



Council Legal Assistance (Defamation) Policy

1. AUTHORITY

This is McKinlay Shire Council's Legal Assistance (Defamation) Policy for how Council handles the provision of legal assistance for defamation actions that are commenced by council members and employees. It is designed to ensure compliance with council's obligations under the *Local Government Act 2009*, *Local Government Regulation 2012* and *Defamation Act 2005*.

2. BACKGROUND AND PRINCIPLES

2.1 As a result of their functions and duties, councillors and employees may be the subject to defamatory publications. In some cases of defamatory publication, councillors and employees may seek to take legal action. It may be appropriate for the Council to provide financial assistance to meet the cost of councillors or employees obtaining the legal representation to institute defamation proceedings against third parties.

2.2 Section 9 and 28 of the *Local Government Act 2009* give a local Council power to take executive action in respect of local government matters. However, any allocation of financial assistance for legal representation must strictly align with the proper exercise of council functions, public purpose, and community benefit, nothing that defamation proceedings remain personal actions by nature.

2.3 Decisions under this policy must be made consistently with the Local government Act 2009, including the local government principles, and must demonstrate a proper local government purpose, transparency, accountability, value for money and responsible use of public funds.

3. SCOPE

This policy applies to all Councillors (including the Mayor) and employees of McKinlay Shire Council.

3. POLICY OBJECTIVES

The objective of this policy is to establish guidelines to receive, assess, and decide any requests for legal assistance from a councillor or employee concerning defamatory publications.

4. Roles and Responsibilities

4.1 The CEO is appointed to receive, assess, and decide any requests for legal assistance from a councillor or employee in accordance with this policy. The CEO then makes any other related decisions, on behalf of the Council under this policy.

4.2 If the applicant is the CEO, the Mayor will receive, assess, and decide the request for legal assistance from the CEO. The Mayor then makes any other related decisions, on behalf of the Council under this policy.

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4.3 Any application made is assessed in the first instance by an appropriate employee so nominated by either the CEO or the Mayor.

4.4 The CEO and the Mayor are delegated by the Council to make the relevant decisions provided for under this policy, and incur the relevant liabilities on behalf of the Council in accordance with this policy.

5. Exceptional Circumstances

5.1 While the categories of exception circumstances are not closed, it will generally be the case that providing financial assistance to a councillor or employee to undertake defamation proceedings will be appropriate only if:

- (a) the publication:
 - (i) is persistent;
 - (ii) would lower or harm the councillor or employees' personal or professional reputation, hold the councillor or employee up to ridicule, or lead others to shun and avoid the person;
 - (iii) is causing, or is likely to cause, the councillor or employee distress in the workplace;
- (b) a concerns notice under the Defamation Act 2005 (**Defamation Act**) has been provided by the councillor or employee to the publisher;
- (c) the councillor or employee has not refused to accept a reasonable offer to make amends by the publisher under the Defamation Act;
- (d) the resources of Council have been, or are likely to be, unreasonably directed towards dealing with the publications; and
- (e) there is no other reasonable legal cause of action or course available to the person to prevent the ongoing publication.
- (f) the defamatory publication explicitly targets the councillor or employee regarding official decisions or actions taken in good faith in their official capacity, and the matter goes beyond mere personal grievance or ordinary political debate.

6. Types of legal representation costs that may be approved

6.1 If the exceptional circumstances outlined in section 5 exist, the CEO or the Mayor may approve the payment of legal representation costs for a councillor or employee to institute or consider the institution of a defamation action against a third party seeking damages under the Council's Legal Assistance (Defamation) Policy, ensuring the expenditure is demonstrably in the public interest.

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6.2 The CEO or the Mayor should not approve a funding decision under clause 6.1, unless there are exceptional circumstances that justify the expenditure of public funds.

Exceptional circumstances – Example

John Smith is a councillor. Terry Murphy is a local environmentalist and has made on-going and persistent publications indicating that the councillor has a drinking problem and alleging that he is drunk at every Council meeting – which he asserts explains Council's pitiful response to environmental issues in the City. He also says that the Councillor has no morals and regularly cheats people of the City, by accepting bribes and gifts from developers. He says that something serious has to be done about the Councillor to save the City from environmental and economic ruin. Terry posts these publications on line and also has been leaving flyers around the City.

