

# government policy and guidelines:

INDEMNITIES AND IMMUNITIES

June 2008



The Secretary  
Department of Treasury and Finance  
1 Treasury Place  
Melbourne Victoria 3002

Tel: +61 3 9651 5111  
Fax: +61 3 9651 2062  
Website: [www.dtf.vic.gov.au](http://www.dtf.vic.gov.au)

Authorised by the Victorian Government  
1 Treasury Place, Melbourne  
Printed by Big Print, 45 Buckhurst Street, South Melbourne Vic 3205

© Copyright State of Victoria 2008

This publication is copyright. No part may be reproduced by  
any person except in accordance with the provisions of the  
*Copyright Act 1968*.

ISBN 978-1-921337-24-6

Published June 2008

# Government policy and guidelines:

indemnities and immunities

June 2008



# Table of contents

<b>1. Executive Summary</b> .....	<b>1</b>
<b>2. Introduction</b> .....	<b>5</b>
2.1 Purpose .....	5
2.2 Further information .....	6
<b>3. What are indemnities and immunities?</b> .....	<b>7</b>
3.1 Liability of the Crown .....	7
3.2 What is an indemnity? .....	7
3.3 What is an immunity? .....	8
<b>4. To whom does this policy apply?</b> .....	<b>9</b>
4.1 Crown servant and agent .....	9
4.2 Principals, teachers and school councils .....	9
4.3 Victoria Police .....	10
4.4 Volunteers .....	10
4.5 Public entities .....	10
4.6 Summary .....	11
<b>5. Indemnities</b> .....	<b>12</b>
5.1 Indemnities pursuant to the VPS and other industrial agreements .....	12
5.2 Indemnities for Crown servants and agents under the Government Policy .....	12
5.3 Ministerial power to grant indemnities .....	17
<b>6. Immunities</b> .....	<b>22</b>
6.1 When may a statutory immunity be used? .....	22
6.2 Model immunity .....	23
6.3 What is good faith? .....	24
6.4 How to create a statutory immunity .....	24
<b>Attachment A</b> .....	<b>26</b>



# 1. Executive Summary

## What is an indemnity?

An indemnity is an agreement to be responsible for the financial liability for all, or a part, of the loss or damage that another party may suffer. For the purposes of this policy, indemnities may be provided by the Government whereby it accepts responsibility for the liability that its employees or agents, or occasionally, another entity or person, may incur.

There are general and specific indemnities. General indemnities cover liability for all, or a range, of situations that might arise. They are in the nature of insurance and for this reason are rarely given because appropriate insurance is usually available to manage the risk. Specific indemnities are usually provided in relation to legal proceedings against individuals and may cover the costs of legal representation in the proceedings and, depending on the outcome of the proceedings, any liability for damages or costs that arises out of the resolution of the proceedings.

## What is an immunity?

An immunity is a legislative provision that prevents action being taken against a person. It confers protection from all forms of civil liability by removing the right of anyone who suffers loss as a result of the protected person's act or omission to take legal action. This means that a person whose acts are protected by an immunity cannot be made legally responsible or financially liable for any harm, damage or loss suffered by a third party.

Immunity provisions are rarely used because they remove legal rights that would otherwise be available to a person who has suffered loss. If they are used, the protected person's liability is often transferred to the body corporate or other body with which they are associated, for example a statutory board becomes liable for the actions of its members.

## Indemnities

### Who is covered by the Policy and Guidelines?

This policy applies to:

- Ministers or former Ministers of the Crown;
- executive employees, non-executive employees, crown servants and agents not covered by the indemnity provisions of workplace agreements or other specific indemnity arrangements. The *Victorian Public Sector Agreement 2006* provides a right to an indemnity for legal costs and damages for employees covered by this agreement. Because it is a certified agreement under the *Workplace Relations Act 1996* it overrides these Guidelines. Police officers, teachers and principals are also covered by similar agreements. Therefore, these guidelines apply mainly to Ministers, executive officers and some statutory office holders.

## How are requests for indemnities for legal proceedings handled?

Requests for specific indemnities will be considered on a case by case basis in respect of costs of legal representation as soon as possible after legal proceedings are threatened or commenced. An indemnity will provide a successful applicant with an agreement or undertaking that the **costs of legal representation** will be met by the State of Victoria (the State).

An indemnity may also be available to meet any **award of damages or costs** that is made by a court as a result of such legal proceedings. The grant of an indemnity to meet an award of damages or costs will not be considered until the conclusion of any such legal proceedings.

The State reserves the right to recover monies paid out under an indemnity if it is subsequently established that the applicant has failed to act in good faith, been found guilty of misconduct, been grossly negligent, or been convicted of an offence in relation to such conduct arising from the discharge of the person's professional duties to the Crown.

This policy covers two types of situations where an indemnity might be requested in relation to legal proceedings:

### Requests within the normal course of business

It is not necessary for a Minister, Crown servant or agent to seek an indemnity for legal proceedings commenced or threatened in connection with the normal exercise of administrative powers and functions attaching to the office of a Minister or Crown servant or agent (such as a decision on an FOI request). Representation for Ministers and Crown servants in relation to those matters is handled in the normal course of business.

- The normal course of business may also include litigation that goes beyond challenging an administrative decision and where there is an allegation that may expose the Minister or Crown servant or agent to the possibility of personal liability (e.g. an action for negligence). The relevant Department or public entity will provide for representation in accordance with its usual business rules provided that the person has purported to be performing their duties in good faith and appears not to have been guilty of misconduct, been grossly negligent, or been guilty of an offence.
- If there is doubt about whether the proceedings should be treated as being in the normal course of business, the relevant Minister (or the Attorney-General if the person is a Minister) should decide whether or not to take the matter to Cabinet.

### Requests outside the normal course of business

An application for an indemnity for a matter falling outside the normal course of government business should be considered by Cabinet where:

- personal impropriety (including intentional defamation) is alleged against a Minister, Crown servant or agent;
- proceedings are instituted by a Minister, Crown servant or agent for personal benefit; or
- criminal charges are brought or offences are alleged against a Minister, Crown servant or agent.

#### **Example:**

A Minister is sued in defamation for a statement reported in a local newspaper.

## Cabinet process for considering an indemnity request

If an indemnity application needs to be considered by Cabinet, a request must be made to the Attorney-General who will seek independent legal advice and, with the relevant Minister, make a recommendation to Cabinet. If the person seeking the indemnity is a Minister, only the Attorney-General will sign the submission. Cabinet will determine whether it is in the public interest to provide assistance with legal costs and other liabilities.

## Treasurer's indemnities

An indemnity creates a potential financial risk or liability that may be realised at a later date due to the occurrence or non-occurrence of a specified event. This is known as a contingent liability. In most instances, it is not possible to quantify the exact value of the risk or liability that is incurred by the provision of an indemnity. This is known as an unquantified contingent liability.

