

**CARDIFF COUNCIL  
CYNGOR CAERDYDD**

**STANDARDS & ETHICS COMMITTEE: 2 MAY 2006**

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**REPORT IN THE PUBLIC INTEREST –  
MEMBERS' ALLOWANCES & OFFICERS' REMUNERATION**

**REPORT OF THE MONITORING OFFICER      AGENDA ITEM: 7**

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**Reason for the Report**

1. To formally advise the Standards Committee of the receipt of the Report from the District Auditor and the actions required by the Council.

**Background**

2. The framework for the payment of Members' Allowances is governed by legislation and regulations. The Local Authorities Members' Allowances Regulations 1991 as amended ("the 1991 Regulations") provide that a scheme of allowances may be amended at any time but may only be revoked with effect from the beginning of the year. If the scheme is revoked it must be replaced by another before the revocation takes effect. Where an amendment is made to a basic or special responsibility allowance, the regulations provide for the apportionment of annual sums payable under the original and amended scheme, having regard to the period for which they were in effect. With limited exceptions the regulations preclude the backdating of increases to basic and special responsibility allowances.
3. In Wales the Local Government Reorganisation (Wales) (Transitional Provisions No 2) Order 1995 required each new Authority as soon as practicable after the 4 May 1995 to make a scheme under the above regulations for the payment of allowances in respect of the period up to the 1 April 1996 and for subsequent years.

4. Cardiff County Council was established on the 4 May 1995 to act as a Shadow Authority and to prepare for the creation of a new Cardiff Unitary Authority effective from April 1996. At its meeting on the 10 July 1995 the Council appointed an Independent Commission to consider and make recommendations for a scheme of Members' Allowances for the new Unitary Authority (the Brooks Commission). It also agreed an interim scheme to facilitate payments on account to members until a substantive scheme could be implemented following receipt of the Brooks Commission report.
5. The Brooks Commission submitted its report to the Council on the 31 January 1996 and the scheme was approved by the Council's Policy Committee on the 2 February 1996 and subsequently ratified by Council on the 29 February 1996. At its meeting on the 2 February 1996 the Policy Committee resolved to backdate the scheme (i.e. for it to take effect from the 4 May 1995) in accordance with the 1995 Order.
6. Following the 1998 Government White Paper "Local Voices" which paved the way for the introduction of Executive Member arrangements, the Council appointed a further Independent Commission in 1999 (the Parkinson Commission). The White Paper acknowledged that a wholesale review of Members' Allowances would be required to reflect the fact that some Members needed to spend most of their time on Council business. In Wales, local authorities were encouraged by the then Secretary of State to address the modernisation agenda in advance of legislation.
7. Following the report of the Parkinson Commission in December 1999 and in response to widespread media debate on the issue, the Council invited the District Auditor in January 2000 to carry out a review of the workings of the Parkinson Commission, its recommendations and its implementation.
8. An initial Draft Public Interest Report was received from the District Auditor in May 2000 followed by a series of other reports up to May 2002 when the scope of the District Auditor review was extended to the earlier Brooks Report and the implementation of the Scheme from 1995-2000.
9. The District Auditor expressed concern to officers regarding the transparency of the payments to Members and Officers and, as a result, the statutory officers prepared a full and detailed report in consultation with the District Auditor which was submitted to the Cabinet. The Cabinet decided to report the full details of all Members' Allowances and the Officers payments that had been made for the period in question to the full Council. (The dates and titles of the reports to Cabinet and Council meeting are detailed in the background papers specified in the report.)

