

Public Document Pack



Northumberland County Council

Your ref:

Our ref:

Enquiries to: Jackie Roll

Email: Jackie.roll@northumberland.gov.uk

Tel direct: 01670 622603

Date: 27 May 2022

Dear Sir or Madam,

Your attendance is requested at a meeting of the **COUNTY COUNCIL** to be held in **COUNCIL CHAMBER - COUNTY HALL** on **WEDNESDAY, 8 JUNE 2022** at **2.00 PM**.

Yours faithfully

Daljit Lally
Chief Executive

To all members of the County Council

Members of the press or public may view the proceedings of this meeting live on our YouTube channel at <https://www.youtube.com/NorthumberlandTV>.

Members are referred to the risk assessment, previously circulated, for meetings held in County Hall. Masks should be worn when moving round but can be removed when seated, social distancing should be maintained, hand sanitiser regularly used and members requested to self-test twice a week at home, in line with government guidelines.



Daljit Lally, Chief Executive
County Hall, Morpeth, Northumberland, NE61 2EF
T: 0345 600 6400
www.northumberland.gov.uk



AGENDA

PART I

It is expected that the matters included in this part of the agenda will be dealt with in public.

1. APOLOGIES FOR ABSENCE

2. DISCLOSURES OF MEMBERS' INTERESTS

Unless already entered in the Council's Register of Members' interests, members are required where a matter arises at a meeting;

(a) Which directly relates to Disclosable Pecuniary Interest ('DPI') as set out in Appendix B, Table 1 of the Code of Conduct, to disclose the interest, not participate in any discussion or vote and not to remain in room. Where members have a DPI or if the matter concerns an executive function and is being considered by a Cabinet Member with a DPI they must notify the Monitoring Officer and arrange for somebody else to deal with the matter.

(b) Which directly relates to the financial interest or well being of a Other Registrable Interest as set out in Appendix B, Table 2 of the Code of Conduct to disclose the interest and only speak on the matter if members of the public are also allowed to speak at the meeting but otherwise must not take part in any discussion or vote on the matter and must not remain the room.

(c) Which directly relates to their financial interest or well-being (and is not DPI) or the financial well being of a relative or close associate, to declare the interest and members may only speak on the matter if members of the public are also allowed to speak. Otherwise, the member must not take part in discussion or vote on the matter and must leave the room.

(d) Which affects the financial well-being of the member, a relative or close associate or a body included under the Other Registrable Interests column in Table 2, to disclose the interest and apply the test set out at paragraph 9 of Appendix B before deciding whether they may remain in the meeting.

(e) Where Members have or a Cabinet Member has an Other Registerable Interest or Non Registerable Interest in a matter being considered in exercise of their executive function, they must notify the Monitoring Officer and arrange for somebody else to deal with it.

NB Any member needing clarification must contact monitoringofficer@northumberland.gov.uk. Members are referred to the Code of Conduct which contains the matters above in full. Please refer to the guidance on disclosures at the rear of this agenda letter.

3. **REPORT OF THE LEADER AND DEPUTY LEADER (PORTFOLIO HOLDER FOR FINANCE AND GOVERNANCE AND CORPORATE SERVICES)** (Pages 1 - 8)

Report of Independent Governance Review

To introduce Max Caller CBE to the Council, to present his report on a review of our Corporate Governance arrangements. Group Leaders have been consulted on the arrangements for the meeting and the proposed recommendations set out in the report.

4. **REPORT OF THE LEADER AND DEPUTY LEADER (PORTFOLIO HOLDER FOR FINANCE AND GOVERNANCE AND CORPORATE SERVICES)** (Pages 9 - 68)

Statutory Report under Sections 114 and 114a

The Chief Finance Officer of the Council, appointed under S.151 of the Local Government Act 1972, issued a formal report to members of the Council on 23 May 2022. Legislation requires the County Council formally to consider the report within 21 days of it being sent to members. For a Council to receive such a report is very unusual and plainly a matter of great significance.

IF YOU HAVE AN INTEREST AT THIS MEETING, PLEASE:

- Declare it and give details of its nature before the matter is discussion or as soon as it becomes apparent to you.
- Complete this sheet and pass it to the Democratic Services Officer.

Name (please print):
Meeting:
Date:
Item to which your interest relates:
Nature of Registerable Personal Interest i.e either disclosable pecuniary interest (as defined by Annex 2 to Code of Conduct or other interest (as defined by Annex 3 to Code of Conduct) (please give details):
Nature of Non-registerable Personal Interest (please give details):
Are you intending to withdraw from the meeting?

1. Registerable Personal Interests – You may have a Registerable Personal Interest if the issue being discussed in the meeting:

a) relates to any Disclosable Pecuniary Interest (as defined by Annex 1 to the Code of Conduct); or

b) any other interest (as defined by Annex 2 to the Code of Conduct)

The following interests are Disclosable Pecuniary Interests if they are an interest of either you or your spouse or civil partner:

(1) Employment, Office, Companies, Profession or vocation; (2) Sponsorship; (3) Contracts with the Council; (4) Land in the County; (5) Licences in the County; (6) Corporate Tenancies with the Council; or (7) Securities - interests in Companies trading with the Council.

The following are other Registerable Personal Interests:

(1) any body of which you are a member (or in a position of general control or management) to which you are appointed or nominated by the Council; (2) any body which (i) exercises functions of a public nature or (ii) has charitable purposes or (iii) one of whose principal purpose includes the influence of public opinion or policy (including any political party or trade union) of which you are a member (or in a position of general control or management); or (3) any person from whom you have received within the previous three years a gift or hospitality with an estimated value of more than £50 which is attributable to your position as an elected or co-opted member of the Council.

2. Non-registerable personal interests - You may have a non-registerable personal interest when you attend a meeting of the Council or Cabinet, or one of their committees or sub-committees, and you are, or ought reasonably to be, aware that a decision in relation to an item of business which is to be transacted might reasonably be regarded as affecting your well being or financial position, or the well being or financial position of a person described below to a greater extent than most inhabitants of the area affected by the decision.

The persons referred to above are: (a) a member of your family; (b) any person with whom you have a close association; or (c) in relation to persons described in (a) and (b), their employer, any firm in which they are a partner, or company of which they are a director or shareholder.

3. Non-participation in Council Business

When you attend a meeting of the Council or Cabinet, or one of their committees or sub-committees, and you are aware that the criteria set out below are satisfied in relation to any matter to be considered, or being considered at that meeting, you must : (a) Declare that fact to the meeting; (b) Not participate (or further participate) in any discussion of the matter at the meeting; (c) Not participate in any vote (or further vote) taken on the matter at the meeting; and (d) Leave the room whilst the matter is being discussed.

The criteria for the purposes of the above paragraph are that: (a) You have a registerable or non-registerable personal interest in the matter which is such that a member of the public knowing the relevant facts would reasonably think it so significant that it is likely to prejudice your judgement of the public interest; **and either** (b) the matter will affect the financial position of yourself or one of the persons or bodies referred to above or in any of your register entries; **or** (c) the matter concerns a request for any permission, licence, consent or registration sought by yourself or any of the persons referred to above or in any of your register entries.

This guidance is not a complete statement of the rules on declaration of interests which are contained in the Members' Code of Conduct. If in any doubt, please consult the Monitoring Officer or relevant Democratic Services Officer before the meeting.

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Northumberland County Council

REPORT TO COUNCIL

DATE: 8 June 2022

REPORT OF INDEPENDENT CORPORATE GOVERNANCE REVIEW

Report of Leader and Deputy Leader (Portfolio Holder for Finance, Governance and Corporate Services)

Cabinet Members: Cllr Glen Sanderson and Cllr Richard Wearmouth

Purpose of report

To introduce Max Caller CBE to the Council and to present his report on a review of the Council's Corporate Governance arrangements. Group Leaders have been consulted on the arrangements for the meeting and the proposed recommendations set out below.

Recommendations

The County Council is asked to:

1. Thank Mr Caller and the whole review team for their work and their report and recommendations.
2. Form a Steering Group on a task and finish basis, consisting of:
 - a. The Leader and Deputy Leader of the Council
 - b. The Business Chair
 - c. The Vice Chair of the Audit Committee (Cllr Towns)
 - d. The Leaders of the Labour, Independent, Liberal Democrat and Green Groups
 - e. A second Member of the Labour Group nominated by the Labour Group Leader

The Steering Group to meet within the next 7 days to consider the Council's response to the Caller Review and its recommendations and report back to the County Council on 21 June 2022.

3. Convene an Extraordinary meeting of the Council on Tuesday 21 June 2022 to receive the report of the Steering Group.

Key Issues

The governance and culture of the Council is a matter for all Elected Members. The way in which we conduct our business, and the interaction between the public and the Council

and officers and Members, is all set by the Members themselves. We all sign up to the Nolan Principles of conduct in public life and we all want the best outcomes for our residents, businesses, and visitors to the County. The 'Caller Review' is an opportunity to take stock and revise the ways in which we work.

Background

When Cllr Sanderson was elected Leader of the Council after the election in May 2021, he asked the Chief Executive to commission a review of how the Council conducted its business. Despite considerable resistance to instituting an external, independent review, the Leader formally delegated the function of appointing an external consultant to the Deputy Leader.

On 7 February the Deputy Leader, acting under executive delegation, commissioned SOLACE Enterprises to undertake a corporate governance review of the County Council and report the findings of that review directly to the County Council. Mr Max Caller CBE is the Lead reviewer supported by Gordon Mitchell and James Taylor. The terms of reference for the review are attached to the delegated decision notice appointing them and appear as appendix 1 to this report.

The purpose of the review is to highlight areas for improvement. It is not designed to 'blame' or criticise anyone in particular. The Administration fully expects there will be learning for everyone and an opportunity for the Council to adapt and change the way in which it does business, to ensure that there is clarity, accountability, and transparency in what we do, why decisions are taken and who is taking the decision.

At the meeting of the County Council on 8 June, Members will receive a presentation from Mr Caller and his team. They will explain their methodology and findings and we expect that they will make recommendations to the Council.

It would not be fair or appropriate to ask Members to take any decision on the report or recommendations on the 8 June meeting as this review deserves careful consideration. We have therefore proposed to Group Leaders that a steering group is established on a 'task and finish' basis to consider the recommendations and report back to a further extraordinary meeting of the County Council on 21 June 2022, with a considered view on:

1. Whether to accept the findings of the report;
2. Whether to accept the recommendations of the report; and
3. If so, an action plan for implementation, identifying financial resources, human resources and a timeline for implementation and review.

The Council has a single party Administration, reflecting our political composition. But the way in which we do business, and the culture of the Council cuts across party political boundaries, and the responsibility to shape the culture of the organisation rests with all Members.

This report proposes the Steering Group includes: all the Group Leaders: the Deputy Leader of the Council, whose portfolio includes finance, governance and corporate services; the Business Chair of the Council (to represent all Members and reflecting his responsibility for the way in which meetings are conducted); and the Vice Chair of the

Audit Committee, Cllr Towns. To provide better overall representation and in consultation with Group Leaders, we also suggest a second member of the Labour Group is appointed to the Steering Group, at the nomination of the Labour Group Leader. This will result in a group of 9 members 4 Cons, 2 Lab, 1 Ind, 1 Lib Dem and 1 Green. It is not strictly proportional in accordance with the make-up of the groups on the Council, but the Steering Group will be non-decision-making and therefore the normal rules of political proportionality do not apply. In this context, it is more important that all the key decision makers and representatives of the groups are represented.

The Group will be supported at an officer level by the Deputy Chief Executive, the Monitoring Officer, and the Interim Senior Service Director (with responsibility for Democratic Services). They will nominate a project lead to manage the action plan and resource requirements.

Ahead of hearing the findings of the review, this report thanks Mr Caller and his team for their hard work, dedication, and professionalism. During the review, the team received a large number of messages and requests for interviews and have worked diligently to assimilate a large volume of information in a very short time. This report also acknowledges all those who contributed to the review as well as the officer team who supported the review team.

This is an important opportunity for the County Council to embrace change. There will doubtless be some hard messages, and significant changes to be made. This report seeks to reach across the aisle and invite all members to be part of that change for the good of the Council and the County as a whole.

Implications

Policy	The corporate governance arrangements are key to all that the Council does.
Finance and value for money	Value for money, transparency and accountability are key aims of the Council
Legal	It is essential there is a firm legal and ethical basis for the way in which the Council does its business. There is a significant number of Member conduct complaints arising from other Members of the Council and there are strained relationships within the Council resulting in legal and reputational risk.
Procurement	Mr Caller was procured through an open process under the executive delegation rules.
Human Resources	Grievances, dignity at work, sickness absences and claims can all be affected by the prevailing culture and policies of the Council
Property	N/A
Equalities	N/A
Risk	The absence of sound corporate management arrangements poses a

Assessment	significant risk to the County Council in terms of finances, reputation, and statutory intervention.
Crime & Disorder	N/A
Customer Consideration	N/A
Carbon reduction	N/A
Health and Wellbeing	N/A
Wards	N/A

Report sign off.

Authors must ensure that officers and members have agreed the content of the report:

	Full Name of Officer
Monitoring Officer/Legal	Suki Binjal
Executive Director of Finance & S151 Officer	Jan Willis
Relevant Executive Director	
Deputy Chief Executive (OBO Chief Executive)	Rick O'Farrell
Portfolio Holder(s)	Cllrs Sanderson and Wearmouth

Author and Contact Details

Suki Binjal, Monitoring Officer
Suki.binjal@northumberland.gov.uk

Appendix 1 Decision Notice and Terms of Reference

Record of Executive Decision made by individual member

Decision made by	Councillor Richard Wearmouth - Cabinet member for Governance and Deputy Leader of the Council
Decision Title	Commissioning an Independent External Review of Corporate Governance
Date of decision (same as date form signed)	Monday 7 February 2022
Key Decision	No - QC advice noted that this is a Cabinet function and not a Key Decision
Special Urgency Key Decision (where key decision requirements above have not been possible)	Not applicable - see above
Decision	Accept the tender from SOLACE
Reason/s for Decision	Please see the tender evaluation matrix attached. Following consultation with Group Leaders and Statutory Officers I was satisfied that Max Caller CBE and his team were best placed to provide these services.
Alternative options considered and rejected	Not holding the review was unwise in light of External Auditor's correspondence. Three bids were received, evaluated and scored. SOLACE were preferred.
Legal implications	QC advice sets out the legal power and delegation to me. Any recommendations of the review will be made in public to the full council and the cabinet.

