

Shire of Mundaring

POLICY

PROVISION OF FINANCIAL ASSISTANCE FOR LEGAL SERVICES FOR ELECTED MEMBERS AND EMPLOYEES

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PURPOSE

This Policy is designed to set out:

1. the circumstances in which the Shire will, as a general rule, provide financial assistance to elected members and employees who require legal services in the course of or arising out of the performance of their official functions; and
2. the procedure for making and dealing with applications.

In each case it will be necessary to determine in the final analysis whether financial assistance is justified for the good governance of the district.

BACKGROUND

Elected members or employees of the Shire from time to time may require legal services in connection with any matter impacting on their conduct or the performance of their functions as elected members or employees.

Questions may arise from time to time as to whether, and the extent to which, the Shire should provide financial assistance to secure legal services, and this policy is intended to facilitate decision-making on those questions.

As a general rule, financial assistance will only be provided to an elected member or employee for a matter which arises out of or in the course of their conduct, or the performance of their functions, as elected members or employees.

It is intended that financial assistance will not be provided to an elected member or employee who has acted unlawfully, dishonestly, improperly, or otherwise in bad faith.

Generally, financial assistance may be provided to former elected members or employees, or may continue to be provided for elected members or employees after

they cease their membership or employment, where that can manifestly be seen to be justified by the interest of good government of the district.

The level of financial assistance provided is to be assessed in all cases against an evaluation of the extent to which it is justified in the interest of the good government of the district.

POLICY

1. Definitions

In this Policy:

“**Act**” means the *Local Government Act 1995*;

“**CEO**” means the Chief Executive Officer of the Shire;

“**department inquiry**” means an inquiry initiated under section 8.3 of the Act;

“**district**” means the local government district of the Shire;

“**employee**” means an employee of the Shire;

“**financial assistance**” means the provision by the Shire of money to pay the whole or part of the cost of legal services, or a guarantee of or indemnity for the payment of such cost or part;

“**improperly**” in this policy describes conduct which would be appropriate to be reported to the Corruption and Crime Commission as corruption or improper conduct;

“**inquiry**” means a department inquiry or a panel inquiry under Part 8 of the Act;

“**legal services**” means the provision of legal advice on any matter, or legal advice and legal representation in connection with court proceedings, or in connection with any other investigation, inquiry, hearing or adjudication, including but without limiting the generality of the foregoing an inquiry under Part 8 of the Act;

“**elected member**” means a member of the Council of the Shire including a Commissioner appointed under Part 8 of the Act;

“**panel inquiry**” means an Inquiry initiated under section 8.16 of the Act;

“**Shire President**” means the President of the Shire;

“**Shire**” means the Shire of Mundaring.

2. Eligible Persons

A person is eligible to make application for financial assistance under this Policy if that person is an elected member or an employee.

3. Proceedings in respect of which financial assistance may be provided

Proceedings in respect of which financial assistance may be provided include:

- 3.1 Proceedings brought by any elected member or employee to enable them to undertake or continue to undertake the duties and responsibilities associated with their office. An example is where an elected member or employee seeks a restraining order against a person using threatening behaviour.
- 3.2 Proceedings brought by any elected member or employee in respect of defamation against them PROVIDED THAT legal advice obtained by the Shire supports such action as being capable of being regarded as appropriate for the good government of the district to ensure elected members and employees are not deflected from the performance of their duties by unreasonable interference. Such proceedings may involve:
 - (a) seeking an injunction to prevent further defamation of a specific elected member or employee, the intention being to seek the removal of a distraction or impediment to the performance by the elected member or employee of their functions as such; or
 - (b) making a claim for damages:
 - (i) additional to an injunction, if it is determined or appears likely that an injunction has failed or will fail to prevent further defamation of the affected member or employee; or
 - (ii) as an alternative to an injunction if damages is the more appropriate remedy or in the event that a Court declines to grant an injunction on grounds that are not directly related to the merits of the proposed action.
- 3.3 Proceedings brought against one or more elected members or employees in the performance of their functions as such. For example, this could be in relation to a decision of the Council or an employee who aggrieves another person (e.g. refusing a development application).
- 3.4 In, or in connection with, an inquiry or other official proceeding or investigation where, in the opinion of the Council, representation of elected members or employees is appropriate or justified.