10. In a letter dated the 19 April 2001, the District Auditor advised for the first time of an intention to issue a report in the public interest under Section 8 of the Audit Commission Act 1998.
11. In July 2001 the National Assembly for Wales published a report "Acknowledging Councillors Worth" which had been commissioned jointly by the Assembly and the Welsh Local Government Association. The Council received a report on this Assembly publication which reflected the view that allowances be fixed by reference to an index, and such payments should be amended automatically by reference to the index and where necessary backdated.
12. In May 2002, the Council received a draft Public Interest Report from the District Auditor. As a result of differences of view between the Council and the District Auditor on a number of legal points the Council invited the District Auditor in June 2002 to seek a joint declaration from the Court on the correct legal interpretation of the relevant legislation on Members' Allowances.
13. In November 2003 the Council was informed that the District Auditor intended to seek a declaration from the High Court under Section 17 of the Audit Commission Act, that certain items of account were unlawful.
14. Section 17(1) and (2) of the 1998 Act provides
  - (i) where it appears to the Auditor carrying out an audit under this Act other than an audit of accounts of a Health Service body, this item of account is contrary to law and the item has not been sanctioned by the National Assembly for Wales, the Auditor may apply to the Court for a declaration that the item is contrary to law
  - (ii) on an application under this Section the Court may make, or refuse to make the declaration asked for."
15. The District Auditor's application sought declarations of unlawfulness in respect of expenditure on
  - (i) Members' allowances for the years 1999 – 2000, 2000 – 2001 and 2001 – 2002, and
  - (ii) Certain items of remuneration paid to Officers for the same time periods.
16. All of the items challenged by the District Auditor involved one or more of the following issues:-
  - Back-dating payments
  - Adoption or application of an automatic review mechanism

- Adoption of a new Members' Allowance Scheme rather than the amendment of an existing Scheme
  - The nature and status of the interim scheme adopted in June 1995.
17. The issue in respect of Members' Allowances turned upon the correct interpretation of the governing legislation namely Section 18 of the Local Government and Housing Act 1989 and the 1991 Regulations.
  18. The Court Hearing was due to be listed in early January 2005. However, in November 2004 there was a proposal from the District Auditor that the matter be dealt with through mediation which took place on Friday 10 December 2004.
  19. As a result of the mediated settlement agreement between the District Auditor and the Council, a Settlement Agreement and Consent Order was placed before the Court. These documents are attached at Appendix 1.
  20. The main terms of the Settlement Agreement in summary are as follows:-
    - (i) The Order declared items of account in the total of £2.4 m, and payments of Officers' remuneration amounting to £75,000 to be unlawful.
    - (ii) The District Auditor agreed that, subject to proper process, the Council could have increased Members' allowances on an annual basis to reflect inflation and could have made adjustments to such allowances to reflect the new executive arrangements implemented in May 1999. The overall total of the allowances paid was not unreasonable and the level of the individual allowances was not itself unreasonable (Para 7 of the Settlement Agreement).
    - (iii) On the basis of the evidence, the District Auditor agreed that she did not allege bad faith on the part of the Council, any Member or Officer, and that the Council, its Officers and Members sought to act reasonably (although the DA did not accept that they acted reasonably in all respects); no body or person acted dishonestly, and that no Officer or Member participated in a decision in which he or she knowingly had a disqualifying interest and, in particular, that Councillor Russell Goodway and the Chief Executive sought advice on the issue, which advice was given and received in good faith, that they acted on such advice and that it was reasonable to act on such advice (Para 8 of the Settlement Agreement).
    - (iv) The accounts of the Council to be rectified as agreed.

- (v) The agreement to be in full and final settlement of all of the issues raised against the Council.
  - (vi) If in the lawful exercise of her statutory discretion the District Auditor was minded to issue a Public Interest Report, she would not do so until she had engaged in a proper consultation with the Council regarding the content of that Report and any Report would reflect the terms of the settlement (Para B 4.2 of the Settlement Agreement).
  - (vii) As part of the Settlement Agreement it was also agreed that there would be a jointly agreed Press Release and this is now attached at Appendix 2.
21. The outcome of the Mediation Agreement was widely reported in the press and all of the Court papers are effectively in the public domain.

### **Public Interest Report**

22. The District Auditor has now formally published her Report, a copy of which is attached at Appendix 1, which includes a summary of the main findings and a series of recommendations in Section 7 of the Report.

