

PRIVATE AND CONFIDENTIAL

Birmingham City Council Waste Management Governance Review

December 2018

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1 **Executive Summary**

1.1 In relation to the specific questions that we were asked, we found that:

- 1.1.1 Cllr Clancy did not have the authority by himself to make the agreement of 15th August with UNITE that was contained in the ACAS press release.
- 1.1.2 Cllr Clancy did not have the prior authority of Cabinet to make that agreement.
- 1.1.3 The subsequent informal Cabinet Meeting did not have the authority to ratify that agreement.
- 1.1.4 Proper governance processes were not followed in the making of that agreement and in its subsequent ratification.
- 1.1.5 We have identified a number of aspects in the purported making of the agreement and its ratification that were contrary to good practice.
- 1.1.6 We have made recommendations of steps the Council should take to prevent any similar circumstances arising in the future.
- 1.1.7 We have recommended a number of areas to the Council where further investigations may be required.
- 1.1.8 We have made recommendations in relation to Member/Officer relations.
- 1.1.9 We believe that there may have been breaches of the Councillor Code of Conduct including a breach of the Nolan Principles and that this should be investigated.

1.2 We have also made a number of other recommendations.

2 Background

- 2.1 The Waste Management Service (the Service) is part of the Place Directorate within Birmingham City Council (BCC). In early 2017 the service proposed to redesign its Refuse Collection Service and Street Cleansing Service which in broad terms included proposals to delete the Grade 3 Leading Hand role and extend the working week. UNITE were in dispute with the Service during the consultation period which resulted in a trade dispute and industrial action.
- 2.2 The industrial action by UNITE had a significant impact on the citizens of Birmingham.
- 2.3 On 15th August the then Leader of the Council, Cllr John Clancy, went to ACAS and purported to reach an agreement with UNITE subsequently set out in an ACAS press release which included that Cabinet members had agreed in principle that the grade 3 leading hand posts in the Refuse Collection Service would be maintained and that consequently there were no redundancy steps in place. In addition, the agreement provided that a suspended shop steward should be re-instated.
- 2.4 When BCC officers became aware of the draft ACAS press release setting out the terms of the agreement that the Leader had purported to reach, BCC's Monitoring Officer spoke to ACAS to make them aware of Cllr Clancy's lack of authority to enter into such an agreement and made it clear that the press release should not be issued. ACAS however issued the press release.
- 2.5 Cllr Clancy sought the agreement of his Cabinet colleagues informally to his actions. Following on from this he represented that the agreement he had reached with UNITE had Cabinet backing and authority. His interpretation of the ability of the Cabinet / Leader to make such decisions was subsequently challenged by BCC's Monitoring Officer and the QC instructed by BCC. Cllr Clancy sought his own legal advice which initially supported him but with the benefit of a fuller understanding of the issues Cllr Clancy's legal advisers then agreed with the legal advice from BCC's Monitoring Officer and QC.
- 2.6 The agreement that Cllr Clancy purported to reach with UNITE at ACAS led to the suspension of the industrial action.
- 2.7 Subsequently BCC issued notices of redundancy to the grade 3 Leading Hands in the Refuse Collection Service.
- 2.8 UNITE brought an application in the High Court for an injunction to compel BCC to observe the terms of the agreement, which UNITE argued was a collective agreement incorporated into the contracts of employment of the employees.
- 2.9 On receipt of the relevant undertakings from UNITE, on 18th September 2017 the High Court granted an interim injunction to restrain BCC from dismissing the Leading Hands pending a speedy trial. The proceedings were then compromised without the need for a trial.
- 2.10 The financial implications of the industrial action together with costs associated with the High Court injunction amounted to in excess of £6m.
- 2.11 There is a need for BCC to understand the operational issues that led to the dispute with UNITE and what processes BCC might have followed in resolving this dispute. This will take the form of two reviews, the first in respect of operational and business aspects of the Waste Strategy 2017 and the second in respect of Governance aspects. This is the latter and hence the focus of this report is on Governance.

- 2.12 BCC has received a Councillor Code of Conduct complaint against Councillor Clancy relating to his involvement in the waste dispute and the 'in principle' agreement reached on 15th August. That complaint has not yet been investigated.

3 The Review

- 3.1 BCC instructed VWV LLP to carry out a Governance Review.
- 3.2 VWV is a full service law firm with a specialism in public sector legal advice for over 25 years. The Review was led by Mark Heath and Allison Cook.
- 3.3 Mark Heath has over 30 years of service within the public sector. Until December 2016, he worked at Southampton City Council. At Southampton, he was Solicitor to the Council (and Monitoring Officer) for 20 years. Subsequent to that he held the positions of Director of Place and subsequently Chief Operating Officer. His legal experience includes drafting and reviewing constitutions, advising on standards and all aspects of local authority governance and decision making.
- 3.4 Allison Cook is a Partner and Head of Public Sector at VWV. She has over 15 years' experience in advising clients on a wide range of employment related issues, ranging from litigation to industrial disputes.
- 3.5 BCC sought advice on whether appropriate and lawful processes were followed in reaching and approving the agreement made on 15th August 2017.
- 3.6 BCC also sought advice on what key learning (from the making and approval of that agreement) could be identified and how BCC could manage or mitigate against any similar circumstances arising in the future.
- 3.7 As part of our brief we were specifically asked to consider nine questions:
 - 3.7.1 Did Cllr Clancy have the authority by himself to make the agreement of 15th August with UNITE that was contained in the ACAS press release?
 - 3.7.2 Did Cllr Clancy have the prior authority of Cabinet to make that agreement?
 - 3.7.3 Did Cabinet have the authority subsequently to ratify that agreement?
 - 3.7.4 Were proper governance processes followed in the making of that agreement and in its subsequent ratification?
 - 3.7.5 Was there any aspect of the making of the agreement or its ratification that in our view was contrary to good practice?
 - 3.7.6 If we were of the view that there was a want of authority or a failure to follow proper governance processes or acts contrary to good practice, what would we advise that the Council does to prevent any similar circumstances arising in the future?
 - 3.7.7 Were there any other recommendations that we wished to make to the Council in respect of further investigations which may be required?
 - 3.7.8 Were there any key issues arising from the Member/Officer protocol in relation to the period of our enquiry and were there any recommendations we would make in relation to Member/Officer relations?
 - 3.7.9 Did we believe that there might be any breaches of the Councillor Code of Conduct including a breach of the Nolan Principles?
- 3.8 For the avoidance of doubt, this report does not amount to the making of findings in respect of any formal processes which relate to either employees or members of BCC. The Council

has its own disciplinary processes for officers and code of conduct processes for members should it, having considered the comments of this report and taken appropriate advice, decide to invoke them.

- 3.9 We were supplied with a considerable amount of documentary information and interviewed those set out in Appendix 1.
- 3.10 It should be noted that everyone that we sought to interview made themselves available and co-operated in full with three exceptions. Cllr Clancy declined to be interviewed. Malcolm Boswell on behalf of ACAS declined as ACAS felt that legally they could not be interviewed but they supplied us with a statement (used previously in the court proceedings) which we have included. Finally, the Local Government Association (LGA) declined to contribute to our work.
- 3.11 We would like to thank everyone we interviewed who made themselves available, sometimes at very short notice.
- 3.12 We undertook to all who we interviewed that what they told us and our discussion would remain confidential. That was important to enable us to understand fully what happened. We were therefore able to obtain some very candid information about what happened in BCC. We have included some comments in an unattributable format. If individuals are quoted in this report it is with their consent, or because what they said is already in the public domain.
- 3.13 We were supplied with and subsequently sought a large number of documents, some of which are confidential. We have read them carefully and have felt able to quote from those documents where the information itself is in the public domain, or where the passage of time and/or events have happened which mean that they can no longer claim to be confidential.
- 3.14 We have used our judgement and experience to reach the conclusions and recommendations in this report, based on the evidence we have collected and the perceptions of the witnesses we have interviewed. Where accounts conflicted about a particular event we have, of necessity, relied on our own judgement and experience to reach a particular conclusion where one was required.
- 3.15 Prior to publication, we sent a copy of this report to the Monitoring Officer in confidence, to check for factual inaccuracies and have corrected those only.
- 3.16 We have addressed each of the nine questions individually, although there is some overlap between them. We added a number of additional points that are by their nature more general conclusions in relation to the situation as we perceive it.

4 Legal Points

4.1 A crucial aspect of the governance concerns that we were asked to review relates to the decision making regime in councils. For that reason, and to avoid repetition, we summarise the key aspects in so far as they are relevant to our report

4.2 The Localism Act 2011 amended the Local Government Act 2000 (LGA 2000) (Parts 1A and Schedule A1) making changes to local authority governance arrangements in England.

4.3 Models of governance

4.3.1 Schedule 2 to the Localism Act 2011 prescribes the following forms of governance:

- (a) Executive arrangements. This can be a leader and cabinet executive (England) or a mayor and cabinet executive.
- (b) A committee system. This operates its decision-making process in accordance with sections 101 and 102 of the Local Government Act 1972.
- (c) Prescribed arrangements. As made by the Secretary of State in regulations. (Paragraph 9B, Schedule 2, Localism Act 2011.)
- (d) Paragraph 9H of Schedule 2 to the Localism Act 2011 also provides for a new system of directly-elected mayors.

4.4 Executive arrangements

4.4.1 A council which has adopted executive arrangements must ensure that its executive takes the form specified in section 9C(2) of Schedule 2 to the Localism Act 2011. The executive is responsible for certain functions and there must be a division between the making of a decision by the executive and the scrutiny of that decision.

4.4.2 An executive can either be a:

- (a) mayor and cabinet executive (an elected mayor of the authority and two or more councillors of a local authority appointed by the elected mayor); or
- (b) a leader and cabinet executive (a councillor of the authority (executive leader) elected as leader of the executive by a local authority (full council) and two or more councillors of the authority appointed by the executive leader). (Section 9C(2), (3), LGA 2000).

4.4.3 In the absence of regulation specifying the contrary, an executive can have up to a maximum of ten members (paragraph 9C(5), Schedule 2, Localism Act 2011).

4.5 Functions of the executive

4.5.1 The functions of the executive are set out in sections 9D and 9DA of the LGA 2000 and regulations made thereunder. The regulations specify functions not to be the responsibility of the executive. As a consequence, there is a presumption that all functions not so specified will be the responsibility of the executive, rather than the full council (section 9D(2), LGA 2000).

