the council member or employee to undertake to refund the costs of legal representation paid by the local government should their action be successful.

3.2 Support for former council members and employees

- 18 The council when considering the scope of its policy will need to determine if the policy extends to the funding of legal representation for former council members, commissioners and employees and under what circumstances funding would be provided.

3.3 Delegation

- 19 A number of councils have, in adopting a policy on this issue, delegated to their CEO the power to deal with requests for the payment of legal representation costs.

Because of the sensitive nature of providing funding, some CEOs have asked council not to delegate the power. A council should discuss the matter with the CEO before making any decision to delegate any aspect of its legal representation policy.

- 20 It may be appropriate for council to seek agreement from the CEO for a delegation limited to circumstances where a delay in approving a request will be detrimental to the legal rights of the council member or employee.

4. Adopting a Policy

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

- 22 The Department welcomes any comments that individuals or local governments believe will assist in the improvement of the model policy.

Model Policy

LEGAL REPRESENTATION FOR COUNCIL MEMBERS AND EMPLOYEES

EXPLANATION OF KEY TERMS

approved lawyer is to be –

- (a) a ‘certified practitioner’ under the *Legal Practice Act 2003*;
- (b) from a law firm on the *City/Town/Shire’s* panel of legal service providers, if relevant, unless the council considers that this is not appropriate – for example where there is or may be a conflict of interest or insufficient expertise; and
- (c) approved in writing by the council or the CEO under delegated authority.

council member or employee means a current or former commissioner, council member, non-elected member of a council committee or employee of the *City/Town/Shire*.

legal proceedings may be civil, criminal or investigative.

legal representation is the provision of legal services, to or on behalf of a council member or employee, by an approved lawyer that are in respect of –

- (a) a matter or matters arising from the performance of the functions of the council member or employee; and
- (b) legal proceedings involving the council member or employee 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 costs may be either by –

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

1. Payment Criteria

There are four major criteria for determining whether the *City/Town/Shire* will pay the legal representation costs of a council member or employee. These are –

- (a) the legal representation costs must relate to a matter that arises from the performance, by the council 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;
- (c) in performing his or her functions, to which the legal representation relates, the council member or employee must have acted in good faith, and must not have acted unlawfully or in a way that constitutes improper conduct; and
- (d) the legal representation costs do not relate to a matter that is of a personal or private nature.

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 a council 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 council member or employee; or
- (b) to enable proceedings to be commenced and/or maintained by a council member or employee to permit him or her to carry out his or her functions – for example where a council member or employee seeks to take action to obtain a restraining order against a person using threatening behaviour to the council member or employee; or
- (c) where exceptional circumstances are involved – for example, where a person or organization is lessening the confidence of the community in the local government by publicly making adverse personal comments about council members or employees.

2.2 The *City/Town/Shire* will not approve, unless under exceptional circumstances, the payment of legal representation costs for a defamation action, or a negligence action, instituted by a council member or employee.

3. Application for payment

3.1 A council member or employee who seeks assistance under this policy is to make an application(s), in writing, to the council or the CEO.

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 council 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);
- (v) an estimated cost of the legal representation; and
- (vi) why it is in the interests of the *City/Town/Shire* for payment to be made.

3.3 The application 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.

3.4 As far as possible the application is to be made before commencement of the legal representation to which the application relates.

3.5 The application is to be accompanied by a signed written statement by the applicant 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 7 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.

3.6 In relation to clause 3.5(c), when a person is to be in receipt of such monies the person should sign a document which requires repayment of that money to the local government as may be required by the local government and the terms of the Policy.

3.7 An application is also to be accompanied by a report prepared by the CEO or where the CEO is the applicant by an appropriate employee.

4. Legal representation costs – Limit

4.1 The council in approving an application in accordance with this policy shall set a limit on the costs to be paid based on the estimated costs in the application.

4.2 A council 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,

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, including a security agreement, relating to the payment, and repayment, of legal representation costs.

- 5.3 In assessing an application, the council may have regard to any insurance benefits that may be available to the applicant under the *City's/Town's/Shire's* council members or employees 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 a council 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.
- 5.6 A determination under clause 5.5 may be made by the council only on the basis of, and consistent with, the findings of a court, tribunal or inquiry.
- 5.7 Where the council makes a determination under clause 5.5, the legal representation costs paid by the *City/Town/Shire* are to be repaid by the council member or employee in accordance with clause 7.

6. Delegation to Chief Executive Officer

- 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 maximum of \$10,000 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. Council may exercise any of its powers under this Policy, including its powers under clause 5.4.

7. Repayment of legal representation costs

- 7.1 A council member or employee whose legal representation costs 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 5.7;
 - (b) as much of those costs as are available to be paid by way of set-off – where the council 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 to it under this Policy.



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FURTHER INFORMATION

For more information about this and other guidelines, contact the Local Government Support and Development Branch of the Department of Local Government and Regional Development on:

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These guidelines are also available on the Department's website at www.dlgrd.wa.gov.au

ABOUT THE GUIDELINE SERIES

This document and others in the series are intended as a guide to good practice and should not be taken as a compliance requirement. The content is based on Departmental officers' knowledge, understanding, observation of, and appropriate consultation on contemporary good practice in local government. Guidelines may also involve the Department's views on the intent and interpretation of relevant legislation.

All guidelines are subject to review, amendment and re-publishing as required. Therefore, comments on any aspect of the guideline are welcome. Advice of methods of improvement in the area of the guideline topic that can be reported to other local governments will be especially beneficial.