Financial implications	Chief Finance Officer has confirmed funding for the review from contingency
Other implications	The Leader's notice of delegation dated 14 January instructed me to procure this review
Background papers considered	Invitation to tender, responses received, evaluation matrix, QC advice, views from group leaders and officers received.
Declarations/conflict of interest	None
Consultation	Informal consultation with external auditor, Group Leaders and Statutory Officers was invited, two Statutory Officers and two Group Leaders responded.
Exempt Decision?	No
Officer/Executive members who participated in the decision as consultees.	Cath McEvoy-Carr - Deputy Chief Executive Jan Willis - Interim Exec Director of Finance Suki Binjal - Interim Director of Governance Cllr Reid, Cllr Morphet



richard.wearmouth (Feb 9, 2022 15:17 GMT)

Signed by Cllr Richard Wearmouth

Dated: 9 February (date notice given)
Date of decision 7 February 2022

The purpose of the review is to highlight areas for improvement, it is not designed to 'blame' or criticise anyone in particular. We expect that there will be learning for everyone, and an opportunity for the council to adapt and change the way in which we do business to ensure that there is clarity, accountability, and transparency in what we do, why decisions are taken and who is taking the decision.

The terms of reference for the resulting report will include:

1. the operation, culture and structure of the organisation;
2. the effectiveness of political and organisational leadership;
3. the capacity and/or capability to provide the organisation with clear and effective strategic direction;
4. use of resources and the impact of governance on the organisation's ability to deliver best value;
5. the impact of corporate governance on service delivery;
6. the culture of openness, transparency and trust within and between the officers and members;
7. openness to challenge;
8. effective engagement with external partners.

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Northumberland County Council

REPORT TO COUNCIL

DATE: 8 June 2022

STATUTORY REPORT UNDER SECTIONS 114 AND 114A

Report of Leader and Deputy Leader (Portfolio Holder for Finance, Governance and Corporate Services)

Cabinet Members: Cllr Glen Sanderson and Cllr Richard Wearmouth

Purpose of report

The Chief Finance Officer of the Council, appointed under S.151 of the Local Government Act 1972, issued a formal report to members of the Council on 23 May 2022. Legislation requires the County Council formally to consider the report within 21 days of it being sent to members. For a Council to receive such a report is very unusual and plainly a matter of great significance.

The purpose of this report is to formally place the Chief Finance Officer's report before the Council and to invite the Council to accept its contents and recommendations. The statutory report is attached at Appendix 1.

The publication of the Statutory Report automatically stopped the continuing unlawful payments in relation to the International Allowance. The recommendations included in the report include that the payment must remain suspended as there is no lawful authorisation, or basis, for the allowance to be paid. The Staff and Appointments Committee will be tasked to examine that issue and consider whether the Council should take steps to recover the monies paid without lawful authorisation over the past 5 years.

The purpose of a report under Ss 114 and 114A is to notify members of the fact that unlawful expenditure has taken place. Its purpose is not to determine why it was allowed to take place, or whether there was any failure by any current or former employee of the Council, or by any Elected Member, in permitting this state of affairs to take place over such a significant period of time. However, the Council and the public are entitled to know how this happened and who, if anyone, was responsible for it happening.

It is the Administration's view that the Council must determine who knew what and when, and whether any current or former officer should, or should have been, subject to any capability or disciplinary action arising from the contents of the Statutory S114/114A Report.

We therefore recommend that in addition to those measures proposed by the Chief Finance Officer in section 6.2 of her report, the Employment (Appeals) Committee (EAC) is asked to consider whether any capability, disciplinary or other investigation should take place in relation to any officer of the Council. Were this to relate to any officer below

deputy chief officer, then it would be a matter for the Head of Paid Service or her nominee, to determine. The EAC has delegated functions in relation to senior officers. Were the EAC to take a view that a former officer(s) of the council had erred, then it could consider whether a reference is made to the current employer(s) (if any) or to any regulator or agency.

In relation to Elected Members, it would be necessary for the EAC to make a reference under the local arrangements agreed by the Council, for consideration of any breach of the Member Code of Conduct. It is advised that a single set of Members with an overview of the whole situation should be in a position to make such referrals or initiate action in this way.

Recommendations

That the County Council:

1. Receives the Statutory Report of the Chief Finance Officer made under S114 of the Local Government Finance Act 1988 dated 23rd May 2022.
2. Agrees the contents of the Statutory Report addressed to the Council under S.114 (in relation to the non-executive functions of the Council).
3. Notes the resolutions of the Cabinet at its meeting on 7 June 2022 in relation to those matters subject to a Statutory Report under S.114A of the Local Government Finance Act 1988.
4. Agrees the recommendations to the County Council set out paragraph 6.2 of the Statutory Report dated the 23rd May 2022.
5. Convenes a meeting of the Staff and Appointments Committee to take place within 14 days, to consider the contents of the Statutory Report in relation to the payment of the International Allowance and the matters referred to it in the recommendations of the Chief Finance Officer.
6. Convenes a meeting of the Employment (Appeals) Committee (EAC) to take place within 14 days, to commence consideration of who knew what, when and whether any grounds exist to take disciplinary, capability or other action in relation to any officer or former officer of the Council, or whether there are circumstances relating to Elected Members to be referred for consideration under the Council's Code of Conduct for Members arising from the circumstances set out in the Statutory Report.

Key Issues

The key issues and statutory obligations are set out in the body of the S114 report. It is for the Council to determine what response it wishes to make to those matters which relate to the non-executive functions of the Council.

Compliance with the Council's legal obligations and acting within its legal powers and ensuring public confidence in the administration of its affairs and the expenditure of public money is a key issue for the Council.

Background

The contents of the statutory report of the Chief Finance Officer are self-explanatory. The Cabinet is meeting on 7 June to consider those parts of the Statutory Report addressed to it and the Leader will confirm actions taken by Cabinet to the meeting.

In relation to the non-executive functions, including the payment of the International Allowance, the Statutory Report is addressed to the County Council. The Council has delegated staffing matters to the Staff and Appointments Committee and in accordance with the recommendations of the report, that committee must now convene to consider issues relating to the allowance, and whether any recovery of unlawful payments should take place.

The Council and the public will want to know how this happened, and who knew what, when. It is for this reason that the EAC is asked to conduct a review of that, and to consider any actions that lie within its terms of reference. Where there are other recommendations, in relation to junior officers, former officers or Elected Members, the EAC is asked to make relevant recommendations to the appropriate person or body.

Legal issues

The statutory provisions relating to the S114 Report are set out in the body of that report, and the legal advice appended to it. As will be seen from the consultation responses, the Monitoring Officer was consulted and agreed the contents of that report and the recommendations contained in it for the reasons set out. The Monitoring Officer, as Director of Governance, has been consulted as part of the statutory process leading up to the publication of the S114 report. In the course of that consultation, the Monitoring Officer has considered whether her statutory reporting duty, under S5 of the Local Government and Housing Act 1989 was also triggered by the facts and matters referred to in the S.114 Report.

The Monitoring Officer, having the benefit of Leading Counsel's Opinion, concluded that, whilst her statutory reporting duty was triggered, the purpose of such a report, namely, to bring matters to Members' attention and for the Council to have an opportunity to consider the report and determine its course of action, was achieved through the issue of a S114 report. This being so, the Monitoring Officer is satisfied that her reporting duty is discharged and that no separate report is required at this time.

In relation to the conduct of Members, whilst any action under the Code of Conduct is exclusively to be dealt with in accordance with the local arrangements agreed by the

County Council under the Standards Regime, it is appropriate for one set of members to have an overview and recommend any action to be considered in relation to both Members and officers.

Human Resources

Chief Officers are subject to the Northumberland Senior Staff Conditions of Service. The Head of Paid Service, Chief Finance Officer and Monitoring Officer have additional statutory protections regarding any potential disciplinary action and all three have identical disciplinary provisions set out in their respective contractual arrangements. The terms of reference of the Employment (Appeals) Committee incorporate the exercise of the Council's disciplinary functions in relation to Chief Officers. Were it found that disciplinary investigation or disciplinary action was required in relation to a more junior employee, then it would be a function delegated to the Chief Executive (or in her absence / conflict of interests) to the Deputy Chief Executive to determine.

It is not possible to take disciplinary action in relation to a former member of staff. However, in appropriate circumstances, consideration can be given to referring matters to their current employer, to a regulator or professional body, or to the Police, if there is information which is relevant to the remit of that organisation.

Given the history of disciplinary action relating to the Head of Paid Service in the Council, it is recommended that external legal advice is taken for the Employment (Appeals) Committee.

Implications

Policy	It is key to the Council to act within the law and to comply with all its legal obligations.
Finance and value for money	These are set out in the body of the Statutory Report. Plainly, further costs will be incurred in obtaining legal advice and completing the investigatory processes referred to and these will be met from within existing departmental budgets. The SAC (Staff and Appointments Committee) will need to determine the issue of recovery of any unlawful expenditure made to an individual, having regard to the external legal advice.
Legal	These are set out in Counsel's opinion, the body of the S.114 Report and this covering report. Council should note in particular, the consultation response from the Monitoring Officer regarding her overlapping reporting obligations.
Procurement	N/A
Human Resources	This is covered above
Property	N/A

Equalities	N/A
Risk Assessment	This is covered in the reports. There is a high risk of further action being taken by the external auditor, to bring the Council into compliance with its legal obligations if the recommendations set out in the S.114 report are not followed.
Crime & Disorder	N/A
Customer Consideration	N/A
Carbon reduction	N/A
Health and Wellbeing	N/A
Wards	N/A

Report sign off.

Authors must ensure that officers and members have agreed the content of the report:

	Full Name of Officer
Monitoring Officer/Legal	Suki Binjal
Executive Director of Finance & S151 Officer	Jan Willis
Relevant Executive Director	
Deputy Chief Executive (OBO Chief Executive)	Rick O'Farrell
Portfolio Holder(s)	Cllrs Glen Sanderson and Richard Wearmouth

Author and Contact Details

Suki Binjal, Monitoring Officer

Suki.binjal@northumberland.gov.uk

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Report under Ss.114 and 114A of the Local Government Finance Act 1988

Report to all members of Northumberland County Council

To be considered by:

The Cabinet in respect of Executive responsibilities (S.114A)

The County Council in respect of non-executive responsibilities (S.114)

**Report of: Jan Willis, Interim Executive Director of Finance and
Section 151 Officer**

Date of Report: 23rd May 2022

1. Purpose of report and executive summary

- 1.1. I am appointed by Northumberland County Council as the Chief Finance Officer under Section 151 of the Local Government Act 1972.
- 1.2. Sections 114 and 114A of the Local Government Finance Act 1988 (the 1988 Act) require me to make a report if it appears to me that the authority, a committee of the authority, or any person holding any office or employment under the authority:
 - (a) has made or is about to make a decision which involves or would involve the authority incurring expenditure which is unlawful;
 - (b) has taken or is about to take a course of action which, if pursued to its conclusions, would be unlawful and likely to cause a loss or deficiency on the part of the authority; or
 - (c) is about to enter an item of account the entry of which is unlawful.
- 1.3. It is the obligation of the Council (and the Cabinet in relation to executive responsibilities) to consider this report within 21 days of the date it is sent to members.
- 1.4. Following careful consideration of matters which have come to my attention, I came to a view that it was likely that the Council had incurred items of unlawful expenditure. I have now taken expert advice from Nigel Giffin QC and consulted my professional body, the Chartered Institute of Public Finance and Accountancy (CIPFA). On the basis of Mr Giffin's advice, I was confirmed in my initial views. I attach to this report a redacted version of Mr Giffin's Opinion at Appendix A.
- 1.5. I am sharing this legal advice with members, as I consider it necessary and proportionate to do so, and as a matter of public interest, and under the statutory access to information provisions, this report and the attached advice are expected to be made public. However, I must emphasise that this does not

constitute any wider waiver of professional legal privilege or litigation privilege that attaches to any other documents concerning these or other issues.

- 1.6. In accordance with my statutory obligations, I commenced a formal consultation with the Head of Paid Service, and the Monitoring Officer on 25 April 2022, and I consulted the Leader of the Council, the portfolio-holder and the Deputy Chief Executive on a voluntary basis, as well as making all Group Leaders and the external auditor aware of my consultation. I have received consultation responses, and I have considered carefully all of those comments. The consultation responses and my comments on them are also attached to this report as appendix B. I would particularly draw members' attention to the consultation response from the Monitoring Officer as set out in the Appendix.
- 1.7. Together with the Monitoring Officer, I have considered and taken advice, in relation to Data Protection issues, and the Access to Information Rules applicable to Council meetings. There is guidance from the Information Commissioner's office that particularly deals with the disclosure of information relating to the remuneration of senior officers of local authorities, and of course duties under the Local Audit and Accounting regime, the transparency code, and statutory guidance issued by DLUHC (Department for Levelling Up Housing and Communities). Having regard to the regulatory framework and weighing the public interest in there being openness and transparency relating to the matters set out in this report, against the private interests of individuals, I have reached the view that the council should disclose the fullest information it possibly can. A material factor is that all of the officers identified or identifiable in this report are (or were) senior chief officers. Furthermore, the data protection legislation provides in principle for such disclosure, where the publication is necessary in the exercise of a statutory function, such as my functions as Chief Finance Officer in this case.
- 1.8. The items of unlawful expenditure that are the subject of this report concern the following matters:
 - 1.8.1. The County Council participated (alongside the Northumbria Healthcare NHS Foundation Trust – referred to in this report as 'the NHCT') as a principal in the Northumbria International Alliance (NIA). This was an unincorporated partnership established to provide international consultancy services for a commercial purpose. NIA traded commercially from at least 2018 to 2021 and did so otherwise than through a company with all of the related income and expenditure being recorded in the Council's accounts. This is a breach of Section 4(2) of the Localism Act 2011. Commercial trading activity is an executive function of the Council, and this section of the report falls to be considered by the Cabinet under S114A(2) of the 1988 Act.
 - 1.8.2. Secondly, the County Council made and continues to make payment of a special "international allowance" of £40,000 per annum to the Chief Executive. This appears to have commenced in 2017 and was initially paid to the Chief Executive in her previous role as Deputy Chief

Executive. Payment continues to be made to the present day. I am satisfied that the payment does not have proper authorisation and is in contravention of the Council's pay policy statements. This is a breach of Section 41 of the Localism Act 2011 and s112(2A) of the Local Government Act 1972. Employment generally, and the remuneration of chief officers is a non-executive function and as such, that element of this report falls within the scope of S114(2) of the 1988 Act and is addressed to the County Council itself.