In accordance with its commitment to the principle of sound financial management set out in section 23D of the *Financial Management Act 1994*, the Government has determined that the Treasurer will execute indemnities on behalf of the Government for risks of an extraordinary or unique nature. This includes significant one-off financial risks that relate to one or more portfolios.

A Treasurer's indemnity is not available:

- where commercial insurance is available (from the Victorian Managed Insurance Authority or a private insurer as appropriate); or
- to provide comfort against general or unspecified risks.

A Treasurer's indemnity will only be granted in exceptional circumstances where:

- the risk is unique and/or extraordinary in nature;
- no commercial insurance is available or is only available on unacceptable terms;
- a public entity is best placed to manage the risk on behalf of the State; and
- the cost to the State of leaving the risk with the party seeking the indemnity, or transferring it to a third party, is prohibitive and outweighs the potential benefits of assuming the risk.

The Treasurer retains an absolute discretion to grant or deny the provision of an indemnity on behalf of the State. The conferral of an indemnity creates a potentially significant precedent risk. Each proposed indemnity will be carefully considered by the Treasurer to assess the likelihood that the proposed indemnity will expose the State to further financial risks.

A Minister who receives an indemnity request should refer it to the Treasurer for consideration.

A Treasurer's indemnity is not generally required in the context of a contractual agreement for the provision of goods or services to the State. However, where a significant or unusual risk exists that is outside the agency's control or the normal course of business, it is recommended the relevant Department or agency consult with the Department of Treasury and Finance.

# Immunities

## When may a statutory immunity be used?

As a statutory immunity fundamentally affects people's legal rights and powers, they are rarely provided and the use of indemnities to allocate and transfer risk is preferred. This is because a statutory immunity removes some of the incentives for a person, class of persons or body to exercise an appropriate level of care in the exercise of their powers.

Statutory immunities are generally considered appropriate where:

- a person or class of persons is carrying out judicial or quasi-judicial functions (e.g. the Optometrists Registration Board); or
- where legislation imposes a legal duty on individuals to disclose information.

## When is a person or entity carrying out quasi-judicial functions?

A person or entity carries out quasi-judicial functions when:

- there is capacity to affect the rights of others through measures such as the imposition of sanctions, penalties or restrictions on a person rights to engage in a trade or profession; and
- they must apply principles of natural justice when undertaking his or her decision making functions.

## Do the Policy and Guidelines indicate when an immunity is inappropriate?

The fact that a person may be exposed to the risk of legal proceedings through the performance of his or her duties is not sufficient justification for the creation of an immunity.

An immunity is not available for any person exercising investigative or enforcement powers such as the powers of entry, search, seizure and arrest.

The Government will not approve the creation of a statutory immunity where an indemnity is a sufficient risk management response.

## Model immunity provision

Where an immunity provision is used, it will normally transfer the person's liability to the corporate entity who employs or otherwise represents the protected person. A model form of immunity has been developed by Chief Parliamentary Counsel to ensure consistency across the public sector as follows:

- (1) A member of the Board is not personally liable for anything done or omitted to be done in good faith:
  - (a) in the exercise of a power or the discharge of a duty under this Act or the regulations; or
  - (b) in the reasonable belief that the act or omission was in the exercise of a power or the discharge of a duty under this Act or the regulations.
- (2) Any liability resulting from an act or omission that would but for sub-section (1) attach to a member of the Board attaches instead to the Board.

## 2. Introduction

### 2.1 Purpose

The purpose of this policy is to set out principles that will inform the use of indemnities and statutory immunities on behalf of the State in favour of Crown servants and agents, public entities and other third parties.

This policy is concerned with indemnities for legal costs, Treasurer's indemnities, statutory immunities and the use of Treasurer's indemnities in lieu of contractual indemnities in certain circumstances.

This policy does not provide general guidance on the use of contractual indemnities.

This policy is based upon principles of sound financial management and is designed to promote effective risk management through the strategic allocation and management of risk.

This policy is not, nor is it intended to be, a statement of the law on the liability of the Crown.

The Attorney-General of Victoria and the Treasurer are responsible for the administration of this policy on behalf of the State.

Any Crown servant or agent considering the use of indemnities or immunities in accordance with this policy should seek legal advice.

This document represents the policy of the Government of Victoria (the Government), as approved by Cabinet on 10 December 2007, and replaces the former policy set out in *Indemnities and Immunities Government Policy and Guidelines* approved by Cabinet on 24 January 2000.

This policy does not override specific arrangements established through workplace agreements or relating to specific Crown servants or agents or the contractual relationships entered into between Departments and agencies and third parties.

## 2.2 Further information

Further information relating to this policy and its application is available from:

Economic and Financial Policy  
Department of Treasury and Finance  
Telephone: (03) 9651 5111

Civil Law Policy  
Department of Justice  
Telephone: (03) 8684 0845

For further information on:

- risk management, consult the *Victorian Government Risk Management Framework* produced by the Department of Treasury and Finance.
- insurance management, consult the *Insurance Management Policy and Guidelines for General Government Sector* produced by the Department of Treasury and Finance.
- conduct of disputes between Government entities, consult the appropriate guidance material produced by the VGSO.
- specific arrangements concerning the *Victorian Public Service Agreement 2006* (the 'VPS Agreement') or other public service agreements, consult Industrial Relations Victoria or a relevant party to the agreement.
- contractual indemnities provided within contracts for goods and services, consult with the Victorian Government Procurement Board.

## 3. What are indemnities and immunities?

### 3.1 Liability of the Crown

Any person who suffers a loss as a result of an act or omission of a Crown servant or agent may take legal action against the State pursuant to the *Crown Proceedings Act 1958* to make good his or her loss.

Such action may be taken in respect of any loss that results from a breach of contract or a civil wrong known as a tort. Common torts include negligence and defamation.

The Crown will be liable to pay legal costs or damages where the Crown servant or agent is liable and he or she has acted in the course of his or her employment.

In some instances, legislation may impose a statutory duty on a Crown servant or agent. If the Crown servant or agent breaches that statutory duty, he or she may be the subject of legal proceedings for a breach of his or her statutory duty.

It is appropriate, in some limited circumstances, that a Crown servant or agent receive some form of specific legal protection. This legal protection may take the form of an indemnity or immunity.

### 3.2 What is an indemnity?

An indemnity is a legally binding promise whereby a party agrees to accept financial liability for all, or a specified part, of the loss or damage that another party may suffer.

An indemnity may be subject to a financial limit or the provision of an indemnity may be subject to specified conditions. This means that an indemnified party may be financially liable for some part of the loss or damage or exposed to certain risks that are not covered by the indemnity.

