



City of
Norwood
Payneham
& St Peters

NAME OF POLICY: Elected Member Access to Legal Advice

POLICY MANUAL: Governance

BACKGROUND

The performance or discharge of official functions and duties of Elected Members, includes leadership in representing the interests of the community and delivering on the vision and strategic direction of the Council.

Section 59 of the *Local Government Act 1999* (the Act), sets out the role of Elected Members, both as a member of the governing body of the Council involved in decision-making and as an elected representative interacting between the Council and the community.

The role of Elected Members is, therefore, both demanding and complex, requiring the identification of community needs, setting objectives to meet those needs, establishing priorities between competing demands and allocating resources. It is vital that Elected Members are provided with support and assistance in the performance/discharge of their functions and duties.

As a general rule, any legal advice obtained through the use of Council resources will occur by or through the Chief Executive Officer. This Policy, consistent with the intent of Section 78A of the Act, recognises and provides for circumstances in which an Elected Member may obtain legal advice at the expense of the Council, to assist in the performance or discharge of official functions and duties, in relation to decision-making responsibilities at Council meetings. The Council recognises that there will be occasions when an Elected Member requires legal advice related to their role, for example, to determine if he/she has a conflict of interest in a matter before the Council, as prescribed by the Act, other than by proceeding through the Chief Executive Officer or a delegate of the Chief Executive Officer.

Although the Chief Executive Officer (and other Council staff) will have a working knowledge of these matters, legal considerations may nevertheless arise, which require independent expert legal advice.

This Policy incorporates the process to provide for and to support Elected Members accessing legal advice in these circumstances.

KEY PRINCIPLES

The City of Norwood Payneham & St Peters is committed to providing Elected Members with assistance and training to ensure they have the requisite skills and knowledge to perform their role, including the provision of legal advice relevant to their role where this is required.

As the provision of legal advice may be confidential and subject to legal professional privilege, where a copy of legal advice obtained under this Policy is provided, in accordance with this Policy, to other Elected Members, it will be noted by the Chief Executive Officer or the General Manager, Governance & Community Affairs, as to its status and the protections that apply to it, which obligations must be observed by all Elected Members who receive a copy of the legal advice.

POLICY

Obtaining Legal Advice – Elected Members

Section 78A of the Act provides for Elected Members to obtain legal advice in certain circumstances, through the establishment of a 'scheme' under regulations. Such a scheme is directly related to the performance or discharge of official functions and duties and may be subject to limitations and other conditions, including conditions of approval.

At the date of the adoption of this Policy, regulations have not established a scheme (as set out in Section 78(A)(1) of the Act). Therefore, this discretionary Policy, is to support requests for access to legal advice by an Elected Member to assist in the performance/discharge of functions and duties and seeks to reflect the expectations of the public policy intent of the Act.

Accordingly, this Policy has been prepared on the basis that an Elected Member may only obtain legal advice at the expense of the Council to assist the Elected Member in performing or discharging his/her official functions and duties. The Council will not provide access to legal advice or pay for the costs of legal advice sourced by individual Elected Members, purely for private matters, including, for instance, in relation to the proposed initiation of defamation proceedings or other civil action by an Elected Member.

Whilst budgeted Council funds will be identified and used to support the operation of this Policy, the Council is unable to delegate the power to any individual Elected Member to expend Council funds as a matter of course.

This Policy supports Elected Members in seeking legal advice (not representation) in the following matters:

- a Code of Conduct matter or investigation by a relevant authority or being undertaken within the Council's procedure for dealing with such matters;
- a Conflict of Interest matter that may affect the individual Elected Member;
- the performance and/or discharge of official functions and duties prescribed within the Act; *and/or*
- matters relating to a potential civil liability claim, in consideration of Section 39 of the Act which provides as follows:
 - (1) *No civil liability attaches to a member of a council for an honest act or omission in the exercise, performance or discharge, or purported exercise, performance or discharge, of the member's or council's powers, functions or duties under this or other Acts.*
 - (2) *A liability that would, but for this section, attach to a member of a council attaches instead to the council.*

An Elected Member may seek specific approval from the Council for any legal advice sought or obtained outside of the terms of this Policy, at the discretion of and upon application to, the Council.

All requests for legal advice under this Policy, must be directed to and will be coordinated by, the General Manager, Governance & Community Affairs. Elected Members must not directly contact legal service providers to seek advice under this Policy without, firstly, notifying and obtaining the approval of the General Manager, Governance & Community Affairs.

