

Title	Access to Legal Services for Elected Members and Employees
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Policy Type

Council

Policy Purpose

The local government environment is highly regulated and from time to time, it can be complex. 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 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.

Usually, seeking Legal Services would be facilitated by the Executive Governance and Strategy in the course of their administrative role and this Policy does not apply to Legal Services obtained by the City of Cockburn (the **City**) in relation to the day-to-day management of the City's affairs.

However, there may be occasion when individual Elected Members or Employees require Legal Services arising from the course of their lawful functions and duties. The City is committed to protecting the interests of Elected Members and Employees and the objective of this Policy is to provide a framework for the:

- (1) provision of financial assistance by the City to an Elected Member or Employee for Legal Services. The Policy principle is that an Elected Member or Employee including the CEO, should not incur legal expenses for Legal Services arising because of performing and discharging their official functions and duties; and
- (2) process for obtaining legal advice where it has been declined by the Executive Governance and Strategy.

Policy Statement

Where an Elected Member or Employee requires Legal Services arising from carrying out their lawful functions and duties, the City may assist them in meeting reasonable legal fees and expenses arising in relation to those Legal Services.

In each case it will be necessary to determine whether assistance with legal fees and expenses are justified for the good government of persons in the City's district. This Policy seeks to provide the parameters in which an Elected Member or Employee can seek Legal Services where the City will meet the reasonable costs arising from those Legal Services.

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The City **will not** provide financial assistance to an Elected Member or Employee with Legal Services in relation to:

- (1) Personal matters outside the scope of their role as an Elected Member or Employee; or
- (2) Criminal matters; or
- (3) Responding to or defending Legal Proceedings alleging breaches of their obligations under the Code of Conduct, the Act, Health and Safety Legislation or the *Fair Work Act 2009* and any relevant subsidiary legislation; or
- (4) The initiation of defamation proceedings by an Elected Member or Employee without approval of the Executive Governance and Strategy, in consultation with the CEO and Mayor; or
- (5) A complaint of serious or minor misconduct under the *Corruption, Crime and Misconduct Act 2003*.

For the avoidance of doubt, the exclusion in Clause (2) (iii) does not apply where the conduct which led to the allegation of a breach, was in the course of the relevant Elected Member or Employee carrying out in good faith, their lawful functions and duties.

(1) Criteria

1. The City may provide financial assistance for Legal Services of an Elected Member or Employee based on the following criteria:
 - i. the requirement for Legal Services arises from and assists the performance and/or discharge by a Member or Employee of their lawful functions and duties; or
 - ii. arises from an individual conflict of interest; or
 - iii. the Legal Services' costs in respect of Legal Proceedings must be for Legal Proceedings that have been, or may be, commenced; or
 - iv. the Elected Member or Employee must have acted reasonably, in good faith, and in accordance with the requirements of the Code of Conduct, Act, any relevant subsidiary legislation, Health and Safety Legislation, FW Act and other written laws applicable to the Elected Member or Employee; and
 - v. any monies that the Elected Member or Employee is paid by way of costs, damages, or settlement, if successful in Legal Proceedings in respect of a matter for which the City has covered the costs of Legal Services, the City will require the Elected Member or Employee to reimburse the City for the costs for the Legal Services incurred by the City.
2. The above criteria are indicative only and do not preclude matters outside these criteria being referred to Council for consideration.

(2) Types of costs that may be approved

1. Without limitation, the City may provide financial assistance for the following types of Legal Services:

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- i. If not previously obtained, legal advice required by an Elected Member or Employee to assist the Elected Member or Employee in performing or discharging their official functions and duties; or
 - ii. Legal Proceedings brought by Elected Members and Employees to enable them to carry out their functions under the Act and subsidiary legislation (e.g. where a Member or Employee seeks a banning order or a misconduct or violence restraining order against a person who has used threatening or inappropriate language or behaviour); or
 - iii. Legal Proceedings brought against Elected Members or Employees in their personal capacity but by reason of a decision made either by Council or its delegate and which has caused an aggrieved person to commence legal action (e.g. refusing a development application); or
 - iv. Legal Proceedings brought against Elected Members or Employees where their conduct in carrying out their function is considered detrimental to a third party (e.g. defending defamation actions); or
 - v. Statutory or other inquiries where representation or attendance of an Elected Member or employee is either compulsory or justified; or
 - vi. Attendance at Legal Proceedings as a witness in circumstances like those described above.
 - vii. Standards Panel and State Administrative Tribunal (SAT) appeals application fees.
2. Notwithstanding the above Clause (2)(iv), the City in its absolute discretion, may provide access to Legal Services and/or reimburse legal fees for Legal Proceedings taken by Elected Members or Employees for substantial, unwarranted and ongoing comments or criticisms levelled at their conduct in their respective roles. Such Legal Proceedings may include action in defamation and/or steps taken to stop bullying.

Examples include:

- i. Where a person or organisation is potentially lessening the confidence of the community in the City by publicly making adverse personal comments about Elected Members or Employees; or
- ii. Where the adverse personal comments by a person or organisation about Elected Members or Employees are resulting in an unsafe workplace.

