



**DISCRETIONARY SCHEME FOR PROVISION OF LEGAL ASSISTANCE AND
INDEMNITIES FOR UNIVERSITY OFFICERS AND EMPLOYEES**
Approved by the Board of Trustees 5 September 2012

1 Introduction

- 1.1 The University does not normally provide indemnities against personal liability or legal assistance to officers and employees of the University where those officers or employees are involved in or parties to inquiries or legal proceedings.
- 1.2 There is, however, protection available to University officers and employees under insurance policies maintained by the University, including its general liability and directors' and officers' insurance policies. In addition, there are some limited forms of statutory protection available, for instance, the *Employer's Liability Act 1991* (NSW) and clause 5 of Schedule 1 of the *University of Western Sydney Act 1997* (NSW).

2 Purpose

- 2.1 There are circumstances where, to the extent permitted by law, it may be appropriate for the University to consider providing an indemnity or legal assistance to a University officer or employee, including for instance, where no or only limited cover is provided for under a University insurance policy.
- 2.2 The purpose of this Scheme is to describe the level, criteria and conditions of assistance available and to prescribe a process for making and deciding applications for assistance.

3 Definitions

- 3.1 In this document, the following words have these meanings:
- (a) **"applicant"** means an employee or officer who wishes to apply for assistance under this Scheme;
 - (b) **"AVO"** means an apprehended violence order within the meaning of section 3 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW);
 - (c) **"employee"** means any person who is a current employee of the University and who is covered by the University's *Academic Staff Agreement 2009-2012* or *Professional Staff Agreement 2009-2012* (or any agreement that supersedes either of those agreements);
 - (d) **"inquiry"** means any inquiry, hearing or investigation (not being a civil or a criminal legal proceeding) conducted by or before a court, a statutory tribunal or other body with power to do so and includes, for example, a coronial inquest, a royal commission or an investigation or inquiry conducted under the *Independent Commission Against Corruption Act 1988* (NSW) or under the *Ombudsman Act 1974* (NSW);



- (e) “**legal proceeding**” means any civil or criminal proceeding before a court or a tribunal;
- (f) “**officer**” means a member of the Board of Trustees of the University, and its committees, the Vice-Chancellor, the Senior Deputy Vice-Chancellor and Provost, a Deputy Vice-Chancellor and Vice-President, a Vice-President, a Pro-Vice-Chancellor, the Chair of Academic Senate, Dean, Deputy Dean, or other senior employee involved in the management of the University.

4 Qualification and criteria for assistance

4.1 Applicants are ineligible for assistance or an indemnity under this Scheme if:

- (a) the provision of any such assistance or indemnity:
 - I would contravene any law;
 - II is in breach of, or compromises, any insurance policy held by the University.
- (b) the inquiry or legal proceeding is or is to be initiated or commenced by the applicant against the University or any officer or employee of the University in their capacity as such;
- (c) the University initiates an inquiry or commences a legal proceeding against the applicant (for instance, misconduct proceedings);
- (d) the University joins the applicant as a party to any legal proceeding, or defends a legal proceeding on the basis that it is not vicariously liable as employer for the actions of the applicant;
- (e) the applicant is a witness to any inquiry or legal proceeding but has no substantial or direct interest in the inquiry or legal proceeding [see 4.2 (c) below]; or
- (f) the applicant has been summonsed for jury service.

4.2 In order to qualify for consideration under this Scheme, an applicant must satisfy **all** of the following criteria:

- (a) the applicant must have been an employee or officer of the University at the time the matters giving rise to the inquiry or legal proceeding arose;
- (b) the applicant’s involvement in any inquiry or a legal proceeding must relate directly to the proper exercise of his or her functions and duties as an officer or employee;
- (c) the applicant must have a substantial and direct interest in the inquiry or a legal proceeding and, in the case of a legal proceeding, either or both of the University and the applicant must be named as party to that proceeding (that is, merely being ordered to appear and give evidence as an ordinary witness or to produce documents is insufficient);



- (d) the applicant must be required to appear personally and give evidence or produce documents before an inquiry or hearing conducted by a court, an investigatory tribunal or statutory body (such as a royal commission or the Independent Commission Against Corruption); and
- (e) the University must be reasonably satisfied that it is in the best interests of the University to provide assistance or an indemnity and that there is no conflict between the University's interests and those of the applicant.

