

12.2 ADVERTISING OF AMENDED POLICY - LEGAL REPRESENTATION FOR COUNCIL MEMBERS AND EMPLOYEES (POLICY NO. 4.2.01)

Attachments: 1. **Legal Representation for Council Members and Employees Policy - (marked up)**

RECOMMENDATION

That Council APPROVES the proposed amendments to the Legal Representation for Council Members and Employees Policy, at Attachment 1, for the purpose of community consultation.

PURPOSE OF REPORT:

For Council to approve, for the purpose of community consultation, the proposed amendments to the [Legal Representation for Council Members and Employees Policy](#) as detailed at **Attachment 1**.

BACKGROUND:

At its 23 July 2002 meeting, Council adopted the Legal Representation for Council Members and Employees Policy (Policy).

In 2006, the Department of Local Government, Sport and Cultural Industries (DLGSC), then known as the Department of Local Government, published its [Local Government Operational Guideline – Legal Representation for Council Members and Employees](#) (Guidelines) and incorporated Model Policy.

The Guidelines and Model Policy were developed in response to an Inquiry into the City of Joondalup which criticised some Council Members for making uninformed and ill-advised decisions to pay personal legal expenses of the Chief Executive Officer (CEO).

At its 7 November 2006 meeting, Council amended its Policy to reflect the Model Policy in its entirety.

The City has previously sought legal advice with regard to its need to rely on the Policy to provide legal representation to its Employees. Legal advice identified that, at law, the City was obliged to indemnify Employees against liabilities, losses and expenses incurred as a result of performing their duties lawfully or even unlawfully, provided it was within the instruction to do so.

The requirement of provisions outlined in clause 1.3 of the [Policy Development and Review Policy](#) were presented to Council Members through the monthly Policy Paper in October 2022. No feedback was received.

DETAILS:

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 done in good faith, in the performance of a function under the Act or any other written law.

The Act further provides that the general function of a local government is to provide for good government of persons in its district and that money held in the municipal fund may be applied towards the performance of the functions and the exercise of powers conferred on the local government by the Act.

The Policy sets out the circumstances under which the City will contribute to legal fees for Council Members and Employees.

The findings of Administration's review are as follows:

Requirement for a documented Council position

A documented Council position is necessary to ensure that the pre-determined view is known to Council Members, Administration and the Community in advance of applications for funding being made.

It is noted in the Guidelines that local governments have a legislative duty of care to their Employees and an in principle duty of care to their Council Members to provide a safe working environment by adopting a policy that clearly outlines the circumstances under which the City will contribute to legal fees for Council Members and Employees.

Preliminaries and Objective

Administration is proposing minor amendments to the wording of the objective for simplicity. An introduction, purpose and scope have also been added for clarification.

There is no definition of 'good faith' in the Act or *Interpretation Act 1984*. Good Faith has been defined in the legal dictionary as *Honesty; a sincere intention to deal fairly with others* and in Wikipedia as a *sincere intention to be fair, open and honest, regardless of the outcome of interaction*. A definition for clarification has been added to the Policy.

Policy

Addition of paragraph to set out that this policy would apply in the instance that the matter is not otherwise covered by the City's Council Member and Employees Liability insurance.

Clause 3.1 – Application for Payment

Clause 3.1 of the Policy requires a Council Member or Employee to make an application, in writing to the Council or the CEO. In practice, Administration would need to prepare a report to Council to consider the application.

It is proposed that this clause is updated to reflect that all applications are to be submitted, in writing to the CEO, or where the CEO is the applicant to the Mayor.

Clause 3.5 – Conditional Approval

Administration has identified that, in its application, the Policy provides no guarantee for financial assistance to the applicant.

Clause 3.5 of the Policy requires the applicant to fill out a statutory declaration in which they agree to repay the cost under clause 7 if:

- a. They are determined under clause 5 to have not acted in reasonable or in good faith or have acted unlawfully or in any way that constituted improper conduct or have misled the Council about their application.

Legal advice, sought as a result of a previous application, recommended that the City amend its Policy to consider that the requirement for a statutory declaration is not mandatory and could form part of a conditional approval, if required.

