

LONDON BOROUGH OF CROYDON

REPORT:	Appointments and Disciplinary Committee	
DATE OF DECISION	23rd March 2023	
REPORT TITLE:	Consideration of two of the stayed recommendations from the Penn report in regard to a referral of the report to the Metropolitan Police and referral to Professional Bodies and Institutes.	
CORPORATE DIRECTOR / DIRECTOR & LEAD OFFICERS :	Katherine Kerswell Chief Executive <u>Katherine.kerswell@croydon.gov.uk</u> Stephen Lawrence - Orumwense Director of Legal Services and Monitoring Officer <u>Stephen.Lawrence-Orumwense@croydon.gov.uk</u>	
LEAD MEMBER:	Mayor Jason Perry	
CONTAINS EXEMPT INFORMATION? <i>(* See guidance)</i>	YES	<p>Exempt Appendix A: List of referrals to professional bodies and institutes</p> <p>Under paragraphs 1 (information relating to any individual) and 2 (information which is likely to reveal the identity of an individual) and, in all the circumstances, the public interest in maintaining the exemptions outweigh the public interest in disclosing the information</p>
WARDS AFFECTED:	All	

1 SUMMARY OF REPORT

- 1.1 The purpose of this report is to offer advice to members in their consideration of two of the stayed recommendations from the Penn Report.
- 1.2 These recommendations were stayed by this Committee at its meeting in April 2022, until the receipt of the Kroll report.
- 1.3 The Kroll report is before this committee today and any consideration of the recommendations in the light of that report is subject to members' decision on that item.
- 1.4 Since the Penn report was issued to the Council in February 2021, there have been other reports published that cover similar issues. The advice to members in their consideration of these two recommendations will also draw upon those other reports; the two Reports in the Public Interest, the Non-Statutory Rapid Review, the PwC report into the Council's Companies and other liabilities, and the Kroll report.

2 RECOMMENDATIONS

For the reasons set out in the report the Appointments Committee is recommended:

- 2.1 to agree that the Penn report be referred to the Metropolitan Police for their consideration as to whether any further action is warranted.
- 2.2 to agree that in addition to the above, the two Reports in the Public Interest, the Non-Statutory Rapid Review report, the PwC report into the Council's Companies and other liabilities, the Kroll report and all other relevant documents also be referred to the Metropolitan Police for their consideration as to whether any further action is warranted.
- 2.3 to agree the Penn report, the two Reports in the Public Interest, the Non-Statutory Rapid Review report, the PwC report into the Council's Companies and other liabilities, the Kroll report and all other relevant documents be referred to relevant professional bodies and institutes for their consideration.
- 2.4 to agree that the individuals listed in **Exempt Appendix A** be referred to the relevant professional body and institute [if knowledge of membership enables the council to do so]
- 2.5 to delegate authority to the chief executive, in consultation with the monitoring officer, to agree any further referrals to relevant professional bodies and institutes based on existing or new information.
- 2.6 to note that a meeting will be requested with the Metropolitan Police for the Mayor as part of the implementation of recommendations 2.1 and 2.2 above.

3 REASONS FOR RECOMMENDATIONS

- 3.1 The April 2022 Appointments Committee deferred consideration of these two recommendations until the Kroll report was received by the council. That report is on this committee's agenda today.
- 3.2 This committee has expressed its determination to address the remaining recommendations of the Penn report in full.
- 3.3 The public interest implications of the Penn report and its recommendations necessitates their formal consideration by this committee.
- 3.4 The Council has been the subject of unprecedented governance and financial crises because of the decisions, actions or omissions of elected members and senior officers. The impact is still being felt today and evidence by the request for extraordinary financial support from the government for the Council to be financially sustainable. See paragraphs below.
- 3.5 The various Reports that are referred to including the Reports in the Public Interest, Penn Report and Kroll Report clearly documents the fundamental failings and the financial implications for the Council. See paragraphs below. These Reports also raises serious concerns about the conduct of elected members and senior officers and that necessitates a referral to relevant authorities to determine whether any action should be taken against these individuals.

4 BACKGROUND AND DETAILS

4.1 The following reports independently document the detail of the financial and governance crisis of Croydon Council from approximately 2014 until the Autumn of 2020.