4. Legal Service Provider

- 4.1 Legal services provided under this policy are to be provided by a lawyer or a firm of lawyers nominated by the Chief Executive Officer (CEO).
- 4.2 In circumstances where the CEO has applied for financial assistance, the Council, or in the case of urgent applications, the Shire President, will nominate the lawyer or firm of lawyers to provide the legal services.
- 4.3 The CEO or the Council, as the case requires, may entertain an application by a elected member or employee for financial assistance for legal services provided by a lawyer other than a lawyer nominated by the CEO or the Council, as the case may be, provided that clear justification is given. An

example of a justification that may be adequate is where there is a perceived conflict of interest on the part of a nominated lawyer.

5. Form of Application

An application under this policy should:

- (a) be in writing;
- (b) provide full details of the nature and extent of the legal services anticipated to be required and when they are required;
- (c) detail how the matter for which the legal services are required arises out of the conduct or performance of functions of the applicant as a member or employee;
- (d) explain how it might be said that the provision of financial assistance would be justified in the interest of the good government of the district;
- (e) provide, in the event that the application is not made in advance, details of the services previously provided and the explanation for there being no application in advance;
- (f) indicate if the applicant considers that the application is urgent and the applicant's reasons for that view;
- (g) contain a declaration by the applicant that:
 - (i) the applicant has read this policy and accepts its terms (including, without limiting the generality of the foregoing, the terms as to repayment in clause 11); and
 - (ii) the applicant in relation to the matter in respect of which the legal services are required did not act unlawfully, dishonestly, improperly or otherwise in bad faith.

An application when presented to the Council is to be accompanied by a report and recommendation prepared through the office of the CEO in response to the application. An application by the CEO shall be reported to the Council by the Shire President.

6. Who Determines an Application

- 6.1 The CEO may determine an application seeking financial assistance not exceeding, or reasonably anticipated as not likely to exceed \$3,000.00.
- 6.2 Where the provision of legal services must occur as a matter of urgency prior to the earliest opportunity for an application to be considered by the Council, the CEO, and in the case of an application by the CEO, the Shire President, may authorise financial assistance up to the value of \$5,000.00, even if that is not anticipated to be the full extent of the financial assistance ultimately required. In any such case the CEO, or the Shire President, as the case may

be, shall present a report to the next available meeting of the Council detailing the application and outlining the circumstances that required the application to be dealt with as a matter of urgency.

- 6.3 Subject to clause 6.2, all applications seeking financial assistance exceeding, or reasonably anticipated as likely to exceed \$3,000.00 in total, are to be determined by the Council.
- 6.4 Notwithstanding the preceding provisions, the CEO may refer any application to the Council for determination.
- 6.5 Subject to clause 6.2, any application by the CEO for financial assistance on his own behalf is to be dealt with by the Council.
- 6.6 An application for financial assistance in respect of proceedings referred to in clause 3.2 is not to be dealt with by the CEO on an urgent application - any application for financial assistance in respect of proceedings referred to in clause 3.2 is to be determined by the Council.

7. Formal Agreement to be Executed

- 7.1 A person to whom financial assistance is to be provided, whether by the decision of the CEO or the Council, shall be required to execute a formal agreement with the Shire, either in a standard form provided by the Shire, or prepared for the occasion by the Shire's solicitors, setting out the terms and conditions upon which the assistance is offered.
- 7.2 In ordinary circumstances the applicant will be required to execute the agreement prior to any financial assistance being provided.
- 7.3 In the case of an application for urgent financial assistance, the CEO, or in the case of an application by the CEO, the Shire President, may accept a written undertaking by the applicant to execute a formal agreement as contemplated by this Policy, as soon as it is presented for execution.