- 1.9. As set out above, the purpose of this report is to bring to members' attention, as I am required to do under s114 and s114A of the 1988 Act, that it appears to me that the Council has incurred unlawful expenditure. The report does not seek to attribute to any individual blame or responsibility for actions or omissions that have led to the unlawful expenditure identified in this report and should not be read as such.
- 1.10. Members may have heard of a 'Section 114 Report' in the context of a council 'going bust'. I must emphasise that this is not the case with Northumberland County Council and it must not be inferred from the fact that I am making this report that I have any concerns about the Council's ability to balance its budget either in the short or medium term. The requirements of S.114 and S.114A also apply to the reporting of unlawful expenditure even where, as here, there are no budgetary issues.
- 1.11. The provisions of S.115 of the 1988 Act require the authority to consider this report within 21 days of the date on which it is sent to members. Following consultation with the Business Chair, he has agreed for this report to be put on the agenda for consideration at the Extraordinary Meeting of the County Council to be held on 8 June 2022.
- 1.12. S.115 (2) of the 1988 Act requires the authority to determine at that meeting whether it agrees or disagrees with the views contained in this report and what action (if any) it proposes to take in consequence of it.
- 1.13. The provisions of S.115 establish a 'prohibition period' which starts on the day on which this report is sent to members and ends on the business day following consideration of this report. During this 'prohibition period' the course of conduct I have identified as leading to 'unlawful expenditure' shall not be pursued.
- 1.14. In the case of NIA and the 'international business', it would appear from the information provided to me that the Council has not suffered any financial loss and I am satisfied that any future or on-going expenditure will now be incurred by Northumbria Integrated Consultancy Limited (NICL), a wholly owned subsidiary of the County Council and would therefore be lawful. In my opinion the prohibition period does not apply to any expenditure incurred through NICL. Nor do I believe that in all the circumstances there is any financial or public interest in seeking to void any of the contracts the Council entered into without

the necessary powers or seek recovery of any sums of unlawful expenditure incurred as a result.

- 1.15. In relation to the payment of the International Allowance, I am satisfied that the expenditure remains unlawful. The provisions of the 1988 Act will take effect to automatically stop payment of the International Allowance for a period of 21 days from the date on which this report is sent to members. This is called the 'prohibition period'. Given the detailed legal opinion provided by Mr Giffin QC, issues relating to the International Allowance, the extent to which (if at all) it could ever have been justified, or paid, and whether, and if so to what extent, the County Council could, or should, continue or resume payment of an allowance, or seek to recover the past unlawful expenditure, should in my view, be referred to the Staff and Appointments Committee for detailed consideration. I further recommend that additional legal advice on this matter be taken from Mr Giffin to inform the Committee's consideration. The recommendations of the SAC can then be reported back to the County Council, if required, in due course. In the meantime, it remains the case that there is no legal basis for payment of this allowance to be made (and nor could any proper decision to pay such an allowance be reached on the basis of the information currently available).
- 1.16. The background, legal framework, findings and recommendations are set out in this report.
- 1.17. As referenced above, in preparing the report I have taken advice from Nigel Giffin QC (paragraph numbering refers to his Opinion) who has concluded that
- 1.17.1. *(Para 49) "...it is clear that the Council in this case engaged, otherwise than through a company, in activities undertaken for a commercial purpose. It had no powers to do so, and the expenditure incurred specifically for the purpose of those NIA activities was therefore unlawful".*
- 1.17.2. *(para 50) "...the Council's Chief Executive was paid an allowance on top of her normal salary on account of responsibilities undertaken in connection with NIA. It is unlikely that the decision to pay such an allowance could have been validly taken by anybody other than the full council. Certainly, there is no evidence, that I have so far seen, of the allowance being decided upon or approved by anybody or person who might even arguably have had the power to do so. Accordingly, the payment of the allowance also amounted to unlawful expenditure."*
- 1.17.3. *(para 51) "It is evident that the CFO must make a statutory report or reports on these matters."*

2. Legal framework for a section 114 report

- 2.1. Section 114(2) of the 1988 Act requires that the chief finance officer of a relevant authority shall make a report under this section if it appears to her that the authority, a committee of the authority, a person holding any office or employment under the authority or a joint committee on which the authority is represented
 - (a) has made or is about to make a decision which involves or would involve the authority incurring expenditure which is unlawful;
 - (b) has taken or is about to take a course of action which, if pursued to its conclusions, would be unlawful and likely to cause a loss or deficiency on the part of the authority; or
 - (c) is about to enter an item of account the entry of which is unlawful.
- 2.2. The process for issuing a s.114 report and the effect of it are set out in the 1988 Act. Subsection 3(A) requires the Chief Finance Officer to consult, so far as reasonably practicable, the Head of Paid Service and the Monitoring Officer. The purpose of this requirement is to ensure so far as practicable, a corporate response to the issues raised. The circumstances that have given rise to this report are somewhat unusual, in that they concern activities for which the Head of Paid Service had direct managerial responsibility and affect her own remuneration. The Chief Executive is also absent from work at present.
- 2.3. Nevertheless, I considered it practicable to consult the Head of Paid Service, and I have received consultation responses from her, the Deputy Leader, the External Auditor and the Monitoring Officer. A summary of these responses, together with my comments (informed by legal advice) is set out in Appendix B attached to this report.
- 2.4. Section 115 requires the Council (or Cabinet in relation to executive matters) to consider the report at a meeting, where it shall decide whether it agrees or disagrees with the views expressed in the report and what action (if any) it proposes to take in consequence of it. Those meetings must be held no later than 21 days beginning with the day the report is sent to members. Consideration of this report is reserved to full council in the case of a report under s114(2) of the 1988 Act and the executive (i.e. Cabinet) in the case of a report under s114A(2), it cannot be delegated.
- 2.5. In this case, the provisions of both s114(2) and s114A(2) of the Act are engaged, as the matters that are the subject of this report touch on both executive and non-executive matters.
- 2.6. The 1988 Act requires that the external auditor is sent a copy of the report and informed of the report and the time, date and place of the meeting(s) at which the report will be considered. The external auditors also must be informed of the outcome of the meeting(s) as soon as practicable.
- 2.7. The external auditor has been kept informed of the emerging position and of my proposal to issue this report. The external auditors will need to consider the

implications of the report on their statutory functions and, in particular, their opinion on the 2019/20 and 2020/21 or prior year accounts and whether any further action is required.

- 2.8. Contact has been made with the Department for Levelling Up, Housing and Communities in advance of issuing this s114 report. The Leader of the Council and Deputy Leader (as portfolio holder for finance and governance), Deputy Chief Executive (in the absence of the Chief Executive), the Monitoring Officer and Executive Directors have also been kept up to date on the emerging situation. The legal opinion from Mr Giffin has also been shared with the consultees and Group Leaders. In consultation with the Deputy Chief Executive, Monitoring Officer and Leader, and in view of the inevitable public interest, I have arranged for a copy of this report to be published on the County Council's website shortly after it is sent to members and for the local Members of Parliament and other stakeholders to be advised of its existence.

3. Background

- 3.1. Since my appointment as Chief Finance Officer in February 2021, I have sought assurances in relation to the lawfulness of international consultancy activities and the payment of the international allowance to the Chief Executive and in particular:

- (a) the intentions of the Council when entering into contracts to provide international consultancy activities;
- (b) the legal powers on which the Council could have relied in undertaking those activities during the period 2016 to 2021 other than the general power of competence, which is subject to the requirement to conduct commercial activities through a company
- (c) the reasons why such a company was not established until 2021;
- (d) the process by which the payment of an international allowance to the Chief Executive was approved and specifically whether that was in compliance with the requirements of s112 and 112A of the Local Government Act 1972 and s41 of the Localism Act, which requires such payments to be made in accordance with the Council's pay policy statement.

- 3.2. Having sought assurances from officers as to the lawfulness of these transactions, I was unable to satisfy myself and I commissioned advice from leading counsel to inform my formal opinion. That advice from Nigel Giffin QC is appended (Appendix A) and is quoted throughout this report. Mr Giffin is one of the leading experts in local government powers and responsibilities.

4. Northumbria International Alliance

- 4.1. In September 2016, NCC and Northumbria Healthcare Trust (NHCT) were invited by UK Trade and Investment to consider exporting models of healthcare.

The then Chief Executive agreed that NCC would provide support to the Trust in relation to these activities, including legal, contracting, finance and business development. It would appear that this was an informal arrangement, as I have not been able to locate any written agreement or memorandum of understanding setting out the services to be provided, or the basis for those activities to be undertaken or arrangements for cost recovery.

- 4.2. In February 2017, NHCT established the Northumbria International Alliance (NIA) as a “go to market” brand with the Christie NHS Foundation Trust as its initial partner. In the same month the Council appointed a Director of International Projects and System Transformation. The Council report approving the creation of this role stated that this was a joint role to be funded as part of a tripartite arrangement between NCC, NHCT and the Clinical Commissioning Group (CCG), although in the event the CCG did not contribute for reasons that are unclear, and the costs of the role were shared on a 50/50 basis by the Council and NHCT.
- 4.3. In July 2017, the Director of International Projects made a presentation to Informal Cabinet and the Board of NHCT on the business development strategy for NIA. Informal Cabinet supported the proposal to provide support functions to NHCT in support of the strategy. The overarching mission of the partnership was described as “to deliver sustainable, profitable, large-scale revenue from international activities”. Strategic objectives were described in commercial terms – for example, to build a £100m revenue stream over 5 years by focusing on multi-year income potential opportunities offering the highest contract income and profits.
- 4.4. Although the strategy referenced a number of peripheral benefits, it is clear to me that the main purpose of NIA was to act as a commercial vehicle and that the Council’s motivation in participating in NIA was to generate income.
- 4.5. This is also the view of Nigel Giffin, QC who has advised that “*On the information I have seen, I have no doubt that the Council’s predominant, and indeed perhaps its sole, purpose in pursuing the NIA collaboration was to generate a financial return which could be deployed to help fund its normal activities as a local authority.....*”
- 4.6. From the Spring of 2017 NCC began providing support services to NHCT in connection with international business development opportunities. The scope of these services and the basis on which they were provided is unclear, and since trading accounts and comprehensive records of time spent by NCC officers on international activities were not kept, it is not possible to establish the relevant costs or whether these were ever fully recovered.

- 4.7. In December 2017, the Council entered into a contract with a company incorporated and based in the United Arab Emirates. The value of this contract was £100,000.
- 4.8. In April 2018, the Council and NHCT as joint signatories entered into a contract to provide consultancy services to a company in China. The value of this contract was £646,680.
- 4.9. In August and September 2018, presentations were made to the NHCT Audit Committee and to an informal Cabinet briefing, updating them on the progress of the international consultancy strategy. Next steps outlined in the presentation included forming a new NCC wholly owned company. Subsequently, meetings took place with NCC legal advisers, Ward Hadaway LLP in September 2018 to discuss options for the form of a trading vehicle, however these do not appear to have considered the requirements of the Localism Act and the fact that the Council was already trading commercially at that point.
- 4.10. Around the same time, the then chief finance officer appears to have advised that preparatory work should be undertaken so that NCC would be ready to set up a company through Cabinet resolution should NCC come close to signing any contracts. It is unclear why officers did not recognise that the requirement to establish a company had already been triggered, given that the Council had entered into commercial contracts with a value of more than three quarters of a million pounds, at that time, with negotiations underway for further multi-million pound contracts.
- 4.11. In November 2018, NCC entered into a contract with a company incorporated and trading in the Republic of Ireland. The value of this contract was £2,954,803. The contract was cancelled prior to work commencing and the deposit of £50,000 returned to the client.
- 4.12. In December 2018, NCC and NHCT entered into an overarching co-operation agreement under which they agreed to collaborate on new commercial opportunities.
- 4.13. Further legal advice was taken from Ward Hadaway in June 2019 around company arrangements including articles of association. The advice note refers to the requirement to conduct commercial activities through a company in accordance with the Localism Act. However, it was not until almost two years later that Northumbria Integrated Consultancy Ltd (NICL) was in fact established.
- 4.14. In September 2019, a further officer briefing was provided to Informal Cabinet. Informal Cabinet were advised that the first contract with the Chinese company had a value of £600,000 was in delivery with a forecast profit of £236,644 and negotiations were underway with that company for phase 2, with a prospective value of £16m over 10 years. Informal Cabinet were also advised that

negotiations with another (different client) based in the United Arab Emirates for a contract with a prospective contract value of £39.6m were in progress with contract signature expected in January 2020.

4.15. That report stated that

“we are now at a critical time in terms of decision making should we decide to progress the next phase of development via the new UAE contract which will lead to a step change in this work and it will be necessary to form a subsidiary company to ensure that there is effective governance and oversight. Advice has been taken from Ward Hadaway in order to ensure appropriate governance is in place and a company could be established at minimal cost”.

4.16. In February 2020, Cabinet formally approved the establishment of a group holding company with up to 10 subsidiaries to support general commercial trading activities. However, it was not until 17 September 2020 that Northumberland Enterprise Holdings Ltd (NEHL) was registered at Companies House and a further 6 months after that before Northumbria International Consultancy Ltd (NICL) was registered on 29 March 2021. In the meantime, in June 2020, NCC signed the phase 2 contract with the Chinese company with a value of £2 million. The total value of commercial contracts signed prior to the incorporation of NICL was £5.8m and the value of contracts delivered was £2.8m. This cannot conceivably be regarded as *de minimis*.

4.17. In summary, it appears to me that the Council engaged in international consultancy activities between, at the latest 2018 and 2021 for a commercial purpose and otherwise than through a company. Legal opinion confirms that there is no lawful basis for the County Council having done so or to have incurred the substantial expenditure occasioned as a result. In entering into international contracts directly, NCC acted unlawfully, and it therefore follows that the expenditure incurred in delivering those contracts was also unlawful.

4.18. The expenditure involved was significant – at least £2.2m during the financial years 2017/18 to 2020/21, thus bringing s114(A) into play. Although it does not appear that the Council has suffered financial loss, and may have made some net gain, this cannot be definitively proven as proper trading accounts and contemporaneous records of all time spent by NCC officers supporting the delivery of these contracts and other business development activities were not kept.

5. International Allowance

5.1. It is currently unclear precisely when the international allowance began to be paid, but it seems to have been at about June 2017, to the then Deputy Chief Executive. In email correspondence with the Director of HR at NHCT dated July 2017 Mrs Lally (who was at that time Interim Chief Executive) refers to being separately remunerated by the Council as lead on the international work. However, no reference is made to a separate allowance in payroll records prior to December 2017.

