

COUNCIL AGENDA ADDENDUM

ORDINARY COUNCIL MEETING

3 February 2021

ADDENDUM ITEMS

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CORP 04

Council leading in good governance practices

Strategic Direction	Leading through Collaboration Strive for best practice in all Council processes
File Ref	001536.2021
Report By	Jessica Saliba - Acting Coordinator Governance
Approved By	George Hampouris - Acting Director City Corporate

EXECUTIVE SUMMARY

Council, at its meeting held on 25 November 2020, resolved to seek advice from the Office of Local Government (OLG) to create a policy (including a budget limit), that enables Councillors to access independent professional advice and that the policy be reported to Council.

Advice has been obtained from the OLG. The advice was prepared on the assumption (based on the wording of the resolution) that the policy would provide individual Councillors with a budget which they could each individually spend on seeking their own professional advice, without any further constraint. On that assumption, the advice obtained from the OLG is that any such policy would be an expenses policy for the purposes of s252 of the *Local Government Act 1993 (Act)*. Such a policy is required by s252(5) of the Act to be consistent with the *Guidelines for the payment of expenses and the provision of facilities for Mayors and Councillors in NSW 2009*, adopted by the Office of Local Government (Guidelines).

The OLG advised that to be permissible under s252(5) and the Guidelines, a policy regarding reimbursement of the expenses of seeking professional advice would need to be subject to strict controls which would create a significant burden for staff to administer. The strict controls would need to govern:

- what advice may be obtained;
- the circumstances in which the advice may be sought;
- who the advice may be sought from;
- the circumstances in which the advice may be sought; and
- what approvals are required prior to seeking the advice and for payment.

As such, the advice of the OLG is that the policy as proposed (with no limit or constraint other than an overall budget) is inconsistent with the Guidelines.

The OLG also advised that if Council was to create the policy, it may then be faced with multiple competing pieces of advice obtained by various Councillors on contentious matters, each supporting their preferred position. The OLG advises that this could create dysfunction and complicate decision-making.

A copy of the advice from the OLG is attached to this report.

RECOMMENDATION

That Council accepts the advice of the OLG and does not create a corporate policy for accessing independent professional advice.

REPORT

The OLG Advice

Council sought advice from the Office of Local Government to create a policy (including a budget limit), that enables Councillors to access independent professional advice and that the policy be reported to Council.

The advice provided by the OLG is attached, however for ease of reference a summary of the advice is provided below:

“What is being proposed may be inconsistent with OLG’s Guidelines for the payment of expenses and the provision of facilities for Mayors and Councillors in NSW. These provide that councils may only meet Councillors’ legal expenses in limited circumstances, namely for defending legal proceedings being taken against the councillor or defending an action in defamation or to provide representation in any inquiry, investigation or review arising from the performance of their functions in good faith, provided that the outcome is substantially favourable to the councillor”.

“Section 252(5) provides that councils’ expenses and facilities policies must comply with OLG’s Guidelines, and to the extent that what is being proposed is inconsistent with OLG’s Guidelines, it may be impermissible under section 252(5)”.

The OLG went on to set out what controls a policy would need to contain to be consistent with the Guidelines. Those matters are set out in the executive summary above.

As the policy proposed does not include those controls, the conclusion from the OLG advice must be that it is inconsistent with the Guidelines.

The policy is inconsistent with the Guidelines, particularly as it relates to independent legal advice, as the Guidelines provide for very limited circumstances in which a councillor can be reimbursed for legal expenses which he or she incurs.

The policy is also inconsistent with the Guidelines as it does not require prior approval to the incurring of expenses, and it does not have any controls to ensure that expenses are incurred only in the performance of civic duties by the councillor.

Under the Act a policy for the reimbursement of expenses *must* be prepared in accordance with s252 and 253 of the Act, and that policy must be consistent with the Guidelines (see s252(5) of the Act).

As the policy is not consistent with the Guidelines, it is in breach of the Act.

Access to External Advice

The Act contemplates councils operating as collegiate decision-making bodies. It is the role of the CEO under the Act (see s335(f)) and under Council's Code of Conduct (see Part 8) to ensure Councillors are provided with the material and advice they require to properly exercise their civic functions.

An individual councillor cannot under the Code of Conduct direct the CEO to obtain independent professional advice. If Councillors require further externally provided professional advice in relation to matters they are required to make decisions on, then the appropriate course of action which is consistent with the Act and the Code of Conduct is for the Council to seek that advice by resolution.

Council's Civic Expenses and Facilities Policy contains the following provisions which reflect the Guidelines:

- clause 4.3 provides that a general allowance is not appropriate, and expenses provided for will be for a purpose specific to the functions of holding civic office; and
- clause 4.13 deals with legal expenses and sets out the limited circumstances in which the costs of legal advice or litigation incurred by a councillor will be reimbursed. In particular Council must determine by resolution whether the legal expenses are to be paid in advance.

The Civic Expenses and Facilities Policy does not contain provisions permitting reimbursement of Councillors' expenses for seeking other professional advice.

Council's Legal Services Policy also provides for the General Counsel to co-ordinate requests for legal advice from external providers to avoid conflicts, ensure consistency and quality of service, maintain client legal privilege and maximise value from Council's expenditure on external providers. Only the CEO can directly brief external providers (without going through the General Counsel) in limited sensitive or urgent situations.

The Legal Services Policy further deals with client legal privilege. If individual Councillors sought their own legal advice, the client legal privilege would be that of the individual councillor. However, it is likely that information provided to the lawyer retained by the individual councillor would be confidential information, and the resulting advice would likely contain

confidential information and advice that could prejudice Council's interests if it became public, or was produced in Court.

In order to properly ensure client legal privilege is maintained by Council, over all legal advice provided in respect of Council's affairs, the Legal Services Policy should be complied with.