### **Required actions of the Council**

23. Sections 24, 25 and 26 of the Public Audit (Wales) 2004 sets out specific procedural and publicity requirements prescribed by legislation:
- (a) The Council must consider the Report at a meeting held by it before the end of a period of 1 month (in this case starting from the 20 April 2006)
  - (b) At the meeting the Council must decide whether the Report requires it to take any action; if the recommendations made within the Report are to be accepted; and what action the Council intends to take in response to the Report and the recommendations
  - (c) The meeting will need to be held at least 7 clear days after a notice has been published in the newspaper circulating in the area of the Council. The notice needs to include details of the time and the place of the meeting, the reason for holding the meeting and the subject matter of the report.
  - (d) As soon as possible after that meeting the Council must notify the District Auditor of the decision made by the Council and obtain her approval to a written summary of the decision which is then to be published in one or more newspapers circulating in the area of the Council.

Officers are currently in the process of making the necessary arrangements in order to comply with the statutory requirements.

**Recommendation**

24. The Committee is asked to note the Public Interest Report and the steps being taken by the Council in its response.

**KATE BERRY**  
**Monitoring Officer**

**25 April 2006**

24 April 2006

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## The County Council of the City and County of Cardiff

I have prepared this report in the public interest which is made under section 22 of the Public Audit (Wales) Act 2004 to bring the matters referred to in this report to the attention of the public and for them to be considered by the County Council of the City and County of Cardiff.

Janet Jones

Appointed Auditor

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## Introduction

This report is made in my capacity as the Appointed Auditor with responsibility for the audit of the accounts of the County Council of the City and County of Cardiff ("the Council") in respect of Members' Allowances and related increases in the remuneration of the Chief Executive and certain Directors of the Council.

This report is made under section 22 of the Public Audit (Wales) Act 2004 which requires me to consider whether, in the public interest, I should make a report on any matter coming to my notice in the course of the audit in order for it to be considered by the Council or brought to the attention of the public. I consider that there is a compelling case to bring to the attention of the public the matters to which I refer in this report. I further consider that those matters should be considered by the Council.

A review of the Council's scheme of Members' Allowances was included in the audit plan for the financial year 1999/2000 as part of a review of a new (Cabinet style) decision making structure adopted by the Council on 28 May 1999. As a result of concerns expressed to me by some Members of the Council and several members of the public and following a request from the Council to review the new scheme in the light of all the media and public criticism, I brought forward the timing of that review and commenced an investigation into the development of the Council's scheme of Members' Allowances. My investigation became more wide ranging as a result of matters which came to my attention, including an increase of some £400,000 in allowances paid to Members in the financial year 1999/2000, which represented an increase of some 56% over the level of allowances paid in 1998/1999, and as a result of legal advice which I received. My investigation covered the period from 4 May 1995 to 31 October 2001.

## Unlawful expenditure

As a result of those investigations, I had great concerns as to the legality of the decisions taken and expenditure incurred by the Council and as to whether the manner in which the Council had proceeded was in accordance with the requirements of good administration and with the standards to be expected of those in public office. Given that the Council did not accept that it had acted unlawfully, I decided to refer various matters to the High Court for a ruling and an application was



therefore issued by me inviting the High Court to resolve questions of legality relating to items of account in the Council's accounts for the financial years 1999/2000, 2000/2001 and 2001/2002 which items recorded the payment of Members' Allowances and officers' remuneration.

The Council opposed my application to the High Court, contending that each of the impugned items of account was lawful. However, one month before the hearing of my application, the Council accepted that all of the impugned expenditure was unlawful and agreed terms of settlement. Under the terms of the Settlement Agreement the Council accepted that items of account recording expenditure on Members' Allowances totalling **£2,433,273** were "contrary to law" and that items of account recording payment of remuneration totalling **£75,250** were "contrary to law". By consent, the High Court made declarations to that effect.