4.5.2 Executive arrangements mean any arrangements by a local authority:

- (a) "(a) for and in connection with the creation and operation of an executive of the authority; and
- (b) (b) under which certain functions of the authority are the responsibility of the executive." (Section 10, LGA 2000.)

4.5.3 The law has provided those functions not to be the responsibility of the Executive. As cited elsewhere, Tim Straker QC advised during the course of this matter that:

"Any decision which is not supported by the legislation, which has distributed functions, is in, short, beyond the law or, in conventional terms, ultra vires"

4.6 Executive meetings

- 4.6.1 Meetings of a local authority's executive can be held in public or private and it is the choice of the executive as to whether/which meetings are held publicly or in private (section 9G, LGA 2000).
- 4.6.2 If a local authority executive chooses to hold its meetings in private then:
 - (a) a written record must be kept of any "prescribed decisions" (those designated as such by the Secretary of State) and of any decisions made by individual members of an executive; and
 - (b) any written records or accompanying documents must be made available to members of the public. (Sections 9G, 9GA, LGA 2000).
- 4.6.3 The Local Authorities (Executive Arrangements) (Meetings and Access to Information) (England) Regulations 2012 (SI 2012/2089) ("The LAR 2012") apply to those local authorities in England that are operating executive arrangements under Part 1A of the LGA 2000, as amended by section 21 and Schedule 2 to the Localism Act 2011. The Regulations:
 - (a) clarify and extend the circumstances in which local authority executive decisions are to be open to the public (Part 2);
 - (b) make provision in relation to key decisions of the executive and the publicity that must be given before the key decision is taken (Part 3) and for the inclusion of prescribed information in a written statement of the executive decision (Part 4); and
 - (c) set out the additional rights of local authority members and members of overview and scrutiny committees to access documents (Part 5) and general provisions relating to information, such as the information which is exempt from disclosure (which includes advice from a political adviser).

4.7 Local authority constitutions

- 4.7.1 Every local authority is required to prepare and keep up-to-date a constitution. This must also be made publicly available at its offices (and is also often on councils websites).
- 4.7.2 The constitution must contain:
 - (a) its standing orders;
 - (b) its code of conduct;

- (c) any information directed by the Secretary of State;
- (d) any other information considered appropriate by the local authority; and
- (e) in the case of a local authority operating the committee system the constitution must also contain a statement as to whether it has an overview and scrutiny committee (OSC). (Section 9P, LGA 2000.)

4.8 The executive

- 4.8.1 The executive is made up of elected executive councillors appointed by the leader or mayor.
- 4.8.2 Members of a leader and cabinet executive can be made up of :
 - (a) a councillor of the authority (an executive leader) elected by the authority; and
 - (b) two or more councillors of the authority appointed to the executive by the executive leader. (Section 9C(3), LGA 2000.)

4.9 Councillors

- 4.9.1 Councillors are elected local authority members. They are elected by the community of a certain area known as a ward or electoral division, and either represent a political party or are independent.
- 4.9.2 Councillors are elected for a term of four years during which they are expected to perform a number of functions on behalf of the local authority acting as a link between it and their wider communities. Councillors are likely to be involved in any decisions relating to the running of a local authority.
- 4.9.3 Councillors are not employed by the local authority that they serve and are not paid a wage but are paid allowances and expenses.
- 4.9.4 Councillors are bound by a code of conduct and must sign up to it as part of their declarations of acceptance of office.

4.10 Council officers

- 4.10.1 The day-to-day business of a local authority is carried out by its employees, known as council officers. Local authorities are required to appoint council officers to a number of specified posts, such as:
 - (a) head of the paid service, usually known as the chief executive;
 - (b) chief finance officer, who cannot also be the head of the paid service (the “section 151 officer”); and
 - (c) monitoring officer appointed under section 5 of the Local Government and Housing Act 1989, whose role is to report unlawful or potentially unlawful acts to their local authority. The role is usually fulfilled by the head of the legal department.

4.11 Overview and Scrutiny Committees (OSC)

- 4.11.1 Where a local authority operates under executive arrangements then it must also have an OSC, which is responsible for overseeing and scrutinising the local authority’s decisions, for example, scrutinising the financial arrangements and

performance of the local authority including its budget and accounting processes (section 9F, LGA 2000). An OSC may be split into a number of OSC select committees (also called sub-committees) dealing with the scrutiny of different areas such as planning and education.

- 4.11.2 A local authority is required to designate one of its council officers to act as a “scrutiny officer” primarily to promote the role of the OSC as well as providing support and guidance to members of the local authority and the OSC itself (section 9FB, LGA 2000). Members of a local authority OSC must be different to those in the local authority’s executive (section 9FA(3), LGA 2000). OSC members are made up of members from all political parties.

4.12 OSC functions

- 4.12.1 OSCs in local authorities may appoint a number of different sub-committees to discharge their functions, for example, committees dealing with adult social care, education and children’s services, environmental issues or housing (section 9FA(1), LGA 2000). Each sub-committee will then undertake investigations into issues of concern for local residents in relation to their respective areas.
- 4.12.2 OSCs are prevented from investigating “excluded matters”. This means any matter which is:
- (a) a local crime and disorder matter under section 19 of the Police and Justice Act 2006; or
 - (b) specified in an order made by the Secretary of State. (Section 9FC(5), LGA 2000.)

4.13 OSC Powers

- 4.13.1 A council operating under executive arrangements must ensure that its OSC has the power to:
- (a) review or scrutinise decisions or actions taken which relate to the discharge of any functions which are and are not the responsibility of the executive;
 - (b) make reports or recommendations to a local authority or its executive relating to the discharge of any functions which are the responsibility of the executive and also those that are not; and
 - (c) make reports or recommendations on matters which affect a local authority’s area or its inhabitants (Section 9F(2), LGA 2000).
- 4.13.2 OSCs have the power to require council officers or members of the executive to appear before it in order to give evidence on a particular matter (section 9FA(8), LGA 2000).
- 4.13.3 They are also able, following a review of a local authority decision, to require the local authority or executive to consider its report or recommendations and respond indicating what (if any) action it intends to take (section 9FE, LGA 2000). Where an OSC has given a local authority notice in writing requiring it to consider its recommendations/report and to respond indicating any proposed action, then a local authority (that is, the responsible cabinet member) will have two months from the date that it receives the recommendations/report to comply (section 9FE(4), LGA 2000). It is the duty of the local authority or

executive to which a notice is given to comply with the requirements specified in the notice (section 9FE(5), LGA 2000).

4.14 Local authority meetings: procedural requirements

4.14.1 The main pieces of legislation that regulate local authority meetings are:

- (a) The Public Bodies (Admission to Meetings) Act 1960 (PBA 1960). This allows members of the public and press to attend meetings of certain public bodies, including local authorities;
- (b) The LGA 1972. This extends the rights in PBA 1960 to meetings of committees and joint committees. It also includes additional provisions, for example, the right to exclude the public and press from meetings and the duty to provide reasonable facilities to the press;
- (c) The Local Government (Access to Information) Act 1985 (LGAIA 1985). Section 1 added Part VA (sections 100A-100K) to the LGA 1972, providing greater public access to local authority meetings and documents (subject to specified confidentiality provisions). It also extended the rights in the LGA 1972 and PBA 1960 to sub-committee meetings. However, the PBA 1960 ceased to apply to local authorities where the LGAIA 1985 applied. The LGAIA 1985 also applies to meetings of parish and community councils, and to joint boards or joint committees (section 100J, LGA 1972);
- (d) The Local Government Act 2000 (LGA 2000). This includes provisions relating to meetings of local authority executives and their committees (section 99, LGA 1972);
- (e) The Local Authorities (Executive Arrangements) (Meetings and Access to Information) (England) Regulations 2012 (SI 2012/2089) ("The LAR 2012") apply to local authorities in England that operate executive arrangements under Part 1A of the LGA 2000. The regulations extend the LGA 2000 provisions to provide greater public access to meetings and documents;
- (f) The Openness of Local Government Bodies Regulations 2014 (SI 2014/2095) (OLGBR 2014). These extend the PBA 1960, LGA 1972 and LAR 2012 to allow for greater rights for the public to report on local authority meetings in England. They also require written records to be kept of certain decisions taken by officers of a local authority. These regulations were made under section 40 of the Local Audit and Accountability Act 2014 and only apply to England.

4.15 Meetings

4.15.1 Public meetings

- (a) The committee and sub-committee meetings of every principal council (that is, the councils of counties and districts in England and Wales and the London boroughs (as defined in section 100J of the LGA 1972)) must be open to the public and press (section 100A(1), LGA 1972). However, a local authority can exclude the public and press in certain circumstances, for example to suppress or prevent disorderly conduct.
- (b) Regulations made by the Secretary of State prescribe the circumstances in which meetings of a local authority's executive or its committees must be open to the public and which must be held in private (section 9GA(4), LGA

2000). There is a presumption under regulation 3 of the LAR 2012 that all meetings of a local authority's executive, its committees and sub-committees are to be held in public unless a narrowly defined legal exception applies (see regulation 4(2), LAR 2012).

4.15.2 Private meetings

- (a) A private meeting is a meeting, or part of a meeting, where the decision-making body (which includes a local authority's executive and its committees and sub-committees) excludes the public and press (section 100A, LGA 1972 and regulations 2 and 4, LAR 2012). For example, the public and the press can be excluded from a local authority meeting if an item of business includes confidential or exempt information (section 100A, LGA 1972) (for local authorities in England that operate executive arrangements, the public and the press must be excluded in such circumstances (regulation 4(2), LAR 2012)).

4.15.3 Notice of a public meeting

- (a) Notice of the time and location of a public meeting must be publicised by a local authority in England at its offices and on its website at least five clear days before the date of the meeting (section 100A(6)(a), LGA 1972 and regulation 6(1)(a), LAR 2012).
- (b) When a meeting is convened at short notice (for example, in the case of an emergency), notice must be given when the meeting is convened (section 100A(6)(a), LGA 1972 and regulation 6(1)(b), LAR 2012).

4.15.4 Items of business at a public meeting

- (a) An item of business may only be considered at a public meeting where a copy of the agenda (or part of an agenda) including the particular item has been made available for public inspection at least five clear days before the meeting (section 100B(4)(a), LGA 1972 and regulation 6(2)(a), LAR 2012).
- (b) When a meeting is convened at short notice, an item of business can only be considered if a copy of the agenda including the item is available once the meeting is convened (section 100B(4)(a), LGA 1972 and regulation 6(2)(b), LAR 2012).