- The Report in the Public Interest (RIPI) published by Grant Thornton October 2020,
- The strategic review of council companies and other investment arrangements PwC November 2020,
- The non-statutory Rapid Review report from MHCLG February 2021
- The independent investigation report by Richard Penn February 2021
- Evidence given to the Local Government and Housing Select Committee March 2021
- Local Authority Financial Sustainability and the Section 114 Regime report of the Local Government and Housing Select Committee Houses of Parliament July 2021
- The Report in the Public Interest published by Grant Thornton in February 2022.
- The Kroll report March 2023

4.1 The depth of that financial and governance crisis resulted in Croydon Council being the first London borough in over 20 years to issue a Section 114 notice. Appointments Committee will be aware that the Council has not only issued such a notice but has had to issue three; such is the severity of the Council's position.

4.2 The first time this has happened in the history of English local government.

4.3 This situation didn't 'just happen'. It arose from the conduct of those charged with governance, some of the Council's public office holders; its previous elected leadership, its previous statutory officers and some of its previous chief officers between 2014 until September 2020.

4.4 The only resolution to the financial crisis faced by the Council was to seek borrowing approval initially of £150m from the Government. Following the Mayor's Opening the Books Programme, borrowing approval for a further £224m has had to be requested and has been approved.

4.5 Due to the need to borrow large sums to cover its costs and balance the budget, the Council has had to make savings of £90m over the last two years. The budget passed on 8th March 2023 requires £36m more savings in the next financial year and an increase in council tax by 15%.

4.6 The council's debt is unsustainable and will cost taxpayers £66m next year simply to service it. Discussions with the Department for Levelling Up, Housing and Communities will begin shortly on how this level of toxic debt can be permanently dealt with.

4.7 In total the council has had to seek permission from Government to borrow £369 million pounds.

4.8 Savings of the scale required by the council to make its budget sustainable and in balance cannot be achieved through trimming and slicing. Services have been subject to severe reductions, and as a result the services to the people of Croydon have worsened and suffered real detriment.

4.9 The causal factors of this financial crisis were first drawn to the public's attention in October 2020, by a Report in the Public Interest (RIPI) by Grant Thornton, the Council's external auditors. This is one of the most serious steps an auditor can take. Around nine RIPI's have been published for upper tier councils since the introduction of the 2014 Local Audit and Accountability Act. Such is the seriousness of the situation; Croydon has had two of these reports.

- 4.10** Following that first RIPI, discussions were held with the External Auditor about the refurbishment of Fairfield Halls. This started out as a formal Value for Money report but due to the seriousness of the findings, it became the Council's second RIPI and was published in January 2022.
- 4.11** What has been outlined in those two RIPI's underscore the findings from the Government's Non-Statutory Rapid Review published in February 2020 which said, "*It is clear that Croydon Council has had significant failings in leadership and management (particularly in sphere of financial management) and its governance and assurance mechanisms have failed in identifying, escalating and addressing risk.*"
- 4.12** What occurred at Croydon has been very damaging to the Council's finances, its capacity to effectively perform its key public service functions and has seriously undermined the public trust and confidence in the Council.
- 4.13** As such the council's current elected leadership, the current statutory officers and the current chief officers of the council; those charged with governance, are duty bound to ensure that those responsible for this situation are fairly and properly held to account so that public trust and confidence can be restored.
- 4.14** **Accountability requirements at Croydon Council for public office holders and those charged with governance.**
- 4.15** Croydon Council is, to a degree, bounded in its actions by its duties and its powers as laid down in legislation. As public office holders, the elected members and employees of Croydon Council are equally prescribed as to the extent and limit of their actions and the expectations of their conduct. The courts have been reluctant to define what is meant by a public office holder and have stressed that each case must be considered individually, considering the nature of the role, the duties carried out and the level of public trust involved.
- 4.16** Both local authority councillors and local authority employees have been defined in case law as public office holders. The case law contains an element of circularity, in that the cases tend to define a public officer as a person who carries out a public duty or has an office of trust. What may constitute a public duty, or an office of trust must therefore be inferred from the facts of a particular case.
- 4.17** The definition of "those charged with governance" is clearer and is an important accounting term. "*The person(s) with responsibility for overseeing the strategic direction of the entity and obligations related to the accountability of the entity. This includes overseeing the financial reporting process.*"
- 4.18** All chief officers and all local government officers employed by Croydon Council have personal accountabilities placed upon them in their job descriptions and in the Council's Constitution with clear expectations of their conduct. These are laid out below.
- 4.19** The relevant documents are:

- The Seven Principles in Public Life – commonly known as the Nolan Principles

- The Council's Constitution which contains,
 - the Officer Code of Conduct
 - the Financial Regulations,
 - the Member Code of Conduct and
 - the Protocol on Staff–Member relations,

4.20 The Nolan Principles

All public office holders are governed by the Seven Principles in Public Life – more commonly referred to as the Nolan Principles. These have been adopted by the Council and underpin the Council's Officer Code of Conduct. They are Selflessness, Integrity, Objectivity, Accountability, Openness, Honesty and Leadership.

4.21 The Officer Code of Conduct -The Council's Officer Code of Conduct states in its' introduction:

“It is important that you are clear about what the Council expects from you in terms of how you carry out your work, behave, respect and treat your colleagues and members of the public. This Code sets out those expectations. Everyone who works at Croydon Council has a responsibility to our residents and those who use our services. That is why it is so important we ensure that we are doing the right thing and adhering to high standards of governance at the Council. We are accountable to the people who use our services and live within our borough and so it is vital that we conduct our business with honesty, transparency and accountability.”

4.22 It is important for the Committee to be clear that the roles of the then Executive Leadership Team, as the most senior officer roles in the Council; were not focused solely on functional service delivery nor on lead professional responsibilities. Each Executive Director bore an obligation to the authority, its body corporate, over and above their specific designation and their roles, in advice giving and service delivery. Elected members and the people of Croydon are entitled to expect that the individuals appointed to these most senior of roles bear personal responsibility to provide effective management for the whole organisation and are accountable as such.

4.23 Executive Directors were more than subject experts or functional managers. They had personal managerial responsibilities to contribute to the proper strategic co-ordination of the Council's functions and activities ensuring its effective and efficient governance and management. The statutory duty of achieving 'best value' in the overall performance of Council functions, provides the legal foundation for this expectation. An individual who was appointed as an Executive Director for Croydon Council had specific personal responsibilities outlined in the Council's Constitution in addition to duties specified in their job description.

4.24 The Financial Regulations – these apply equally to elected members and officers.

Section 1, paragraph 1.1 of the introduction to the Financial Regulations state: *“The regulations provide the governance framework for managing the Council's financial affairs. They apply to all Members, officers of the Council and anyone acting on its behalf.”*

4.25 Paragraph 1.4 of the introduction also says. *“All Members and officers have a general responsibility for taking reasonable action to provide for the security of the assets under their control and for ensuring that the use of these resources is legal, is properly authorised and achieves value for money. In doing so, proper consideration must be given at all times to matters of probity and propriety in managing the assets, income and expenditure of the Council”.*

4.26 Paragraph 1.10 of the same section says, *“The regulations are supported by a set of mandatory Financial Policies and Procedures which provide more detailed direction on the arrangements to be complied with. All Officers and Members must ensure that they read and follow these procedures. Failure to comply may constitute misconduct and lead to formal disciplinary action”*.

4.27 Section 8 paragraph 8.3 makes clear that, *“Executive Directors are responsible for establishing sound arrangements for planning, appraising, authorising and controlling their operations in order to achieve continuous improvement, economy, efficiency and effectiveness and for achieving financial performance targets.”*

4.28 And in the same section at paragraph 8.12 it is stated that if there are any suspicions that financial irregularity or avoidable losses may be taking place, there is a duty on all officers to act.

4.29 The Members code of conduct

Upon being elected, each elected member signs a declaration of office and commits to being bound by the members code of conduct contained in the council’s constitution. The code is designed to protect all councillors, the public, local authority officers and the reputation of this council. It sets out general principles of conduct expected of all councillors and their specific obligations in relation to standards of conduct. The fundamental aim of the Code is to create and maintain public confidence in the role of councillor and local government.

4.30 Section 5 of the Code focuses upon disrepute. The code requires each member to agree not to bring the council into disrepute by their actions.

4.31 The Code also requires member to ensure that public resources are used prudently in accordance with the council’s requirements and in the public interest.

4.32 The Protocol on Staff-councillor Relations

Two of the published independent reports describe the working relationship between senior officers and members as having generated an organisational culture which was dysfunctional, and which contributed to the Council’s financial and governance crisis.

