
CGP017 – Legal Advice and Representation

1. Intention

To provide guidance on situations where the potential for securing legal advice is being considered and that the legal advice is sought in a consistent manner; and to protect the interests of elected members and employees (including past members and former employees) where they become involved in legal proceedings as a result of performing their normal duties.

In most situations the Shire may assist the individual in meeting reasonable expenses and any liabilities incurred in relation to these proceedings.

2. Scope

This policy applies to Elected Members and employees of the Shire of Waroona where the following may apply:

1. Criteria for determining application for legal representation

There are four criteria for determining whether an application for the payment of the legal representation costs of an elected member or employee will be approved:

- (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.
- (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; 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

If the criteria above are satisfied, approval may be given for the payment of legal representation costs:

- (a) Where legal 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) To enable proceedings to be commenced and/or maintained by an elected member or employee to permit him or her to carry out his or her functions – for example where an elected member or employee seeks to take action to obtain a restraining order against a person using threatening behaviour to the elected 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 elected members or employees.

3. Definitions

'approved lawyer' means a 'certified practitioner' (as defined in the *Legal Practice Act 2003*) who is from a law firm on the Shire's panel of legal service providers, unless Council or the Chief Executive Officer considers that this is not appropriate – for example, where there is or may be a conflict of interest.

'Shire' means the Shire of Waroona.

'elected member' means a current elected member.

'employee' means a current employee of the Shire.

'improper conduct' means a breach of the standards of conduct that a reasonable person would expect of a person knowing their duties, powers and authority.

'legal proceedings' may be civil or criminal.

'legal representation' means the provision of legal services, to or on behalf of an elected member or employee, by an approved lawyer that is 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.

4. Statement

4.1 Legal Advice

The Shire of Waroona will from time to time need to seek legal advice on a matter. It is important that there is clarity about the many legislative duties and functions discharged on a daily basis by officers and that there is independent legal advice available to assist the organisation and Council to make robust decisions.

A central role of the Chief Executive Officer is to provide advice to Council and as such, it is solely the role of the Chief Executive Officer to commission legal advice on matters relating to the business of the Shire. The commission of legal advice follows the same procurement requirements as any other aspect of Council business. The Chief Executive Officer must approve the procurement of all legal advice sought by the Shire of Waroona, other than advice relating to the performance of the Chief Executive Officer and/or the relationship between the Chief Executive Officer and Council.

4.2 Legal Representation

It is policy to facilitate elected members and employees access to legal advice in such cases where enabled in legislation and where the matter falls within the scope and application of this policy as stated below.

The objective of this policy is to ensure that elected members and employees of the Shire are represented in legal action relating to their roles and functions subject to considerations set out below. Elected members and employees of the Shire performing their statutory roles and functions, may occasionally in the course of their duties, be exposed to legal action initiated by third parties.

In these circumstances elected members and employees may require legal advice and/or representation and should be able to expect their local government will provide financial assistance to meet the cost of the advice or representation. Accordingly, it is appropriate and prudent for the Shire to be in a position to assist members and employees by adopting a policy to fund or partly fund the cost of providing legal services in appropriate circumstances.

5. Application

An application by an elected member, or the Chief Executive Officer, must be made in writing to Council which may approve or decline the application.

An application by an employee must be made in writing to the Chief Executive Officer who may approve or decline the application.

The application must give details of:

- (a) The matter for which legal representation is sought.
- (b) How that matter relates to the functions of the elected member or employee making the application.
- (c) The nature of the legal representation being sought (such as advice, representation in court, preparation of documents etc).
- (d) The lawyer (or law firm) who is to be requested to provide the legal representation.
- (e) An estimate of the cost of the legal representation; and
- (f) Why it is in the interests of the Shire for payment to be made.

The application must 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 proceedings to which the application relates.

The application must be accompanied by a statement signed 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 and any other conditions to which the approval is subject; and
- (c) Undertakes to repay to the Shire any legal representation costs in accordance with this policy.

A person who receives payment of legal representation costs shall sign a document acknowledging that repayment may be required by the Shire under the terms of this policy.

An application must be accompanied by a report prepared by the Chief Executive Officer or where the Chief Executive Officer is the applicant by an appropriate employee nominated by the President.

6. Assessing the Application

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

When approving an application the Council or Chief Executive Officer shall set a limit on the amount of costs to be paid, based on the nature of the matter and on the estimate of costs in the application.

An elected member or employee may make a further application to Council or Chief Executive Officer in respect of the same matter.

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

Council or the Chief Executive Officer may determine, after an application has been approved, that an elected member or employee:

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

A determination may be made by Council or the Chief Executive Officer on the basis of and consistent with the findings of any court of competent jurisdiction, the State Administrative Tribunal or of an inquiry conducted pursuant to Part 8 of the *Local Government Act 1995*. Where a determination is made, the legal representation costs paid by the Shire are to be repaid by the elected member or employee.

7. Repayment of Legal Representation Costs

An elected member or employee whose legal representation costs have been paid by the Shire is to repay the Shire:

- (a) All or part of those costs – in accordance with a determination by Council or the Chief Executive Officer; 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; and
 - Damages, or settlement, in respect of the matter for which the Shire paid the legal representation costs.

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

8. Legislative and Strategic Context

Section 9.56 of the *Local Government Act 1995* (the Act) provides protection from actions of tort for anything an elected 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 elected members or employees if they believe that the elected 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 a local government can expend funds to provide legal representation for elected members and employees as long as it believes that the expenditure falls within the scope of the local government's function.

9. Review

This policy is to be reviewed as required.

10. Associated Documents

Other documents that have an association to this policy and that may be useful reference material are:

- Department of Local Government, Sport and Cultural Industries: Operational Guidelines No.14 – Legal Representation for Council Members and Employees

Division	Corporate & Governance				
Policy Number	CGP017				
Contact Officer	Chief Executive Officer				
Related Legislation	Legal Practice Act 2003 Local Government Act 1995				
Related Shire Documents	CG17 – Legal Representation Application				
Risk Rating	Medium	Review Frequency	As required	Next Review	When required
Date Adopted	22/06/2021				OCM21/06/071

Amendments		
Date	Details of Amendment	Reference
Previous Policies		
CORP016 – Legal Action to Defend Councillors and Staff CORP043 – Commissioning of Legal Advice 1.29 – Legal Action to Defend Councillors and Staff		