4.15.5 Special circumstances

- (a) In addition, for local authorities operating a committee structure, an item of business can also be considered if, as a result of special circumstances (specified in the minutes), the chairman of the meeting is of the opinion that the item of business is a matter of urgency (section 100B(4)(b), LGA 1972).
- (b) The special circumstances requirement implies a mandatory duty to give good reasons, which have to be recorded in the minutes and will be considered carefully by the courts. When deciding whether there is a good reason to depart from the usual procedure for considering an item of business, the chairman must take into account all the circumstances of the particular matter. A chairman's opinion that an item should be considered as a matter of urgency must be substantiated as there could be a risk of judicial review.

4.15.6 Order of business at a public meeting

- (a) A local authority's order of business at public meetings will vary depending on the individual local authority, the nature of the meeting and the subject of the meeting. The local authority's constitution and standing orders usually provide for the order of business and for it to be capable of being altered at the meeting, within the law.

4.15.7 Procedure for private meetings

- (a) A local authority's decision to hold a private meeting is subject to the LAR 2012 (made under section 9GA(4) of the LGA 2000). A decision to hold a private meeting is a prescribed decision for the purpose of section 9GA(5) of the LGA 2000 (regulation 5(1), LAR 2012). "Prescribed" means prescribed by regulations made by the Secretary of State (section 9GA(9), LGA 2000).

4.15.8 Notice of a private meeting

- (a) Notice of a private meeting must be given by a local authority operating executive arrangements at its offices and on its website at least 28 clear days before the meeting (regulation 5(2), LAR 2012). The notice must include a statement of reasons explaining why the meeting is being held in private (regulation 5(3)).
- (b) A local authority must give further notice at its offices and publish that notice on its website at least five clear days before the meeting. The notice must include:
 - (i) a statement of reasons for holding the meeting in private;
 - (ii) details of any representations received by the local authority about why the meeting should be held in public; and
 - (iii) a statement of responses to any representations. (Regulation 5(4) and (5).)

4.15.9 Exceptions

- (a) A local authority operating executive arrangements can hold a private meeting contrary to the above notice procedure if the meeting is urgent and cannot reasonably be deferred, and it has received approval from one of the following:
 - (i) the chairman of the relevant overview and scrutiny committee;
 - (ii) the chairman of the local authority; or
 - (iii) the vice-chairman of the local authority. (Regulation 5(6), LAR 2012.)
- (b) Once the local authority has received approval to hold the meeting, notice must be given as soon as reasonably practicable at its offices and be published on its website. The notice must explain why the meeting is urgent and cannot reasonably be deferred (regulation 5(7)).

4.15.10 Order of business at a private meeting

- (a) This will be similar to that of a public meeting, but a private meeting will not include public questions

4.15.11 Documents for public inspection

- (a) A local authority must provide the following documents relating to its meetings for public inspection:
 - (i) copies of meeting agendas and accompanying reports relating to items on an agenda (section 100B, LGA 1972 and regulation 7(1), LAR 2012);
 - (ii) the minutes of the meeting (apart from those concerning parts when the public were excluded). Where the minutes do not provide a fair reflection of the meeting because part of it was excluded, then the proper officer will provide a summary of the excluded part, but without disclosing the exempt information (section 100C, LGA 1972);
 - (iii) any further statements or particulars that are necessary to indicate the nature of the items included in an agenda (regulation 7(7)(b), LAR 2012);
 - (iv) copies of any other documents supplied to members of the executive in connection with an item on a local authority meeting agenda (as the proper officer sees fit) (regulation 7(7)(c), LAR 2012);
 - (v) any record prepared in accordance with an executive decision and any report (or part) considered in a meeting that is relevant to a recorded executive decision (regulation 14(1), LAR 2012);
 - (vi) a written record of a wide variety of decisions taken by officers of a local authority. Decisions that must be recorded are those made under a specific express authorisation or a general authorisation if the effect of the decision is to grant a permission or licence, affect the rights of an individual or award a contract/incur expenditure which materially affects the local authority's financial position (regulation 8, OLGBR 2014);
 - (vii) background papers to reports referred to at meetings. This includes a copy of a list of background papers to a report (compiled by the proper officer) and at least one copy of each of the documents in that list (sections 100B, 100C and 100D, LGA 1972 and regulation 15, LAR 2012).

4.16 Decision-making under executive arrangements

4.16.1 Key decisions

- (a) A key decision for local authorities operating executive arrangements is an executive decision that could result in either:
 - (i) a local authority incurring expenditure or making savings that are significant in its budget for the service or function relating to the decision; or
 - (ii) having a significant effect on communities living or working in an area comprising two or more wards or electoral divisions in the area of a local authority (Regulation 8(1), LAR 2012).
- (b) A local authority must consider any relevant Secretary of State guidance on the meaning of "significant" (regulation 8(2)).

4.16.2 Executive decision or key decision?

- (a) A relevant overview and scrutiny committee may consider that an executive decision that has been made should actually be a key decision. In such cases, the committee can request the executive to provide a report to the relevant local authority, within a “reasonable period”, which includes:
 - (i) the decision and reasons for the decision;
 - (ii) the identity of the decision-maker; and
 - (iii) if the executive of the relevant local authority considers that the decision was not a key decision, then the reasons behind this (Regulation 18, LAR 2012).

4.16.3 Executive decisions

- (a) An executive decision is a decision made (or due to be made) by a decision-making body in connection with the discharge of a function that is the responsibility of the executive of a local authority (regulation 2, LAR 2012).

4.16.4 Recording executive decisions

- (a) After making an executive decision, a decision-making body or an individual member of the executive must, as soon as reasonably practicable, provide a written statement that includes the following information:
 - (i) a record of the decision, accompanied by the reasons for it and the date on which it was made;
 - (ii) details of any alternative options considered and rejected at the meeting; and
 - (iii) a record of any conflict of interest relating to the decision that was declared by a member of the decision-making body. Where a conflict of interest has been declared, a note of dispensation granted by the relevant local authority’s head of paid service must be included in the written statement (Regulations 12 and 13, LAR 2012).
- (b) Executive decisions made by decision-making bodies or individual members of local authority executives are prescribed decisions for the purposes of section 9G(3) to (4) of the LGA 2000 (regulation 12(4) and 13(3), LAR 2012). A prescribed decision is a decision based on regulations made by the Secretary of State (section 9GA(9), LGA 2000).

4.16.5 Standing orders

- (a) A local authority has a statutory power to make discretionary standing orders:
 - (i) for the regulation of any committee of a local authority or joint committee of two or more local authorities in relation to its proceedings and business; and
 - (ii) regarding the minimum number of members (quorum) who must be present, convening meetings, proceedings and the place of meetings of their committee and sub-committees (Section 106, LGA 1972).

- (b) Standing orders can be made to regulate the conduct of business at local authority meetings. For example, a local authority could make a standing order dealing with notices of motions to council, including motions that may be moved without notice (for example, extending the time limit on speeches or to exclude the public during consideration of confidential business)
- (c) Standing orders are made by resolution. The primary aim is to ensure that local authorities use fair and transparent decision-making processes and can be held to account. The consequences of a local authority failing to follow its own standing orders can be serious.

4.16.6 Public rights of appeal

- (a) The LGA 1972 and LAR 2012 do not expressly provide relief for instances where a local authority does not comply with its statutory obligations or fails to follow its own standing orders in relation to meetings. They also do not contain any internal enforcement mechanisms with rights of appeal to designated officers.
- (b) Therefore, individuals who consider that a local authority has not complied with its statutory obligations may wish to obtain redress through the following methods:
 - (i) political support through a councillor or a letter of complaint to the local authority;
 - (ii) having exhausted a local authority's complaints procedure, a complaint to the Local Government Ombudsman; and
 - (iii) judicial review.

4.17 Decision-making and avoiding legal challenge

4.17.1 Decision-making; the context

- (a) Councils make many decisions every day which affect the lives of individuals, groups of citizens and industry. The law sets down parameters within which such decisions should be made. The overall purpose of this is simple: to avoid the state and its agencies wielding power in an arbitrary way. Most decisions are capable of challenge by way of an appeal mechanism and, failing that, judicial review.
- (b) Challenge and The Ultra Vires Principle
 - (i) Should a local authority exceed the statutory powers expressly or impliedly given by parliament its actions will be ultra vires and can be challenged by way of judicial review in the High Court. The review is not so much concerned with the merits of the case but with whether the decision is one which the authority could legally make. The effect of a successful judicial review is that the public authority is prevented from taking a decision, or taking it in a particular way, or that a decision already made is quashed or declared invalid. Judicial review must be distinguished from an appeal, which is available only when specifically provided for, and in which the appeal court or tribunal can substitute its decision for that of the body appealed from.

- (ii) A convenient classification of the legal grounds on which judicial review may be sought was given by Lord Diplock in the GCHQ case (Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374) where his Lordship identified three categories of challenge that a decision was ultra vires – illegality, irrationality and procedural impropriety.
- (iii) The principles of ultra vires are flexible as well as complex. The categories of challenge are used for convenience of analysis. They do not form rigid compartments and there is considerable overlap. The flexibility of the ultra vires principles and the discretionary nature of the remedies mean that a court will have a considerable degree of latitude in deciding whether a local authority has acted unlawfully and if so whether a legal remedy is to be issued.
- (iv) **Illegality**
 - (A) A decision may be challenged for illegality where, due to an error of law, the local authority did not have legal authority for the decision made. There may have been a lack of jurisdiction, an absence of evidence to support the decision, a fettering of the exercise of a discretionary power, the exercise of a power for an improper purpose or the taking into account of irrelevant considerations.
- (v) **Unreasonableness and Irrationality**
 - (A) Beyond the matters already outlined, although often intertwined with them, a separate and distinct ground of invalidity exists that has become known as ‘Wednesbury unreasonable’: ‘an authority may come to a conclusion so unreasonable that no reasonable authority could ever come to it ... but to prove a case of that kind would require something overwhelming’ (Lord Greene MR in Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1KB 223). More than ordinary negligence, there must be ‘something overwhelming’.
 - (B) There is some debate as to whether ‘irrationality’ adds anything to ‘unreasonableness’ but whatever term is preferred, the test remains stiff. The emphasis is still on the perverse, the absurd, the bloody-minded or the pig-headed.
- (vi) **Procedural Fairness**
 - (A) The notion of procedural fairness in relation to the activities of public authorities is contained in the common law rules of natural justice. The rules of natural justice embody the right to be heard before a decision is taken (*audi alteram partem*) and an absence of bias in the decision maker (*nemo iudex in causa sua*).
 - (B) Apart from unfair procedure (breach of the rules of natural justice) there are many other forms of potential procedural irregularity. Particular aspects of procedural irregularity have been recognised over the years. First, the body or

person taking a decision must have been properly constituted or appointed. This will depend upon the interpretation of the relevant statutory provisions. A second aspect of procedural irregularity is improper delegation of authority (*delegatus non potest delegare*). This is one of the most important principles contained within the ultra vires doctrine and requires that a discretionary power is to be exercised only by the person or body properly authorised

4.18 Legal requirements

4.18.1 Declaration of interests

- (a) Public bodies should make decisions dispassionately according to the law and the materials before them. It is important that decision-makers have no personal interest in the subject on which they are adjudicating.
- (b) It is a fundamental principle of law that a decision-maker should not be a “judge in his own cause”. This principle applies to all public decision-makers.
- (c) Although a close connection with the subject of the decision will automatically disqualify a person from making a decision, declaration of a less direct interest before a decision is made may permit them to take part.