4.33 MHCLG’s Rapid Review report describes an unhealthy, dysfunctional working environment with *“many accounts of officers being asked to re-word Cabinet reports to present the most favourable picture”*.

4.34 The October 2021 RIPI describes that environment as, *“collective corporate blindness to both the seriousness of the financial position and the urgency with which actions needed to be taken”*.

4.35 There is a duty on both officers and Members to uphold the Protocol on Staff - Councillor Relations and it is described as *“important to the successful working of the authority”*. The Protocol is clear that it requires action to maintain it.

4.36 The Kroll report’s executive summary chapter [pages 14-65] comments upon conduct and also outlines the expectations of the council’s constitution and contractual governance framework. There is a dedicated report on this committee agenda on the Kroll report.

4.37 The recommendations from the Penn Report

4.38 The Penn Report contained 6 recommendations (**Appendix C**). Three of those recommendations have already been dealt with by this committee.

4.39 At the April 2022 Appointments Committee, the remaining recommendations were stayed until the receipt of the Kroll report. That report has now been received and is before the committee today for its consideration. Two of the remaining recommendations are the focus of this report.

4.40 The remaining recommendations are:

- Members are requested to consider referring this initial investigatory report to the Metropolitan Police for assessment of any further action being warranted in regard to the handling of public money and conduct in public office.
- It is recommended that members consider whether the concerns raised in this initial investigation report warrant a referral to the Conduct and Ethics Committee of the Chartered Institute of Public Finance and Accountability.

4.41 Referral of the Penn and other reports to the police for their consideration.

4.42 The reports that have been published and the Kroll report which is on the committee's agenda today comment upon the conduct of individuals between 2014 and 2020.

4.43 Referring the Penn report, the two Reports in the Public Interest, the Non-Statutory Rapid Review, the PwC report into the Council's Companies and other liabilities, and the Kroll report to the Metropolitan Police, as well as all other relevant documents, will enable them to consider whether any investigation is warranted.

4.44 If there are concerns about the conduct of public office holders, it is possible that they may be addressed by reviewing the offence of misconduct in public office. Excerpts from the Crown Prosecution Service guidance note on this are reproduced below to aid the committee in its understanding. Their guidance note is appended in full at **Appendix 9** to the agenda pack for this meeting.

4.45 Misconduct in Public Office 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 that office.

4.46 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

4.47 The willful neglect or misconduct can be the result of a positive act or a failure to act. There must also be an element of knowledge or at least recklessness about the way in which the duty is carried out or neglected. In *Attorney General's Reference No 3 of 2003* the court

approved the definition of 'wilful' as 'deliberately doing something which is wrong knowing it to be wrong or with reckless indifference as to whether it is wrong or not'.

- 4.48** Public officers carry out their duties for the benefit of the public as a whole. If they neglect or misconduct themselves in the course of those duties this may lead to a breach or abuse of the public's trust. The behaviour must be serious enough to amount to an abuse of the public's trust in the office holder. In *R v Dytham*, Lord Widgery said that the element of culpability: "... must be of such a degree that the misconduct impugned is calculated to injure the public interest so as to call for condemnation and punishment."
- 4.49** Although the offence is not a 'results crime', the likely consequences of any wilful neglect or misconduct are relevant when deciding whether the conduct falls below the standard expected: "It will normally be necessary to consider the likely consequences of the breach in deciding whether the conduct falls so far below the standard of conduct to be expected of the officer as to constitute the offence. The conduct cannot be considered in a vacuum: the consequences likely to follow from it, viewed subjectively ... will often influence the decision as to whether the conduct amounted to an abuse of the public's trust in the officer. (Attorney General's Reference No 3 of 2003)."
- 4.50** Whilst there is no need to prove any particular consequences flowing from the misconduct, it must be proved that the defendant was reckless not just as to the legality of behaviour, but also as to its likely consequences.
- 4.51** In order to establish whether the behaviour is sufficiently serious to amount to the offence, the motive is also relevant. At its highest the motive may be malice or bad faith, but they are not prerequisites. Reckless indifference would be sufficient.
- 4.52** Other concerns in regard to conduct have been raised in relation to possible common law offences such as misfeasance in public office, a breach of the Financial Reporting Standards in regard to possible fraudulent accounting and budgeting, possible breaches of Section 1 of the 1999 Local Government Act, Section 151 of the Local Government Act 1972, Section 4 of the Local Government and Housing Act 1989, and Sections 5 and 5A of the Local Government and Housing Act 1989.
- 4.53** Although not intended to be an exhaustive list, for the Committee's consideration, some of the legal causes of actions or legal standards mentioned above against which the conduct, behaviours and activities reported could be assessed are set out in **Appendix D**.
- 4.54 Referral of the Penn and other reports to relevant professional bodies and institutes for their consideration.**
- 4.55** Professional bodies and institutes are bodies that, among other things, regulate the conduct, behaviours and activities of their members in the public interest. Entry to the professional body or institute is usually based on qualifications gained, experience at work, and length of service. Membership of the professional body or institute is maintained through a combination of continuing professional development and upholding the standards and conduct required by that body or institute. Local Government requires a wide range of professionally qualified officials to deliver its services. Many of the more senior posts in local government, e.g., solicitors, planners, development professionals, etc., will be required to have professional membership of regulatory bodies or (chartered) institutes as part of the council having assurance as to the professional knowledge and competency of that individual.