I was and am pleased that the very substantial costs of a two week hearing scheduled for January 2005 were avoided. I express my appreciation to those officers and Members who promoted a settlement which involved the acceptance by the Council that all of the challenged expenditure was unlawful. However, in view of the fact that the Council capitulated on all of the items of expenditure challenged, I am critical that for some three years the Council mounted, at significant expense to the public purse, hostile opposition to my conclusions as to the legality of expenditure on Members' Allowances and related increases in officers' remuneration leaving me with no alternative but to commence legal proceedings.

My High Court application was in respect of the financial years 1999/2000 to 2001/2002.

The application of the principles conceded in that application establishes that the Council had also incurred unlawful expenditure on Members' Allowances amounting to **£339,773** in the financial years 1995/1996 to 1998/1999.

The total level of unlawful expenditure incurred by the Council in the period from 4 May 1995 to 31 October 2001 in respect of Members' Allowances was therefore **£2,773,046**. However, with the exception of unlawful increases in Special Responsibility Allowances amounting to **£152,752** which were unreasonable (such that no local authority acting reasonably could have agreed those increases), it would have been open to the Council, if it had followed proper procedures (including giving publicity to what was being done), to set Members' Allowances at the level that it did. I do not intend to speculate as to what decisions the Council would

have taken as to the level of Members' Allowances if it had taken decisions which were subject to media and public scrutiny. I note however that in 2001, in the face of public criticism, the Council did reduce some Members' Allowances.

Payments totalling **£56,186** made to the Chief Executive and four Directors in respect of what was called "pay point assimilation" were unlawful and could not lawfully have been made by the Council. Payments totalling **£19,064** of "arrears" of salary made to the Chief Executive in respect of returning officer fees were unlawful and could not lawfully have been made by the Council. It is nevertheless the case that the Chief Executive was entitled to receive returning officer fees from central funds. In the Settlement Agreement, the Council accepted that salary payments in respect of pay point assimilation and returning officer fees were made in each case under a "mistake of law".

### Legality

My principal concerns on legality were and are:

- a** the unlawful use by the Council of an "automatic review mechanism" (which as operated by the Council did not review the appropriateness of any allowance but provided for automatic increases in allowances). The Council has now accepted that, at all relevant times, it was not empowered to operate an automatic review mechanism;
- b** the unlawful backdating of increases in Members' Allowances. The Independent Commission appointed in 1995 to advise the Council on a scheme of Members' Allowances recommended a scheme to take effect from 1 April 1996, the date on which the Council assumed responsibility for its full range of functions following local government reorganisation. In February 1996, however, the Council (unlawfully) backdated the increased allowances recommended by the 1995 Commission to apply through the shadow year (1995/1996) when the Council did not have responsibility for that full range of functions. The Council unlawfully backdated increases in Members' Allowances on further occasions in 1997, 1998 and 1999; the Council has now accepted that it was not empowered to backdate those increases in Members' Allowances but continues to contend that it acted lawfully in backdating the Members' Allowances approved in February 1996. I do not accept that contention;

**c** lack of authority (increases in Members' Allowances effected without delegated or other authority); and  
**d** unlawful participation in the decision making process.

## Governance

I am critical of the standards of governance adopted by the Council which fell short of the standards that the public were entitled to expect. I am particularly critical of:

**a** unreasonable increases in Members' Allowances which gave rise to inequitable treatment of different Members. Although the Independent Commission in 1995 recommended a link between levels of Special Responsibility Allowances and officers' salary scales, the Council implemented a link between levels of Members' Allowances and the salaries of certain officers with inequitable, unreasonable and unlawful results.

Even though there was no assumption of additional responsibilities or change in relative responsibilities the Chief Whip and Opposition Leader received an increase of only 5% in their Special Responsibility Allowances over the same three year period that other Members in receipt of Special Responsibility Allowances received increases ranging from 44% to 74%;

**b** the lack of transparency and accountability. The Council not only failed to comply with statutory requirements to draw up a publicly available scheme of Members' Allowances and to give publicity to increases in Members' Allowances but also, on occasion, appears to have taken steps to keep increases in Members' Allowances "confidential".