4.18.2 Following correct procedure

- (a) A decision-maker will frequently be required to follow a set procedure for making its decisions. This may take the form of procedural requirements set out in statute, statutory instrument, guidance (whether statutory or non-statutory) or a procedure, which the decision-maker has set for itself. Any such procedures are usually drafted with the purpose not only of guaranteeing that the decision-maker takes into account all relevant considerations, but also to ensure procedural fairness for those affected by the decision it is required to make. In R (Boyejo) v Barnet London Borough Council [2009] EWHC 3261 (Admin), the High Court quashed decisions taken by Barnet Council and Portsmouth City Council since they had failed to bring their duties under the Disability Discrimination Act 1995 to the attention of the decision-makers.
- (b) Also in R (Rahman) v Birmingham City Council [2011] EWHC 944 (Admin), the High Court granted a declaration that the council’s decisions in November 2010 and March 2011 to terminate funding to three voluntary organisations providing legal entitlement advice were unlawful, as they were taken without due regard to the race and disability public sector equality duties under section 71 of the Race Relations Act 1976 and section 49A of the Disability Discrimination Act 1995.
- (c) The High Court in R (South Tyneside Care Home Owners Association and others) v South Tyneside Council [2013] EWHC 1827 (Admin) quashed the local authority’s decision as to the level of fees that it would pay its care home providers. It did so on the basis that the decision was unlawful, procedurally unfair and/or Wednesbury unreasonable.
- (d) Departure from an established prescribed procedure can give rise to a successful legal challenge, for example, by way of judicial review, even if no unfairness results:

“... susceptibility to judicial review under this head [procedural impropriety] covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice”
(Lord Diplock in Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374 (at 411A-B)).

- (e) Examples of prescribed procedures for decision-makers include express duties to:
 - (i) consult;
 - (ii) serve notice of the intended decision;
 - (iii) publish an agenda for the meeting at which the decision will be made;
 - (iv) seek written representations;
 - (v) hold oral hearing if requested;
 - (vi) give reasons for the decision; and
 - (vii) be informed of any right of appeal.
- (f) While it is necessary for a public body making decisions to follow a set procedure, doing so does not necessarily render its procedure fair. For example, where notice has been properly served on an affected person and they have indicated an intention to serve written representations outside the prescribed timescale, fairness may require the body to adjourn to allow them to do so, even though an express rule setting out requirements of service would permit it to proceed if representations have not been received within the specified timescale.

4.18.3 Consultation

- (a) Public bodies including local authorities are required by law to consult before making decisions, particularly in the context of making policies or issuing guidance.
- (b) On 5 November 2013, the Cabinet Office published new guidance on the consultation principles that government departments and other public bodies should adopt when engaging stakeholders in policy and legislation developments. While the guidance is not legally binding and does not prevail over other statutory and mandatory requirements, it is persuasive and provides a useful ‘best practice’ approach for conducting a lawful consultation process.
- (c) The legal requirements for a proper consultation exercise are known as the Sedley Criteria reflecting arguments put forward by Stephen Sedley QC in R v Brent London Borough Council, ex parte Gunning (1985) 84 LGR 168 and adopted in the judgement.
- (d) The Sedley Criteria are that:
 - (i) consultation must be made at a time when proposals are at a formative stage;

- (ii) sufficient reasons for the proposal must be given to allow intelligent consideration and response;
- (iii) adequate time must be given for a response; and
- (iv) the product of the consultation must be conscientiously taken into account in finalising proposals.

4.18.4 Within remit

- (a) It is a fundamental principle of administrative law that a public body may only do what it is empowered or required to do by statute, whether expressly or by necessary implication.
- (b) This means that a public body must make decisions that lie within the requirements of its governing legislation. Equally, if the decision-makers have a duty to perform in determining a question, they must not evade their duty. Doing otherwise would render their decision ultra vires and void.
- (c) Public bodies are also governed by the requirements of other legislation, such as the European Communities Act 1972 (ECA 1972) and the Human Rights Act 1998 (HRA), which respectively implement European Law and the European Convention on Human Rights., although the supremacy of EU law in the UK will end when the European Union (Withdrawal) Bill 2017-19 repealing the ECA 1972 is enacted. There may be general duties imposed on public bodies, for example, by the Equality Act 2010. Accordingly, public bodies must make their decisions compliant with all duties placed on them by statute.

4.18.5 Rational and evidence-based

- (a) Whether a public body has a duty or discretion to exercise in making its decision, that decision must be rational.
- (b) An irrational or unreasonable decision is one that was not reasonably open to it, as stated by Lord Green MR in the Associated Provincial Picture Houses v Wednesbury Corporation [1948] 1 KB 223.
- (c) The courts have offered the following interpretation of “irrationality”:
 - (i) *“Unreasonableness can include anything which can objectively be adjudged to be unreasonable. It is not confined to culpability or callous indifference. It can include, where carried to excess, sentimentality, romanticism, bigotry, wild prejudice, caprice, fatuousness or excessive lack of common sense”.* (In Re W (An Infant) [1971] AC 682, Lord Hailsham (at 699H).)
 - (ii) *“a decision which does not add up”.* (In R v Parliamentary Commissioner for Administration, ex parte Balchin [1998] 1 PLR 1.)
 - (iii) *“a decision which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt”.* (In Secretary of State for Education and Science v Tameside Metropolitan Borough Council [1977] AC 1014, Lord Diplock (at 1064 E-F).)
- (d) Decision-makers are given a degree of latitude by the courts when challenged by way of judicial review on grounds of unreasonableness. The courts recognise that the decision was for the public body to make, not the

court, and so they are reluctant to interfere where they might disagree with a decision but it is objectively rational.

- (e) One way that a public body can ensure that its decisions are objectively reasonable is to ensure they are evidence-based. Regulators such as the Financial Conduct Authority proceed to assess risk and apply their powers according to evidence-based decision-making; this is also an approach that is promoted by the Better Regulation Executive.
- (f) Those making decisions in the public interest should not do so arbitrarily or on the basis of personal feeling. They should look at the available information and evidence and reach a considered view in light of their powers and duties. It does not matter if another person looking at the same material might have reached another decision. What matters is that the decision-maker can be shown, objectively, to have taken the material into account and reached its own conclusion based on the evidence.

4.18.6 All relevant considerations

- (a) One aspect of reaching a rational and evidence-based decision is taking all relevant factors or considerations into account. This was made clear by the House of Lords in Anisminic v Foreign Compensation Commission [1969] AC 147 (confirmed in Lumba v Secretary of State for the Home Department [2012] 1AC 245, paragraph 66), and by Lightman J in R v Director General of Telecommunications, ex parte Cellcom Ltd [1999] COD 105:

"The Court may interfere if the Director has taken into account an irrelevant consideration or has failed to take into account a relevant consideration".

- (b) This does not mean that a decision-maker must consider all material, but it should have as much information as possible, that is relevant to the decision that it is about to make. Deciding what is relevant depends on the subject matter of the decision, but examples include:
 - (i) the proposal;
 - (ii) responses to consultation or written representations received;
 - (iii) guidance on parameters for the decision;
 - (iv) cost of the decision;
 - (v) effects of decision on others. If the decision affects those with protected characteristics under the Equality Act 2010, due regard must be had to the decision-maker's public sector equality duty; and
 - (vi) advice from officers.
- (c) Examples of irrelevant considerations include:
 - (i) the need to get business finished quickly;
 - (ii) assumptions not based on evidence;
 - (iii) personal experience of a different situation; and
 - (iv) dislike for the person affected by the decision or what they represent.

4.18.7 Proper purpose

- (a) A public body must act for a proper purpose. Those making public decisions must not have ulterior motives and must apply their minds when making decisions to the correct statutory objective (Padfield v Minister of Agriculture, Fisheries & Food [1968] AC 997).
- (b) A public body must not act in bad faith, which is akin to dishonesty (Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223 (at 229)).
- (c) An example of an improper motive is exercising local authority powers for the electoral advantage of a particular political party (Magill v Porter [2001] UKHL 67).

4.18.8 ECHR-compliant

- (a) It is unlawful for any public body to act contrary to one of the rights contained in the European Convention on Human Rights (ECHR) that has been incorporated into domestic law by the HRA:

4.18.9 Proportionate

- (a) Public decision-makers should act in a way that is proportionate. While the common law does not necessarily accept proportionality as a ground for judicial review, it is a principle embedded in both EU and ECHR law and touches on most of the decisions taken by public bodies:
- (b) A decision that is proportionate, is also likely to be rational, evidence-based and reasonable. See R v Secretary of State for the Home Department, ex parte Brind [1991] 1 AC 696):

"reliance on proportionality is simply a way of approaching the Wednesbury formula: was the administrative act or decision so much out of proportion to the needs of the situation as to be "unreasonable" in the Wednesbury sense." (Lord Lowry (at 766D-E).