4.3 If an applicant wishes to apply for an AVO against a third person (not being an officer or employee of the University), the following additional criteria apply:

- (a) the alleged behaviour for which the AVO is sought must have a direct connection with and relate to the applicant's duties and functions as an employee or officer of the University; and
- (b) the University must be reasonably satisfied that the applicant holds genuine and reasonable fears for his or her personal safety.

5 Conditions of assistance or indemnity

5.1 A decision to grant assistance or an indemnity under this Scheme is always subject to the following conditions:

- (a) that the University may at any time review and, if appropriate, vary or terminate assistance under this Scheme if it considers that the interests of the University and the applicant have diverged sufficiently so that a conflict of interest arises, or it is otherwise not in the University's best interests to continue to provide assistance or an indemnity either in its current form or at all;
- (b) the applicant must:
 - I make full and continuous disclosure (even if unfavourable to him or her) to assist and cooperate with the University and any lawyers appointed to represent the applicant throughout the inquiry or legal proceeding; and
 - II not communicate with another person about the inquiry or legal proceeding, or do anything that would compromise a claim for legal professional privilege in relation to any communications between the applicant and any lawyer(s) appointed to represent the applicant;
- (c) the University is under no obligation to provide assistance or indemnify an applicant in relation any appeal or review of an inquiry or a legal proceeding unless the University is first satisfied that there are reasonable prospects of success and it considers the circumstances reasonably warrant that appeal or review. Any request for assistance in this case will be dealt with as a fresh application;
- (d) in any inquiry or legal proceeding where the applicant is entitled to apply for costs, and unless the University first agrees otherwise, the applicant must do all things and



sign all documents necessary to enable an application for costs to be made and for recovery of the full amount of costs that can be claimed;

- (e) the applicant must refund to the University any amounts paid to or on behalf of an applicant under this Scheme if:
- I any information or document provided by the applicant in support of his or her application under this Scheme is later found to be misleading or incorrect;
 - II the University later becomes aware of any new information that, if available to the University at the time deciding an application under this Scheme, would have led to a different decision;
 - III the applicant is found guilty of a criminal offence to which the proceeding or inquiry relates;
 - IV where the inquiry relates to an allegation of corrupt conduct within the meaning of the *Independent Commission Against Corruption Act 1988* (NSW), the applicant is found to have engaged in corrupt conduct within the meaning of Part 3 of that Act; or
 - V applicant receives a verdict (including a verdict to pay any damages) that is unfavourable to him or her, and the University is not found to be vicariously liable as employer;
- 5.2 Any amount demanded by the University under paragraph 5.1 (e) becomes a debt immediately due and owing by the applicant to the University.
- 5.3 In addition to any debt due under paragraph 5.1 (e), the University is entitled to claim interest on so much of that debt that remains unpaid within thirty (30) days of the University making demand, calculated at the pre-judgment rates of interest prescribed under the *Civil Procedure Act 2005* (NSW).
- 5.4 The University must approve in advance any lawyer(s) appointed to act for the officer or employee, including the scope of that lawyer's brief and rates and charges. The applicant may not instruct another, or change, any lawyer without first obtaining the University's written approval.
- 5.5 The University retains the right to settle or compromise an inquiry or a legal proceeding on behalf of the applicant (including instructing the applicant's solicitors to do so) if it is reasonable to do so, based on legal advice obtained by the University and any commercial considerations.
- 5.6 The applicant may not settle or compromise any inquiry or legal proceeding without first obtaining the University's written consent, which may not be withheld unreasonably and is to be based on legal advice about the likely outcome of any such inquiry or legal proceeding.



