

Legal Representation Costs Indemnification

Introduction

This policy is designed to protect the interests of Elected Member and Shire Officers (including past Members and former Shire Officers) where they become involved in legal proceedings due to their official functions.

s.9.56 of the *Local Government Act 1995* (the Act) provides protection from actions of tort for anything an Elected Member or Shire Officer has, in good faith, done in the performance or purported performance of a function under the Act or under any other written law.

s.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.

s.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 Members and Shire Officers, as long as it believes that the expenditure falls within the scope of the local government's function.

Objective

To provide transparency where Council makes a determination as to whether assistance will be given to Members or Shire Officers with legal costs and other liabilities.

The Shire's approval to pay legal representation costs incurred by an individual Councillor or Shire Officer will rely on the determination that it is reasonably concluded that the expenditure provides for the good governance of the district.

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

Scope

This policy applies to Council and the Shire; providing guidelines regarding any financial assistance that may be provided by Council or the Shire in making determinations as to whether assistance will be provided to Members and/or Shire Officers for legal representation, including costs and other liabilities.

This policy will:

- clarify what issues Council will offer financial assistance for; and
- ensure that all requests for financial assistance are treated equitably.

Definitions

Term	Definition
Act	<i>Local Government Act 1995.</i>

Term	Definition
Approved lawyer	<ol style="list-style-type: none"> 1. a 'certified practitioner' under the Professions Act 2008; 2. approved in writing by the Council or the CEO under delegated authority.
CEO	Chief Executive Officer
Council	The local government, responsible for making decisions in formal meetings held under the auspices of Part 5 of the <i>Local Government Act 1995</i> and under the <i>Shire's Standing Orders Local Law 2008</i> .
Executive Manager	<p>Means the Managers defined as Senior Employees that Council resolved (Res. No. OCM026/03/22) to designate in accordance with section 5.37 of the <i>Local Government Act 1995</i>:</p> <ul style="list-style-type: none"> • Manager Corporate and Community Services; • Manager Infrastructure and Assets; and • Manager Development and Regulation.
Legal proceedings	May be civil, criminal or investigative.
Legal representation	<p>the provision of legal services, to or on behalf of a Member or Shire Officer , by an approved lawyer that are in respect of:</p> <ol style="list-style-type: none"> 1. a matter or matters arising from the performance of the functions of the Member or Shire Officer ; and 2. legal proceedings involving the Member or Shire Officer that have been, or may be, commenced.
Legal representation costs	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.
Member	means a current or former Council Member in the Act; Elected Member; or Councillor. In respect to this policy it also means a non-elected member of a council committee.
Payment of Costs	Means payments by the Shire of legal representation costs either by a direct payment to the approved lawyer (or the relevant firm) or a reimbursement to the Member or Shire Officer.
Regulations	Local Government (Administration) Regulations 1996.
Shire	the Shire of Toodyay

Term	Definition
Shire Officer	means a current or former Employee of the Shire.
Shire President	means a mayor or president elected by the Council from amongst the councillors.

Policy Statement

Council shall ensure adequate resources are allocated annually in the Shire's Annual Budget to provide legal representation and costs indemnification to assist a Member or Shire Officer in meeting reasonable expenses and any liabilities incurred in relation to legal proceedings subject to the following:

1. Payment Criteria

There are four major criteria for Council determining whether the Shire will pay the legal representation costs of a Member or Shire Officer as follows:

- (i) the legal representation costs must relate to a matter that arises from the performance, by the Member or Shire Officer, of his or her functions;
- (ii) the legal representation cost must be in respect of legal proceedings that have been, or may be, commenced;
- (iii) in performing their functions, to which the legal representation relates, the Member or Shire Officer must have acted in good faith, and must not have acted unlawfully or in a way that constitutes improper conduct; and
- (iv) 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

If the criteria in Clause 1 of this Policy is satisfied the Shire may approve the payment of legal representation costs:

- (i) where proceedings are brought against a Member or Shire Officer 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 Member or Shire Officer; or
 - where a Member or Shire Officer seeks a restraining order against a person using threatening behaviour); or
 - where a decision of Council or a Shire Officer has aggrieved another person (e.g. refusing a development application); or
 - where the conduct of a Member or Shire Officer in carrying out his or her functions is considered detrimental to the person (e.g. defending defamation actions).
- (ii) to enable proceedings to be commenced and/or maintained by a Member or Shire Officer to permit them to carry out their functions. For example, where a Member

or Shire Officer seeks to take action to obtain a restraining order against a person using threatening behaviour to the Member or Shire Officer; or

- (iii) 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 Members or Shire Officers.

Council, nor the Shire, will approve the payment of legal representation costs for a defamation action; or a negligence action; instituted by a Member or Shire Officer, unless under exceptional circumstances.

3. Application for Payment

A Member or Shire Officer who seeks assistance under this policy is to make an application, in writing, to Council or the CEO.

3.1 Written Application

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 Member or Shire Officer 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, including (but not limited to): advice; representation in court; preparation of a document; et cetera;
- (v) an estimated cost of the legal representation; and
- (vi) why it is in the interests of the Shire for payment to be made.