4.18.10 Properly reasoned

- (a) Procedural requirements may specify that a public body must give reasons for its decisions. It should do so in any event, not only because the common law may require it, but because a well-reasoned decision will fully inform those affected about the decision the body has taken. Reasoned decisions also enable those affected to consider whether to subject it to legal challenge, and on what grounds. Well-reasoned decisions help public bodies withstand legal challenge by explaining their thought processes.
- (b) The process of setting out written reasons for a decision also improves the decision-making process by making the decision-maker focus on the logic lying behind its decision (R v Brent LBC, ex parte Baruwa (1996) 28 HLR 361).
- (c) Reasons do not need to be excessively detailed, but do need to be adequate, see R (Savva) v Royal Borough of Kensington and Chelsea [2010] EWCA Civ 1209. Adequate reasons are reasons that:
 - (i) deal with all the substantial points that have been raised;

- (ii) are sufficient for the parties to know whether the decision-maker has made an error of law;
 - (iii) set out and explain key aspects of the decision-maker's reasoning in coming to its conclusion;
 - (iv) include all aspects of reasoning that were material to the decision; and.
 - (v) do not need to set out in detail all the evidence and arguments referred to by the decision-maker.
- (d) Decision-makers should record the reasons for their decisions at the time they are made. In the event of a subsequent appeal or other legal challenge, they will not usually be able to clarify, correct or add to their reasons at a later stage (see R v Secretary of State for the Home Department, ex parte Lillycrop (unreported 27.11.96)).

4.19 Practical requirements

4.19.1 Reading all the papers

- (a) Decision-makers are often busy people. The decision to hand may be only one of a handful of things that occupy their time on any given day. They may also have been presented with a substantial bundle of papers to read that are relevant to the decision to be made.
- (b) Decision-makers must read all the papers that have been provided and that are relevant to the decision they are about to make. Failure to do so, out of laziness, insufficient time or a belief that they are irrelevant, would be a breach of their duty. It could also likely lead to a decision that is unlawful as it fails to take account of relevant considerations.

4.19.2 Taking legal advice where necessary

- (a) Some procedural rules expressly require a decision-maker to be accompanied by a legal adviser. For example, the disciplinary committees of the regulators of the professions (doctors, teachers, social workers and so on) are often required by the rules governing their procedures, to have in attendance a legal adviser or assessor to provide independent legal advice to the committee.
- (b) Other decision-makers are not required to have legal advice available to them. However, any decision-maker who is in any doubt about their remit should take independent legal advice. This may need to be disclosed to those affected by the decision in question.
- (c) Some decision-makers find it helpful for the person giving them independent legal advice to put their reasoning in writing. This has many advantages; but the legal adviser should faithfully reproduce the decision-makers' reasoning and refer to information they considered relevant, rather than interposing his own thoughts or view.

4.19.3 Minutes

- (a) Some decision-makers' procedural rules require minutes to be taken. Others prohibit this, either expressly or as a matter of practice. Some public

decision-makers will have rules concerning the process for agreeing minutes, but having a procedure for doing so is good practice.

- (b) The relevant procedure should be followed, provided that an adequate record is kept of the decision reached and the reasons.
- (c) Minutes may also be covered by a public body's publication scheme, under section 19 of FOIA, and so be made available to the public and any interested parties following the decision-making process. For information on guidance issued by the Information Commissioner on when minutes should be published.

4.19.4 Transparency and FOIA

- (a) Public bodies do not operate in a vacuum. Even though many may deliberate in private, their papers may subsequently be disclosed to the public, either in accordance with the relevant publication scheme under FOIA, or as a result of a specific request for information under section 1 of FOIA by a person affected by the decision.
- (b) Decision-makers should remember that all the material they consider and any notes they make, as well as their ultimate decision, may be disclosable in this way.

5 BCC's Constitution

5.1 Every local authority is required to prepare and keep up-to-date a constitution containing:

- (a) its standing orders;
- (b) its code of conduct;
- (c) any information directed by the Secretary of State;
- (d) any other information considered appropriate by the local authority; and
- (e) in the case of a local authority operating the committee system the constitution must also contain a statement as to whether it has an overview and scrutiny committee (OSC). (Section 9P, LGA 2000.)

5.2 A local authority's constitution must be made available:

- (a) at its principal office to members of the public to inspect; and
- (b) on request for a "reasonable fee" determined by the local authority. (Section 9P(3), (4), LGA 2000.)

5.3 Constitutions embody and lay out the considerable legal requirements reviewed in Section 4 of this report. There is therefore a significant overlap between the law and constitutions, but where the law permits they can also enable local governance arrangements to be given effect to.

5.4 It was argued that the Leader / the Cabinet through its subsequent ratification took an Executive key decision 'to approve the compromise negotiated on the Council's behalf through ACAS, including the decision to permit the suspended shop steward to return to work'.

5.5 There are a number of key constitutional points that are worthy of note. References to the Constitution are references to the relevant provision of the version in force at the time.

5.5.1 BCC's constitution defines a key decision as 'an Executive decision relating to the discharge of an Executive function'. (Volume A: Art 13).

5.5.2 As already considered, staffing matters are not Executive 'functions' as they are expressly excluded from the Executive by reason of statute. Cabinet did not have the necessary authority to take the said key decision in relation to the specific employment matters.

5.5.3 For 'executive decisions' to be valid and not subject to either internal or external challenge including individual Councillor liability, such a decision must be taken in accordance with the Council's constitution and in accordance with the relevant statutory provisions, as set out in section 4 of this report, namely:

- (a) the subject matter of the decision must fall within the responsibilities of the Executive;
- (b) the decision shall only be taken by Cabinet based on written reports from Chief Officers after any appropriate advice from the Head of Paid Service, Monitoring Officer and Chief officer Volume A Art 6.5(c));

- (c) a meeting of a decision making body must be held in public ; Cabinet meetings are held in public and can be convened on giving 3 days' notice if the matter is urgent; (Vol B; Art 4. 1).
- (d) If a decision is a 'key decision', as set out in the Constitution and is not included in the Forward Plan then the decision may still be taken if:
 - (i) both the Chief Executive and the Chair of the Overview and Scrutiny Committee have agreed that it is impracticable to defer the decision; and
 - (ii) notice of the proposed decision is available to the public (Volume B; Art 4.5).
- (e) If a proposed Executive decision is not a key decision then if the decision is likely to exceed a value of £200,000 it will only be taken by Cabinet if based on written reports with a completed checklist in the approved form and after advice from the Monitoring Officer and Chief Finance Officer (Volume A: Art 6.8).
- (f) In an emergency, an executive report may be agreed by the Chief Executive in consultation with the Leaders of the Political Groups. (Volume B; Art 4.6).
- (g) Opposition leaders and Overview and Scrutiny Chairs are entitled to attend Cabinet meetings and to remain during the deliberations of the Cabinet during the 'private sessions'.
- (h) Overview and Scrutiny Committees are entitled to copies of documents transacted at a public or private meeting of the Executive including any decision taken by an individual Cabinet Member. (Volume B; Art 4.9).

5.6 As a consequence, the purported "Executive decision" taken by Cabinet on Friday 18th August relating to both a Cabinet agreement to a compromised position to reinstate the GR3 Leading Hands and the lifting of the suspension of the shop steward was unlawful.

5.7 A formal meeting of the Cabinet should have been called, following the necessary legal and constitutional requirements, to consider these issues via a written Report at a Cabinet meeting. Such a meeting was subsequently arranged for Thursday 24th August 2017 at 12.00 with a report presented by the Head of Paid Service and the Corporate Director of Place.

5.8 During this matter, BCC sought advice from Tim Straker QC on 18th August 2017 on a specific issue, namely the ability of Cllr Clancy as Leader to decide to reinstate a suspended employee. That advice sets out clearly the Constitutional position on this point:

5.8.1 *"By article 2 of the Local Authorities (Functions and Responsibilities) (England) Regulations 2000, SI 2000/2853 the functions of Birmingham City Council specified in column 1 of schedule 1 to those regulations are not to be the responsibility of the executive. (I have substituted the words Birmingham City Council for the words local authority).*

5.8.2 *Column 1 at I Part II No.37 lists, as excluded from the responsibility of the executive, the power to appoint staff, and to determine the terms and conditions on which they hold office (including procedures for their dismissal). Column 2 lists as the related functions section 112 of the Local Government Act 1972, which deals with the appointment of staff and the terms and conditions on which they hold employment.*

- 5.8.3 *Section 37 of the Local Government Act 2000, under which Act the regulations are made, demands that local authorities prepare a constitution. Nowhere does the section or the Act even hint at the possibility that a constitution could disturb the distribution of functions demanded by the 2000 Act and the regulations made under it. It would be remarkably strange (and unconstitutional) if it did or could.*
- 5.8.4 *Article 13 of the Constitution of Birmingham City Council deals with executive decision making. Such is expressly stated. It does not deal with other decision making. Accordingly, on the face of the article and bearing in mind the law, staff is excluded from article 13.*
- 5.8.5 *Simply because urgency may be thought to attach to any given decision it does not follow that it falls within executive decision making. If the matter, as staff has, been removed from executive decision making then it is removed from such decision making whether or not it is an urgent issue.*
- 5.8.6 *I have read an e mail dated 17 August 2017 and timed at 21.41. It comes from Councillor Clancy. The point is made that a particular matter relating to staff is urgent and therefore a key decision for the executive to take. Such a proposition is plainly wrong. Key decisions for the executive to take relate to functions that have been provided to the executive. There are excluded functions which have been excluded, as staff has, from the executive.*
- 5.8.7 *The simple point is that legislation has distributed functions. The constitution cannot and does not seek to redistribute them. It simply provides the basis on which the City Council functions but it cannot function outside the law. Any decision which is not supported by the legislation, which has distributed functions is, in short, beyond the law or, in conventional terms, ultra vires. In particular neither the leader nor the executive has the power, because they do not have the function, to do what is sought to be done by the e mail of 17 August 2017. I do not embark on a discussion of misfeasance in a public office but it can be defined in terms of knowingly or recklessly pursuing an ultra vires course of action”.*

5.9 We have reviewed this advice and consider that it is correct.

6 Question 1: Did Cllr Clancy have the authority by himself to make the agreement of 15th August with UNITE that was contained in the ACAS press release?

- 6.1 On 27 June 2017, a report was made to BCC's cabinet by Jacqui Kennedy, the Corporate Director Place at BCC, setting out the proposals for re-organisation of the Council's waste management service to secure high quality of services and value for money. This sought agreement, amongst other things:

"To continue dialogue with the trade unions with a mandate to implement a structure to deliver improved quality of service whilst operating within the allocated budget."