Administration is recommending that clause 3.5 and 3.6 are deleted and any requirement to repay legal cost are to be assessed and determined on a case-by-case basis and included in the condition of approval noted in clause 5.1 (c) and clause 5.2.

At the Council Briefing 7 March 2023 considerations was requested in relation to the proposed deletion of clause 7. It was noted that repayment of legal representation cost, in particular instances where costs are awarded, may not be adequately captured under clause 5.3.

For clarification, Administration is recommending clause 7 remains with a minor amendment to clause 7a. This clause has been updated to note that repayment of legal representation costs is to be in accordance with any formal agreement conditioning the application.

Council determination of Employee applications

The existing policy requires all applications to be submitted to Council for approval. The City is obliged to indemnify Employees against liabilities, losses and expenses incurred as a result of performing their duties. In accordance with the Act Council Members have no direct authority over Employees with respect to the performance of their duties. The Act prescribes that the CEO is responsible for performance of Employees, determination of Employee applications (with the exception an application made by the CEO) should reside with the CEO.

Administration is proposing that the Policy is amended to authorise the CEO to determine all Employee applications (past and present) in accordance with the Council approved budget.

Condition 3.7 – Reports to Council

Clause 3.7 requires applications to be accompanied by a report to Council. As noted above Administration is proposing that the Policy is updated to reaffirm the CEO's authorisation to determine Employee applications.

Reports for Employee applications, with the exception of an application made by the CEO, will no longer require a report to Council. Administration is recommending that this clause is updated to note that an application made by Council Members is to be accompanied by a report prepared by the CEO or where the CEO is the applicant by an appropriate Senior Employee.

Condition 5 – Council's Powers

It is proposed that clause 5 is updated to authorise the CEO to refuse; grant; or grant subject to conditions; an application for payment of legal representation cost for Employees and the remaining clauses updated to reflect this authorisation accordingly.

CONSULTATION/ADVERTISING:

In accordance with the City's [Community and Stakeholder Engagement Policy](#), community consultation of all new and significantly amended policies must be provided for a period exceeding 21 days in the following ways:

- notice published on the City's website;
- notice posted to the City's social media;
- notice published in the local newspapers;
- notice exhibited on the notice board at the City's Administration and Library and Local History Centre; and
- letters distributed to relevant local businesses and community groups

Public notice of proposed amendments to the Policy will be provided from early April 2022.

LEGAL/POLICY:

Section 2.7(2)(b) of the *Local Government Act 1995* provides Council with the power to determine policies.

The City's [Policy Development and Review Policy](#) sets out the process for the development and review of the City's policy documents.

RISK MANAGEMENT IMPLICATIONS

Low: It is low risk for Council to undertake community consultation of the proposed amendments to the policy.

STRATEGIC IMPLICATIONS:

This is in keeping with the City's *Strategic Community Plan 2018-2028*:

Innovative and Accountable

*We are open and accountable to an engaged community.
Our community is aware of what we are doing and how we are meeting our goals.*

Legal Representation for Council Members and Employees Policy



Legislation / local law requirements	<i>Local Government Act 1995</i> <i>Legal Practice Act 2003</i>
Relevant delegations	Nil.
Related policies, procedures and supporting documentation	Local Government Operational Guideline - Legal Representation for Council Members and Employees

PRELIMINARY

INTRODUCTION

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.

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, Council can expend funds to provide legal representation for its members and employees, as long as it believes that the expenditure falls within the scope of the local government's function.

PURPOSE

To set out the circumstances under which the City will contribute to legal fees for council members and employees.

OBJECTIVE

~~This policy is designed to protect the interests of Council Members and Employees (including past members and former employees) where they become involved in legal proceedings because of their official functions. In these situations the City may assist the individual in meeting reasonable expenses and any liabilities incurred in relation to those proceedings.~~

~~This policy is necessary to ensure security, equity and consistency for Members and Employees to work for the good government of the district. This policy applies in that respect~~

To:

- protect the interests of council members and employees (including past members and former employees) where they become involved in legal proceedings as a result of their official functions;
and
- ensure security, equity and consistency for council members and employees to work for the good government of the district.

