

Council Policy – Legal Representation and Cost Indemnification

| | |
|------------------------------------|-------------------------------|
| Responsible Directorate | Corporate Services |
| Responsible Business Unit/s | Corporate Performance |
| Responsible Officer | Manager Corporate Performance |
| Affected Business Units | All |

Objective

This policy is designed to protect the interests of Elected Members and employees (including past members and former employees) where they become involved in civil legal proceedings because of their official functions. In most situations the local government may assist the individual in meeting reasonable expenses and any liabilities incurred in relation to those proceedings, which may include through the relevant insurance policy.

This policy does not apply to legal advice and representation that is obtained by the Shire of Serpentine Jarrahdale (the Shire) in the normal course of fulfilling the functions and exercising the powers of a local government.

Scope

This Policy applies to current and former Elected Members and employees, including full time, part time, and casual staff, and volunteers.

Policy

Introduction

Section 9.56 of the *Local Government Act 1995* (the Act) provides protection from actions of tort for anything a Councillor or employee has, in good faith, done in the performance or purported performance of a function under the Act or any other written law.

Section 3.1 of the Act provides that the general function of the local government is to provide for the good governance of person in its district. Section 6.7(2) provides that money held in the Municipal Fund may be applied towards the performance of the functions of the local government.

Therefore, the Shire's approval to pay legal representation costs incurred by an individual Elected Member or employee will rely on the determination that it is reasonably concluded that the expenditure provides for the good governance of the district, whether through use of the Shire's insurance policy or not.

Payment Criteria

There are four major criteria for determining whether the 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 relevant person, or 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 relevant person 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.

The Shire may not pay, either wholly or partially, for legal representation, or any other costs such as punitive damages, for any matter relating to:

- (a) a complaint or investigation regarding behavioural or code of conduct breaches, or any breach specified by the Act.
- (b) Proceedings before any tribunal, including the State Administrative Tribunal.
- (c) Criminal investigations or proceedings.

Examples of Legal Representation Costs that may be Approved

If the payment criteria listed above are satisfied, the Shire may approve the payment of legal representation costs in the following circumstances:

- (a) where proceedings are brought against a relevant person in connection with his or her functions (e.g.: an action for defamation or negligence arising out of a decision made or action taken by the relevant person); or
- (b) to enable proceedings to be commenced and/or maintained by a relevant person to permit his or her functions (e.g.: where a relevant person seeks to take action to obtain a restraining order against a person using threatening behaviour to the relevant person); or
- (c) where exceptional circumstances are involved (e.g.: where a person or organisation is lessening the confidence of the community in the local government by publicly making adverse personal comments about a relevant person).

Applications for Payment

A relevant person who seeks assistance under this policy is to make an application(s), in writing, for Council to consider. Applications can be submitted to the CEO. If the relevant person is the CEO, applications will be processed by the Director Corporate Services.

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

- (a) the matter for which legal representation is sought;
- (b) how the matter relates to the functions of the relevant person making the application;
- (c) the proposed lawyer (or law firm) who is to be asked to provide the legal representation;
- (d) the nature of legal representation to be sought (such as advice, representation in court, preparation of documents etc);
- (e) an estimated cost of the legal representation; and
- (f) why it is in the interest of the Shire for payment to be made.

The application is to contain a declaration by the applicant that they have acted in good faith, disclosed anything that might affect representation, and have not acted unlawfully or in a way that constitutes improper conduct in relation to the matter to which the application relates.

The application is to be made as far in advance as possible before commencement of the legal representation to which the application relates.

The application is to be accompanied by a signed written statement by the applicant that they:

- (a) have read and understood the terms of this policy; and
- (b) acknowledge that any approval of legal representation costs is conditional on the repayment provisions of this policy and any other conditions to which the approval is subject.

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.

The completed application and CEO report will then be submitted to Council for determination.

Legal Representation Costs – Limit

Unless otherwise determined by Council, the payment of legal representation costs in respect of a particular matter is not to exceed \$10,000. If the matter is accepted under the Shire's insurance policy, unless otherwise determined by Council, the amount to be paid is not to exceed the amount of the policy excess.

An Elected Member or employee may make a further application to Council in respect of the same matter.

Council's Powers

Upon assessing the application, the Council may:

- (a) refuse;
- (b) grant; or
- (c) grant, subject to conditions,

an application for payment of legal representation costs.

Conditions 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.

In assessing an application, Council may have regard to any insurance benefits that may be available to the applicant under the Shire's Council members 'or employees' insurance policy or its equivalent. All decisions to use the Shire's insurance for matters under this policy must be approved by Council.

Council may at any time revoke or vary an approval, or any conditions of approval, for the payment of legal representation costs.

Based on, and consistent with, the findings of a court, tribunal, or inquiry, Council may, 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.

Where the Council makes this determination, the legal representation costs paid by the Shire are to be repaid by the Elected Member or employee in accordance with this policy.

Chief Executive Officer

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 approval powers of the Council under this policy, to a maximum of \$10,000 in respect of each application.

An application approved by the CEO is to be submitted to the next ordinary meeting of Council. Council may exercise any of its powers under this policy, including its powers to revoke or vary an approval.

This clause shall not apply where the applicant is the CEO. The matter will instead be referred to Council at the earliest opportunity, including a special meeting.

Repayment of Legal Representation Costs

A relevant person whose legal representation costs have been paid by the Shire is to repay the Shire:

- (a) all or part of those costs, if a determination is made by Council that the person did not act in good faith, acted unlawfully, engaged in improper conduct, or has given false or misleading information.
- (b) as much of those costs as are available to be paid by way of set-off, where the person receives monies paid for costs, damages, or settlement

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

Definitions

Approved lawyer means:

- a) a 'person who is admitted to the legal profession' under the *Legal Profession Uniform Law Act 2022*
- b) from a law firm listed as a WALGA preferred supplier, if relevant, unless Council considers that this is not the appropriate – for example where there is or may be a conflict of interest or insufficient expertise
- c) approved in writing by Council or the Chief Executive Officer under delegated authority.

Good faith means a sincere belief or motive without any malice or desire to defraud others.

Elected Member or employee means a current or former Elected Member, employee, volunteer or member of a council committee of the Shire.

Legal proceedings may be civil, criminal or investigative.

Legal representation is the provision of legal services, to or on behalf of an Elected Member or employee, by an approved lawyer in respect of:

- a) A matter or matters arising from the performance of the functions of the Elected Member or employee
- b) Legal proceedings involving the Elected 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 include advice, representation or documentation that is provided by an approved lawyer.

Payment by the Shire of legal representation costs may be either by:

- a) a direct payment to the approved lawyer
- b) a reimbursement to the Elected Member or employee, or
- c) insurance (including payment of the policy excess).

Relevant person is an Elected Member or employee.

Related Documents

- Department of Local Government, Sport & Cultural Industries Operational Guideline No 14 Legal Representation for Council Members and Employees

Legislation / Local Law Requirements

- Local Government Act 1995*
- Legal Profession Uniform Law Application Act 2022*

Amendment Record

| Relevant Delegations | | | |
|----------------------|------------|-------------------|--|
| | | Date | Resolution Number |
| Council Adoption | | 27 November 2000 | C087/11/00 |
| Version | Date | Resolution Number | Amendment Details |
| 2 | 24/05/2004 | SM047/05/04 | |
| 3 | 15/12/2008 | CGAM050/12/08 | |
| 4 | 29/09/2015 | OCM187/09/15 | |
| 5 | 18/12/2017 | OCM179/12/17 | |
| 6 | 17/03/2025 | OCM068/03/25 | New template, minor updates and process clarification. Added references to insurance. |