- 5.2. The County Council considered an item of business in closed session in September 2017 regarding the restructure of the Executive Management Team. On page 5 of that report, there is a note on bullet point 8, which states that the “Chief Executive [not Deputy] will be responsible for the Commercial International lead for NCC and System Transformation Support with Northumberland Commissioning Group (CCG) (separately remunerated)”. This does not specify who would be paying any separate remuneration, or how much it was intended to be, or what it is for.
- 5.3. At that stage, recruitment to the role of Chief Executive in the new structure had not taken place. Importantly, the report to Council did not invite any decision on that issue or specify at what rate or by which body any such allowance would be paid.
- 5.4. The resolution at paragraph 3 of the September 2017 report is to agree the remuneration of the [new] Executive Management Team “as outlined in the report”. Recommendation 5 in the report delegates responsibility for nominating a Deputy Chief Executive [in the new structure] to the [new] Chief Executive in consultation with the Leader of the Council and makes provision for that post [the Deputy Chief Executive] to receive an additional allowance. The report does acknowledge that the then Deputy Chief Executive (Mrs Lally) had responsibility for leading the nascent international business. However, there is no mention that this work was separately remunerated, as such.
- 5.5. Appendix 2 of the September 2017 report shows the [new] Chief Executive on a gross salary of £186,915 with the column showing the ‘cost to the council’ as £123,081, including on-costs. This is consistent with that post being 0.5FTE. The next line shows an ‘allowance’ for the Deputy Chief Executive of £20,000 (cost to the council £26,460) which is consistent with recommendation 5, referred to above, as the Deputy Chief Executive was not intended to be a substantive post, but rather an additional responsibility given to another Executive Director.
- 5.6. I therefore conclude that resolution 3 as set out in this September 2017 Report cannot amount to authorisation to pay an international allowance of £40,000 per annum to the new Chief Executive (whomsoever that might be).
- 5.7. In November 2017, the County Council received a further report, directly from the then Leader of the Council which resolved to appoint Mrs Daljit Lally as Chief Executive and Head of Paid Service on a joint basis with Northumbria Healthcare NHS Foundation Trust. Council agreed that she should be appointed on the basis of remuneration as set out in that report, which referred to a salary of £190,000 per annum with 50% to be funded by the Trust. That report did not make any reference to the payment of an international allowance at all.
- 5.8. In her consultation responses the Chief Executive has suggested that a draft of her proposed contract of employment or similar, showing the international allowance, was circulated at the November 2017 Council meeting as a ‘pink paper’ item. That would, in my experience, have been an unusual approach, not

least because the terms of the resolution do not accord with the statement of terms and conditions that were eventually agreed, and the corresponding appointment to the NHCT had not been made at that stage. Democratic Services have confirmed that they have no record of that draft being circulated, and it is not referred to in the resolution or the minutes, whereas there is a minute relating to questions asked of the Leader in relation to remuneration, which was to the effect that the only remuneration being paid to the Chief Executive by NCC was the 0.5FTE salary set out in the report. For completeness, I note that this allowance was not referred to in the Council's pay policy statement in force at that time.

- 5.9. In January 2018, it appears that terms and conditions were agreed with the Chief Executive which resulted in her being employed on two separate, parallel, contracts: one with the NHCT and the other with County Council. This appears to have been governed by a Memorandum of Understanding between the Council and NHCT, signed by the then Leader of the Council and the Chief Executive of NHCT in January 2018. It would further appear that neither Council nor the Staff and Appointments Committee were ever advised of this variation to the arrangements for the Chief Executive's employment approved in the November 2017 Council resolution.
- 5.10. The November 2017 resolution of Council specifically delegated to the Staff and Appointments Committee responsibility for on-going review of the Chief Executive's remuneration. I have checked with Democratic Services and have been unable to identify any meetings, reports to, or resolutions of, the Staff and Appointments Committee at all between January 2017 and May 2018. This includes the period in which the restructure proposals and appointment process of the Chief Executive took place. The first record that has been identified of the Staff and Appointments Committee considering any aspect of the Chief Executive's pay and conditions of service was in August 2021.
- 5.11. In December 2017, the then Executive Director of HR and OD instructed the Council's payroll team that an additional allowance of £40,000 was to be paid to the Chief Executive with effect from 1 December 2017. Email correspondence between officers suggests that the Executive Director of HR and OD obtained confirmation from some source that the then Leader of the Council had approved payment of this allowance. However, there is no record of this approval, or the rationale for, or basis of the allowance being paid. Nor is there any record of Staff and Appointments Committee ever having been consulted about or informed of it.
- 5.12. From contemporaneous email correspondence between the then Executive Director of HR and OD and the payroll team it would appear that officers were under the impression that Mrs Lally was already being paid an international allowance by the Trust, at the time of her appointment as the Council's Chief Executive. There is no evidence to support this assertion. In fact, it would appear that Mrs Lally was in receipt of an allowance for acting as executive lead for the

Council in relation to the international business before the September 2017 report to Council. There is no reference to this in payroll records for the relevant period. Nor is it clear on what basis or by whom this allowance was originally authorised and paid.

- 5.13. On 18 January 2018, the then Executive Director of HR and OD wrote to Mrs Lally confirming the offer of the position of Chief Executive and attaching a Statement of Terms and Conditions which stated that her salary would be £135,000 per annum inclusive of a £40,000 international allowance. The Executive Director of HR and OD subsequently clarified via email correspondence in September 2018 that the £40,000 was in fact not part of the Chief Executive's base salary, but a separate allowance to be paid for an indefinite period. In May 2019, the Executive Director again confirmed in email correspondence that the allowance was non-contractual and did not form part of the Chief Executive's salary, stating that this was an ad-hoc allowance approved by the then Leader.
- 5.14. In February 2018, the then Leader reported to Council on progress in implementing changes to senior management arrangements. This report was silent on the contractual or remuneration arrangements for the Chief Executive (even though they were different to those approved by Council in November 2017). Specifically, it did not refer to the payment of the international allowance to the Chief Executive.
- 5.15. The Council's 2017/18 accounts (which were published in draft form in the summer of 2018), referred to an allowance being paid to the Deputy Chief Executive from April to May 2017, and to the [interim] Chief Executive from June to December 2017. It is described as being jointly funded by NCC and NHCT. However, the amount of the allowance is not disclosed, and in the event, that allowance was not jointly funded. In any event, publication (in whatever level of detail) after the event, does not alter the fact that the allowance was unapproved, and the expenditure was therefore unlawful. The 2018/19 accounts conflate the salary and allowances paid to the Chief Executive, and merely refer to the Chief Executive as an 0.5FTE post. The 2019/20 accounts report a separate allowance of £40,000 being paid, but without explanation of what it is, or why it was being paid.
- 5.16. In November 2018, the Chief Executive made a report to Staff and Appointments Committee on further management structure changes. Again, the report did not refer to the payment of an international allowance to the Chief Executive.
- 5.17. I am advised that in order to be lawful, any payments made to the Chief Executive need to fall within s 112 of the Local Government Act 1972, which allows an authority to appoint officers "on such reasonable terms and conditions, including conditions as to remuneration, as the appointing authority think fit." By virtue of s 112(2A), this power is subject to s 41 of the Localism Act, which in turn requires

any determination relating to the remuneration or other terms and conditions of a chief officer to be made in compliance with the authority's pay policy statement under s 38 of the Localism Act.

5.18. The international allowance represents a very substantial enhancement (almost 40%) to the Chief Executive's base NCC salary of £95,000. It should also be noted that at the time the allowance was agreed, a full time Director of International Projects and Systems Transformation had already been appointed to lead this area of activity. In the absence of any written record of the rationale or basis for the allowance, I have not been able to form a view about whether it was reasonable to pay any such allowance, within the meaning of s112, at the time.

5.19. However, the more fundamental issue highlighted in Leading Counsel's advice, is that the international allowance was not paid as a result of any decision taken by a properly authorised decision maker. Matters relating to the terms and conditions of officers are non-executive decisions under the Local Authorities (Functions and Responsibilities) (England) Regulations 2000 Schedule 1, Item I37. Neither the Executive Director of HR and OD, nor the Leader of the Council had the power to approve the allowance.

5.20. The payment of an international allowance in addition to the Chief Executive's base salary was not consistent with the Council's published pay policy statements over the relevant period for the reasons set out at paragraphs 5.21 to 5.25 below.

5.21. I am further advised that under s 38 of the Localism Act 2011, the Council (and this has to be the full council) is required to prepare a pay policy statement, and this must include its policies relating to "the level and elements of remuneration for each chief officer", and "increases and additions to remuneration for each chief officer". The effect of s 41 of the Localism Act, and s 112(2A) of the Local Government Act 1972, is that a chief officer's terms and conditions must be determined in compliance with the pay policy.

5.22. Although the Localism Act does not require actual numerical amounts to be determined as part of the policy, the pay policy statement should identify what elements a chief officer's remuneration will contain, and how those elements will be fixed. If an authority wants to make a payment to a chief officer of a kind for which the pay policy statement does not make provision, it can only validly do so by first amending the pay policy statement.

5.23. Furthermore, the Council's pay policy statements have at the relevant times provided for the full council to determine salary bands, and for senior staff to be appointed to a spot point within their salary range, with the possibility of incremental increase within the range as a result of performance review. The international allowance is not of that nature. Some paragraphs in the statement

do assume that chief officers may receive fees and allowances other than basic salary, but these references are in the context of the approved salary package on appointment, and clearly do not contemplate the post-appointment addition of further allowances.

- 5.24. The advice is that the evident purpose of the Localism Act provisions is that the full council should decide, and formally record in the published statement, what the “building blocks” of a chief officer’s remuneration should be, and how they should be set. There is no reference in the Council’s pay policy statements to anything in the nature of an international allowance, and certainly no provision addressing how and by whom the amount of any such allowance should be fixed.
- 5.25. Payments have in large part been reflected in the Council's published financial statements. However, a mere statement in the policy that allowances “will be published”, relates to what happens after an allowance has been awarded and paid, and it does not provide any lawful basis for any decision to award or pay that allowance – or justify why it should be paid – even if a properly authorised decision taker had decided to do so.
- 5.26. In summary, it is my view, supported by the opinion of leading counsel, that in the absence of any evidence that the NIA allowance was approved by the full council (or even by the SAC), it must follow that there has never been a lawful decision properly taken by (or on behalf of) the Council to pay that allowance, and that the payment of it to date has accordingly amounted to unlawful expenditure.

6. Recommendations

- 6.1. Given that the Council does not appear to have suffered any financial loss and may have been a net beneficiary of international consultancy activities and the position has now been regularised by the establishment of NICL, I do not consider that it would be in the Council’s interests to seek to unwind the previous contractual arrangements. Nevertheless, the following actions are proposed to ensure that lessons are learned, controls strengthened so that the Council does not find itself in a similar situation in future and that the current position is regularised.

In relation to trading for a commercial purpose, the Cabinet is invited to **agree** the contents of this report and:

- 6.1.1. Agree that Audit Committee be requested to commission a full, independent investigation into the circumstances that gave rise to the unlawful trading activities.
- 6.1.2. Note that the Chief Finance Officer will revise finance and contract procedure rules to strengthen control and oversight of commercial

- trading activities and issue updated guidance on the requirements relating to trading accounts for such activities.
- 6.1.3. Note that the chief finance officer in consultation with the Monitoring Officer will undertake a review of the Council's commercial activities to ensure that they are taking place on a lawful basis and issue further formal guidance as appropriate.
- 6.1.4. Note that the Chief Finance Officer will commission further advice and consult the external auditor with regard to any disclosures and/or adjustments that may be required to the Council's statement of accounts for 2020/21 and prior years, in respect of income and expenditure relating to international consultancy contracts between 2018 and 2021, or as between the Council and the NHCT.
- 6.1.5. Note that the Chief Finance Officer will consider whether, and if so what, disclosures should be made to HMRC in relation to corporation tax or other liabilities.
- 6.2. With regard to the payment of the international allowance to the Chief Executive (and previously to the Deputy Chief Executive) from 2017, Council is invited to **agree** the contents of this report and:
- 6.2.1. Note that payment of the international allowance has been stopped from the date of this report as a result of the prohibition period provisions in the Local Government Finance Act.
- 6.2.2. Agree that payment of the International Allowance will remain suspended pending consideration of further legal advice with regard to potential recovery of unlawful payments and any related issues by the Staff and Appointments Committee and any recommendations arising being reported to County Council for consideration.
- 6.2.3. Note that legal and (if necessary) actuarial advice will be taken regarding any potential adjustment of pension contributions made to the Local Government Pension Scheme in relation to the International Allowance.
- 6.2.4. Note that the Chief Finance Officer will undertake further investigation to establish whether any other unlawful payments have been made to any officers or former officers, including severance payments, which may require further reports under S114 of the Local Government Finance Act 1988.
- 6.2.5. Instruct the Director of HR in consultation with the Chief Finance Officer and Monitoring Officer to review the Council's pay policy statement to ensure that it is up to date and complies with the requirements of s38 of the Localism Act 2011 and report any required changes to the County Council.

7. **Next Steps & Timescales**

- 7.1. Subject to Cabinet approval, the Deputy Chief Executive will draw up terms of reference for an independent investigation into the circumstances that gave rise to unlawful trading activity. These will be presented to the Audit Committee for approval at its July meeting.
- 7.2. The Chief Finance Officer will draft amendments to finance and control procedure rules to strengthen control and oversight of commercial trading activities and prepared updated guidance on the requirement for and form of trading accounts, for approval by Council.
- 7.3. Advice is being commissioned on any disclosures or amendments to the financial statements for 2020/21 and prior years and their recommendations will be shared with the external auditor in due course.
- 7.4. Payroll have been instructed to cease payment of the international allowance to the Chief Executive with immediate effect.
- 7.5. A further legal opinion regarding restitution has been requested from Nigel Giffin QC and will be reported to the Staff and Appointments Committee for detailed consideration.
- 7.6. Advice regarding the status of contributions made to the LGPS based on the international allowance will be commissioned and Tyne and Wear Pension Fund officers have been alerted to the issue.
- 7.7. Internal audit has been requested to investigate a small number of other potentially unlawful payments to officers and to review all exit packages with a value of £100k or more over the last 2 years.
- 7.8. The Head of HR is reviewing the pay policy statement in consultation with the Chief Finance Officer and Monitoring Officer to ensure that it complies with the requirements of the Localism Act and any amendments will be submitted to the July meeting of Council.



Jan Willis

Executive Director of Finance (Interim) and S151 Officer

23rd May 2022

NORTHUMBERLAND COUNTY COUNCIL: INTERNATIONAL PROJECTS

OPINION

1. I am instructed by Northumberland County Council ("the Council"). My client is the Council, but I have been instructed specifically to advise its chief financial officer ("CFO") in her capacity as such, in order that she may best decide how to perform her duties under Part VIII of the Local Government Finance Act 1988 ("LGFA").
2. Under LGFA ss 114 and 114A, the CFO is obliged to make a formal report where it appears to her that, amongst other possibilities, the Council or one of its officers or employees has made a decision which involves the Council "incurring expenditure which is unlawful". The CFO is considering the potential need for such a report in connection with certain activities undertaken by the Council under the rubric "Northumbria International Alliance" ("NIA"). This Opinion confirms, and in some respects elaborates upon, the advice which I gave orally in consultation on 22 April 2022.