4.56 There is one post which by law (section 113 of the Local Government Finance Act 1988) requires qualification and membership of a specified accountancy body such as the Chartered Institute of Public Finance and Accountancy (CIPFA). This is a pre-requisite in order to be employed as a chief finance officer (section 151).

4.57 Professional bodies and institutes have frameworks to govern themselves and byelaws or rules that members agree to be bound by. They operate conduct and ethics committees (or equivalent decision making entities) and disciplinary processes to uphold the standards of the profession and the practice of their membership. As an example, CIPFA will investigate complaints against its members where there is evidence of:

- Professional incompetence;
- Breach of any guides to conduct, principles or rules (whether or not professional) prescribed and published by CIPFA Council;
- A Member having conducted himself/herself in such a way as to prejudicially affect the status, reputation or welfare of the Institute;
- A Member being guilty of 'misconduct' which for these purposes includes any conduct which has brought or is likely to bring discredit upon him or herself, his or her employer,
 - the Institute or the profession of accountancy;
 - member being convicted in any proceedings in relation to which a sentence of imprisonment may be imposed;
 - a member being subject to a finding or other determination in any civil or criminal proceedings that he or she has acted dishonestly or fraudulently.

4.58 Referring the Penn report, the two Reports in the Public Interest, the Non-Statutory Rapid Review report, the PwC report into the Council's Companies and other liabilities, and the Kroll report as well as other relevant documents to the relevant professional bodies and institutes will enable them to consider whether any investigation into the conduct of any members is warranted.

5 ALTERNATIVE OPTIONS CONSIDERED

5.1 An alternative option is to cease action on the two stayed recommendations and to dismiss the recommendations.

5.2 Due to the public interest matters relating to the financial and governance crisis at Croydon Council and the intense interest in accountability for the situation, this is not recommended to members at this time, but does remain an option for them to consider.

6 CONSULTATION

6.1 N/A

7. IMPLICATIONS

7.1 FINANCIAL IMPLICATIONS

- 7.1.1** The Penn report revealed a broad range of historic legacy problems that help identify the causes which eventually led to the Council issuing three S114 notices and the Council's external auditors issuing two Reports in Public Interest.
- 7.1.2** The Council's financial mismanagement will mean the Council and residents of the Borough will have to pay for such costs for many years to come.
- 7.1.3** The cost of funding this work, including any subsequent, legal and financial advice, is funded from existing budgets previously set aside and will not result in overspends.
- 7.1.4** The potential outcomes of any referrals are unlikely to result in financial benefits back to the Council but any such findings will help the Council in making governance and operational improvements.
- 7.1.5** Comments approved by Jane West Corporate Director of Resources and Chief Finance Officer 150323

7.2 LEGAL IMPLICATIONS

- 7.2.1** The Council has a broad discretion to make referrals to the Police and/or professional bodies and institutes as recommended by the Penn report and on its own initiative. But this discretion must not be abused or fettered and exercised reasonably and in accordance with administrative law principles. The Committees decision must be rational, prudent and should consider all relevant considerations. No irrelevant considerations may be taken into account, and any decision made must be one which only a reasonable authority, properly directing itself, could have reached. The Committee is advised to have regard to all the prevailing facts and circumstances and, in particular, the information presented in this report and other related information forming part of this Committee meeting's agenda pack.
- 7.2.2** Comments approved by Looqman Desai, Deputy Monitoring Officer, on behalf of the Director of Legal Services and Monitoring Officer. (150323)