An indemnity issued in accordance with this policy may take one of the following forms:

- an indemnity for legal costs – an agreement that the State will assume responsibility for legal costs that are incurred by a Crown servant or agent, where civil proceedings are threatened or commenced by a member of the public;
- an indemnity for legal costs where criminal charges are brought against a Crown servant or agent or offences are alleged;
- an indemnity for an award of damages – an agreement that the State will assume responsibility for an award of damages made against a Crown servant or agent at the conclusion of legal proceedings;
- a Ministerial indemnity – an agreement to meet losses or damages that are suffered by a public entity or an unrelated third party as a result of a commercial risk that is explicitly assumed or otherwise acquired by a public entity; or
- Any statement or representation by a Crown servant or agent may intentionally or otherwise create a legally binding obligation on behalf of the State to indemnify a third party. All Crown servants or agents should closely review any documents, including correspondence and contractual agreements, executed by a Crown servant or agent on behalf of the State, to ensure that no such statements or representations are made without appropriate consideration.

Further information is set out in Section 5.

### 3.3 What is an immunity?

An immunity is a legislative provision that protects someone from all forms of civil liability by removing the right of anyone else to sue for loss or damage caused by the person who has the benefit of the immunity. This means that a person whose acts are protected by an immunity cannot be made legally responsible or financially liable for any harm, damage or loss suffered by the other person.

An immunity from legal liability can only be created by legislation. Furthermore, the legislative form of an immunity provision may place limits upon the degree of protection that is conferred. For example, a person may not receive the benefit of an immunity from legal liability where he or she has not acted in good faith.

Further information is set out in Section 6.

## 4. To whom does this policy apply?

### 4.1 Crown servant and agent

A Crown servant or agent includes:

- a public sector employee;
- a Ministerial officer or Parliamentary adviser employed under Part 6 of the *Public Administration Act 2004*;
- the holder of a statutory office or a prerogative office; and
- a director of a public entity.

A Crown servant or agent does not include an electorate officer employed under Part 4 of the *Parliamentary Administration Act 2005*.

The definition of Crown servant and agent is established by the common law and may, in practice, include a wider range of persons than those covered by the *Public Administration Act 2004* and listed above.

Reference in this policy to Ministers, Crown servants and agents includes former Ministers, Crown servants and agents.

Where Crown servants and agents are covered by the indemnity provisions of the VPS Agreement, or of any other workplace agreement, or any statutory provision creating a right of indemnity, the Policy has no application.

Legal advice is recommended where any uncertainty exists.

### 4.2 Principals, teachers and school councils

Principals and teachers are Crown servants and agents. However, the following documents and legislative provisions set out specific indemnity arrangements for principals, teachers and schools. Note that the indemnity may be limited in scope (e.g. restricted to actions in respect of personal injuries):

<i>Victorian Government Schools Reference Guide</i>	February 2003	6.16.2.1-2 6.16.4
<i>Schools of the Future Reference Guide</i>	September 1996	6.14.2.1-2 6.14.4
<i>Schools Information Manual</i>	March 1991	
<i>Education News</i> (School councils and chaplains)	31 March 1994	
<i>Education Training and Reform Act 2006</i>		Section 2.3.32

## 4.3 Victoria Police

Members of the Victoria Police are Crown servants and agents. However, the following documents and provisions set out specific immunity and indemnity arrangements in relation to members of Victoria Police:

<i>Police Regulation Act 1958</i>	Section 123
<i>Legal Fees and Costs Reimbursement Agreement</i> <sup>1</sup>	17 September 2002

## 4.4 Volunteers

No statutory immunity is available to a volunteer of a community organisation where:

- the relevant community organisation (or other public entity) can obtain insurance on behalf of volunteer members from the Victorian Managed Insurance Authority (if eligible) or a commercial insurance body;
- no legal entity exists that can assume the liability on behalf of the volunteer member; or
- a volunteer member is covered by the volunteer protection provisions set out in Part IX of the *Wrongs Act 1958*<sup>2</sup>.

## 4.5 Public entities

A public entity includes any body, whether corporate or unincorporated, that is established by or under an Act, by the Governor in Council or by a Minister. A public entity is defined under section 5 of the *Public Administration Act 2004*.

Any public entity may seek a ministerial indemnity against identified commercial risks in accordance with this policy. Public entities may also enjoy indemnities granted pursuant to statute.

Further information is set out in section 5.3.

---

<sup>1</sup> Agreement signed by the State of Victoria and The Police Association of Victoria

<sup>2</sup> Nominal remuneration or payment for out of pocket expenses to a volunteer does not affect the protection set out in the *Wrongs Act 1958*.

## 4.6 Summary

Applicant	Indemnity determined by:
Current public sector employee	<i>Policy and Guidelines: Indemnities and Immunities</i> applies unless the employee is covered by the <i>Victorian Public Service Agreement 2006</i> or another workplace agreement providing an indemnity
Ministerial Officer or Parliamentary adviser (under Part 6 <i>Public Administration Act 2004</i> )	<i>Policy and Guidelines: Indemnities and Immunities</i> applies unless the person is covered by a workplace agreement providing an indemnity
Holder of statutory office or a prerogative office	<i>Policy and Guidelines: Indemnities and Immunities</i>
Director of a public entity	<i>Policy and Guidelines: Indemnities and Immunities</i>
Minister of the Crown	<i>Policy and Guidelines: Indemnities and Immunities</i>
Electorate Officer	Own contractual arrangements with employer
Principals, teachers and school councils	Specific indemnity arrangements (see section 4.2)
Victoria Police	Specific indemnity arrangements (see section 4.3)
Volunteers	Statutory arrangements under Part IX of the <i>Wrongs Act 1958</i> (see section 4.4)
Public entities	<i>Policy and Guidelines: Indemnities and Immunities</i> (see section 5.3)
Former Ministers, Crown servants or agents	<i>Policy and Guidelines: Indemnities and Immunities</i> (unless covered by the <i>Victorian Public Service Agreement 2006</i> at the time of their employment, whereby the principles of that agreement apply as approved by Cabinet)

## 5. Indemnities

### 5.1 Indemnities pursuant to the VPS and other industrial agreements

Clause 14 of the VPS Agreement places an obligation on the State to meet any legal costs that are incurred by an employee of the Victorian Public Service where legal proceedings are threatened or commenced.

The VPS Agreement states that an employer will not unreasonably withhold agreement to meet an employee's reasonable legal costs where:

- the employee legitimately and properly performed his or her duties, and
- the legal proceedings are initiated as a direct consequence of the employee acting in the performance of his or her duties.

Under the VPS Agreement, legal proceedings may be civil or criminal in nature and also include coronial inquests.

The VPS Agreement does not apply to:

- a Minister of the Crown; and
- executive employees.

The VPS Agreement is certified under the Commonwealth *Workplace Relations Act 1996* and therefore overrides the operation of this policy.