- 6.2 This report also included removal of the grade 3 posts. I shall refer to this as the June report. It stated that 113 grade 3 posts would be lost or, to use the management speak adopted in the report, "will be deleted".
- 6.3 Until these matters were considered by the Council's special cabinet meeting on 24 August 2017, the decision on the waste re-organisation taken by cabinet on 27 June was the position of the council.
- 6.4 The Council should have proceeded to implement the decisions agreed by the cabinet report of 27 June. In the alternative, a lawful decision could have been taken by the Council to change course.
- 6.5 However, Cllr Clancy as the then Leader had no legal or constitutional right to change that and agree without following any legal / Constitutional processes an agreement with UNITE at ACAS.
- 6.6 The legal position in terms of decision making is set out in section 4 of this report.
- 6.7 Crucially, the Local Authorities (Executive Arrangements) (Meetings and Access to Information) (England) Regulations 2012 (SI 2012/2089) apply to those local authorities in England that are operating executive arrangements under Part 1A of the Local Government Act 2000, as amended by section 21 and Schedule 2 to the Localism Act 2011. This includes BCC.
- 6.8 These regulations clarify the circumstances in which local authority executive decisions are to be open to the public (Part 2). There is a presumption that a meeting will be open to the public unless the nature of the business that is transacted means that, in breach of the obligation of confidence, confidential information would be disclosed to the public
- 6.9 They also make provision in relation to key decisions of the executive and the publicity that must be given before the key decision is taken (Part 3) and for the inclusion of prescribed information in a written statement of the executive decision (Part 4).
- 6.10 Finally, they set out the additional rights of local authority members and members of overview and scrutiny committees to access documents (Part 5) and general provisions relating to information, such as the information which is exempt from disclosure (which includes advice from a political adviser).
- 6.11 In relation to executive meetings (meetings of the Cabinet), meetings of a local authority's executive can be held in public or private and it is the choice of the executive as to whether/which meetings are held publicly or in private (section 9G, LGA 2000).
- 6.12 If a local authority executive chooses to hold its meetings in private then a written record must be kept of any 'executive decisions' and of any decisions made by individual members

of an executive and any written records or accompanying documents must be made available to members of the public.

- 6.13 None of these legal obligations were followed. The failure to follow the law rendered the decision unlawful. The law sets out a process for decision making which ensures amongst other things that decision makers receive the correct advice and information, take into account that which they should and also disregard that which is irrelevant, decisions are made transparently and are available for public and political scrutiny. These aspects are essential to sound decision making by public bodies. These are not simply "tick the box" type requirements. Those entrusted with making decisions on behalf of the public are required to follow these legal obligations as then embodied in BCC's constitution. Doing so ensures that councils such as BCC follow the key requirements of openness, accountability and transparency. The process is prescriptive and not optional.
- 6.14 Quite simply, it was not followed.
- 6.15 To pick one failing (namely the absence of compliance with the requirements of openness and transparency in decision making) and illustrate the seriousness of that, in R v London Borough of Tower Hamlets ex p. Khaliq (1994) 26 HLR 517 at 525 Sedley J described the impermissible delegation of local authority housing decisions in that case in scathing terms:
- "Because a group of councillors and officers which does not amount to a committee or subcommittee of the council is under no obligation under Part VI of the Local Government Act 1972 to give public access to its meetings, agenda material and minutes, the taking of decisions on policy or practice by such a body is in my view a grave abuse of power."*
- 6.16 The Constitutional requirements for decision making are set out in section 5 and follow the legal obligations as set out in Section 4. One of the issues purportedly agreed at ACAS was in relation to a specific employee and their re-instatement. This is clearly a matter that legally and constitutionally falls outside the ambit of the Executive. Reflecting the legal requirements, BCC's constitution provides that the power to appoint staff, to determine the terms and conditions on which they hold office (including procedures for their dismissal and the related functions section under section 112 of the Local Government Act 1972, which deals with the appointment of staff and the terms and conditions on which they hold employment) are functions which are excluded from the responsibility of the executive.
- 6.17 Consequently, it is clear that Cllr Clancy had no legal or constitutional authority to purport to enter into any such agreement nor to bind BCC in such an agreement. In relation to the issue regarding the specific employee and their re-instatement, this appears to be something that Cllr Clancy accepted he could not do as he attempted to instruct officers (against the Head of Paid Services' direction) to do this.
- 6.18 It should be noted that the Monitoring Officer and Head of Paid Service at the time did challenge Cllr Clancy over his actions.
- 6.19 Our conclusion is that he did not have the authority to make the agreement that he did, and as a consequence the decision that he purported to reach was ultra vires his position as Leader and unlawful.

7 Question 2: Did Cllr Clancy have the prior authority of Cabinet to make that agreement?

- 7.1 On 27 June 2017, a report ("the June Report") was made to BCC's cabinet by Jacqui Kennedy, the Corporate Director Place at BCC, setting out the proposals for re-organisation of the Council's waste management service to secure high quality of services and value for money. This sought agreement, amongst other things:

"To continue dialogue with the trade unions with a mandate to implement a structure to deliver improved quality of service whilst operating within the allocated budget."

- 7.2 This report also included removal of the grade 3 posts. It stated that 113 grade 3 posts would be lost, or to use the management speak adopted in the report "will be deleted".
- 7.3 Until these matters were considered by the Council's special cabinet meeting on 24 August 2017, the decision on the waste re-organisation taken by cabinet on 27 June pursuant to the June Report was the position of the council.
- 7.4 The Council should have proceeded to implement the decisions agreed by the cabinet on 27 June. In the alternative, a lawful decision could have been taken by the Council to change course.
- 7.5 However Cllr Clancy did not follow either of these routes. As such he had had no prior authority from the Cabinet / Council, legally or constitutionally to depart from that position when he then purported as Leader to enter into an agreement with UNITE at ACAS.

8 Question 3: Did cabinet have the authority subsequently to ratify that agreement?

- 8.1 Where a decision has been taken, or as in this case appeared to have been taken, by someone without authority to make that decision, it is not in principle impossible for the local authority in the form of the body or person with the authority to take the decision for themselves (Co-operative Retail Services v Taff-Ely BC (1979) 39 P&CR 223 C.A. confirmed on appeal to the House of Lords (1982) P&CR 424)..
- 8.2 The ability to do this will always depend on the circumstances and ratification is only possible if the decision was capable of being delegated to the person who purported to take it.
- 8.3 In this case the then Leader did not have that capability and hence ratification was never an option.
- 8.4 Those decisions that could have been made by the Cabinet however could have been revisited afresh by them, and indeed were on 24th August.
- 8.5 However, the informal cabinet meeting that was held on 18 August was not a formal decision-making meeting of the cabinet and was therefore not capable of making such a decision. It did not comply with any requirements of the law or constitution in relation to decision making meetings.
- 8.6 In addition, it is clear that the issue in relation to the re-instatement of the employee was not a function that was within the scope of the executive and therefore could not be made by them.
- 8.7 An option for public bodies facing a challenge based on a procedural point related to their decision making is to re-make the decision under attack. Given that if such a challenge is successful, the court may well order the remaking of the decision anyway but “properly” (i.e. the re-taking of the decision by a person or body with proper authority), this can avoid the legal challenge.
- 8.8 In the Sunday trading case Stoke on Trent City Council v B&Q Retail Ltd [1984] Ch 1, the council commenced proceedings to enforce provisions of the Shops Act 1950 without having properly considered whether it was expedient to do so, under s. 222 of the Local Government Act 1972. However, it subsequently considered its discretion and this was held by the Court of Appeal to have provided authority for the continuance of the proceedings. However, there are limits to this kind of rear-guard action. In Webb v Ipswich Borough Council (1989) 21 HLR 325, the Court of Appeal upheld the quashing of a control order in respect of a House in Multiple Occupation (HMO) that had been approved by an officer without delegated authority. It was held that the ratification of the order by the appropriate committee could not save it, since this came after the order, which had “immediate effect”.
- 8.9 In this case, the purported ratification by informal cabinet had no effect as this was not a decision meeting. It was not until the Cabinet meeting on 24th August that the decision reached by the Executive on 27 June no longer represented the position of the Council

9 **Question 4: Were proper governance processes followed in the making of that agreement and in its subsequent ratification?**

- 9.1 As reflected in our answers to questions 1, 2 and 3, proper (legal and constitutional) processes were not followed.
- 9.2 In addition, we were made aware that during the course of this matter, Cllr Clancy, dissatisfied with the legal advice he was receiving from the in-house team and Monitoring Officer, obtained his own.
- 9.3 Seeking a second opinion is not unusual. This would normally be undertaken by the head of the legal function identifying possible alternative sources of advice, agreeing the question / issues to be raised and then instructing the alternative source of legal advice to provide that second opinion.
- 9.4 In this case Cllr Clancy went direct to lawyers of his choice albeit after an exchange of emails with the Monitoring Officer.
- 9.5 Initially, they were supportive of his view which was at variance with the advice provided by the in-house team and Monitoring Officer and the QC they instructed. Such advice was however heavily caveated.
- 9.6 Quite quickly thereafter Cllr Clancy's legal advisers aligned themselves with the advice of the in-house legal team and monitoring officer and that from BCC's QC.
- 9.7 This second opinion should have been commissioned differently, not directly by the Leader. The information / instruction commissioning that advice was clearly initially inadequate. The Council is now having to meet the bill for that advice.
- 9.8 Thought should be given as to how such second opinion legal advice should be commissioned in the future and suitably recorded so everyone is clear as to the arrangements.

- 10 **Question 5: Is there any aspect of the making of the agreement or its ratification that in your view was contrary to good practice?**
- 10.1 In addition to legality and constitutional concerns expressed in our answers to questions 1,2 and 3, we consider that the following were contrary to good practice.
- 10.1.1 The Leader attending ACAS without officer support or awareness and negotiating an agreement in the name of and on behalf of the Council is unheard of to us. It is without doubt outside the “norms” of governance and remarkable.
- 10.1.2 Whilst Cllrs Jones, Trickett and Ward did challenge the Leader on being informed of his actions in going to ACAS and being asked to subsequently agree his actions, the Cabinet collectively did not challenge him over his decision and actions.
- 10.1.3 The Leader getting directly involved in employee cases which were the responsibility of the Chief Executive (and Head of Paid Service), attempting to work around her to get the employee re-instated, resulting in the Leader ringing up relatively junior staff and giving them instructions that the suspended employee should be re-instated

- 11 **Question 6: If you are of the view that there was a want of authority or a failure to follow proper governance processes or acts contrary to good practice, what would you advise that the Council do to prevent any similar circumstances arising in the future?**
- 11.1 At the heart of this matter lies an ongoing failure to accept that the norms of decision-making. This is the DNA that is the day to day governance of a council and its heart and at the material time, namely in 2017 was missing / distorted at BCC.
- 11.2 Whilst we have undertaken not to quote or identify those we interviewed, during the course of our investigation, from interviews and documentation we have seen, various points were made to us that warrant inclusion in this report.