7.3 EQUALITIES IMPLICATIONS

- 7.3.1** Under section 149 of the Equality Act 2010, the Council has a duty when exercising its functions to have "due regard" to the need to eliminate discrimination, harassment and victimisation and any other conduct prohibited under the Act and advance equality of opportunity and foster good relations between persons who share a protected characteristic and persons who do not. This is the public sector equality duty. The protected characteristics are age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation.

7.3.2 “Due regard” is the regard that is appropriate in all the circumstances. The weight to be attached to each need is a matter for the Council. As long as the council is properly aware of the effects and has taken them into account, the duty is discharged.

7.3.3 There are no immediate equalities implications arising from this report however, as the main body of the report outlines, it is in the council’s interests and in the public interest to ensure that those responsible for the council’s financial situation and governance failures are fairly and properly held to account so that public trust and confidence can be restored. In holding those people to account the council should ensure there is no bias, unequal or less favourable treatment on the grounds of one or more protected characteristics.

7.3.4 Comments approved by Dean Shoesmith, Chief People Officer. Date 15/03/2023.

8. APPENDICES SPECIFIC TO THIS REPORT

9.1 *Exempt Appendix A:* List of individuals to be referred to relevant professional bodies and institutes for their consideration;

Appendix B: Seven Principles of Public Life

Appendix C: Penn report Recommendations

Appendix D: Legal causes of action and legal standards for assessing conduct, behaviours and activities under consideration.

9. BACKGROUND DOCUMENTS

None

Appendix B – The Seven Principles of Public Life

The principles are:

Selflessness Holders of public office should act solely in terms of the public interest.

Integrity Holders of public office must avoid placing themselves under any obligation to people or organisations that might try inappropriately to influence them in their work. They should not act or take decisions in order to gain financial or other material benefits for themselves, their family, or their friends. They must disclose and resolve any interests and relationships.

Objectivity Holders of public office must act and take decisions impartially, fairly and on merit, using the best evidence and without discrimination or bias.

Accountability Holders of public office are accountable to the public for their decisions and actions and must submit themselves to the scrutiny necessary to ensure this.

Openness Holders of public office should act and take decisions in an open and transparent manner. Information should not be withheld from the public unless there are clear and lawful reasons for so doing.

Honesty Holders of public office should be truthful.

Leadership Holders of public office should exhibit these principles in their own behaviour. They should actively promote and robustly support the principles and be willing to challenge poor behaviour wherever it occurs.

Appendix C - Penn report recommendations

1. It is therefore recommended that, when this report is presented to the relevant Council body, formal consideration is given to whether the concerns raised in this report warrant further formal proceedings to be commenced in line with the JNC disciplinary procedures. The officers involved will have the opportunity to make representations to members of that Committee as part of its formal consideration whether or not to proceed with any further formal action. The three officers involved are:
 - the (current) Executive Director of Resources and Monitoring Officer,
 - the (current) Executive Director for Place, and
 - the (current) Director of Finance, Investment and Risk and S151 Officer.
2. Concerns have also been raised about the behaviour of the Executive Leadership Team as a group and its behaviour in response to possible breaches of the Officer Code of Conduct in regard to bullying behaviour. Members are asked to consider what, if any, further action is warranted in regard to these concerns.
3. It is also recommended that when this report is presented to the relevant Council body, formal consideration is given as to whether there have been breaches of the Member Code of Conduct and the Protocol on Staff - Councillor Relations and whether formal action is appropriate in regard to any potential breaches. The members involved are:
 - the Former Leader of the Council, and
 - the former Cabinet Member for Finance & Resources.
4. The investigation has raised concerns about the actions and inactions of the former Executive Director of Resources and S151 Officer. This individual is no longer employed by the Council. It is recommended that members consider whether the concerns raised in this initial investigation report warrant a referral to the Conduct and Ethics Committee of the Chartered Institute of Public Finance and Accountability.
5. The investigation has raised concerns about the actions and inactions of the former Chief Executive who is no longer employed by the Council. It is recommended that members consider a review of the settlement agreement that was signed by the Council with the former Chief Executive and whether the concerns raised in this initial investigation constitute a repudiatory breach of her contract and thus a breach of the terms of the settlement.
6. Members are also requested to consider referring this initial investigatory report to the Metropolitan Police for assessment of any further action being warranted in regard to the handling of public money and conduct in public office.