The policy proposed would be inconsistent with the Legal Services Policy. Council's Councillor Access to Information and Interaction with Staff Policy and the Code of Conduct also ensure that Councillors have access to independent advice where appropriate and necessary for the performance of their civic duties.

Administrative and Other Issues

The OLG advice highlights not only the administrative burden of a proposed additional policy, given the controls which such a policy would need to contain, but also the risks of a number of Councillors seeking advice on the same issue and presenting conflicting advice to Council.

There could particularly be a conflict in advice presented to council if the information provided to the external advisors was not consistent with the information provided to advisors retained by Council or other Councillors.

The concerns regarding external legal advice and the protection of confidential information and client legal privilege are also noted above.

In addition, in respect of advice which is not legal advice, again there is a risk that a councillor could reveal confidential council information in seeking external advice, contrary to the Code of Conduct. Coordinating requests for advice through the CEO or General Counsel in respect of legal advice, is the most effective and risk mitigating method for Council to ensure the security of its information, and consistency of the advice it receives.

There is also a concern about receiving value for money, if Council's funds are being spent on a number of external advisors in respect to the same issue.

The reasons set out in the Legal Services Policy for coordinating advice in respect of legal matters apply similarly to the need for coordination of other professional advice, which should be managed by the CEO.

CONSIDERATIONS

Economic	There are no economic and financial considerations.
Environment	There are no environmental and sustainability considerations.
Social	There are no social and cultural considerations.

Civic Leadership	There are no civic leadership and governance considerations.
Legislative	Include any relevant legislation and section here. There are no legislative considerations relating to this report.
Risk	The risk is deemed to be Medium.

ATTACHMENTS

1. Advice from OLG dated 1 December 2020

Jessica Saliba

From: John Davies <John.Davies@olg.nsw.gov.au>
Sent: Tuesday, 1 December 2020 5:33 PM
To: Jessica Saliba
Subject: RE: Advice regarding policy

Hi Jessica

It would appear that what is being proposed is to provide each councillor with a budget to pay for their own "independent professional advice", presumably to assist them in the performance of their functions. On the available information, there appear to be no rules or controls on what councillors may expend their allotted budget on and this appears to be entirely at each councillor's discretion.

In effect, this is an "expense" for the purposes of section 252 of the *Local Government Act 1993*. Section 252(3) of the Act provides that a council must not pay any expenses "incurred or to be incurred" by councillors other than in accordance with a policy adopted by the council under that section for the payment of expenses and the provision of facilities to the mayor and councillors. The Council would therefore need to amend its councillor expenses and facilities policy in accordance with the requirements of section 253 to provide for this.

To the extent that "independent professional advice" comprises legal advice, what is being proposed may be inconsistent with OLG's *Guidelines for the payment of expenses and the provision of facilities for Mayors and Councillors in NSW*. These provide that councils may only meet councillors' legal expenses in limited circumstances, namely for defending legal proceedings being taken against the councillor or defending an action in defamation or to provide representation in any inquiry, investigation or review arising from the performance of their functions in good faith, provided that the outcome is substantially favourable to the councillor.

Section 252(5) provides that councils' expenses and facilities policies must comply with OLG's Guidelines, and to the extent that what is being proposed is inconsistent with OLG's Guidelines, it may be impermissible under section 252(5).

If it were permissible, the proposal would need to be subject to strict controls governing what advice may be obtained, the circumstances in which the advice may be sought, who the advice may be sought from, the circumstances in which the advice may be sought and what approvals are required prior to seeking the advice and for payment.

On a more practical level, if the proposal were to proceed, it is not difficult to see a situation where the Council may be faced with multiple competing pieces of advice procured by various councillors on contentious matters before the Council each supporting their preferred position. This would be a recipe for dysfunction and decision making paralysis. The *Local Government Act* contemplates councils operating as collegiate decision-making bodies. If councillors require further externally provided professional advice in relation to matters they are required to make decisions on, then it would be more appropriate and consistent with the spirit of the Act for the Council to seek that advice by resolution.

I hope this information is of assistance.

Regards

John Davies | **Manager Council Governance**
Policy and Sector Development Group
Office of Local Government | Locked Bag 3015, Nowra NSW 2541
e: john.davies@olg.nsw.gov.au | p: 4428 4139 | f: 4428 4199 | <http://www.olg.nsw.gov.au>



From: Jessica Saliba <SalibaJ@liverpool.nsw.gov.au>
Sent: Tuesday, 1 December 2020 11:47 AM
To: OLG Office of Local Government Mailbox <olg@olg.nsw.gov.au>
Cc: John Davies <John.Davies@olg.nsw.gov.au>
Subject: Advice regarding policy
Importance: High

Dear John,

Liverpool City Council is seeking advice from the Office of Local Government about the following;

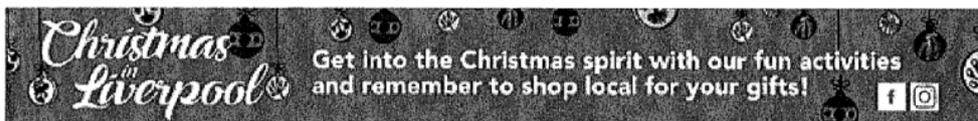
'To create a policy, with a budget limit, that will enable Councillors in good faith to access independent professional advice'

Can you please provide your thoughts in relation to the above?

Kind regards,
Jess

Jessica Saliba
Acting Coordinator Governance

LIVERPOOL CITY COUNCIL 02 8711 7715 | 0448 373 323 | SalibaJ@liverpool.nsw.gov.au
Customer Service: 1300 36 2170 | 33 Moore Street Liverpool, NSW 2170, Australia
   www.liverpool.nsw.gov.au



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