The Cabinet did not operate effectively during this time. It was dysfunctional, not a cabinet. It was divisive, not inclusive. A Leader and Cabinet model is one of distributed leadership with cabinet members having authority over their portfolios. At this time BCC's cabinet did not operate like that. Rarely did Cabinet meet collectively, information was not shared. As a consequence collectively they were not an effective team. They were also played off against each other by the Leader. Meetings when they did happen were ineffective. When presented with the ACAS meeting and outcome, Cabinet members did not challenge the Leader collectively over his actions and did not stop Cllr Clancy as might be expected. At least one said that they did not do so because they did not want to lose their job as a cabinet member.

The senior officer management team (CLT) was dysfunctional during this time. These issues required a team approach but that was lacking. Collective responsibility and trust were missing from the culture at the highest officer level.

Given this it is hardly surprising that the member / officer interface and relationship was equally ineffective although it was clear senior officers tried to make it work.

The Leader in ordering the re-instatement of the suspended member of staff attempted to give unlawful instructions to junior officers having been made aware of the decision of the Chief Executive on this matter, and deliberately tried to work around the Chief Executive.

The Leader commissioned his own legal advice in an inappropriate manner, resulting in initially incorrect advice (albeit based on limited instructions) and at a cost to the public purse (BCC).

Because of concerns about the failure to maintain confidentiality on key issues, briefings to members by officers were limited in terms of the scope / audience. As a consequence not all decision makers always understood all the facts, risks or implications of their decisions.

Relationships between officers and members need to be strong and robust enough to work in the good times and when there are issues. During this time they were not.

The local politicians could have addressed Cllr Clancy's behaviour and performance earlier whether through cabinet, the local labour group, regional labour group or national party.

Cllr Clancy would have benefitted from greater support at a political level, perhaps an issue for the LGA

Expectations as to the role / potential intervention of the LGA / Improvement Panel during this time were not realistic or legitimate

11.3 What occurred here could largely be placed at the feet of one person – Cllr Clancy.

- 11.4 But to stop at that point would be a mistake. BCC has had governance issues for some time. All that we heard suggested that the problems went far deeper than the behaviour of one individual. The issues lie with members and officers.
- 11.5 The “normal” governance arrangements in a council would have intervened and probably prevented this.
- 11.6 BCC needs to arrive at a way of working in terms of its governance that not only has the rules, checks and balances to prevent a re-occurrence of what occurred in relation to this matter, but more fundamentally addresses the longer term and more deeply ingrained governance issues at BCC, particularly addressing the underlying behaviours and culture. The latter is more important, as any number of extra rules, protocols or guidance would not have prevented what occurred in this matter.
- 11.7 Major change requires leadership. This must come from the managerial leadership and the political leadership, but the managerial leadership must take the initiative. New councillors are very unlikely to have served elsewhere and will therefore adopt and follow the BCC “way” of doing things.
- 11.8 The managerial leadership must show the way and shine a light on where change is needed. The political leadership must accept the existence of the issue and be prepared to change.
- 11.9 The executive should work effectively and collectively as an executive. And that should also involve joint working with senior officers.
- 11.10 The senior officer management team (CLT) must similarly function with collective responsibility and trust between the participants.
- 11.11 The executive must also have a way of working that supports collective working with all members. Backbench members acting through scrutiny (and wider member involvement) has to be central. This is about member buy in and visibility.
- 11.12 Officers owe members a duty to ensure that they are brought in to what is happening – at the start and as plans develop. Transparency is an important part of any sound democratic decision-making process. Briefings must be full, and timely.
- 11.13 But members also have to understand that confidential information must be treated as such.
- 11.14 Further, Members generally must respect officers’ professional advice and officers’ roles. Breaches of rules by non-executive members (disclosure and reuse of confidential information in election material) was specifically referred to as an example of the general attitude of members towards the legal requirements and the norms of governance.
- 11.15 Effective communication is crucial, whether between officers, between members or between officers and members. That includes the ability to challenge advice or proposed decisions. The relationship – and trust – must be developed to enable such conversations to take place without fear, and without a subsequent inappropriate response or action.
- 11.16 Of particular importance is the relationship between the chief executive and leader. Particular attention as to how best to establish and maintain effective communication is of vital importance to both roles (officers and members) but also consequentially, the performance and delivery of both groups and hence (and critically) the strength of the Council’s performance for its citizens.
- 11.17 Max Caller, the author of the recent best value report for Northamptonshire CC said

In Local Government there is no substitute for doing boring really well. Only when you have a solid foundation can you innovate.

- 11.18 In Northamptonshire a large part of the “*boring*” was sound governance and decision-making with an effective member / officer culture and approach.
- 11.19 As our findings make clear, BCC has significant governance issues. It also needs to focus on the “boring”.
- 11.20 A starting point might be revisiting the understanding of the roles of senior officers, members (both within the Cabinet and within the council generally) and how officers and members work jointly.
- 11.21 It is within these relationships that we consider the cause of these events lie. A number of those we interviewed referred to a lack of “trust” in these relationships. Defining a relationship, how it should be characterised is almost impossible as is imposing trust.
- 11.22 However, defining and ensuring that all are clear as to their respective roles (and limitations) is not. Developing that mutual understanding and respect will take time but will serve to reset the foundations of BCC’s governance. So it is here that we recommend BCC should start. Defining the role and being clear that the parties will respect the roles will start to develop a relationship that is based on the sound foundations of the norms of good governance.
- 11.23 We would also want to add that there needs to be a systemic approach to member and officer training and development around governance and associated issues. New members, or members taking on new roles, need good support and mentoring.
- 11.24 Executive members in particular need a robust induction programme, especially when they may be new to taking on such significant roles.

- 12 **Question 7: Are there any other recommendations that you wish to make to the Council in respect of further investigations which may be required?**
- 12.1 There are a number of matters that we recommend BCC should consider. In so recommending we do not suggest that any are substantiated but given the nature of our findings, these are matters that BCC should consider further, and taking appropriate advice as required.
- 12.2 Misconduct in public office
- 12.2.1 It is our view that BCC should consider whether the offence of misconduct in public life has been committed here.
- 12.2.2 Misconduct in public office is an offence at common law triable only on indictment. It is an offence confined to those who are public office holders and is committed when the office holder acts (or fails to act) in a way that constitutes a breach of the duties of that office.
- 12.2.3 The offence is committed when a public officer acting as such wilfully neglects to perform his duty and/or wilfully misconducts himself to such a degree as to amount to an abuse of the public's trust in the office holder without reasonable excuse or justification
- 12.2.4 The courts have accepted that a Councillor holds a public office - R v Speechley [2004] EWCA Crim 3067
- 12.3 Misfeasance in Public Office
- 12.3.1 BCC should consider whether there has been misfeasance in public office.
- 12.3.2 Misfeasance in public office is unique among torts in that it is targeted exclusively at those exercising public power. There are two features of the tort, both given recent clarification by the House of Lords, which limit it greatly. This can be seen by the very small number of cases that are brought, or if brought, succeed.
- 12.3.3 The House of Lords in Three Rivers District Council v Bank of England (No. 3) [2003] 2 A.C 1 clarified what conduct on the part of the defendant must be proven to establish the tort, namely that the public official concerned in exercising public power either: -
- (a) did so for an ulterior purpose specifically intending to injure the claimant; or
- (b) did so with reckless indifference to the fact that he had no power to do the act complained of and with reckless indifference to the probability of injury being caused to the claimant, or a class of persons of which the claimant was a member.
- 12.3.4 Bad faith is an element of both forms and it is this requirement which makes the tort very difficult to apply in practice. It sets a high threshold of misconduct which is forensically difficult to prove save in the clearest of cases.
- 12.3.5 It should also be noted that in Watkins v Home Office [2006] 2 A.C 395 Lord Bingham identified the two principles that come into conflict in relation to this tort:-

“8. There is great force in the respondent's submission that if a public officer knowingly and deliberately acts in breach of his lawful duty he should be amenable to civil action at the suit of anyone who suffers at his hands. There is an obvious public interest in bringing public servants guilty of outrageous conduct to book. Those who act in such a way should not be free to do so with impunity.

“9 On the other hand, it is correctly said that the primary role of the law of tort is to provide monetary compensation for those who have suffered material damage rather than to vindicate the rights of those who have not. If public officers behave with outrageous disregard for their legal duties, but without causing material damage, there are other and more appropriate ways of bringing them to book. It is said to be unnecessary and untimely to develop this tort beyond the bounds hitherto recognised.”

12.3.6 This was also mentioned by Tim Straker QC in his advice.

12.4 External auditor

12.4.1 We recommend that BCC discusses this report with its external auditors. Whether there are matters that the external auditors wish to pursue and investigate is of course a matter for them.

- 13 **Question 8: Are there any key issues arising from the Member/Officer protocol in relation to the period of your enquiry and are there any recommendations you would make in relation to Member/Officer relations.**
- 13.1 Whilst we believe that the Member / Officer Relations Protocol would benefit from review and recasting in the light of these events, simply adding extra words to the constitution would not of itself in our view address the underlying governance issues that we identified in our answer to question 6.
- 13.2 In section 11 of this report we identified possible areas of work around BCC's governance.
- 13.3 It is important in our view to start there, not with the redrafting of parts of the Constitution.
- 13.4 An outcome of that, in looking at the effective working relationships between officers and members, could be additional guidelines and working practices to address the issues we have identified that could be codified within a revised Member / Officer Relations Protocol.
- 13.5 Areas that could be so addressed could include:
- 13.5.1 greater clarification of the officer role in supporting members generally;
- 13.5.2 specific guidelines on officer support for the Executive and Overview and Scrutiny;
- 13.5.3 the role of the statutory officers (Head of Paid service, S151 Officer and Monitoring Officer); and
- 13.5.4 members' access to information, including confidential briefings.
- 13.6 Such additional areas would need to set out what members are entitled to and what they are not, as well as what officers can and cannot do.
- 13.7 Consideration should be given to the arrangements for officers and/or members to raise concerns about governance matters.
- 13.8 Effective communication between and within the various groups is of course essential and structured arrangements for that may at least provide for a minimum expectation.
- 13.9 Finally, the crucial working relationship between the Leader and Head of Paid Service (and possibly also Leader and S151 / Monitoring Officers) may benefit from codification.
- 13.10 It is important that officers and members collaborate effectively in terms of respective powers and duties. Dialogue is crucial before any Cabinet decision or proposed Cabinet decision is made.