1. Appendix D: Legal causes of action and legal standards for assessing conduct, behaviours and activities under consideration

Misfeasance in public office

What is misfeasance in public office?

Misfeasance in public office is an action against a holder of public office. It provides a remedy for persons who are injured by the actions of a public officer who has exercised his powers in bad faith. It is an unusual tort in that the prime focus is on the motivation of the defendant.

There are similarities between the tort of misfeasance in public office and the criminal offence of misconduct in public office. However, the two are not the same and care should be taken before transferring principles between them.

The ingredients of the tort are as follows.

- The defendant must be a public officer.
- The defendant must have exercised power as a public officer.
- The defendant must have acted with malice or in bad faith, either with the intention of injuring the claimant or, being aware of the risk of such injury, without an honest belief that his conduct was lawful.
- That conduct must have caused the claimant material injury or damage of a sort foreseen by the defendant.

Each of these ingredients is considered below. However, this is a tort which is still developing and so the law remains unclear in a significant number of areas.

1. The defendant must be a public officer

The defendant must have “governmental” power, meaning the power to interfere with the way in which other citizens wish to conduct their affairs.

2. The defendant must have exercised power as a public officer

A claim for misfeasance in public office may be founded on an omission as well as an act. However, the omission must be deliberate and conscious in order to give rise to liability.

It has been held that even a deliberate failure to act will not sustain liability, unless there was (at least in effect) a duty to do the act in question.

3. The defendant must have acted with malice or bad faith

There are two ways in which the necessary mental element of the tort may come about.

“Targeted malice” arises where the defendant specifically and improperly intends to

cause injury or damage to a person or persons. To bring a claim under this head, it is not necessary for the claimant to show that the conduct in question would otherwise be unlawful; the improper motive makes it so. "Untargeted malice" arises where the defendant knows (or is subjectively reckless as to the risk) that:

- He has no power to do the act complained of; and
- The act will probably injure a person or persons.

Untargeted malice is more complex than targeted malice as set out below.

Unlawful conduct

The authorities suggest that conduct in question must already be unlawful in order to make out a claim for misfeasance under this head. It is likely that a claimant relying on this limb will have to show that the defendant did not have the power to act as he did, leaving aside his (the defendant's) knowledge, intention or recklessness.

Knowledge of unlawfulness

Mere unlawfulness cannot found a claim in misfeasance; an element of "knowledge" is required. Actual knowledge of unlawfulness is sufficient but not necessary. However, while the defendant need not actually know that his conduct is unlawful in order to be liable, it is not enough that he ought reasonably to have known that his act was unlawful. His action must at least be subjectively reckless; he must have been aware that his conduct might be unlawful but recklessly ignored the risk. This involves bad faith in that the public officer does not have an honest belief that his act is lawful.

Knowledge of probability of damage

It is also necessary to show that the defendant had some "knowledge" of the probability of damage. The defendant need not actually know that his conduct would cause damage, but it is not sufficient to show that damage was reasonably foreseeable. The defendant must actually have foreseen that his conduct would "probably" cause damage of the sort which has been suffered by the claimant.

The defendant must have caused the claimant material damage. The tort of misfeasance in public office is not actionable per se without proof of actual damage or loss, even if the abuse of power is grievous. In general, the normal principles of tort claims apply to claims for misfeasance in public office.

2. Misconduct in Public Office

Misconduct in public office is an offence at common law triable only on indictment. It carries a maximum sentence of life imprisonment. 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.

Definition of the Offence

The elements of the offence are summarised in Attorney General's Reference No 3 of 2003 [2004] EWCA Crim 868.

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.

A Public Officer

The prosecution must have evidence to show that the suspect is a 'public officer'. There is no simple definition and each case must be assessed individually, taking into account the nature of the role, the duties carried out and the level of public trust involved.