The background

3. NIA was not a legal entity. Rather, it was the description used to designate a certain area of activity undertaken by the Council in collaboration with the Northumberland Healthcare NHS Foundation Trust ("the Trust"). In a business case appended to a report compiled in about January 2021, this collaboration is described as having been undertaken in order to "test the opportunities of *[sic]* commercial activities for health and care consultancy in international markets". From the materials which I have seen, this is an accurate description, at two levels.

4. First, it is a correct summary in the sense that what the Council and the Trust actually did was to seek contracts from persons located outside the United Kingdom under which they were to use their experience in the delivery of integrated health and social care services to provide the contractual counterparties, or those parties' own clients, with advice of one kind or another (and perhaps also linked services such as strategic planning, project management, and training) to assist with the delivery of such services in the non-UK location in question.
5. Secondly, it is also accurate to describe the NIA activities as commercial ones. On the information I have seen, I have no doubt that the Council's predominant, and indeed perhaps its sole, purpose in pursuing the NIA collaboration was to generate a financial return which could be deployed to help fund its normal activities as a local authority (the same probably goes for the Trust as well, though that is of limited significance for present purposes).
6. For example, when the Council appointed a Director of International Projects and System Transformation in 2017, the report supporting the creation of the post referred to a "key expectation" being "that a profitable business growth will be accelerated and an increased margin delivered in order to re-invest in Northumberland services." The text of a speech given by the Leader of the Council to a reception at the House of Lords in June 2018 is to similar effect. A briefing by the Chief Executive to an informal Cabinet meeting in September 2019 described NIA as having "the strategic purpose of gaining entry and securing sustainable share of a growing global health and care trade market", and as having been "born from the desire to share innovative international best practice whilst delivering commercial income to [the Council and the Trust]." The January 2021 report to which I have already referred recorded that NIA's original 5 year strategic objectives had been "to develop income and brand". Also in January 2021, a report by the Chief Executive to the Council's Audit Committee set out the

background history in terms which repeatedly described the nature of the exercise, from discussions in 2016 onwards, as “income generation”.

7. These examples could be multiplied, and the theme of commercial gain is consistent across the documentation. By contrast, I have seen nothing which suggests that, from the Council’s perspective, NIA ever had any other real and substantial purpose. At most, the papers contain some passing references to the altruistic sharing of best practice, to projects on which NIA was working as being likely sources of job creation where they were located, or to NIA as providing an opportunity for career progression and upskilling for Council staff, and generating “international respect” for the Council. But such matters were evidently treated as being in the nature of desirable but peripheral side effects.
8. Further, there is no doubt that decisions (whether or not they were lawfully made by properly authorised persons) were in fact taken to pursue these activities, including by way of entering into contracts with third parties, and that these decisions involved the Council in incurring expenditure.
9. Thus, in 2017 or possibly early 2018¹ the Council entered into a contract with [REDACTED] [REDACTED] Company for the provision of “healthcare consultancy services” in connection with the proposed development of certain health and care facilities in Dubai, and it appears that this contract was performed in the course of 2018. It is said to have yielded a net profit (which was apparently used to offset NIA start-up costs) of approximately £100,000 on a gross contract value of about £200,000.
10. There have also been a number of contracts with companies belonging to the [REDACTED] of China: a feasibility study carried out in 2019 and early 2020 and said to have generated some £236,000 profit on a contract

¹ The copy in my papers bears an uncompleted 2017 date, and has been signed on behalf of [REDACTED] but not the Council.

value of about £600,000; and then a framework agreement for the provision of future services, concluded in June 2020, under which a contract was immediately called off for scheme design and clinical modelling services relating to a proposed hospital in Fujian. This contract was scheduled to be, and presumably was, completed by April 2021 in return for gross payments amounting to £2 million, and it is said that the Council incurred expenditure of just under £1.2 million in performing the contract (principally by way of payments to sub-contractors). However, further hoped-for call-off contracts have not materialised, at any rate to date. Nor, it appears, have further contracts been secured. A share of the net profits will have been due to the Trust, and I am instructed that the CFO and her staff have found it less than straightforward to determine clearly what costs should be allocated to these contracts, and exactly what income has been received. However, the precise figures are beside the point for present purposes. What matters is, firstly, that the Council has needed to incur significant expenditure to perform the contracts (so bringing ss 114 and 114A into play); and secondly, that the relevant activity was largely if not wholly completed before the formation of the trading company referred to in paragraph 13 below – the significance of this will become apparent.

The issues

11. There are two basic questions which have been raised with me. One is whether the Council had the statutory power to engage in these NIA activities at all. If it did not, then it is to my mind self-evident that the expenditure incurred solely for the purpose of those activities must have been unlawful expenditure. The second question concerns an allowance paid to the Council's Chief Executive in connection with her responsibilities concerning NIA.

The Council's power to engage in NIA activities

12. A local authority such as the Council has a very broad source of *vires* in the shape of the general power of competence under s 1 of the Localism Act 2011 ("GEPOC"). It extends in principle to doing things outside the United Kingdom: see s 1(4)(a). However, even this power is not without limits. In particular, if an authority wishes to use GEPOC to do things for a commercial purpose, it must act through a company: see s 4(2). This does not mean that the authority is required to use a company as its agent; rather, the authority will establish or participate in a company, and the company will undertake the trading or other relevant activity.
13. The problem in this case is that the Council did not even form a company until a late stage, and certainly did not act through a company until very late on, if at all. It was the Council itself which was party to the relevant contracts; it undertook (directly or through sub-contractors) whatever part of the work was not done by the Trust; it paid the bills; and it received the income. Although there seems to have been an intention from a fairly early stage to establish a trading company, this was not acted upon until a company called Northumberland Integrated Consulting Ltd ("NICL") was formed in about March 2021. Another company, Northumberland Enterprise Holdings Ltd ("NEHL"), had been formed rather earlier, in about September 2020, but it appears that this was intended as a holding company, and certainly that no actual use was made of NEHL before 2021. By the time that NICL was actually functional, the active life of the relevant contracts appears to have been largely at an end. At any rate, the subsequent formation of NICL cannot change the fact that between about 2018 and 2020 (and perhaps for longer than that) the Council pursued the NIA activities in its own right and without any company being involved on its side.
14. This being so, the Council did not, at material times, act through a company. Yet, as I have already indicated, I have no doubt that it was acting for a

commercial purpose. The inevitable corollary is that its decisions and actions cannot have been authorised by GEPOC (nor by the overlapping though somewhat narrower s 95 of the Local Government Act 2003, which is a trading power, but which also requires the use of a company).

15. If there were some other power which authorised the Council's NIA commercial activities, the inability to rely upon GEPOC would not matter – s 4(2) of the Localism Act only applies to the use of GEPOC, and GEPOC is not exclusive of other powers. But at present I am unable to identify any such alternative source of power, and nor indeed does anyone else appear to have done so at any stage, save in the respect to which I allude at paragraph 19 below. In particular, I note that:

- (i) The various contracts involved the Council in providing services directly to overseas commercial undertakings. Either the Council was the sole contracting party, or the Council and the Trust contracted jointly. So the Council's activity cannot be characterised as an exercise in providing services to the Trust or to any other UK public body.
- (ii) That necessarily precludes reliance either upon the Local Authorities (Goods and Services) Act 1970, or upon either s 74(1) or s 74(3) of the National Health Service Act 2006, quite apart from a number of other reasons why those provisions would not assist here.
- (iii) Additionally, I cannot see how these arrangements would fall within the joint working provisions of s 75 of the 2006 Act, given the limited nature of the functions to which the NHS Bodies and Local Authorities Partnership Arrangements Regulations 2000 apply.
- (iv) In the light both of caselaw on s 111 of the Local Government Act 1972, and of the express but restricted provision now made for

trading activities in the legislative scheme, it is not realistic to suppose that s 111 could have authorised these activities.

- (v) From as early as 2019², the Council appears to have been in receipt of advice to the effect that a company needed to be incorporated to carry on these activities. The delay in forming NIICL and in seeking to novate contracts to it does not appear to have been the result of anyone believing that an alternative lawful approach existed. Whatever the reasons for that delay, and whether they were good or bad³, the Council continued to engage in the relevant commercial activities meanwhile.

16. In my opinion, therefore, it is clear beyond serious argument that the Council was acting unlawfully when it entered the contracts in question, and also that expenditure incurred purportedly pursuant to those contracts was itself unlawful.

17. I should record that I have seen a brief set of instructions to counsel, apparently from some time in 2021, in which counsel (I understand Mr Nikolaus Grubeck of Monckton Chambers) was asked to advise on whether the Council had acted *ultra vires* in certain relevant respects. I have also seen a draft letter from the Council to its external auditor (I do not know whether this letter was in fact sent), which I am told was settled by Mr Grubeck. The letter takes two points by way of an argument that the

² Advice from Ward Hadaway, solicitors, in November 2018 had recommended the use either of a company or an LLP, but apparently without appreciating the potential *vires* issue that an LLP could not be used. However, a Co-operation Agreement concluded between the Council and the Trust in December 2018 contemplated that the supply of services to third parties would be through a company wholly owned by the Council. Further advice from Ward Hadaway in June 2019 on proposed incorporation of the NIA activity specifically referred to s 4 of the Localism Act.

³ I have noted what is said in a document, I think prepared by the Chief Executive, headed "Narrative for discussion Integrated Care Consultancy March 2021", but it is not the function of this Opinion to pass comment on the reasons given for the failure to put a company in place earlier.

absence of a company did not mean that the Council had acted *ultra vires*. Before dealing with those points specifically, I should make clear, first, that I have seen no actual advice from Mr Grubeck (to settle a document making an argument does not imply that one regards that argument as objectively correct); and secondly, that the history of events set out in his instructions appears to me, in the light of the documentation which I have seen, to represent a materially incomplete and in some respects inaccurate account of the history. I note also that the instructions seem to have had in mind an argument that the Council could not have been acting for a commercial purpose until the point arrived at which it had actually made an overall profit. But any such argument (which was not adopted in the draft letter) would be plainly wrong – an authority’s purpose is a function of what it is trying to do and why, and it does not depend on whether or when its objects are realised.

18. Paragraph 6 of the draft letter seeks to suggest that, although the Council’s dominant purpose ultimately became a commercial one (seemingly at some point in 2020, according to the analysis in the letter), that was not initially the case, and that earlier on NIA had been “driven by aims of international information exchange, learning, and the improvement of public health as much as by any commercial opportunities.” All I have to say about that is that, on the basis of the documentation which I have seen (which I suspect is rather fuller than was made available to Mr Grubeck), I do not regard that as a remotely tenable proposition.

19. Paragraph 7 of the draft letter suggests that the relevant activities were authorised by s 2B(1) of the National Health Service Act 2006, which imposes a duty (and hence also confers a power) upon local authorities to take such steps as they consider appropriate “for improving the health of the people in its area”. The letter points out that, by virtue of s 2B(3), such steps expressly extend to providing training for persons working in the field of health improvement. It suffices to say that, if there is any evidence that

the contracts referred to in paragraphs 9 and 10 above, or any related activities by NIA or the Council, were undertaken with a view to improving the health of people in Northumberland, I have not noticed that evidence, and I would struggle to envisage (given the nature of the contracts) how that could have been the case. The mere generation of additional resources for the Council, some of which might potentially have been deployed in health-improving activities, obviously does not suffice.

20. Accordingly, nothing in the letter drafted by Mr Grubeck changes the view that I have expressed in paragraph 16 above. Since this Opinion is concerned with whether the CFO needs to make a report under s 114 or s 114A, I shall not spend time here looking at precisely what the potential legal consequences of the unlawful activity I have identified might now be, although I have had some initial discussions about that with my Instructing Solicitor and the CFO, and will advise further as required⁴. In broad terms, it is fair to say that since the Council appears to have been a net beneficiary of the arrangements, albeit on a modest scale, it is unlikely to be in the Council's own interests to attempt any general unwinding (even if that were possible in principle), whilst there are a number of reasons why it may also be unlikely that other parties would consider any attempt to reopen the transactions to be a worthwhile exercise.

The NIA allowance paid to the Chief Executive

21. I now turn to the issue of the allowance paid to the Chief Executive. In this respect the factual history so far available to me may not be wholly complete. However, I am instructed that it can be said that in the calendar year 2018 and in each of the subsequent years to date, the Chief Executive has been paid, in addition to her salary, an allowance at the rate of £40,000 per annum, and that during that period the whole of this cost has been met by the Council (a point which it is necessary to make because, as a result

⁴ The same applies to the allowance paid to the Chief Executive, where somewhat different considerations may arise.

of certain joint working arrangements, the Chief Executive was, until May 2021, also a salaried officer of the Trust).

22. Although in one sense part and parcel of the Council's NIA activity, the payment of this allowance raises some discrete issues. I would not necessarily regard a payment of salary made by a local authority to an employee as unlawful simply on the basis that the activity in which the employee was required to engage was one not being lawfully undertaken by the authority. There may be more room for argument about this if one is dealing, as here, with an allowance which related specifically and entirely to an unlawful activity. However, I do not think it is necessary to embark upon this potentially difficult topic, because there appears on present information to be a more fundamental problem with the payment of the allowance here.

23. Any payment made to the Chief Executive needed, in order to be lawful, to fall within s 112 of the Local Government Act 1972, which allows an authority to appoint officers "on such reasonable terms and conditions, including conditions as to remuneration, as the authority appointing [the officer] think fit." By virtue of s 112(2A), this power is subject to s 41 of the Localism Act, which in turn requires any determination relating to the remuneration or other terms and conditions of a chief officer to be made in compliance with the authority's pay policy statement under s 38 of the Localism Act.

24. I am unable on present information to express any concluded view as to whether the £40,000 p.a. allowance was, when it was paid, substantively "reasonable" within the meaning of s 112. That would have been something for the properly authorised decision-maker within the authority to judge, subject to normal judicial review principles. The Chief Executive's total salary, excluding the allowance, was £190,000 at the end of 2017 (the Council and the Trust each separately contracted to pay her a salary of half that amount, and she was supposed to devote half her working time to each

body). An allowance of £40,000 was therefore, in proportionate terms, a very substantial addition to her remuneration. It would, I think, be somewhat unusual for a senior local authority employee to receive such a substantial additional amount for taking on overall managerial responsibility for a particular area of activity – especially where, as here, another full-time senior officer (the Director of International Projects) had been appointed with specific responsibility for the Council’s NIA activities and related matters. But I do not think that it can be ruled out that, for some or all of the relevant period, there might have been some rational justification for granting at any rate some form of allowance. Were it necessary for any purpose to come to a definite conclusion about this one way or the other, further investigation would be required.