The VPS Agreement provides that “an application to meet an employee’s reasonable legal costs will be dealt with expeditiously by the level of management responsible for deciding the matter”. Subject to any specific arrangements or conditions in the VPS Agreement or other industrial agreement, decisions will be made in accordance with the Department or public entity’s usual business rules. Criteria such as those outlined in Section 5.2.1 (litigation in the normal course of government business) would typically be considered in making a decision about the legitimate and proper performance of an employee's duties. Where the VPS Agreement or other agreement does not apply to the particular circumstances (e.g. the indemnity is sought by a former VPS employee) then this policy will apply.

The Government has agreed that where a former employee is sued in respect of actions that occurred while they were employed with the VPS, then if the VPS Agreement would have applied to them during their employment the same principles in the Agreement will apply to their request for an indemnity in respect of the proceedings.

### 5.2 Indemnities for Crown servants and agents under the Government Policy

A Minister, Crown servant or agent may seek an indemnity in accordance with this policy. Requests for specific indemnities will be considered on a case by case basis in respect of costs of legal representation (“legal costs”) as soon as possible after legal proceedings are threatened or commenced. An indemnity will provide a successful applicant with an

agreement or undertaking that the costs of legal representation will be met by the State of Victoria.

An indemnity may also be available to a Minister, Crown servant or agent to meet any award of damages or costs that is made by a court against that person as a result of such legal proceedings. The grant of an indemnity to meet an award of damages or costs will not be considered until the conclusion of any such legal proceedings.

Payment of legal costs will be met by the relevant department as they are incurred.

An indemnity for legal costs is not available to a director or officer of a public entity who is eligible to obtain indemnity cover from the Victorian Managed Insurance Authority.

## 5.2.1 Litigation in the normal course of government business

There are numerous occasions where statutes or the common law confer power or impose duties and functions on Ministers and Crown servants or agents. The exercise of these powers and performance of these functions will often be subject to legal challenge in the normal course of government business.

As highlighted by the following examples, it is not necessary in these circumstances for a Minister, Crown servant or agent to seek an indemnity for legal proceedings commenced or threatened in connection with the exercise of powers and functions attaching to the office of a Minister or Crown servant or agent.

Representation for Ministers and Crown servants in relation to those matters is handled in the normal course of business.

### Examples

1. A disaffected member of the public seeks an injunction to restrain the Minister for Planning from carrying out his Ministerial duties under the *Planning and Environment Act 1987*.
2. A freedom of information review is sought in VCAT by a member of the public where a public entity is the respondent.

The normal course of business may also include litigation that goes beyond challenging an administrative decision and where there is an allegation that may expose the Minister or Crown servant or agent to the possibility of personal liability (e.g. an action for negligence). The relevant Department or public entity will provide for representation in accordance with its usual business rules provided that the person has purported to be performing their duties in good faith and appears not to have:

- been guilty of misconduct;
- been grossly negligent; or
- been guilty of an offence.

If there is doubt about whether the proceedings should be treated as being in the ordinary course of business, the relevant Minister (or the Attorney-General if the person is a Minister) should decide whether or not to take the matter to Cabinet in accordance with the process outlined in section 5.2.3.

## 5.2.2 Litigation that is not in the normal course of government business

An application to Cabinet for an indemnity for a matter falling outside the normal course of Government business should usually be made in cases where:

- personal impropriety (including intentional defamation) is alleged against a Minister, Crown servant or agent;
- proceedings are instituted by a Minister, Crown servant or agent for personal benefit; or
- criminal charges are brought or offences are alleged against a Minister, Crown servant or agent.

### Examples

1. A Minister is sued in defamation for a statement reported in a local newspaper.
2. A person aggrieved by the action of a Minister, Crown servant or agent takes action against him or her by lodging a caveat against the title to land owned by the Minister, Crown servant or agent. In this case, it may well be proper for assistance to be provided to commence legal proceedings to have the caveat removed.

Such applications will be decided by Cabinet in accordance with the process outlined in section 5.2.3. Cabinet will determine whether it is in the public interest to provide assistance with legal costs and other liabilities. Assistance with legal costs will not normally be provided where a Minister, Crown servant or agent seeks to bring proceedings in defamation unless the Minister, Crown servant or agent elects to:

- seek nominal damages only; or
- enter into an undertaking to pay any award greater than nominal damages to the Consolidated Fund.

If allegations against a Minister, Crown servant or agent appear to be malicious, frivolous or otherwise without substance, the Minister or relevant head of the Department or public entity or their delegate may authorise representation without referral of the matter to Cabinet.

## 5.2.3 How to seek Cabinet approval for an indemnity for legal costs

The following process must be followed where an indemnity for legal costs is sought for matters outside the normal course of Government business.

Where legal proceedings are threatened or commenced against a Crown servant or agent, to whom the Policy applies (see summary in section 4.6), he or she must make a request for an indemnity for legal costs to the responsible Minister. The responsible Minister will then prepare a letter requesting that the Attorney-General consider an application for an indemnity for legal costs by the Crown servant or agent. The letter must set out all relevant circumstances. Where a Minister seeks an indemnity he or she must write to the Attorney-General setting out the relevant circumstances.

Upon receipt of the letter, the Attorney-General will obtain independent legal advice to assess the request regarding the eligibility of the Minister, Crown servant or agent. The Attorney-General will consider this advice before determining whether to endorse the request. The Attorney-General will advise the applicant of his or her decision.

Where the Attorney-General has agreed to endorse a request, the relevant department will prepare a submission to Cabinet seeking approval of the proposed indemnity. The submission must be signed by the responsible Minister and the Attorney-General.

The Attorney-General has sole responsibility for presenting and signing any submission to Cabinet that recommends the provision of an indemnity to a Minister of the Crown.

Where the Attorney-General seeks an indemnity for legal costs on his or her own behalf, the Premier of Victoria (the Premier) is responsible for presenting and signing any submission to Cabinet that recommends the provision of an indemnity.

Where the Attorney-General and Premier seek a joint indemnity for legal costs, the Cabinet will select a Minister that is not a party to the legal proceeding who is responsible for presenting and signing any submission to Cabinet that recommends the provision of an indemnity.

The Department of Treasury and Finance and Department of Justice must be consulted in the preparation of any submissions to Cabinet relating to the provision of an indemnity for legal costs.

The relevant Department or public entity is responsible for the cost of obtaining legal advice where Crown Counsel (Advisings) is unavailable. This may occur where there is a conflict of interest.

## **5.2.4 Legal representation**

The VGSO is responsible for providing all legal representation for any person who has received an indemnity for legal costs in accordance with this policy, unless special circumstances require the person to be represented by other solicitors.