The following have been accepted as holding a public office by the courts over several centuries:

- Local authority employees (1995) Bowden 4 All E.R 505
- Local councillor (2004) R v Speechley [2004] EWCA Crim 3067

Wilful neglect or misconduct

- Nature of the neglect or misconduct

The wilful neglect or misconduct can be the result of a positive act or a failure to act.

There must also be an element of knowledge or at least recklessness about the way in which the duty is carried out or neglected. The test is a subjective one and the public officer must be aware that his/her behaviour is capable of being misconduct.

- Meaning of 'wilful' (also see 'Breach of Duty')

In Attorney General's Reference No 3 of 2003 the court approved the definition of 'wilful' as 'deliberately doing something which is wrong knowing it to be wrong or with reckless indifference as to whether it is wrong or not'.

Abuse of the public's trust

Public officers carry out their duties for the benefit of the public as a whole. If they neglect or misconduct themselves in the course of those duties this may lead to a breach or abuse of the public's trust.

- Seriousness of the neglect or misconduct

The behaviour must be serious enough to amount to an abuse of the public's trust in the office holder. In Attorney General's Reference No 3 of 2003 the court said that the misconduct must amount to:

“... an affront to the standing of the public office held. The threshold is a high one requiring conduct so far below acceptable standards as to amount to an abuse of the public's trust in the office holder.”

- **Consequences**

Although the offence is not a 'results crime', the likely consequences of any wilful neglect or misconduct are relevant when deciding whether the conduct falls below the standard expected:

“It will normally be necessary to consider the likely consequences of the breach in deciding whether the conduct falls so far below the standard of conduct to be expected of the officer as to constitute the offence. The conduct cannot be considered in a vacuum: the consequences likely to follow from it, viewed subjectively ... will often influence the decision as to whether the conduct amounted to an abuse of the public's trust in the officer. (Attorney General's Reference No 3 of 2003).”

Whilst there is no need to prove any particular consequences flowing from the misconduct, it must be proved that the defendant was reckless not just as to the legality of his behaviour, but also as to its likely consequences.

The consequences must be likely ones, as viewed subjectively by the defendant. Although the authorities do not say so, likely can probably be taken to mean at the very least 'reasonably foreseeable'; it is arguable that likely may mean 'probable' in this context.

- **Motive**

In order to establish whether the behaviour is sufficiently serious to amount to the offence, the officer's motive is also relevant.

At its highest the motive may be malice or bad faith but they are not prerequisites. Reckless indifference would be sufficient.

Without reasonable excuse or justification

It is not necessary for the prosecution to prove the absence of a reasonable excuse or justification, although the nature of the prosecution evidence should in practice negate any such element.;

The defendant may advance evidence of a reasonable excuse or justification. It is for the jury to determine whether the evidence reveals the necessary culpability.

3. Fraud

In the UK the legal test to apply is the Fraud Act 2006.

"Fraud by false representation" is defined by Section 2 of the Act as a case where a person makes "any representation as to fact or law ... express or implied" which they know to be untrue or misleading.

"Fraud by failing to disclose information" is defined by Section 3 of the Act as a case where a person fails to disclose any information to a third party when they are under a legal duty to disclose such information.

"Fraud by abuse of position" is defined by Section 4 of the Act as a case where a person occupies a position where they are expected to safeguard the financial interests of another person, and abuses that position; this includes cases where the abuse consisted of an omission rather than an overt act.

In all three classes of fraud, it requires that for an offence to have occurred, the person must have acted dishonestly, and that they had to have acted with the intent of making a gain for themselves or anyone else, or inflicting a loss (or a risk of loss) on another.

Gain and loss

Importantly a "gain" or a "loss" is defined to consist only of a gain or a loss in money or property (including intangible property).

This needs to be judged against the criminal intent test 'of making a gain for themselves or anyone else, or inflicting a loss' applied against the Fraud Act 2006 which is the test that the Crown Prosecution Service may apply for any of those named in the report.

The Crown Prosecution Service have some useful worked examples of cases and guidance for prosecutors in relation to abuse of position which help to illustrate the scope and intent of the Fraud Act. For example, the 'causing a loss' example under 'abuse of position' where an employee who fails to take up the chance of a crucial contract in order that an associate or rival company can take it up instead would allow the Crown Prosecution Service to pursue that individual in law i.e. the person acting with criminal intent rather than having to 'go after' the associate or rival company.