25. The more clear-cut point, and a fundamental problem, is that so far as investigations to date have been able to identify, the allowance was not paid as the result of any decision taken by a properly authorised decision-maker. At the start of December 2017 the Chief Executive took up that position substantively, having previously acted for a number of months as Interim Chief Executive. She was issued with a statement of terms of employment which identified her salary as being £135,000 per annum. It is evident that this was the sum of £95,000 (i.e. half of £190,000 – see paragraph 24 above) and £40,000 (the allowance), and the statement of terms did refer specifically to the salary as including a £40,000 international allowance. However, the decision to appoint her as Chief Executive had been made by the full council on 1 November 2017, and as part of that decision it was specifically resolved that her remuneration would be as outlined in a report from the Leader of the Council. The report referred to the proposed salary of £190,000, gave a brief justification for that level of payment, and referred to the post being a 0.5 wte one under joint arrangements with the Trust. But it made no reference to any international allowance. So the remuneration authorised by the full council on 1 November did not include any such allowance.

26.I note that an earlier report to full council, dated September 2017, and seeking agreement to a revised executive management structure, set out a high level summary of areas of responsibility for the posts in the proposed new structure, and one of the bullet points for the Chief Executive read “Commercial international lead for [the Council] and System Transformation support with Northumberland Commissioning Group (CCG) (separately remunerated).” This passing reference to separate remuneration in the September 2017 report is in my view irrelevant: since it refers to no particular amount, it cannot have amounted to authority to pay an allowance of a specific amount⁵; the wording is at best ambiguous as to which authority was paying or would pay that “separate remuneration”; and it must in any event be regarded as superseded by the specific remuneration decision taken on 1 November 2017.

27.I have seen e-mails passing between the Council’s Executive Director of Human Resources and Organisational Development (“the HR Director”), and a ■■■■■■■■■■ Manager tasked with making the payment arrangements, between 4 and 7 December 2017. It is clear that the HR Director initially understood (one imagines from what she was told by the Chief Executive herself) that the international allowance was something already being paid by the Council, and to begin with she simply instructed her colleague that it should remain in place. However, the latter pointed out that the Council was *not* currently paying any such allowance – rather it was “paid on the NHS payroll”. After what appears to have been a further meeting with the Chief Executive, the HR Director gave the instruction that the Council was to pay the £95,000 plus £40,000. I am informed that this is said to have been done with the approval of the Council’s then Leader.

⁵ The only specific amounts set out for the Chief Executive in the new structure were those in Appendix 2 to the report – gross salary of £186,915, and cost to the Council including on-costs, of £123,081. It will be immediately apparent that these figures did not include a £40,000 allowance payable by the Council on top of its half share of the gross salary.

28. So it can be seen that there was in effect a decision by the HR Director that the Council should pay the allowance, and it may be assumed on present information (although the documentary material before me does not as yet establish this) both that the allowance was something previously paid to the Chief Executive in her capacity as an officer of the Trust, and that its payment by the Council is something that the Leader approved. Nonetheless, I do not think that this represented a lawful basis for paying the allowance. There are four interconnected reasons why I take that view.
29. First, there is no doubt that a positive decision on the part of the Council to pay the allowance was required (and, of course, such a decision would have had to meet normal *Wednesbury* standards of decision-making). The assumed fact that the Trust was previously paying the allowance was in this respect irrelevant. There was no transfer of any contract of employment from the Trust to the Council. If the Trust was already properly paying the allowance, that might have been an argument for the Council paying a similar allowance, or a half share of it, but that was not something which could happen automatically.
30. Secondly, matters relating to the terms and conditions of employment of officers are non-executive decisions under the Local Authorities (Functions and Responsibilities) (England) Regulations 2000: see Schedule 1, Item I37. It follows that, whilst the Leader undoubtedly had the authority to take certain executive decisions under the Council's constitution, the Leader by himself cannot have had the power to decide upon or approve the allowance. From a legal perspective, his involvement is irrelevant.
31. Thirdly, I have looked at the Council's published pay policy statements for the financial years 2017/18 to 2021/22. There is no difference between the 2019/20 to 2021/22 statements which is material for present purposes, and only minor differences in the 2017/18 and 2018/19 statements.

32. The statements need to be considered against the statutory background that, under s 38(4)(a) and (c) of the Localism Act, a pay policy statement must include, amongst other matters, the authority's policies relating to "the level and elements of remuneration for each chief officer", and "increases and additions to remuneration for each chief officer". Although the Act does not require actual numerical amounts to be determined as part of the policy (as the statutory guidance confirms), it is plain that the statement should identify what elements a chief officer's remuneration will contain, and how those elements will be fixed.

33. The Council's pay policy statements provide (see paragraphs 6 and 10) for the full council to determine salary bands, and for senior staff to be appointed to a spot point within their salary range, with the possibility of incremental increase within the range as a result of performance review. By itself, this evidently does not contemplate any additional payment for particular responsibilities. Paragraph 15 (in the earlier versions) and paragraph 14 (in later versions) does assume that chief officers (who include the Chief Executive) may receive fees and allowances other than basic salary, but this refers to the approved salary package on appointment. Even if this general provision is sufficient to comply with s 38(4)(a) of the Act, which may be questionable, it clearly does not contemplate the post-appointment addition of further allowances.

34. Paragraph 26 of the 2017/18 document (paragraph 27 in 2018/19 and paragraph 24 in later versions) provides that:

"To ensure the Council has sufficient flexibility to cope with a variety of circumstances, foreseeable or not, the Head of Paid Service, or an individual nominated by the Head of Paid Service, may agree the use of market supplements or other such mechanisms for individual categories of posts, individual posts, or individual employees."

35. Again, I do not think this provision could justify what seems to have occurred in this case. It would defeat the whole object of having a formal

pay policy statement if additional allowances of unspecified amount could be paid at will. This paragraph must be confined to extra payments which need to be made in order to meet staffing requirements in current market conditions, i.e. "other such mechanisms" must be read as being limited to payments of a kindred nature to market supplements. I have seen nothing to suggest that any such rationale underpinned the allowance now in question. Quite apart from that, the Council's Chief Executive, under its current constitution, also occupies the statutory role of Head of Paid Service. It cannot be the case that the pay policy statement is to be read as permitting the Chief Executive herself, or a necessarily more junior officer nominated by her, to increase her own remuneration.

36. My conclusion is that (leaving aside the special case, irrelevant here, of returning officer fees) no allowance on top of salary could be paid to the Chief Executive consistently with the pay policy statement as it has stood at the material times. Had it ever been considered appropriate to pay such an allowance, the pay policy would in effect have needed to be amended, which would have required a decision of the full council.

37. Fourthly, it is necessary to consider the Council's constitution, and specifically the extent to which the full council had at the material time in fact delegated its power to determine the terms and conditions of the Chief Executive. The starting point, of course, is that if a non-executive function has not been delegated, it is only the full council which may exercise that function.

38. I have been provided with the constitution both in its current (February 2021) form, and in the version adopted on 1 November 2017. I have not identified any difference between them which is material for present purposes, although the numbering of some of the provisions is different. For convenience I refer below to the current version.

39. The only specific provision of the constitution which I have identified concerning the fixing of terms and conditions of service generally, or of remuneration in particular, is paragraph 9.1(g) of Part 4, which makes decisions on employee terms and conditions a matter for the Chief Executive, in conjunction with a nominee of the HR Director. Unsurprisingly, however, decisions relating to the Head of Paid Service (i.e. the Chief Executive herself), and indeed other Executive Directors, are expressly excluded from this delegation.

40. The terms of reference of the Staff & Appointments Committee ("SAC") are contained in Part 3 Section 22 of the constitution. Item (a) is to consider and determine "the overall scheme and policies in relation to employee terms and conditions" – that evidently does not cover a decision about what an individual should be paid. Item (b) is to "determine appointments" of chief officers (and deputies). It is debateable whether that includes the setting of remuneration upon appointment (it probably does) or subsequent changes in remuneration (it probably does not). Even if the SAC does have power to deal with changes to chief officer remuneration under item (b), item (c) draws a clear distinction between chief officers generally on the one hand, and the Head of Paid Service on the other – in the latter case, the role of the SAC is limited to making recommendations to the full council on the appointment. My conclusion is that the SAC would have had no authority under the constitution itself to decide that the NIA allowance should be paid.

41. The constitution does not stand alone here. As I have noted above, when the Chief Executive was appointed by the full council on 1 November 2017, it was resolved that her remuneration would be as outlined in the report before the meeting. It was also resolved that such remuneration would be "subject to ongoing review by the [SAC]."

42. In my view the full council could in principle delegate decision-making in this matter to the SAC even without the constitution being amended to

reflect that delegation. There is nonetheless some room for debate as to what the resolution meant – that is, whether the SAC’s task of “reviewing” the Chief Executive’s remuneration extended to making changes to that remuneration, or whether it was merely to review the matter so that recommendations could be made to the full council as contemplated by the constitution. In any case, the SAC could not have been given authority to depart from the pay policy statement. But apart from any of that, the more fundamental point is that, so I am instructed, there appears to be no sign of the matter ever in fact having been formally considered, and a decision taken, by the SAC or a properly constituted sub-committee of it.

43. For completeness, I note that Executive Directors are given a general delegated authority, under Part 4 paragraph 6.1(d) of the constitution, to “put in place staffing and management arrangements for the delivery of services”, this applies only within their own areas of responsibility – see paragraph 4.1. I can see no serious argument that this provision would have authorised the HR Director to vary the Chief Executive’s remuneration. More fundamentally still, when the HR Director was dealing with the matter in December 2017, the full council had just resolved that that remuneration should be as set out in a particular report, which did not provide for such an allowance. The HR Director, who presumably overlooked or was unaware of that fact, cannot possibly have been entitled to do something which in effect contradicted what the full council had decided.

44. In the absence of any current evidence that the NIA allowance was approved by the full council (or even by the SAC), it must follow that there has never been a decision properly taken on behalf of the Council to pay that allowance, and that the payment of it to date has accordingly amounted to unlawful expenditure.

The CFO's reporting duty

45. I have concluded that all the expenditure about which I am asked to advise was unlawful. In the circumstances, and subject to anything which may emerge during the required statutory consultation, it seems inescapable that the CFO must make a statutory report or reports. The reporting function under ss 114 and 114A is by way of a duty that must be fulfilled when the conditions arise for it to apply. Even if there might be cases in which the incurring of unlawful expenditure could properly be treated as something *de minimis* and to be disregarded, the present case cannot be regarded as falling into that category. The sums in question are material, and the reasons why the expenditure was unlawful are far from technical⁶. Even if past income and expenditure were by some means now to be re-routed through NIICL (probably not easy to achieve), that would not alter the fact that the relevant expenditure had been unlawful when it was incurred, and nor would it solve the problem with the allowance paid to the Chief Executive.

46. There is some room for debate as to whether a report in this case would need to be made under s 114, s 114A, or both. Since the unlawful allowance related to a non-executive matter, and the unlawful contracts to an area of executive decision-making, it may well be that in theory the report in respect of the former should be made under s 114, and the report in respect of the latter under s 114A. However, I understood from the consultation that the CFO's present intention was to produce a single report to be placed before both the Cabinet and the full council. Given that the issues arise from the same course of conduct, and that elected members will need to have a proper understanding of the full background, this seems eminently sensible,

⁶ The reasons why it is important for payments to senior officers to be properly authorised are self-evident. In the case of the commercial activity, the reasons for the statutory requirement to act through a company include the policy intention that corporation tax should be payable on the profits of such activities, and probably also that there should be that clarity of accounting treatment which seems to have been lacking in the present case.

albeit that Cabinet and full council will need to have in mind their respective spheres of responsibility in deciding how to respond to the reports.

47. Although my specific remit in this case is to advise the CFO, I agree with the suggestion that has been made to me that the logic of what I have said above is that the Council's monitoring officer's reporting duty under s 5 and/or s 5A of the Local Government and Housing Act 1989 must also have been triggered, on the basis that there has been a contravention of an enactment or a rule of law. Engaging in commercial activity without statutory power to do so can be regarded as a contravention either of s 4 of the Localism Act, or of the rule of law that statutory bodies must act within the powers given to them by statute. Making unauthorised payments to an employee in circumstances such as this is similarly a contravention either of s 112 of the Local Government Act or of the *ultra vires* rule.

48. The CFO is required under the LGFA to consult the monitoring officer when preparing a report. In such circumstances, I see no reason why the monitoring officer's own reporting duty cannot in substance be discharged by the provision of appropriate comments within the CFO's report (e.g. to the effect, if this is the case, that the monitoring officer agrees with what the CFO has said, considers that the facts set out amount to a s 5 or s 5A contravention, and wishes the comments to be treated as a report by the monitoring officer).

CONCLUSIONS

49. In my opinion it is clear that the Council in this case engaged, otherwise than through a company, in activities undertaken for a commercial purpose. It had no power to do so, and the expenditure incurred specifically for the purpose of those NIA activities was therefore unlawful.

50. Further, the Council's Chief Executive was paid an allowance on top of her normal salary on account of responsibilities undertaken in connection with

NIA. It is unlikely that the decision to pay such an allowance could have been validly taken by any body other than the full council. Certainly there is no evidence, that I have so far seen, of the allowance being decided upon or approved by any body or person who might even arguably have had the power to do so. Accordingly, the payment of the allowance also amounted to unlawful expenditure.

51. It is evident that the CFO must make a statutory report or reports on these matters. There may be other issues to consider as to the present consequences of these past transactions, but that is not the subject of this Opinion.