In some instances, a conflict of interest may exist between the State and the person who will receive the benefit of the indemnity and therefore it would not be appropriate for the Victorian Government Solicitor's Office to represent this person. In these circumstances, it is necessary to seek approval from the relevant public service body head or his or her delegate to engage a legal service provider other than the VGSO.

The State reserves the right either to decline an application for an indemnity or to set a daily maximum limit on the total legal costs that will be paid by the State where a person engages a legal service provider who is not a member of the Victorian Government Legal Services panel.

Further information relating to the Government Legal Services panel may be found at: [www.justice.vic.gov.au](http://www.justice.vic.gov.au) or by contacting Government Legal Services on (03) 8684 0810 or via email: [glc@justice.vic.gov.au](mailto:glc@justice.vic.gov.au)

## **5.2.5 Who is responsible for funding any costs incurred under an indemnity for legal costs?**

The relevant Department or public entity is responsible for any costs incurred pursuant to an indemnity unless otherwise approved by Cabinet.

## **5.2.6 Who is responsible for managing legal proceedings?**

The relevant Department or public entity head or his or her delegate is responsible for overseeing any legal proceedings and administering the indemnity proceedings.

Following Cabinet's decision the relevant Department or public entity head or his or her delegate will write to advise the applicant of the decision and any terms and conditions upon which an indemnity is granted.

The relevant Department or public entity head or his or her delegate is responsible for receiving and approving all progress reports prepared by the VGSO (or other approved legal service provider) in relation to the legal proceedings.

In accordance with this policy, the State retains a right of subrogation including the right to settle any proceedings ("subrogation" means that the State "steps into the shoes" of the indemnified person). Therefore, the relevant Department or public entity head or his or her delegate may assume control of the legal proceedings on behalf of the State if dissatisfied with the conduct of the legal proceedings.

### **5.2.7 Obligation to provide full cooperation**

Any person who receives an indemnity for legal costs in accordance with this policy is required to fully cooperate with the State throughout the legal proceedings to the extent that this does not prejudice their legal rights. Failure to cooperate may result in the indemnity being withdrawn.

### **5.2.8 Does an indemnity for legal costs apply to an agreement to settle legal proceedings?**

The relevant Department or public entity head or his or her delegate may approve a settlement agreement for the cessation of legal proceedings in accordance with his or her authorised financial delegation. Cabinet is responsible for approving any settlement agreement where the amount payable exceeds the financial delegation of the accountable officer of a public entity.

In urgent circumstances where it is not possible to receive Cabinet approval, the Treasurer of Victoria and the Attorney-General of Victoria may jointly approve a settlement agreement.

### **5.2.9 State reserves the right to recover monies**

The State reserves the right to recover any monies paid out in respect of an indemnity for legal costs issued in accordance with this policy, where it has been established that the Minister, Crown servant or agent has:

- failed to act in good faith;
- been found guilty of misconduct;
- been found grossly negligent; or
- been convicted of an offence in relation to such conduct arising from the discharge of the person's professional duties to the Crown.

Circumstances in which this right might be exercised are rare and the decision to seek recovery will be made by the agency head, the relevant Minister or Cabinet, depending on the nature of the case.

In addition, under section 57 of the *Financial Management Act 1994* any person who is or was employed by a Department (or a person or body prescribed for the purposes of the *Financial Management Act 1994*) may be liable to the State for any misconduct or gross negligence that causes or contributes to a loss of public money or damage to State property. He or she will be liable to pay an amount necessary to make good the loss.

A public entity or Minister may, under section 87 of the *Public Administration Act 2004*, bring legal proceedings against a director of a public entity who has failed to act in accordance with his or her duties as a director of the relevant public entity. These duties are set out in Part 5, Division 2 of the *Public Administration Act 2004*. Where a director of a public entity has contravened one (or more) of these sections, he or she will be liable, as a debt due to the public entity, for:

- an amount equal to any profits he or she made as a result of the contravention; and/or
- an amount equal to any loss or damage suffered by the public entity as a result of the contravention.

### 5.2.10 Caretaker period

The relevant Departmental head will make an interim decision relating to the conferral of an indemnity for legal costs during a caretaker period in accordance with this policy. This decision must be considered by Cabinet immediately following the election period.

### 5.2.11 Royal Commissions and special inquiries

Royal Commissions and other special inquiries are generally established for a public purpose that may justify the provision of an indemnity for legal costs to some parties.

Cabinet has approved a separate process relating to the provision of indemnities for Royal Commissions and other special inquiries. A copy of this process is at Attachment A to this policy.

## 5.3 Ministerial power to grant indemnities

An indemnity creates a potential financial risk or liability that may be realised at a later date due to the occurrence or non-occurrence of a specified event. This is known as a contingent liability. In most instances, it is not possible to quantify the exact value of the risk or liability that is incurred by the provision of an indemnity. This is known as an unquantified contingent liability.

All indemnities create a financial risk or liability that must be identified and reported as a financial risk to the State as part of each Departmental annual report.

All Ministers of the Crown possess the prerogative power to grant an indemnity to a third party on behalf of the State in respect of matters that fall within their portfolio. However, in accordance with its commitment to the principle of sound financial management set out in section 23D of the *Financial Management Act 1994*, the Government has determined that the Treasurer will execute indemnities on behalf of the Government for risks of an extraordinary or unique nature. This includes significant one-off financial risks that relate to one or more portfolios.

A Minister who receives an indemnity request in respect of such a risk should refer it to the Treasurer for consideration. The basis upon which a Treasurer's indemnity will be granted is set out in section 5.3.1 below. As set out in section 5.3.12 a Treasurer's indemnity is not generally required in the context of a contractual agreement for the provision of goods or services to the State.

The Treasurer may create an indemnity using his or her prerogative power. This power is not based on any legislative provision. The Treasurer also has the power, under Part 6A of the *Financial Management Act 1994*, to create indemnities benefiting:

- directors of statutory authorities;
- public entities including statutory authorities and statutory companies; and
- owners of goods that are loaned to the State.

Wherever possible, an indemnity should be created using these statutory powers rather than the Treasurer's prerogative powers. This is because section 40H of the *Financial Management Act 1994* provides that any sums required by the Treasurer in fulfilling an indemnity given under this Act shall be paid out of the Consolidated Fund. Thus, any indemnities that are provided outside the operation of the *Financial Management Act 1994* must be satisfied from the public entities' annual appropriation from the Consolidated Fund.

### 5.3.1 When will a Treasurer's indemnity be made?

A Treasurer's indemnity is not available:

- where commercial insurance is available (this may be acquired from the Victorian Managed Insurance Authority or a private insurer in some circumstances); or
- to provide comfort against general or unspecified risks.