Legal Representation for Council Members and Employees Policy



SCOPE

This policy applies to the contribution of legal fees for council members and employees (including past members and former employees) where they become involved in civil legal proceedings in the course of their official functions.

POLICY PROVISIONS

DEFINITIONS

approved lawyer is to be

- a. a 'certified practitioner' under the *Legal Practice Act 2003*;
- b. from a law firm on the City's panel of legal service providers, if relevant, unless the Council or CEO 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.

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 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.

to act in good faith

To act 'in good faith' is to act honestly or sincerely, without an intention to deceive. This is also known as **acting bona fide**. A decision made in good faith is one where you genuinely believe it to be for the benefit of the company as a whole and not merely for your self interest.

Legal Representation for Council Members and Employees Policy



POLICY

In each case, the Council Member or Employee must refer the matter to the Local Government Insurance Scheme for assessment under the management liability insurance (elected members and employees liability) cover in respect of claims against them personally for any alleged wrongful acts arising out of their official duties. should the cover not provide the representation, the conditons of this policy apply.

1. Payment Criteria

There are four major criteria for determining whether the City 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 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 organisation 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 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.~~

3.1 All applications are to be submitted, in writing, to the CEO or where the CEO is the applicant to the Mayor

Legal Representation for Council Members and Employees Policy



- 3.2 The written application for payment of legal representation costs is to give details of:
- the matter for which legal representation is sought;
 - how that matter relates to the functions of the council member or employee making the application;
 - the lawyer (or law firm - if known) who is to be asked to provide the legal representation;
 - the nature of legal representation to be sought (such as advice, representation in court, preparation of a document etc);
 - an estimated cost of the legal representation; and
 - why it is in the interests of the City 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 Statutory Declaration by the applicant that he or she:~~
- ~~has read, and understands, the terms of this Policy;~~
 - ~~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~~
 - ~~undertakes to repay to the City 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 Statutory Declaration 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 made by a Council Member or the CEO is ~~also~~ to be accompanied by a report to Council prepared by the CEO or where the CEO is the applicant by an appropriate Senior Employee. The report will contain an assessment of the request, together with a recommendation.

4. Legal representation costs – Limit

- 4.1 The Council or CEO, 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 Determination

- 5.1 The Council may:

Legal Representation for Council Members and Employees Policy



- a. refuse;
- b. grant; or
- c. grant subject to conditions, an application for payment of legal representation costs made by Council Members or the CEO.

5.2 The CEO may:

- a. refuse;
- b. grant; or
- c. grant subject to conditions, an application for payment of legal representation costs made by Employees.

5.23 Conditions under clause 5.1 and 5.2 will include, but are not restricted to:

- a. a financial limit; and
- b. a requirement to enter into a formal agreement, including a security agreement, relating to the payment, and repayment, of legal representation costs.

5.34 In assessing an application, ~~the council may have~~ regard to any insurance benefits that may be available to the applicant under the City's Council Members or Employees insurance policy or its equivalent, shall be applied.

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

5.56 The Council or CEO may, subject to clause 5.67, 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 reasonably or 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.

5.67 A determination under clause 5.56 may be made ~~by the Council~~ only on the basis of, and consistent with, the findings of a court, tribunal or inquiry.

5.78 Where ~~the Council makes a~~ determination is made under clause 5.56;

- a. assistance will be immediately withdrawn; and
- b. the legal representation costs paid by the City are to be repaid by the Council Member or Employee in accordance with ~~clause 7~~ the conditions of approval.

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 or may result in increased risk exposure to the City, the CEO may exercise, on

Legal Representation for Council Members and Employees Policy



behalf of the Council, any of the powers of the Council under clause 5.1 in accordance with the City's Risk Management Policy.

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 5.45.

7. Repayment of legal representation costs

7.1 A Council 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 any formal agreement conditioning the application;~~
- 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 paid the legal representation costs.

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

OFFICE USE ONLY	
Responsible Officer	Executive Manager Corporate Strategy and Governance
Initial Council Adoption	23/07/2002
Previous Title	N/A

Legal Representation for Council Members and Employees Policy



Reviewed / Amended	Amended 07/11/2006 Reviewed 04/04/2018 (no amendments made)
Next Review Date	