John has given Terry a concerns notice under the Defamation Act, but has not received any reasonable offer to make amends from Terry. John has also raised the matter with the police, but no action has been taken because Terry's behaviour is not considered sufficiently threatening.

John has indicated to Council that he is concerned about the impact of the publications on his family and that it is causing him stress in performing his duties and functions as a councillor. Council is spending a lot of time responding to John's concerns and in trying to manage the issue. For example, Council is continually fielding calls from journalists and ratepayers about the publications.

Not exceptional circumstances – Example

Mary Bloggs is a councillor. Bob James, her neighbour, was dissatisfied at the state of Mary's garden, which had trees overhanging on Bob's property. Bob sent Mary an email in which he asked her to get the trees cut, but Mary did not respond. Bob then complained about the state of Mary's garden on social media and suggested that the poor delivery of council services was a direct result of Mary's incompetence as a councillor.

Mary is frustrated that the post was made. Some local newspapers have reported the comments about the neighbourly dispute, but the council have not fielded any calls from residents and ratepayers.

6.3 The Council will not approve for a councillor, unless there are exceptional circumstances, the payment of legal representation costs that arise from, or are associated with, election issues or the conduct of an election campaign especially having regard to the implied freedom of political communication that has been recognised by the Australian Courts.



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7. Application of Payment

7.1 A councillor or employee who seeks assistance for the payment of legal representation costs under the Council's policy is required to make an application(s) in writing, in a form similar to that set out in Schedule 1. If the applicant is the CEO, the application will be made to the Mayor.

7.2 A written application under the policy for the payment of legal representation costs should provide the required details which may include:

- (a) the details of the matter for which legal representation is sought;
- (b) how that matter relates to the Council functions and duties of the councillor or employee making the application;
- (c) the steps that the councillor or employee have taken in respect of the publication (e.g. whether a concerns notice has been served and/or whether an offer to make amends has been received);
- (d) the lawyer (or law firm) who is to be asked to provide the legal representation;
- (e) the nature of legal representation to be sought (such as legal advice, representation in court, preparation of legal proceedings etc);
- (f) an estimate of the cost of the relevant legal representation; and
- (g) why the council should provide the relevant support and assistance.

7.3 The application should include a declaration by the applicant that they have acted in good faith.

7.4 Any application should normally be made before the incurring of any legal costs to which the application relates.

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

- (a) has read, and understands the terms of council's Legal Assistance (Defamation) Policy;
- (b) acknowledges that any approval of legal representation costs is conditional on the repayment provisions (see guidance in clauses 10.1 – 10.2) and any other conditions which are provided for in any approval given under the policy; and
- (c) the applicant undertakes to repay to the council any legal representation costs (see guidance in clauses 10.1 – 10.2)

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7.6 In relation to clause 7.5(c), if the amount of the legal assistance is material, then an applicant will be requested to sign a more formal document which requires repayment of monies to the Council in return for the provision of assistance.

8. Limitation of Legal Representation Costs

8.1 Council requires the CEO or the Mayor to set a limit on legal costs that will be paid when approving an application.

8.2 A councillor or employee is allowed to make a further or subsequent application to the council in respect of the same matter.

9. Possible Decisions

9.1 The CEO or the Mayor may:

- (a) refuse;
- (b) grant; or
- (c) grant subject to conditions,

an application for the payment of legal representation costs.

9.2 The CEO or the Mayor may, in appropriate circumstances, decide to approve the provision of legal representation to a councillor or employees, but may require that the Council's legal team provide the relevant advice or representation using internal or external resources.

9.3 The conditions that may be imposed under clause 9.1 may include, but are not restricted to, setting a financial limit and/or a requirement to enter into a formal agreement, including a security agreement, relating to the payment, and repayment of the legal representation costs paid for by the Council.

9.4 In assessing an application, the CEO or the Mayor can have regard to any insurance benefits that may be available to the applicant under the Council's insurance policies or other similar arrangements.

9.5 The CEO or the Mayor may, subject to clause 9.6, determine that a councillor or employee whose application for legal representation costs has been approved:

- (a) did not act in good faith; or
- (b) provided false or misleading information in respect of their application for assistance.