A Treasurer's indemnity will only be granted in exceptional circumstances where:

- the risk is unique and/or extraordinary in nature;
- no commercial insurance is available or is only available on unacceptable terms;
- a public entity is best placed to manage the risk on behalf of the State; and
- the cost to the State of leaving the risk with the party seeking the indemnity, or transferring it to a third party, is prohibitive and outweighs the potential benefits of assuming the risk.

An assessment that the level of risk associated with a proposed Treasurer's indemnity is low, in terms of likelihood and impact, will not determine or otherwise influence the decision of whether an indemnity should be provided.

The Treasurer retains an absolute discretion to grant or deny the provision of an indemnity on behalf of the State.

The conferral of an indemnity creates a potentially significant precedent risk. Each proposed indemnity will be carefully considered by the Treasurer to assess the likelihood that the proposed indemnity will expose the State to further financial risks.

### 5.3.2 Is a charge payable?

Under the *Financial Management Act 1994*, the Treasurer may determine that a charge is payable for any indemnity that he or she may give under this Act.

The Treasurer will exercise his or her absolute discretion in determining whether a charge is required and calculating the amount payable.

### 5.3.3 Terms and conditions

The *Financial Management Act 1994* confers an absolute right on the Treasurer to use his or her discretion to impose whatever terms or condition upon the indemnity that he or she deems appropriate.

### 5.3.4 Who may apply for an indemnity?

Any person or body (whether corporate or unincorporated) may apply to the Government for an indemnity to be granted.

### 5.3.5 Indemnities between the Victorian Government and other governments

In some instances, the Commonwealth or a state or territory government may seek an indemnity from the Government. A contractual or ministerial indemnity may be sought. The provision of an indemnity in favour of a Commonwealth, state or territory government is not desirable and should be avoided wherever possible.

This policy applies in relation to any ministerial indemnity sought by the Commonwealth or a state or territory government and its application is in no way altered or affected by the legal identity of the body corporate.

Where a department or agency receives a request for the provision of an indemnity, either contractual or ministerial in nature from a Commonwealth, state or territory government, consultation with Government Branch, Department of Premier and Cabinet, is strongly recommended.

### 5.3.6 When will the Victorian Managed Insurance Authority issue an indemnity?

The Victorian Managed Insurance Authority is established under the *Victorian Managed Insurance Authority Act 1996* to act as the Government's insurer. Sections 25 and 25A of the *Victorian Managed Insurance Authority Act 1996* authorises the Victorian Managed Insurance Authority to issue an indemnity to:

- a person who is or has been a director or officer of:
  - a statutory authority; or
  - a State company;
- other person or body (as directed by the responsible minister) for a period not exceeding one year; or
- an owner of goods that are lent for the purposes of a temporary exhibition or are otherwise made available to the State for a limited period.

Section 25 of the *Victorian Managed Insurance Authority Act 1996* is generally used by the Victorian Managed Insurance Authority for the purpose of providing directors' and officers' indemnity and professional indemnity. Both types of cover are generally available from the commercial insurance market. The director or officer of a public entity or the public entity must pay a premium to the Victorian Managed Insurance Authority for these types of cover.

An indemnity will not be granted in accordance with this policy where a person or public body can acquire (but has failed to do so) an indemnity from the Victorian Managed Insurance Authority in accordance with the *Victorian Managed Insurance Authority Act 1996*.

### 5.3.7 When will a public entity issue an indemnity?

A public entity may have the power to issue an indemnity pursuant to its governing legislation. Therefore, a public entity established as a:

- statutory corporation has the power to issue an indemnity where that power is provided in its governing legislation;
- State business corporation, as defined by the *State Owned Enterprises Act 1992*, has the power to issue an indemnity as prescribed by that Act; and
- company constituted under the Commonwealth's *Corporations Act 2001* has the power to issue an indemnity subject to the provisions set out in that Act.

The provision of indemnities by public entities is outside the scope of this policy and legal advice is highly recommended.

### 5.3.8 How to apply for an indemnity?

Any person or body seeking a ministerial indemnity must apply in writing to the Treasurer. The chairperson of a board of directors of any public entity (or other body corporate) or the chief executive officer (acting on behalf of the board of directors) is responsible for making an application for an indemnity on behalf of either a board of directors or a public entity.

Any request to a Minister of the Crown (other than the Treasurer) or Department for an indemnity must be referred to the Treasurer. This must be accompanied by a letter of support from the responsible Minister.

The following information must be provided to the Treasurer before an indemnity is granted:

- a clear identification of the risk;
- an assessment of the likelihood of the risk occurring;
- the financial and other impacts or consequences that will occur if the risk materialises;
- the availability or non-availability of insurance;
- who is responsible for managing the risk on behalf of the public entity;
- what risk management or mitigation strategies are proposed;
- the indemnity period; and
- any further information required by the Department of Treasury and Finance on behalf of the Treasurer.

### 5.3.9 Who will draft the deed of indemnity?

The Department of Treasury and Finance is responsible for drafting all indemnities on behalf of the Treasurer.

The Department of Treasury and Finance or, where appropriate, its legal advisers will consult with the person or body that has requested the indemnity.

### 5.3.10 What is the process for managing and reporting an indemnity?

All indemnities must be recorded by the Department of Treasury and Finance in an indemnities register. The following information must be reported:

- a clear description of the risk;
- the name of each party;
- the name of the party responsible for managing the risk (usually a public entity);

- an estimate of the financial risk created by the indemnity; and
- the indemnity period (e.g. commencement and termination or expiry).

It is the responsibility of the relevant public entity to monitor each indemnity and advise the Treasurer in the event of any changes in circumstances that may change the nature of the risk covered by the indemnity, increase or decrease the likelihood of the risk occurring or increase or reduce the potential financial liability that is created by the indemnity.

The Department of Treasury and Finance is responsible for monitoring and reporting all significant quantified and unquantified contingent liabilities as part of the Government's annual budget.

### 5.3.11 What terms and conditions may apply?

The Treasurer, on behalf of the State, retains an absolute discretion to determine what terms and conditions may apply to an indemnity.

The indemnity shall authorise the State to assume control of any legal proceedings or defence. The indemnified person shall be required to cooperate with the State and will not make any admission of liability or fault without the prior approval of the State.

### 5.3.12 Contractual indemnities

An indemnity may be granted by the State for the benefit of a third party as part of a broader commercial arrangement for the provision of goods or services to the State. Apart from the notable exceptions outlined below, such indemnities (referred to as contractual indemnities) are outside the scope of this policy.

First, where an agency is seeking to provide a contractual indemnity within the standard operations of that agency or otherwise, and the scope or financial exposure arising from the provision of such an indemnity would have a material impact upon the agency's capital inflows, the Department of Treasury and Finance should be consulted before the contractual indemnity is finalised.

Second, if the contractual relationship gives rise to an arrangement which is outside the standard operations of the agency, the Department of Treasury and Finance should be consulted where the contractual indemnity pertains to material risks, financial or otherwise, that are not within the control or dependent on actions within the control of that specific agency.