Any advice obtained by Elected Members that, in accordance with this Policy, is funded by the Council, is legal advice pertaining to the performance/discharge of functions of office of the Elected Member, it is legal advice to the Council and is subject to the official record requirements of the *State Records Act 1987*. Therefore, it is a condition of this Policy that, as public funds have been or are intended to be relied upon to fund the advice, that a copy of the legal advice must be provided to the General Manager, Governance & Community Affairs and registered to the Council's Corporate Records Management system.

A copy of the advice may also be provided to the Chief Executive Officer, either by the Elected Member who has obtained the advice or by the General Manager, Governance & Community Affairs. Depending on the nature of the legal advice and if, in the opinion of the Chief Executive Officer and/or the General Manager, Governance & Community Affairs, it is relevant to the operations of the Council, a copy may also be provided (on a confidential basis) to other Elected Members.

Whilst it will be in only limited circumstances that legal advice relating to an individual (personal) conflict of interest matter will be disclosed further, this will be at the discretion of the General Manager, Governance & Community Affairs, after consultation with the Elected Member, on the basis that the advice may be or have some relevance to or for other Elected Members.

Obtaining Legal Advice - Mayor

Section 58 of the Act, sets out the role of the Mayor (Principal Member) as follows:

58 - Specific roles of Principal Member

- (1) *The role of the principal member of a council is -*
 - (a) *to preside at meetings of the council;*
 - (b) *if requested, to provide advice to the chief executive officer between council meetings on the implementation of a decision of the council;*
 - (c) *to act as the principal spokesperson of the council;*
 - (d) *to exercise other functions of the council as the council determines;*
 - (e) *to carry out the civic and ceremonial duties of the office of principal member.*

- (2) *Subsection (1)(c) does not apply in circumstances where a council has appointed another member to act as its principal spokesperson.*

In addition to the matters where Elected Members may wish to seek legal advice; circumstances may also arise whereby the Mayor requires legal advice to ensure compliance with the provisions of Section 58 of the Act. These circumstances may include the following, by way of example only:

- clarification regarding the provisions of the *Local Government (Procedures at Meetings) Regulations 2013*;
- the legality of a Council decision and/or legal ramifications of a Council decision;
- the employment arrangements between the Council and the Chief Executive Officer.

Having regard to the express functions of the Mayor as set out in Section 58 of the Act, this Policy recognises that it is appropriate for only the Mayor to seek advice in relation to these matters.

All requests by the Mayor for legal advice pertaining to functions as set out in Section 58 of the Act will be directed to and co-ordinated by either the Chief Executive Officer (where appropriate), or the General Manager, Governance & Community Affairs.

Legal advice obtained by the Mayor regarding specific roles of the Mayor, is deemed to be legal advice to the Council and a copy will be provided to the Chief Executive Officer (where appropriate), and/or the General Manager, Governance & Community Affairs and the Council.

A copy of the legal advice may also be provided to the Council at the next scheduled Council Meeting or via the Council's Elected Member Communique, depending on the nature of the legal advice. This will be at the discretion of the Chief Executive Officer and/or the General Manager, Governance & Community Affairs (as relevant).

Obtaining Legal Advice – The Council

Councils are responsible for complex strategic and operational functions with strong accountability to the community. They provide a range of statutory and discretionary services in accordance with specific roles and powers set out in the *Local Government Act 1999* or other legislation.

The role of the Council is to act as a representative, informed and responsible decision maker on behalf of its citizens.

From time to time therefore, the Council may require legal advice in relation to issues associated with a decision or the related decision-making process as the validity of the Council's decision may be contingent on the decision having been lawfully made. In some cases, legal advice may be required prior to the decision being made to ensure that the matter before the Council is not beyond the power of the Council, (ie not *ultra vires*).

In those circumstances where legal advice is obtained on behalf of the Council to assist the Council in its decision-making processes, a copy of the request for the legal advice and the advice, including any attachments and appendices to the advice, will be provided to Elected Members in full written form.

Annual Budget Allocation

An annual budget allocation will be provided to support the legal expenses associated with requests for legal advice by Elected Members, in accordance with this Policy.

REVIEW PROCESS

The Council will review this Policy within 12 months of the next Local Government General Elections to be conducted in November 2022. The Council does, however, have the ability to review this Policy and to amend or repeal and to replace it at any time.

INFORMATION

The contact officer for further information at the City of Norwood Payneham & St Peters is the Council's General Manager, Governance & Community Affairs, telephone 8366 4549.

ADOPTION OF THE POLICY

This Policy was adopted by the Council on 6 July 2020.

TO BE REVIEWED

2023.