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9.6 A determination under clause 9.5 should be made only on the basis of, and consistently with, the finding of a court, tribunal inquiry, regulatory investigation or other similar independent body.

9.7 Where a determination is made under clause 9.5, the legal representation costs paid by the Council should be required to be repaid by the councillor or employee in accordance with clauses 10.1 – 10.2.

10. Repayment of Legal Representation Costs

10.1 A councillor or employee whose legal representation costs have been paid by the Council will be required to repay to the Council:

- (a) all or part of those legal costs – in accordance with a determination made under clause 9.7; and
- (b) if the councillor or employee receives monies from costs orders, damages, or any settlement, in respect of the matter for which the council has paid legal representation costs, the councillor or employee must repay such sum to the council up to the amount of legal representation costs that have been paid by the council under the policy.

10.2 The Council reserves its rights to take action in a court of competent jurisdiction to recover any monies due and owing to it by a councillor or employee.

11. RELEVANT LEGISLATION

Local Government Act 2009.

Local Government Regulation 2012.

Defamation Act 2005.

12. DEFINITIONS

CEO refers to a person who holds an appointment as Chief Executive Officer of McKinlay Shire Council, under section 194 of the Local Government Act 2009. This includes a person acting in this position.

Approved Lawyer is to be –

- (a) an 'Australian legal practitioner' under the *Legal Profession Act 2007* (QLD);
- (b) from a law firm on the Council's panel of legal service providers, unless the Council considers that this is not appropriate in the circumstances; and

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- (c) as otherwise approved in writing by the Council or the CEO under delegated authority.

Councillor or **employee** means a current or former councillor, non-elected member of a council committee or employee of the Council.

Legal Representation Costs are the costs, including reasonable professional fees and disbursements, that are properly incurred in providing the approved legal representation and the associated legal costs arising therefrom.

Legal Services includes advice, representation or the preparation of documentation that is provided by an approved lawyer.

Payment by the Council of the legal representation costs may be either by:

- (a) a direct payment to the approved lawyer; or
- (b) a reimbursement to the councillor or employee.



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SCHEDULE 1

APPLICATION FOR LEGAL ASSISTANCE (DEFAMATION)

FROM: Name of Councillor or Employee:

- Current Position:
- Current Department or entity:
- Position at the time of the incident:
- Department at the time of the incident:
- Address:
- Telephone:
- Fax:
- Email:
- Include brief details of assigned duties and functions:
- If applicable, include details of legal representatives:

TO: Name of Decision Maker:

- Position:
- Department or entity:
- Address:

Details of Matter

I am applying for Legal Assistance in relation to the following matter/s:

- (a) [insert the details of the matter for which legal representation is sought];
- (b) [how that matter relates to the council functions and duties of the councillor or employee making the application];
- (c) [the steps that the councillor or employee have taken in respect of the publication (e.g. whether a concerns notice has been served and/or whether an offer to make amends has been received)];
- (d) [the lawyer (or law firm) who is to be asked to provide the legal representation];
- (e) [an estimate of the cost of the relevant legal representations]; and
- (g) [why the council should provide the relevant support and assistance].

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Undertakings by Councillor or Employee:

1. I have diligently and conscientiously endeavoured to carry out my Council functions and duties in good faith.
2. I have not been convicted of a criminal offence nor had a finding of official misconduct against me in relation to this matter
3. I am / am not aware of any criminal, official misconduct or disciplinary proceedings being brought against me in relation to this matter. Include details if applicable.
4. I have attached a copy of any relevant documents (e.g. copies of publications, concerns notice, offer to make amends, cost estimate from legal representative etc.).
5. I agree to provide any further information requested by the decision maker and to keep the decision maker informed of any change in circumstances which may affect my application.

I agree that any grant that I receive of legal assistance under this policy will be subject to any terms and conditions placed on the grant by the relevant decision maker as well as the terms and conditions of the Policy on the Provision of Legal Assistance for Councillors and Employees

I declare that the publications complained of do not arise from any wilful misconduct, breach of the Local Government Code of Conduct, or unauthorised release of confidential information on my part.

Signature of councillor/employee: _____

Date: _____