(3) Application for Legal Services and Payment

1. An Elected Member or Employee is to make a written application requesting Legal Services to the Executive Governance and Strategy who will make the determination in consultation with the CEO and Mayor.
2. If a request is to be made, it is to be lodged with the Executive Governance and Strategy as soon as possible and it must give details of:
 - i. the matter for which Legal Services are sought.
 - ii. how the matter relates to the functions of the Elected Member or Employee making the application.
 - iii. the nature of the Legal Services sought (e.g., advice, preparation of a document or Legal Proceedings); and

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- iv. why it is in the interests of the City for the Legal Services to be obtained and why the City should pay for the Legal Services.
- 3. If the Legal Services are instigated prior to approval being obtained from the Executive Governance and Strategy, the City will require the Elected Member or Employee to provide to the City copies of all documents created prior to the Executive Governance and Strategy's approval including any legal advice obtained. In the case of Elected Members, approval will be required by Council for the reimbursement of expenses incurred without the Executive Governance and Strategy's prior approval.
- 3. The City will determine the law firm to whom the Legal Services are to be directed and will manage the instructions to that law firm and retain ownership of any legal advice provided.
- 4. Where the legal advice obtained relates to an individual Elected Member or Employee, the advice will not be distributed to all Elected Members to maintain legal professional privilege over that advice. Where the legal advice pertains to a matter before Council it will be provided in confidence to Elected Members or if it contains information that the Executive Governance and Strategy considers is highly sensitive, the advice will be made available for Elected Members to view at the City's office.
- 5. The City will not fund 'forum shopping' for further Legal Services in the event the Elected Member or Employee does not accept or agree with the legal advice provided, including legal advice previously sought on the same subject matter.

(4) Extent of Executive Governance and Strategy's Authority

- 1. The Executive Governance and Strategy is to receive, assess and decide any requests for financial assistance for Legal Services by an Elected Member or Employee which may include a cap on the financial assistance to be provided and will make the determination in consultation with the CEO and Mayor.
- 2. Financial assistance may include reimbursing legal costs, or SAT appeal lodgement fees incurred by an Elected Member or Employee or taking action on their behalf.
- 3. The payment of Legal Services' costs to an Elected Member or Employee, in respect of each application, is not to exceed \$25,000 without the approval of Council.
- 4. When considering the request for Legal Services, the Executive Governance and Strategy at their discretion, may consider the following:
 - i. whether alternate actions/means are available to resolve the matter.
 - ii. whether prior legal advice has been received on the matter.
 - iii. the seriousness of the matter; and
 - iv. any history relevant to the matter.

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5. In the event an Elected Member's request for financial assistance to obtain Legal Services is declined by the Executive Governance and Strategy, the Elected Member may take the request to Council in the form of a notice of motion for it to determine the request for Legal Services and financial payment by the City for those services.
6. Where there is a conflict in the application, the CEO replaces Executive Governance and Strategy, Executive Corporate Affairs replaces the CEO, and the Deputy Mayor replaces the Mayor.
7. The Executive Governance and Strategy is to report all Legal Services obtained by Elected Members and Employees including details of the action and payments made under this Policy by confidential memo, or email (also to be uploaded on the Hub) at as soon as practical, or within a month of the expenditure.

(5) Insured Risk

1. In assessing an application, the Executive Governance and Strategy is to have regard to whether the claim is an insured risk and must be first referred to the City's insurer.
2. It will be at the Executive Governance and Strategy's discretion as to whether to take any action to either grant or decline financial assistance until the matter has been reviewed by the City's insurer.

(6) Repayment of Cost for Legal Services

Assistance to an Elected Member or an Employee will be withdrawn, and that Elected Member or Employee will be required to repay any costs for Legal Services incurred by the City where the Council determines, upon legal advice, that the Elected Member or Employee has:

- i. not acted reasonably, in good faith, and in accordance with the Code of Conduct, the Act, any relevant subsidiary legislation, Health and Safety Legislation, the Fair Work Act and other applicable written laws; and/or
- ii. given false or misleading information in respect of the application for financial assistance from the City.

DEFINED TERMS

Act means the *Local Government Act 1995 (WA)* as amended from time to time.

Administration Regulations means the *Local Government (Administration) Regulations 1996 (WA)*.

CEO means the Chief Executive Officer of the City of Cockburn.

City means the City of Cockburn.

Code of Conduct means the City's code of conduct as amended from time to time.

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Elected Member means a current or former elected member of the City of Cockburn.

Employee means a current or former employee of the City of Cockburn.

FW Act means the *Fair Work Act 2009* (Cth) as amended from time to time.

Legal Proceedings means civil, criminal, or investigative proceedings brought in a court, tribunal, or authorised body within the jurisdiction of Western Australia.

Legal Services includes advice, required attendance at Legal Proceedings or inquiries, Legal Proceedings representation or documentation provided to an Elected Member or Employee, the cost of which may or has been covered by the City of Cockburn.

Policy means POL-C-044 Access to Legal Services for Elected Members and Employees.

Rules of Conduct means the *Local Government (Rules of Conduct) Regulations 2007* (WA) as amended from time to time.

Subsidiary legislation means any subsidiary legislation made under the Act and as amended from time to time, including but not limited to the Rules of Conduct and the Administration Regulations.

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