- 5.7 The University may impose such other conditions for assistance or indemnity as it considers appropriate in the circumstances. The University may also, following grant of an application, withdraw or place limitations on continuing to provide legal assistance or an indemnity if, based on legal advice, the applicant has not complied with any of the conditions of such assistance or indemnity.
- 5.8 A decision to grant assistance or an indemnity under this Scheme is subject to the applicant first entering into a deed that reflects the provisions of this Scheme, including conditions imposed under paragraphs 5.1 to 5.7 inclusive.

6 Type of assistance or indemnity available

- 6.1 Subject to compliance with the above conditions and paragraph 6.2, the University will, as appropriate, in relation to any inquiry or civil or criminal proceeding:
- (a) pay any damages or costs awarded against the officer or employee (which the University may limit to a specified amount);
 - (b) arrange for the appointment of any lawyer(s); and
 - (c) pay the legal costs and reasonable expenses incurred by the officer or employee in conducting his or her defence.
- 6.2 The University will **not** pay for:
- (a) any assistance or indemnity described in paragraph 6.1, to the extent that such assistance or indemnity is already available to the officer or employee under an insurance policy effected by the University (for instance, directors' and officers' liability insurance or general liability insurance);
 - (b) any fine or penalty (whether criminal or civil) ordered by a court or tribunal as payable personally by the applicant; or
 - (c) any damages (including punitive or exemplary damages) awarded against the applicant where:
 - I the University is not vicariously liable as employer;
 - II the officer or employee has engaged in deliberate or wilful misconduct, or with reckless disregard of his or her obligations or duties as an officer or employee of the University; or
 - (d) any claim arising out of and not based upon or attributable to or in any way connected with:
 - I the committing of any criminal, dishonest, fraudulent or malicious acts or omissions by the relevant officer or employee; or
 - II any knowing or wilful violation of any law or regulation by the relevant officer or employee,



where that conduct is established by admission, the judgment or decision of a court or a tribunal, or other finding or adjudication.

7 Appointing lawyers

- 7.1 Normally, the Office of University Legal Counsel will appoint an external lawyer (who may also act for the University in the same proceeding or inquiry if there is no conflict of interest) to act on behalf of the applicant, following consultation with the applicant.
- 7.2 If appropriate and reasonable, the University may appoint a lawyer(s) nominated by the applicant.

8 Application process

- 8.1 A person may apply for assistance or indemnity under this Scheme by sending a written request to the Senior Deputy Vice-Chancellor and Provost. A request must specify the criteria (see paragraph 4) on which the applicant relies and attach all relevant documents available to the applicant at the time.
- 8.2 Applications are to be determined as follows:
- (a) in the case of employees who are not officers, by the Vice-Chancellor;
 - (b) in the case of officers not being the Chancellor, a member of the Board of Trustees, the Vice-Chancellor or a Deputy Vice-Chancellor, by the Chancellor and one external member of the Board of Trustees appointed by the Minister or the Board);
 - (c) in the case of the Chancellor, a member of the Board of Trustees, the Vice-Chancellor or a Deputy Vice-Chancellor, the members of the Board of Trustees by majority resolution.
- 8.3 If the Chancellor or a member of the Board of Trustees is the applicant, then he or she may not participate in any decision of the Board of Trustees under paragraph 8.2.
- 8.4 A decision to approve assistance or an indemnity under this Scheme is discretionary only and cannot be reviewed.
- 8.5 If assistance or an indemnity is granted under this Scheme, the applicant must execute a deed in a form approved by the General Counsel.
- 8.6 The Senior Deputy Vice-Chancellor and Provost or the General Counsel have delegated authority, pursuant to section 23 of the *University of Western Sydney Act 1997* (NSW), to execute any such deed for and on behalf of the University, following determination in accordance with paragraph 8.2.
- 8.7 If either the Senior Deputy Vice-Chancellor and Provost or the General Counsel is the applicant under this Scheme, then the Vice-Chancellor has delegated authority, pursuant to



section 23 of the *University of Western Sydney Act 1997* (NSW), to execute any such deed for and on behalf of the University, following determination in accordance with paragraph 8.2.