8. Preconditions to the Provision of Financial Assistance

Financial assistance will only be provided:

- 8.1 In proceedings to be brought by any member or employee where the CEO or the Council, as the case may be, forms the opinion that the action proposed to be taken is reasonably necessary to enable the elected member or employee to continue to perform their functions without unreasonable obstruction, impediment or discouragement.
- 8.2 In the case of any proceedings against a elected member or employee, where legal action has been taken or is threatened or seems likely to be taken, in relation to conduct or circumstances arising out of or in the course of the performance of the functions of the elected member or employee.
- 8.3 In the case of an inquiry where:

- (a) prior to the final report on the outcome of the inquiry, an adverse allegation is made against the elected member or employee, or the inquiry or any officer assisting indicates that an adverse finding against the member or employee is possible;
- (b) where conduct of the elected member or employee is subject to inquiry and/or report in the terms of reference of the inquiry, or the elected member or employee receives a summons or subpoena from the inquiry requiring him/her to give evidence and/or produce documents;
- (c) conduct of the elected member or employee in the performance of their functions as such is under consideration; and
- (d) the legal services are required prior to the conclusion of the inquiry.

8.4 In any case, financial assistance will only be provided where no indemnity for legal services is provided for under a policy of insurance taken out by the elected member or employee, or by the Shire, or to the extent that full cover is not provided under such policy of insurance.

9. No Pledging of the Shire's Credit

Nothing in this policy is intended to represent that any person has authority to pledge the Shire's credit or otherwise commit the Shire to any liability to legal expenses whatsoever.

10. CEO May Continue to Seek Legal Advice

Nothing in this policy derogates from the authority of the CEO or other employees to obtain legal services concerning the business and affairs of the Shire from the Shire's solicitors.

11. Repayment of Financial Assistance

11.1 It is a condition of the provision of financial assistance under this Policy, and it shall be a condition of the formal agreement referred to in clause 7, that:

- (a) the provision of financial assistance shall be at an end; and
- (b) any financial assistance already paid by the Shire shall be repaid by the elected member or employee,

in the event that:
 - (c) a finding is made in the report of an inquiry or in court proceedings that the member or employee has acted unlawfully, dishonestly, improperly, or otherwise in bad faith, in circumstances that are fundamental to the inquiry or the court proceedings in respect of which the financial assistance was sought;
 - (d) the Council determines on legal advice that the member or employee has acted unlawfully, dishonestly, improperly, or otherwise in bad faith

in circumstances that are fundamental to the proceedings in respect of which financial assistance was obtained; or

- (e) where information provided to the CEO or to the Council in the application is materially false or misleading.

11.2 Elected members or employees are not to personally benefit financially from proceedings to the extent that they are financed by the Shire. Damages or costs awarded to the elected member or employee in excess of any expenses incurred separately by the elected member or employee should be dealt with in the following order:

- (a) in reimbursement of any expenses paid or payable personally by the elected member or employee;
- (b) in reimbursement of the financial contribution of the Shire which reimbursement may be repaid to the ordinary funds of the Shire; and
- (c) any excess should be held by the Shire to be used for a charitable purpose within the district.

The reason for the provisions in this clause is not that the Shire should benefit financially from legal proceedings taken by or against a elected member or employee, but rather to ensure that financial assistance will only be provided by the Shire in circumstances where it can be demonstrated manifestly that the purpose for the Shire providing financial assistance is to act in the interest of good government of the Shire's district by ensuring that elected members and employees are not deflected or discouraged from the performance of their official functions by their inability to finance appropriate legal services.

11.3 Where financial assistance is withdrawn, the elected member or employee who obtained the financial assistance is required to repay any moneys already provided.

12. Recovery

An elected member or employee applying for financial assistance under this Policy must agree under clause 7 that:

- (a) the Shire may take action to recover any financial assistance required to be repaid under clause 11;
- (b) the moneys to be repaid shall constitute a debt due by the elected member or employee to the Shire and may be recovered in a court of competent civil jurisdiction; and
- (c) the Shire is entitled additionally to deduct the amount of any outstanding financial assistance from any allowance or salary payable by the Shire to the elected member or employee provided that the Shire is not to deduct more than 5% per week of an employee's weekly salary.

The agreement to be prepared under clause 7 should make provision for such repayment and recovery.