- 14 **Question 9: Do you believe that there might be any breaches of the Councillor Code of Conduct including a breach of the Nolan Principles?**
- 14.1 We believe that there may have been breaches of the Code of Conduct including the Nolan Principles. As a consequence, we believe that the due process should now be followed.
- 14.2 We have submitted our detailed consideration on this issue separately to the Deputy Monitoring Officer so as not to prejudice any future consideration of a case that may ultimately be presented to members of BCC who sit on the Council's Standards Committee.

15 General Findings

15.1 Role of ACAS

- 15.1.1 We sought clarification of certain matters from ACAS as we were surprised that ACAS did not (seemingly) challenge the authority of a single member, attending ACAS without officer support, as being able to agree and bind BCC in the manner which occurred.
- 15.1.2 We also wanted to understand the consequences of the telephone call.
- 15.1.3 In our communications with ACAS, they made it clear that Section 251B Trade Union and Labour Relations Consolidation Act 1992 expressly prohibits any disclosure of information by them save in limited circumstances.
- 15.1.4 ACAS did make a statement in response to representations from both parties to the Court hearing, upon receipt of an undertaking to release ACAS from the obligation to maintain confidentiality received from both parties but subject to the following limitation: “the waiver of confidentiality does NOT extend to matters which flow and is limited to the contents of paragraph 6 of [BCC's Monitoring Officer's] witness statement only”.
- 15.1.5 Paragraph 6 of that statement stated:

“Late in the afternoon, in the presence of the Interim Chief Executive Stella Manzie, I telephoned Malcolm Boswell the responsible ACAS officer, to instruct him not to issue the statement on behalf of the Council on the basis that the Council had not agreed this statement. I believe I expressly said ‘you do not have the authority of the Council to issue the Statement on behalf of the Council’. Malcolm Boswell did not give an indication as to whether he was going to issue the statement or not [Exhibit KC1 page 56].”

- 15.1.6 The ACAS Statement made by Mr Malcolm Boswell was as follows:

I can confirm that I did receive a telephone call at about 6.15pm from someone who said that they were Kate Charlton. I have not previously met with her. At no time during the negotiations leading up to the agreement did I speak to Kate Charlton. I was not aware that she was party to the negotiations, nor was I in any way aware that she had authority to speak for Birmingham City Council. At no time during the course of the brief conversation did she state that Stella Manzie was present in the room with her.

I do not recall exactly what I said, but I did point out that the agreement which was recorded in the notice had been reached between the Leader of Birmingham City Council (John Clancy) and Unite (Howard Beckett) with whom we had been negotiating over a number of days and that it was their agreement.

I can confirm that I did not give an indication as to whether I was going to issue the statement or not, as I was duty bound to check both the standing of the caller and the implications of statement made with John Clancy, the person who had held himself out to be negotiating on behalf of Birmingham City Council. The statement was not due to be released that day as final approval was awaited from both parties, thus enabling me to do so.

- 15.1.7 Mr Boswell added to us that he was unable to add anything further, other than to say that ratification was received and approval to release the agreed press statement was forthcoming from both parties. This then triggered the release of the press statement around midday. That was also a matter of public record.
- 15.1.8 Whilst this is clearly a matter for ACAS, we were surprised that the attendance at ACAS by a councillor albeit the Leader of the Council without officer support would not at least raise sufficient queries to warrant a call to the Chief Executive to confirm the arrangements .
- 15.1.9 Further, that in relation to the telephone call, that again a call was not made to the Chief Executive to verify the bona fides of the Monitoring Officer. The acceptance of the authority of Cllr Clancy seems at odds with the cautious approach as to the identity and authority of the Monitoring Officer. Further having been put on notice of a potential issue as a consequence of the call from the Monitoring Officer, a call back to the Chief Executive would have resolved that and could have avoided all that followed.
- 15.1.10 As a consequence, we recommend that BCC shares this report with ACAS and that whilst this is entirely a matter for ACAS, they may wish to consider whether their policies and procedures could usefully be reviewed to avoid anything similar happening again.

15.2 The Kerslake Report

- 15.2.1 In December 2014, Sir Bob Kerslake's report which reviewed the governance and organisational capabilities of BCC was published.
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/384732/The_way_forward_-_an_independent_review_of_the_governance_and_organisational_capabilities_of_Birmingham_City_Council.pdf
- 15.2.2 That report bears re-reading in the light of our review. Recommendation 3 in particular bears revisiting:
- (a) *"Birmingham City Council's governance needs to be reset in the following ways:*
 - (i) *the council needs to clarify roles, responsibilities, behaviours and ways of working expected in relation to the of the Leader, Cabinet, councillors Chief Executive and officers. The strategic, executive, independent scrutiny and community roles of members needs to be clearly defined and better supported including with appropriate training. The council also needs to ensure there are shared expectations of capacity, capability and how performance will be measured between members and the senior officer team;*
 - (ii) *Birmingham City Council should develop a simplified planning framework this should flow from the City Plan (see recommendation 8 below). The process and documentation the council will need is set out in chapter 2;*
 - (iii) *in order to achieve strong corporate governance and coordination of the council's required transformation support services such as finance, performance management, Human Resources, IT and property should be managed corporately. The corporate centre should be strengthened to enable this to be done effectively and*

provide greater support to the Chief Executive and his team. A senior post to lead the economic work of the council should be re-established to effectively carry out this role and at the same time to provide the capacity needed for the Chief Executive to play his corporate leadership role;

- (iv) *there should be a programme of culture change that is owned by both members and officers”.*

15.2.3 Our view is that the position in BCC may well have moved on in some aspects. But in governance the issues remain.

15.3 INLOGOV

- 15.3.1 A number of those that we spoke to drew our attention to the INLOGOV report dated February 2016 "Exploring Relationships between Partners, Officers and Elected Members in BCC".
- 15.3.2 The general view expressed to us was that the INLOGOV report was fair and reflected the BCC position at that time, but that BCC had done relatively little to address the issues raised in the report.
- 15.3.3 One comment made to us in relation to the INLOGOV report was that they would have expected INLOGOV to return and re-review BCC with a view to advising on progress, but this did not happen. To this person, there seemed little or no follow through by BCC on the report.

15.4 The Role of the Improvement Panel

- 15.4.1 A key outcome of the Kerslake report was the establishment of an Independent Improvement Panel.
- 15.4.2 Given the on-going governance failings at BCC, BCC will need to revisit its plan / approach to this area.
- 15.4.3 We have no doubt that the Improvement Panel will wish to consider this report alongside BCC's response.

15.5 Role of political parties in choosing Leaders

- 15.5.1 We recommend that it should be regarded as good practice for political parties to identify the future skills base and type of representation needed for politicians and, using appropriate selection methods, to take steps to fill these gaps when seeking candidates for election and for succession planning in roles within the council eg Chairs of Committees and Executive members.
- 15.5.2 We recommend that political parties should, in putting forward members as a Leader of a council, give consideration to the experience of those seeking such office.
- 15.5.3 We recommend that it should be regarded as good practice for political parties to appraise the performance of those that are elected and put in place training and development programmes to fill any skills gaps and also for future members.

16 Concluding Comments

- 16.1 On 18th September 2017 the High Court granted an interim injunction to restrain BCC from dismissing the Leading Hands pending a speedy trial. The proceedings were then compromised without the need for a trial. Two quotes from that judgement bear repeating:

“Neither party to this litigation emerges from this sorry saga with any credit at all, in my judgment. How a public body with 12,000 employees can operate sensibly with this degree of chaos between its senior personnel is remarkable. I could choose any number of similar words; extraordinary and astonishing being two which immediately spring to mind. Certainly this is an exceptional case”.

....

“The schism within the council of the officers and the executive not working together, and in fact positively working against one another in some respects, is what has led to this highly unusual situation and what has led to these proceedings.”

- 16.2 Quoted in Sir Bob Kerslake’s report of December 2014 were the 5 factors (according to the LGA) that are critical to council performance and improvement.

Councils need:

a. effective political and managerial leadership, working in partnership;

b. to understand their local context and establish a shared long-term vision for the future with a clear set of priorities;

c. effective governance and decision-making arrangements that respond to challenges and manage change, transformation and disinvestment;

d. the organisational capacity and resources focused in the right areas in order to deliver the agreed priorities including a workforce that understands what the priorities and supports their delivery; and,

e. a financial plan in place to ensure its long-term viability and to be sure it is being implemented and a performance management plan that manages delivery.

(Based on the current headline questions/areas looked at by Local Government Association corporate peer challenges).

(Our Emphasis).

- 16.3 The Kerslake report also specifically said:

“To improve the most important thing the council has to do is to change its corporate culture. Everyone in Birmingham City Council needs to take personal responsibility for confronting and changing the mindset that says the council’s problems are unique to the city and can be explained by its size. Members need to have a realistic vision for the city and the council’s future that is achievable. Officers need to be honest about the tough decisions and trade-offs that will be needed to get there. Issues need to be confidently raised and dealt with rather than ignored or put off” (Chapter 2, para 11).

“Instead of an effective partnership between the political and managerial leadership of the council we have consistently heard that the respective roles of members and officers are blurred in practice. In the words of a Cabinet member: “councillors pretend they are officers, and officers occasionally pretend they are councillors.” (Chapter 2, para 12).

“While we heard this was partly the result of members’ frustrations and feeling they needed to intervene in detail to ensure their decisions were implemented, this is not healthy. It is a clear sign that the governance of BCC is not operating the way it should.” (Chapter 2, Para 13).

- 16.4 Those tasked with taking forward the necessary changes in governance at BCC arising from this will not only need to look at the specifics in this report, but also the findings from December 2014.
- 16.5 An inevitable question that they must ask is what has changed in terms of governance and the underpinning culture of trust between the key players in BCC since the Kerslake report.
- 16.6 And if not enough has changed, why not (and what will be different this time).

Appendix 1 SCHEDULE OF INTERVIEWEES

Cllr Ian Ward

Cllr Lisa Trickett

Cllr Brigid Jones

Cllr Peter Griffiths

Cllr Tristan Chatfield

Stella Manzie: Interim Chief Executive, BCC (at the material time)

Angela Probert: Chief Operating Officer, BCC

Kate Charlton: City Solicitor, BCC

Jacqui Kennedy: Corporate Director of Place, BCC

Frances Done: Improvement Panel