Either of these circumstances may warrant the use of a Treasurer's indemnity or a more detailed assessment of the risk exposure to the State.

Third, the use of contractual indemnities between Government entities is not recommended. It is recommended that where uncertainty exists agencies clarify their responsibilities through an exchange of letters or memorandum of understanding. In the event of disagreement over loss or potential claims, the VGSO is a source of useful advice on the conduct of disputes between Government entities. As a general principle, litigation is undesirable and undermines the whole of Government approach to problem solving. Alternative dispute resolution should be utilised. For these reasons formal indemnities are not considered necessary or appropriate between Government entities in Victoria.

## 6. Immunities

### 6.1 When may a statutory immunity be used?

A statutory immunity confers certain rights and privileges upon a specified person, class of persons or public entity. Immunity from legal liability may only be created by statute. Liability for any loss or damage that may result from the acts or omissions of a person who has received the benefit of a statutory immunity may be transferred to the relevant public entity (such as the person's employer - this is consistent with the common law principle of vicarious liability).

Liability for any loss or damage that may result from the act or omission of a person who has received the benefit of a statutory immunity may be removed altogether, in which case liability would not attach to either the person or the relevant public entity. This is known as an absolute immunity. Absolute immunities are very rare as they effectively deprive the person who suffers loss or damage caused by the act or omission of another person of any legal right to seek redress in the form of damages or other compensation. However, an absolute immunity will often be appropriate if a judicial office is being created.

As an immunity fundamentally affects people's legal rights and powers, statutory immunities are rarely provided and indemnities are preferred as a way of transferring risk. This is because a statutory immunity removes some of the incentives for a person, class of persons or body to exercise an appropriate level of care in the exercise of his or her powers.

The fact that a person may be exposed to the risk of legal proceedings through the performance of his or her duties is not sufficient justification for the creation or continuation of an immunity where legislation is being amended or revised.

The Government will not approve the creation of a statutory immunity where an indemnity is a sufficient risk management response.

An immunity is not available for any person exercising investigative or enforcement powers such as the powers of entry, search, seizure and arrest.

#### 6.1.1 Judicial and quasi-judicial functions

A judge of the Supreme Court of Victoria (the Supreme Court) is immune from liability for civil wrongs or torts where he or she has acted in the performance of his or her duties as a judge of the Supreme Court. This immunity is not set out in legislation but has evolved through the common law and the consideration of different legal cases by the courts.

The *County Court Act 1958*, *Magistrates' Court Act 1989* and *Victorian Civil Administrative Tribunal Act 1998* confer the same immunity upon judges appointed to the County Court of Victoria, magistrates and members of the Victorian Civil and Administrative Tribunal.

A statutory immunity in the model form is appropriate where a person, class of persons or body corporate is responsible for exercising quasi-judicial functions.

A person, class of persons or body corporate has quasi-judicial powers if:

- he or she has the capacity to affect the rights of others through measures such as the imposition of sanctions, penalties or restrictions on a person's right to engage in a trade or profession; and

- he or she must apply principles of natural justice when undertaking his or her decision-making functions.

#### Example

The Optometrists Registration Board of Victoria (the Board) is established under the *Optometrists Registration Act 1996* (the Act) to consider the professional conduct of optometrists and impose disciplinary sanctions such as fines and the suspension or cancellation of an optometrist's registration under this Act. Sections 50 and 51 of the Act require the Board to apply rules of natural justice and some rules of evidence (set out in the *Evidence Act 1958*). These factors justified the inclusion of a statutory immunity under section 78 of the Act in accordance with the model immunity set out in this policy.

An immunity is not available to any person who exercises quasi-judicial functions that are incidental to his or her primary duties. An immunity may be appropriate if these quasi-judicial functions can be clearly identified and described in legislation.

### 6.1.2 Disclosure of information

A limited immunity may be appropriate, on public policy grounds, where legislation imposes a legal duty upon individuals to disclose information.

#### Example

The *Children, Youth and Families Act 2005* requires any person, acting in the course of his or her professional duties, who forms a reasonable belief that a child is in need of protection to disclose this information to the departmental head of the Department of Human Services. The Act confers protection on any such a person, who acts in good faith, in respect of that disclosure.

The conferral of an immunity may also be appropriate where legislation, such as the *Whistleblowers Protection Act 2001*, is designed with the public policy objective of encouraging any person, acting in good faith, to voluntarily disclose certain information.

## 6.2 Model immunity

All immunities should be expressed in the following terms. These provisions may only be modified in consultation with the Office of Chief Parliamentary Counsel and Civil Law Policy, Department of Justice so as to accurately identify the person or class of persons to whom the immunity is intended to apply.

- (1) A member of the Board is not personally liable for anything done or omitted to be done in good faith –
  - (a) in the exercise of a power or the discharge of a duty under this Act or the regulations; or
  - (b) in the reasonable belief that the act or omission was in the exercise of a power or the discharge of a duty under this Act or the regulations.
- (2) Any liability resulting from an act or omission that would but for sub-section (1) attach to a member of the Board attaches instead to the Board.

The model immunity provision does not limit or alter the jurisdiction of the Supreme Court as defined by section 85 of the *Constitution Act 1975*.

## 6.2.1 Nationally consistent legislation

Departure from the model provision set out above may be justified where nationally consistent legislation is proposed. However, the model provision must be adopted where jurisdictions retain discretion to vary provisions contained in the proposed legislation.

## 6.3 What is good faith?

The concept of 'good faith' is established in Australian common law and is subject to constant evolution due to judicial consideration of this concept through relevant case law. Legal advice is recommended to determine what constitutes 'good faith' at any given time.

## 6.4 How to create a statutory immunity

Immunity from legal liability may only be created by statute. A proposal for the inclusion of a statutory immunity will usually arise as part of the legislative process undertaken by a department, on behalf of a responsible Minister, in consultation with the Office of Chief Parliamentary Counsel and must be approved by Cabinet and the Parliament of Victoria.

The responsible department must consult with Economic and Financial Policy, Department of Treasury and Finance and Civil Law Policy, Department of Justice in relation to any proposal for a statutory immunity.

The responsible department must demonstrate that:

- the creation of the immunity is in the public interest; and
- alternative risk mitigation and/or management strategies (such as insurance or indemnities) are not adequate.

Consultation with the Office of Chief Parliamentary Counsel is required for drafting of the statutory immunity in accordance with the model provision set out in this policy.

Cabinet must explicitly approve the inclusion of the proposed immunity as part of the recommendations set out in the Approval-in-Principle Cabinet submission and/or the Bill-at-Cabinet submission as part of the legislative process.