NIGEL GIFFIN QC

11KBW

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11 King's Bench Walk
Temple
London EC4Y 7EQ

Appendix B - Summary of Consultation Responses

Consultation Response	My Comments
Head of Paid Service	
<p>The HOPS is not aware of any legal advice that the business had to be conducted through a limited company prior to the relevant company being established.</p>	<p>Council records show that legal advice received from Ward Hadaway in June 2019 stated at paragraph 1.1 that</p> <p><i>“Under section 1 of the Localism Act 2011 (“LA”) any local authority has the power to do anything that individuals may do. Importantly, the LA provides that a local authority can exercise that general power of competence in any way, including for a commercial purpose. Section 4 of the LA places a condition on the exercise of power for a commercial purpose, requiring such a commercial matter to be carried out through a company”.</i></p> <p>Whether officers or members were aware of this requirement is not relevant to my report, however. The Council was trading for a commercial purpose otherwise through a company at the latest from 2018 to 2021 and the expenditure incurred in relation to this activity was therefore unlawful.</p>
<p>The legal advice received was that there was no requirement to establish a company until such time as the Council was seeking by itself to deliver international services and sufficient income was received to warrant it.</p>	<p>The Ward Hadaway Guidance Note on Use of Corporate Vehicle for Commercialisation dated 8 November 2018 or any subsequent written advice from Ward Hadaway does not state that the requirements of the Localism Act only apply once the Council begins to generate substantial income from commercial activities in its own right.</p> <p>Even if that were a correct interpretation of the legal position (and clearly it does not accord with the Opinion of Nigel Giffin QC which is emphatic in this respect) by November 2018 the Council had already entered into commercial contracts with a value of £3.8m and by September 2019 the second Chinese contract with a value of £646,000 and a forecast profit of £236,000 was already in delivery. By March 2021, when NICL was eventually established, commercial contracts with a value of more than £2.7m had been delivered, none of it through a company.</p>

<p>The [then] Monitoring Officer advised Cabinet and Officers that the arrangements that were in place were suitable given the requirements of the Localism Act.</p>	<p>I have not seen any written advice from the Monitoring Officer to either Cabinet or Officers regarding the legal powers on which the Council was relying in undertaking international consultancy activities for a commercial purpose; or how the arrangements in place complied with the requirements of the Localism Act. Indeed, there was no formal report to Cabinet at all until 2020.</p>
<p>This position is supported by further legal advice commissioned by the [then] Section 151 Officer from Nik Grubeck, of Monckton Chambers, in September 2020</p>	<p>Records suggest that the former Chief Finance Officer did consult Mr Grubeck in September 2020. There is no record of written instructions or detailed advice being given at that time. Certainly, there was no written opinion.</p> <p>I further consulted Mr Grubeck in September 2021. Again, no formal advice was given. However, Mr Grubeck did draft a response to queries received from the external auditor which was sent in November 2021. Mr Grubeck’s argument to as set out in the letter to the auditor concerns whether there were powers other than the general power of competence that the Council could have relied upon in undertaking commercial activities other than through a company.</p> <p>The legal analysis is dealt with in paragraphs 17-20 of Mr Giffin’s Opinion. Specifically, Mr Giffin states at paragraph 17 that “...<i>the instructions seem to have had in mind an argument that the Council could not have been acting for a commercial purpose until the point arrived at which it had actually made an overall profit. But any such argument (which was not adopted in the draft letter) would be plainly wrong – an authority’s purpose is a function of what it is trying to do and why, and it does not depend on whether or when its objects are realised.</i>”</p>
<p>The incorporation of a group holding company for Northumberland County Council was made in February 2020. The outbreak of the COVID pandemic delayed new company registrations as they were</p>	<p>Companies House records indicate that NEHL was established in September 2020. Companies House have confirmed that no restrictions were placed on the registration of new companies, limited liability partnerships nor limited partnerships during</p>

<p>suspended by Companies House in March 2020.</p>	<p>2020, although “same day” registrations were suspended temporarily.</p> <p>Even if that had been the case, it does not explain why between June 2019 when Ward Hadaway advised that a company needed to be established to comply with the requirements of the Localism Act and the onset of the covid pandemic in March 2020 no subsidiary company was formed.</p>
<p>The establishment of a trading company was further delayed by the suspension of the Chief Executive/HoPS on 7 August 2020.</p>	<p>Whilst the CX/HoPS was suspended for a period of time, nevertheless, the Deputy Chief executive, Monitoring Officer, Chief Finance Officer or Director of International Projects and System Transformation remained at work and the formation of the company could have taken place during this period.</p> <p>Whatever the reasons for the delay, this does not alter my view that the Council acted commercially between 2018 and 2021 and that no company was in existence for the whole of that period and that the expenditure incurred was therefore unlawful.</p>
<p>The decision to establish NIC Limited, together with a supporting business case, was considered by Cabinet on 19 January 2021 with approval given to proceed. Deliberate targeted behaviours by Cllrs and initially prevented the company being registered. A further report was made to Cabinet on 21 February 2021.</p>	<p>The report on 19 January was not to the Cabinet but to an informal cabinet briefing. It could not have given formal approval.</p> <p>The report to Cabinet was made on 21 February 2021, by which time the Council had been engaged in the commercial activities outside of a company structure for over 3 years, given that the first contract was signed in December 2017.</p>
<p>The report to Cabinet on 21 February 2021 stated “Since the registration of Northumberland Enterprise Holdings Ltd in September 2020, a significant publication on commercial activities in another Local Authority has been published which draws attention to risks associated with governance arrangements for commercial trading companies within a local authority. The report produced by Grant Thornton has highlighted a need to review the arrangements initially proposed to Cabinet in February 2020, to identify and mitigate further risk to the Council based on this</p>	<p>This is not relevant to my consideration of the lawfulness of commercial activities during the period 2018 to 2021.</p>

<p>Public Interest Report and the legal advice sought on behalf of the Council setting out the recommendations for change.”</p>	
<p>From February 2021 the former chief finance officer handed over to the current chief finance officer, his responsibilities. On your appointment it was agreed that Internal audit would undertake a review of the International Business. This review reported directly to the CFO and raised no concerns.</p>	<p>I was appointed on 24 February 2021. From the outset of my appointment concerns were being raised with me by members of the Audit Committee, other members and the external auditor regarding the legal basis for the international business and whether the financial performance of the business had been accurately reported.</p> <p>I commissioned a detailed examination of income and expenditure relating to the international business from 2016/17 in the Spring of 2021. This was undertaken by the Council’s finance team and Internal Audit were asked to review and validate their analysis. The terms of reference for this review this did not include the vires under which these commercial activities had been undertaken.</p>
<p>On 08 November 2021 12:25 following advice from Nik Grubeck (received on 23 September 2021) you set out the Council’s position to the external Auditor.</p> <p>The text of that letter indicates the sequence of events and shows all was properly done and regarded by you as properly done.</p> <ol style="list-style-type: none"> 1. <i>Section 1 of the Localism Act 2011 provides that a “local authority has power to do anything that individuals generally may do”, including for a commercial purpose. Section 4 of that Act imposes certain limits on doing things for a commercial purpose in exercise of that power. In particular, section 4(2) requires that “where, in exercise of the general power, a local authority does things for a commercial purpose, the authority must do them through a company.</i> 2. <i>The meaning of “commercial purpose” in section 4 was considered by Mr Justice Warren, sitting in the Upper Tribunal, in R (The Durham Co.) v HMRC and HM Treasury [2017] STC 264. He stated at</i> 	<p>Following continuing concerns raised with me by the external auditor and members regarding the legal basis of the international business, I arranged a further consultation with Mr Grubeck in September 2021. During that consultation Mr Grubeck suggested that it would not necessarily be helpful to the Council’s case that it had not acted ultra vires for him to give a formal opinion.</p> <p>Mr Grubeck did however advance an argument that in undertaking international consultancy activities the Council might have relied on Section 2B(1) of the National Health Service Act 2006, at least at the outset. This argument was summarised in a letter to the external auditor in December 2021.</p> <p>Statutory officers were informed at the time of my reservations about whether this argument would stand up to serious scrutiny and that it was unlikely to be accepted by the external auditor. It is therefore untrue to suggest that no concerns were raised. At no time did I state that I was of the view that I regarded everything as having been properly done.</p> <p>Indeed, from late 2021 I redoubled my efforts to obtain a clear evidence trail with reports, decisions, and reasons why the</p>

<p><i>paragraph 63 that “it is a question of fact, in any particular case, whether the [local authority] is carrying out the relevant activities for a commercial purpose or otherwise than for a commercial purpose.”</i></p> <p>3. <i>This approach was cited with approval by the High Court in R (Peters) v Haringey LBC [2018] EWHC 192 (Admin). Mr Justice Ouseley went on to hold, at paragraphs 135-136, that “[section 4] requires an overall view to be taken of “the thing” being done, and of the overall purpose for which it is done”, that being the “primary” or “dominant” purpose. He noted that “if the purpose which is said to be commercial is simply an incidental or ancillary purpose to the non-commercial purpose, it is correctly seen as part of the non-commercial purpose, and not as a commercial purpose at all.”</i></p> <p>4. <i>Mr Justice Ouseley also made clear that “[section 4] should not be interpreted so as to bring in a requirement for a company to be used where no such requirement had previously existed in respect of the same activity” (paragraph 117). He emphasised that “I do not consider that Parliament, which had already accepted that certain Council activities should be undertaken through a company, intended that those other “things” that could be done already without a company, now had to be done through a company, if they were to be done at all” (paragraph 132).</i></p> <p>5. <i>Both of these findings are relevant in respect of the Council’s international consultancy work.</i></p> <p>6. <i>First, the Council’s international activities did not initially have a dominant commercial purpose. These started out as an exploratory venture, driven by aims of international information exchange, learning, and the improvement of public health as much</i></p>	<p>international business had been conducted in this way and encountered significant difficulties in obtaining basic facts, reports, minutes and decision notices – many of which are simply absent.</p>
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as by any commercial opportunities. Over time, the commercial aspect of the exchanges became more pronounced. Eventually the Council considered that the dominant purpose had become a commercial one and therefore, on 17 September 2020, incorporated a company to undertake any international consultancy work. It does not follow, however, that all prior activities had a dominant commercial purpose from the outset. As such, the absence of a company before 17 September 2020 does not mean the activities were ultra vires.

7. *Second, and in any event, the Council's international activities are activities that it could already undertake without a company prior to the Localism Act 2011 coming into force:*
 1. *Section 2B(1) of the National Health Service Act 2006 provides that "each local authority must take such steps as it considers appropriate for improving the health of the people in its area." Subsection (3) makes clear that such steps include, amongst others, "providing or participating in the provision of training for persons working or seeking to work in the field of health improvement."*
 2. *This covers the kind of health focused international learning and information-exchange projects at the heart of the Council's foreign efforts. The power to carry out such projects therefore existed prior to the Localism Act 2011.*
 3. *In the circumstances, section 4 of the Localism Act 2011 imposed no new compulsory requirement for a company to be used.*
 4. *The fact that the Council ultimately did decide to undertake its international work through a company does not change that position. In any event, as explained*

<p><i>above, that decision reflected the evolving purpose of its international activities.</i></p> <p>8. <i>In light of the above, the Council considers that none of its international work was ultra vires.</i></p>	
<p>The Executive Team were always advised by the Council's Head of Legal Services who fulfilled the role of Monitoring Officer. He advised that, given the arrangements and the partnership, the Council was providing technical services so a report to Cabinet was not required.</p> <p>Framework agreement and contracts were entered into on the advice of the Monitoring Officer and Section 151 Officers, who were fully involved in meetings, advice and briefings. They advised the International Team on oversight and control.</p> <p>The Monitoring Officer advised Cabinet and Officers that the arrangements that were in place were suitable given the requirements of the Localism Act.</p> <p>The Monitoring Officer oversaw the development of contractual documents, the taking of legal advice and counter signed the contracts.</p>	<p>I have not seen any written advice from the statutory officers to either Cabinet or Officers regarding the legal powers on which the Council was relying in undertaking international consultancy activities for a commercial purpose; or how the arrangements in place complied with the requirements of the Localism Act.</p>
<p>In October 2018 both the Northumbria Healthcare Chief Executive and the Leader of the Council, Cllr Peter Jackson, gave a commitment to representatives of the Chinese company for a 10-year programme of support. Therefore, all contractual arrangements were based on the joint partnership working model. A briefing to Cabinet in November 2018 described why and how and identified progress with next steps including consideration of form.</p>	<p>The fact that the contractual arrangements were based on a joint partnership working model are not relevant to whether they complied with the requirements of the Localism Act.</p>
<p>The joint international service was launched at the House of Lords by Cllr Jackson and the Chairman of the Trust on 11 June 2018. The oversight of the programme was conducted through the Trust's finance and</p>	<p>My report is not concerned with the oversight arrangements in place at the Trust, but the lawfulness of expenditure incurred by the Council.</p>

<p>performance committee with a formal audit report being taken in November 2018.</p>	
<p>A further briefing was made to Cabinet in September 2019, this included an update on the potential for a company. On 29 April 2020 a paper was taken to a Cabinet Briefing meeting with oversight of the Council's Monitoring Officer for consideration to sign ...Stage 2 [of the Chinese contract].</p>	<p>Again, this was an informal Cabinet briefing.</p> <p>In my view the requirement to establish a company to ensure compliance with the Localism Act had already been triggered a year before this, as set out at paragraph 4.10 of my report.</p> <p>At this point where the potential for establishing a company was being discussed, a contract with a value in excess of £600,000 and forecast profit of £236,644 had already been signed and was in delivery and negotiations were underway for phase 2 with a prospective value of £16m over 10 years. Negotiations with another client based in the UAE with a prospective contract value of £39.6m were in progress with contract signature expected in January 2020.</p>
<p>The matter was at all stages sufficiently reported</p>	<p>It is not clear what is meant by the word 'sufficiently'. It is not suggested in my report that either the Cabinet or officers did not know that there was an international consultancy business or that members were not kept informed of relevant matters.</p> <p>Briefing meetings, of the cabinet or the Executive Officer Team do not constitute legal meetings at which decisions can be taken.</p> <p>To the limited extent that it is relevant, I have found no evidence that there were any decisions made by the Cabinet in relation to the international consultancy business before the resolution to establish NEHL in February 2020 or that the County Council made any resolutions, nor are there any delegated decision notices signed by an officer (or a member) in relation to the international business.</p>
<p>The International Allowance was first paid as part of my appointment as Deputy Chief Executive role [sic]</p>	<p>Records show that Mrs Lally was appointed as Deputy Chief Executive in October 2015. I have not been able to find any record of any international allowance being referred to in her appointment in 2015 or conditions of service as Deputy Chief Executive. Nor is there any reference to such a payment in the payroll records until December 2017 following her appointment as Chief</p>

	<p>Executive. There is no reference to any authorisation for the Deputy Chief Executive to receive an international allowance in any version of the pay policy statement, as would be required by law.</p>
<p>In August 2017 the Leader of the Council advised me that my substantive role of Deputy Chief Executive was being deleted and I would be invited to apply for the role of Chief Executive/Head of Paid Service, which he would set out to full council on 6 September 2017. The report is attached. The Leader took the report to Council on 6 September 2017.</p> <p>That report set out the duties of the role offered to me on a full time basis but remunerated jointly with the Trust. The Leader's September 2017 report to full Council also formally set out the commercial role which was remunerated separately, and this was also agreed by full council.</p> <p>The payment was clearly set out as part of the Chief Executive/Head of Service role in the report to Council by the Leader of the Council on 6 September 2017, where it states that this is '(remunerated separately)'. Recommendation 3 agrees the remuneration of the proposed Executive Team. The International Allowance is stated as an Allowance in Appendix 2, and is referred to at background point 4. This report was agreed by Full Council on 6 September 2017. This is the first approval for the payment.</p>	<p>I do not agree that payment of the international allowance was authorised by Council on 6 September 2017.</p> <p>I have reviewed the report (taken in confidential session and therefore not available to the press and public or reported in the public minutes) dated 6 September 2017. The resolution at paragraph 3 is to agree the remuneration of the [new] Executive Management Team as outlined in the report.</p> <p>Recommendation 5 in the report delegates responsibility for nominating a Deputy Chief Executive [in the new structure] to the [new] Chief Executive in consultation with the Leader of the Council and makes provision for that new DCX post to receive an additional allowance.</p> <p>The report does acknowledge that the then Deputy Chief Executive [in the old structure] had responsibility for leading the nascent international business. However, there is no mention that this work was separately remunerated or by whom any additional payments were made.</p> <p>Appendix 2 to the report shows the [new] Chief Executive would be on a gross salary of £186,915 with the column showing the 'cost to the council' as £123,081, including on-costs. This is consistent with that post being 0.5FTE.</p> <p>The next line shows an 'allowance' for the [new] Deputy Chief Executive of £20,000 (cost to the council £26,460) which is consistent with recommendation 5, referred to above.</p> <p>The only other mention in this report of the international work appears on page 5 of that report, where there is a note on bullet point 8, which states that the "Chief Executive (not Deputy) will be responsible for the Commercial International lead for NCC and</p>