A Member or Shire Officer requesting financial support for legal services, or any other person who might have a financial interest in the matter, should take care to ensure compliance with the financial interest provisions of the Act.

3.2 Declaration by Applicant

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.

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

3.3 Signed Written Statement

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

- (i) has read, and understands, the terms of this policy;
- (ii) acknowledges that any approval of legal representation costs is conditional on the repayment provisions of clause 7 of this policy and any other conditions to which the approval is subject; and

- (iii) undertakes to repay to the Shire any legal representation costs in accordance with the provisions of clause 7 of this policy.

3.4 Agreement

In relation to clause 3.3(iii), when a person is to be in receipt of such monies the person should sign a document which requires repayment of those monies to the local government as may be required by the local government and the terms of the policy.

3.5 Preparation of Council Report

An application is to be accompanied by a report prepared by the CEO or, where the CEO is the applicant, by an appropriate Executive Manager.

4. Legal representation costs – limit

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.

A Member or Shire Officer may make a further application to Council in respect of the same matter.

5. Council's powers

Council may:

- (i) refuse;
- (ii) grant; or
- (iii) grant subject to conditions,

an application for payment of legal representation costs.

The above 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.

5.1 Assessment of Application

In assessing an application, Council may have regard to any insurance benefits that may be available to the applicant under the Shire's Members or the Shire Officer's insurance policy or its equivalent.

5.2 Revoking or Varying an Approval

Council may at any time revoke or vary an approval, or any conditions of approval, for the payment of legal representation costs, subject to Part 15 'Revoking or Changing Decisions' of the *Shire of Toodyay Standing Orders Local Law 2008*.

5.3 Determination

Council may, subject to clause 5.4, determine that a Member or Shire Officer whose application for legal representation costs has been approved has, in respect of the matter for which legal representation costs were approved:

- (i) not acted in good faith, or has acted unlawfully or in a way that constitutes improper conduct;
- (ii) or given false or misleading information in respect of the application.

5.4 Conditions

A determination under clause 5.3 may be made by Council only on the basis of, and consistent with, the findings of a court, tribunal or inquiry.

5.5 Legal Representation Costs

Where the Council makes a determination under clause 5.3, the legal representation costs paid by the Shire are to be repaid by the Member or Shire Officer in accordance with clause 7.

6. Delegation to Chief Executive Officer

Where there is a need for the provision of urgent legal services before an application can be considered by Council; e.g. 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 Council, any of the powers of the Council under clause 5, 5.1 and 5.3, to a maximum of \$10,000 in respect of each application provided that the power to make such an authorisation has been delegated to the CEO in writing under section 5.42 of the Act.

An application approved by the CEO under clause 5 is to be submitted to the next Ordinary Council Meeting. Council may exercise any of its powers under this policy, including its powers under clause 5.2.

7. Repayment of legal representation costs

A Member or Shire Officer whose legal representation costs have been paid by the Shire is to repay the Shire:

- (i) all or part of those costs - in accordance with a determination by the council under clause 5.5;
- (ii) as much of those costs as are available to be paid by way of set-off - where the Member or Shire Officer receives monies paid for costs, damages, or settlement, in respect of the matter for which the Shire paid the legal representation costs.

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

Reference Information

- [Local Government Operational Guideline](#);
- [Local Government Payments and Gifts to Members](#) (GOV8);
- [Compliance and Enforcement Policy](#) (GOV1);
- [Execution of Documents Policy](#) (ADM22);
- [Council Delegates Roles and Responsibilities Policy](#) (GOV12); and
- [Risk Management](#) (ADM18) – containing the Risk Matrix tables.

Legislation

Local Government Act 1995

- s.2.7 Role of Council;
- s.5.99A. Allowances for council members in lieu of reimbursement of expenses;
- s.5.100A. Gifts to council members.

Local Government (Administration) Regulations 1996 (Part 8 local government payments and gifts to members)

- r.31. Expenses to be reimbursed (Act s. 5.98(2)(a) and (3));
- r.35. Training for council members (Act s. 5.126(1)).

Local Government (Financial Management) Regulations 1996

- r.5 CEO's duties as to financial management;
- r.12 Payments from municipal fund or trust fund, restrictions on making;
- r.13 Payments from municipal fund or trust fund by CEO, CEO's duties as to etc.

Associated documents

Expense Reimbursement Form.

Version control information

Version No.	Date Issued	Review position	Developed by	Approved by
V2	23/06/2020	Amended (CRN209/06/20)	Council	Council
V3	27/04/2022	Reviewed	Executive Services	Council

Document control information	
Document Theme	Governance
Document Category	Administration
Document Title`	Legal Representation Costs Indemnification
Document ID	ADM4
Document Owner (position title)	Chief Executive Officer
Author (position title)	Executive Services
Date of approval	27 April 2022 (CRN: OCM057/04/22)

Document control information	
Approving authority	Council
Access restrictions	Nil
Date Published	28 April 2022
Date of last review	27 April 2022
Date of next review	5 February 2025
Archived antecedent documents and previous versions	<p>Policy A.4 - 23 Nov 2000 (Review)</p> <p>Policy A.4 - 24 Nov 2005 OCM (Review)</p> <p>Policy A.4 - 23 June 2020 OCM (CRN 209/06/20)</p>