### 6.4.1 Policy exceptions

Where Cabinet approval is sought for an immunity that does not conform to the model immunity provision set out in this policy, the Cabinet submission must include the following statement:

This submission seeks Cabinet approval for the inclusion of a proposed immunity that does not comply with the model immunity approved under the *Cabinet Policy and Guidelines on Indemnities and Immunities*.

The Cabinet submission should explicitly set out the reasons why an exception to the policy is merited and clearly identify who will benefit from the proposed immunity. It must clearly identify what rights are being removed or limited and the likely impact on any person or entity that will be deprived of legal rights because of the introduction of the proposed statutory immunity.

An absolute statutory immunity limits, or removes, the right of a person or entity to seek compensation for any loss or damage that he or she may have suffered because of an act or

omission by the other person or entity. The potentially adverse effect of an absolute immunity means that it is important that any proposed statutory immunity, that does not comply with the model immunity approved under the policy, is defined as narrowly as possible so as to avoid potential, unintended harm.

The Department of Treasury and Finance and the Department of Justice may, or may not, support an exception to this policy based on the reasons set out in the Cabinet submission.

This may be included as part of the Approval-in-Principle Cabinet submission or Bill-at-Cabinet submission.

## **6.4.2 Reviewing current statutory immunities**

Many statutory immunity provisions set out in Victorian statutes pre-date the *Cabinet Policy and Guidelines on Indemnities and Immunities* (24 January 2000) or have been otherwise developed and approved by Parliament that do not comply with this revised policy or its predecessor (as set out in the *Cabinet Policy and Guidelines on Indemnities and Immunities* (24 January 2000)).

Where a Department proposes to amend an existing statute that includes an immunity provision, the Department of Treasury and Finance and Department of Justice will seek to align this statutory immunity with the model provision approved by this policy.

## **6.4.3 Persons or bodies other than a Crown servant, agent or public entity**

The principles set out in this policy in relation to the use of statutory immunities apply to all persons and bodies and are not limited to Crown servants and agents or public entities.

# Attachment A

## Process for determining applications for legal assistance for Royal Commissions and other special inquiries

1. All applications from former Ministers, serving Members of Parliament, Ministerial advisers and public servants seeking the assistance of the State for legal costs associated with appearing before a Royal Commission or other special inquiry should be made to the Secretary, Department of Justice.
2. The Attorney-General will assess each application objectively in accordance with the *Government Policy and Guidelines on Indemnities and Immunities* endorsed by Cabinet on 24 January 2000 (and revised in 2007). The policy applies to Ministers and Crown servants (including public sector employees) and agents.
3. The Policy acknowledges that as Royal Commissions and other special inquiries are conducted for a public purpose, the purpose may justify assisting some or all parties with their legal costs as a matter of fairness to ensure that the Royal Commission or Inquiry is conducted efficiently and in accordance with due process.
4. The following factors will be taken into account by the Attorney-General in assessing an application for assistance with legal costs in relation to a Royal Commission or other special inquiry:
  - whether Government assistance is justified as a matter of fairness to ensure that the Royal Commission is conducted fairly and in accordance with due process;
  - whether there is a “material connection” between the applicant and the matters being investigated by the Royal Commission;
    - In determining whether there is a “material connection” between the applicant and the matters being investigated by the Royal Commission, the Attorney-General shall have regard to all circumstances by which the applicant’s activities are relevant to the Inquiry. These matters should include:
      - whether the duties performed by the applicant or the evidence to be produced by the applicant are integral to the matters investigated (it may be appropriate in some circumstances for the Attorney-General to determine that, whilst the applicant’s activities (or evidence) are material to the inquiry, they are not central to the matters investigated and assistance would not therefore be appropriate); and
      - the extent to which the applicant has any responsibility or accountability for the matters inquired into (it may be appropriate in some circumstances for the Attorney-General to determine that the whilst the applicant’s duties are such that he/she is able to give evidence concerning the subject of the Inquiry, he/she could not be held accountable or responsible for any relevant act or omission so that legal representation could not be justified).
  - whether the matters being investigated by the Royal Commission arise out of the discharge of the applicant’s duties on behalf of the Crown.
5. Any assistance provided by the Government would be in relation to a Royal Commission or special inquiry only. A separate request will need to be made in relation to any matters arising from a recommendation of a Royal Commission or special inquiry. In assessing

any further request, the Attorney-General will take into account the factors listed in paragraph four as well as the following:

- whether the applicant has acted in good faith in discharging his/her duties on behalf of the Crown in relation to the subject matter of the Royal Commission or special inquiry;
  - whether the applicant has been guilty of misconduct or acted in a grossly negligent manner in relation to matters being investigated by the Royal Commission or special inquiry;
  - whether the applicant has been convicted of an offence in relation to the conduct arising from the discharge of his/her duties on behalf of the Crown which is the subject matter of the Royal Commission or special inquiry; and
  - whether personal impropriety has been alleged against the applicant in relation to the subject matter of the Royal Commission or special inquiry.
6. All applications by former Ministers and current Members of Parliament for assistance with legal costs associated with Royal Commissions and other special inquiries will be determined by Cabinet based on an assessment by the Attorney-General.
  7. All other applications for individuals, including Ministerial advisers and public servants, for assistance with legal costs associated with Royal Commissions and other special inquiries will be determined by the Attorney-General.

#### **Policy for Capping Legal Costs for Indemnities**

8. Any Government assistance for legal costs will be capped, based on the following formula developed by the Department of Justice. The basis for imposing a cap on assistance is to balance the appropriate expenditure of public funds with the need to provide a reasonable standard of legal representation to the applicant.
9. The maximum assistance available for legal costs for an applicant will be limited to \$3,000 per day. The number of days for which assistance will be made available will also be limited depending on advice from counsel assisting the Royal Commission or inquiry.
10. The Attorney-General may approve a maximum above this cap in special cases upon a recommendation from the Victorian Government Solicitor on the basis of the nature of the claims being investigated, the relationship of the person to the matters under investigation, the likely length of time that the person will need representation, and the reasonable costs of obtaining legal representation appropriate for the matters under investigation.
11. While the formula is based on the calculation of \$1,500 per day for the services of a barrister and \$1,500 per day for a solicitor, it will be left to applicants to apportion the amount provided by the Government however they determine.
12. Where applications have been approved (either by Cabinet for former Ministers and current Members of Parliament, or by the Attorney-General for other Crown servants and agents), an applicant will be notified by the Attorney-General that approval in principle has been granted for legal assistance for a specified number of days and up to a maximum of \$3,000 per day. However, payment of legal assistance will only be made when bills for legal costs are presented.

If you would like to receive this publication in an accessible format, such as large print or audio, please telephone 9651 0909 or email [information@dtf.vic.gov.au](mailto:information@dtf.vic.gov.au). This document is also available on the internet at [www.dtf.vic.gov.au](http://www.dtf.vic.gov.au)