	<p>System Transformation Support with Northumberland Commissioning Group (CCG) (separately remunerated)". This does not specify who would be paying any separate remuneration, or how much it would be, or what it is for. Indeed, given that the role had not been advertised, it is surprising that this specification was included at all, three months ahead of the recruitment process</p> <p>I therefore conclude that this report does not provide authorisation to pay an international allowance of £40,000 per annum to the new Chief Executive once appointed (whomsoever that might be).</p>
<p>Following the invitation to apply for the role of Chief Executive/Head of Paid Service, the appointments committee was called as a panel of the Staff and Appointments Committee (SAC). At the panel there were a number of questions put including a detailed discussion of how the joint arrangements for the full time role of Head of Paid Service would work.</p> <p>I was clear that the roles I had held had always required me to work full time hours for my Council role and that the NHS work was then conducted additionally including quite a lot of work at weekends. I was clear that I would not expect two salaries i.e. a full time one for the Council role and half for the Trust and that I would be paid the equivalent of one whole time salary but that my Council role was a permanent substantive role, which is also stated in recommendation 3 of the Council Report dated 1 November 2017.</p> <p>The panel agreed the arrangements and authorised the Leader to finalise the details with the Director of HR. The issue of the commercial work was discussed and that it was remunerated separately at that interview.</p> <p>When I was informed by Cllr Jackson and Kelly Angus that I had been successful, Cllr Jackson advised me that he had been delegated by the panel to confirm the contractual arrangements and payment of the commercial allowance. Kelly Angus then drafted a letter to the SAC to confirm my</p>	<p>The Interview Panel was not a committee or sub-committee of the Council and could not take any decisions.</p> <p>The recommendation to Council to appoint Mrs Lally as Chief Executive was made by the Leader of the Council and not the SAC (despite its terms of reference). I can find no report to or minute of any meeting of SAC (Democratic Services confirm that no such meeting took place during that period).</p> <p>I have not been able to verify that the draft terms and conditions were circulated to the Council as suggested (see separate response below).</p> <p>It is irrelevant to my consideration as to whether these conversations took place with Cllrs Jackson and Daley. My responsibility is to determine whether lawful decisions were taken by the council or a duly delegated committee/sub-committee or officer. As Mr Giffin confirms a non-executive function, such as those under S.112 of the Local Government Act 1972 (appointment and remuneration of officers) cannot be delegated to an individual member.</p> <p>For all of the reasons given by Mr Giffin, this account of what took place does not amount to such lawful decision taking, and it does not in any event deal with the issues relating to the required inclusion of all elements of remuneration for chief officers in the Council's Pay Policy statement for each year.</p>

successful interview. The Leader of the Council Cllr Peter Jackson oversaw the contract drafted by Kelly Angus along with Liam Henry and legal support. The contract set out the half time salary and included the allowance, on page 1 of the Statement of Particulars.

The payment was set out and agreed in the Leader's full council report of 6 September 2017 stating "commercial international lead for NCC and system transformation support with Northumberland Commissioning group (CCG)". This was discussed as part of my interview in 2017, and is shown in my contract of employment first received in 2017 from HR.

On 31 October 2017 the then Leader Cllr Peter Jackson, Cllr Wayne Daley the then Deputy Leader and Kelly Angus had a discussion in the Chairman's Dining Room at 12md when Cllr Jackson confirmed agreement to the allowance by the SAC members. The then leader of the Council, Cllr Jackson, the former deputy leader of the Council Wayne Daley and the former HR director Kelly Angus were aware of the international allowance and it had been approved as part of the report in September 2017, approved by the interview panel sub committee of the SAC, which was then reflected in the contract that was shared with members at Full Council on 1 November 2017.

On 1 November 2017 full Council were presented the report of my appointment by Cllr Jackson and a copy of the contract (on pink paper) was circulated to all members present (61 in total). Liam Henry gave out the pink paper which contained my contract which set out the allowance as part of the terms and conditions.

The report of the Leader dated 1 November 2017 along with the pink copy of the contract presented and agreed at the full council meeting confirmed the arrangements including terms and conditions.

I have checked with Democratic Services. There is no record that this information was circulated, nor do the minutes refer to it.

Firstly, the terms of the appointment authorised by the Council do not mirror the contractual arrangements eventually agreed.

Even if they had, the resolution of Council relating to remuneration of the post makes no reference to any additional allowance (and the minutes of the meeting show that the Leader was asked a specific question and replied in the negative).

Even if these hurdles could be overcome, the pay policy statement for 2017/18 made

	<p>no reference to an allowance payable to the Chief Executive, and thus any such payment would have been unlawful in any event.</p> <p>There is considerable correspondence between officers of the Council and with officers of NHCT relating to the international allowance from January 2018 onwards, in the course of which the character of the allowance changed from contractual to ad-hoc, and there was debate in writing about whether it was pensionable or not. If the terms and conditions referencing the allowance had been placed before and agreed at Council in November 2017 as suggested, there would have been no need for this correspondence.</p>
<p>In terms of the Pay Policy, the paragraphs assume that chief officers may receive fees and allowances other than basic salary, your view is that this would not include post-appointment allowances.</p> <p>As this allowance was agreed by the SAC as part of the appointment process and as set out to Full Council, the International Allowance would therefore be included as part of the Pay Policy statement.</p>	<p>This is not my view. It is permissible for post appointment allowances or revisions to a Chief Officers pay to be agreed. However, they can only be agreed by (in the case of the Chief Executive/HOPS) the full council, or possibly the SAC and would in any event require an amendment to the Pay Policy by the full council.</p> <p>I have seen no evidence that either of these things happened.</p> <p>Whilst it is possible that, if the SAC or Council had agreed expressly for there to be an international allowance (and always provided that it was reasonable in terms of justification in all the circumstances (see paragraphs 23 and 24 of Nigel Giffin's Opinion)), that is not in fact what took place.</p> <p>There was no express authorisation, there was no apparent consideration of reasonableness, and it was not in the pay policy statement. I have therefore concluded that it was unlawful expenditure. The fact that the payment of the allowance was reported in transparency data is not relevant to its lawfulness.</p>
<p>The international allowance has also always been stated both in the transparency data outlined on the Council's website, and in the Accounts for each Financial Period since it has been paid. The transparency data is</p>	<p>I have checked the published accounts for the years in question. In 2017/18 the notes to the accounts state that Mrs Lally's remuneration as DCX and Interim CX were jointly funded posts with NHCT and included</p>

<p>referred to clearly from the Pay Policy statement. Accordingly, the international allowance has always been properly authorised and recorded.</p>	<p>an international allowance. The CX and HoPS was a 0.5 FTE post and in addition the CX receives an international allowance paid by NCC. The note does not specify how much the allowance is, or why it is paid.</p> <p>In 2018/19 the note to the accounts says that the CX and HoPS post is 0.5 FTE and the remuneration and allowances are conflated into a single figure. The note It makes no reference at all to an international allowance.</p> <p>In 2019/20, the note to the accounts state that the CX post is 0.5FTE. The note refers to a £40,000 taxable allowance shown separately from the salary paid, but it does not reference why it is paid. That remained the case in the draft 2020/21 accounts. This lack of specificity or disclosure of what the allowance was, or why it was being paid, means it cannot amount to a resolution or authorisation for the payment.</p> <p>More fundamentally, authorisation cannot take place <u>after</u> the event, and cannot be prayed in aid of a decision that must be taken <u>before</u> the expenditure takes place.</p> <p>Even if I were wrong about that, again, there is no mention of it in the pay policy statements for the years in question and it would therefore fall outside the statutory requirements and amount to unlawful expenditure.</p>
<p>Deputy Leader</p>	
<p>It seems there may be changes that will need to be made to the constitution in the light of this. Please can the MO team and the finance team propose any changes that might be necessary.</p>	<p>This is addressed in the recommendations set out in the report.</p>
<p>It seems to me unlikely that we have other similar situations in terms of payments to individuals or other entities existing within NCC but please can we ensure that this is the case.</p>	<p>This is addressed in the recommendations set out in the report.</p>
<p>I would welcome clarity about what legal advice was sought and when officers became aware of the potential issue around legality and when this was brought to the attention of members.</p>	<p>This is addressed in the recommendations set out in the report.</p>

Any investigation into the circumstances that gave rise to these unlawful payments should be fully independent.	This is addressed in the recommendations set out in the report.
Monitoring Officer	
The issues on which you intend to report are concerned wholly with Ss114(2) and 114A(2) and relate to unlawful expenditure by the authority. There is no suggestion of insolvency or inadequacy in the Council's short, or medium-term financial strategy. In short, I agree with your proposal to publish a statutory report and note with grave concern the circumstances that have led to the unlawful items of expenditure that you have identified.	Noted
The Act obliges you to consult formally with me as Monitoring Officer and with the Head of Paid Service. As you know the Head of Paid Service is currently absent from work and so I have not been able to coordinate a response to you in the way that might usually be expected. You have kindly shared with me the written opinion of Nigel Giffin QC whom you have engaged to advise you on the legal framework for issuing a report and the legality or otherwise of the actions which have led to the unlawful expenditure.	Noted
<p>As you are already aware, none of these issues are new to me, and I have discussed with you my concerns over these and other items of expenditure, which appear to me to have taken place without the necessary legal power, authorisation or transparency. It is axiomatic that, for there to be unlawful expenditure, the Council is also in breach of an enactment or rule of law, or of any code of practice made under any enactment. This engages my statutory reporting duty under Ss5 and 5A of the Local Government and Housing Act 1989.</p> <p>Mr Giffin has identified the specific statutory provisions that have been breached in this instance. I agree with his analysis and can add nothing further.</p>	Noted
I have considered whether I should issue a separate and corresponding report as the Monitoring Officer. As you are aware, I issued a note of significant concerns regarding governance issues at the Council on 10th January 2022 and invited responses from the Head of Paid Service and you, in contemplation of whether I should then	Noted

<p>issue a statutory report under my statutory powers. On that occasion, I was sufficiently satisfied that my concerns were being addressed through the institution of an independent corporate governance review by Max Caller CBE, and, to pause further consideration of that until his report has been presented to Council.</p>	
<p>You have now brought two very specific issues to my attention. These relate to unlawful trading for a commercial purpose by the County Council between 2018 and 2021, and the payment of an International Allowance to the Chief Executive, without lawful authority and contrary to Ss112A of the Local Government Act 1972 and Ss 38 and 40 of the Localism Act 2011. These are serious issues and go to the heart of governance and accountability arrangements at the County Council. I add for completeness that we are both interim appointments and all the factual background took place long before you or, I were in post.</p>	Noted
<p>Having considered my statutory reporting role, the contents of Mr Giffin's advice, the draft report you have shared and the forthcoming Caller Review, I have concluded that, as the issues are already being brought to the attention of members under your reporting duty, it is unnecessary and would be a duplication, for me to issue a separate Ss5 and 5A report.</p>	Noted
<p>External Auditor</p>	
<p>As you know I have consistently expressed our concerns to Members and Officers over the lawfulness of the Council's participation in the Northumbria International Alliance and the 'International Business' since Summer 2020. You are also aware that our attempts to conclude have persistently been stymied by a lack of cooperation on the part of some officers and the absence of documentary evidence. However, the information provided more recently, including your letter and counsel's advice would appear to support our initial concerns around lawfulness.</p> <p>In light of the above it would appear to me that your decision to exercise your duties under the Part VIII of the Local Government Finance Act 1988 would appear reasonable</p>	Noted

in the circumstances as I now understand them.

Clearly we will also take this into account in relation to both our opinion on the financial statements and our VFM conclusion. We will also give consideration to the need to exercise our powers under the Local Audit and Accountability Act 2014 in relation to this issue as we have previously discussed.

Appendix C

List of Background Papers

1. Council Report 22nd February 2017 – Leadership Arrangements for International Projects and System Transformation within Health and Social Care
2. Email correspondence DL NHCT July 2017
3. Presentation to Informal Cabinet July 2017 – Draft International Strategy for NHCFT and NCC
4. Council report 6th September 2017 – Approval of Revised Executive Management Structure
5. Approved Minutes of Council Meeting on 6th September 2017
6. Council report 1st November 2017 - Appointment of the Chief Executive (Head of Paid Service) and associated changes to the Executive Management Structure
7. Approved Minutes of Council meeting on 1st November 2017
8. United Arab Emirates contract December 2017
9. Email correspondence Exec Director HR & OD and payroll December 2017
10. Memorandum of Understanding NCC/NHCT 9th January 2018
11. Chief Executive statement of terms and conditions January 2018
12. Council report 21st February 2018 - Strategic Management Changes and Changes to the Returning Officer and the Electoral Registration Officer for the Council
13. Approved Minutes of Council meeting on 21st February 2018
14. Chinese phase 1 contract April 2018
15. Informal Cabinet Briefing September 2018
16. Ward Hadaway advice note November 2018 – Guidance Note on Use of Corporate Vehicle for Commercialisation
17. Irish contract November 2018
18. Presentation to Informal Cabinet – NHS Northumbria International Alliance Internal Introduction 6 November 2018
19. Overarching Co-operation Agreement NCC NHCT December 2018
20. Ward Hadaway advice note regarding proposed NCC incorporation June 2019
21. Informal Cabinet Briefing September 2019
22. Ward Hadaway advice note November 2019 – Legal guidance to support proposal regarding company incorporations
23. Cabinet Report 11th February 2020 – Proposed Incorporation – Group Holding Company for Northumberland County Council
24. Informal Cabinet Briefing 29th April 2020
25. Framework Agreement NCC/Chinese company 19th June 2020
26. Chinese phase 2 contract June 2020
27. International Consultancy Summary of Financial Performance 2016/17 to 2020/21
28. NCC Statement of Accounts 2016/17
29. NCC Statement of Accounts 2017/18
30. NCC Statement of Accounts 2018/19

31. NCC Statement of Accounts 2019/20
32. NCC Draft Statement of Accounts 2020/21
33. Pay Policy Statements 2017 to 2021