The latter criticism does not apply to the February 1996 or December 1999 decisions to increase Members' Allowances;

**c** the absence of authorisation for decisions in relation to increases in Members' Allowances and officers' remuneration. This, coupled with a failure to report to Members generally and the public on what had been done, contributed to the absence of transparency and accountability in decision making;

**d** officers authorising increases in remuneration for each other in respect of pay point assimilation without reporting to the Council or any committee or sub committee of the Council;

**e** individuals with a pecuniary interest in the

outcome of a decision making process nevertheless participating in that process albeit that no officer or Member participated in a decision in which he knowingly had a disqualifying interest;

**f** inadequate reporting to Members generally who were not kept informed of significant decisions taken in relation to Special Responsibility Allowances, increases in officers' remuneration and increases in returning officer fees paid to the Chief Executive. Furthermore, on occasion, Members were provided with an incomplete/misleading account of what had been done. No contemporaneous report was made to the Council or any committee or sub-committee of the Council in connection

with pay point assimilation. Members generally were not informed that there had been substantial increases in the salary of the Chief Executive and four Directors as a result of pay point assimilation and that substantial "arrears" had been paid to the individual officers. Nor were Members informed of the consequential retrospective increases in Special Responsibility Allowances as a result of pay point assimilation and increases in returning officer fees and that substantial "arrears" had been paid to the relevant Members. The Council did not publish any amendment to its "scheme" of Members' Allowances required to give effect to those increases in the Special Responsibility Allowances;

**g** even, on occasion, failing to keep records of decisions, eg the decision in August 1998 to implement an automatic review mechanism and the decision in 1999 to increase Members' Allowances in consequence of the report of a further (1999) Independent Commission; and

**h** the Council's failure to keep a proper audit trail of payments of Members' Allowances which made it difficult for me to conduct my investigation into the Council's scheme of Members' Allowances.

The Council submits that all its actions were taken in accordance with legal and financial advice and/or flowed from a mistake of law. I do not accept that submission.

### **Standards of conduct**

In my view, the Council as a body acted in a manner which was inconsistent with its position as trustee of monies contributed by taxpayers and its fiduciary duty to taxpayers and others in a number of important respects. In particular, the Council failed to

act with transparency or in an accountable manner. I regard with great concern the departures from required standards of public governance recorded in this report. The public had a right to expect higher standards.

I do not suggest that any Member or officer acted dishonestly or other than in good faith. Nevertheless, I consider that the conduct of those who were party to "approving" increases in Members' Allowances and increases in officer remuneration which were not disclosed to Members generally and/or the public fell short of what it should have been and the then Leader and the Chief Executive can hardly be surprised that their conduct is the subject of public criticism.

### The way ahead

The Council has set up a Recovery Committee to consider the extent to which the Council may be able to recover unlawful payments made to Members and officers.

I have made a number of recommendations which I am pleased to report the Council has implemented. These are set out in full in the concluding section of my report.

The Council's commitment to improvement is evidenced by the fact it instigated a corporate governance review under the chairmanship of Sir Michael Lyons. According to the Chief Executive, "the Council culture, processes and transparency has changed" as part of the action plan resulting from that review. However, I include a word of caution.

I cannot emphasise enough that good systems and processes are not sufficient on their own and their effectiveness depends on the manner in which they are operated. For those systems and processes to operate as intended there must be, throughout the Council, a culture in which Members and officers are continually alert to the consequences of their actions and the way in which those actions might be perceived by others. This is essential if the public is to maintain confidence in the way the Council conducts its affairs.

### Structure of report

The remainder of this report sets out my more detailed findings under the following headings:

- \_ Introduction
- \_ The legal framework relating to Members' Allowances, officers' remuneration and the payment of fees for returning officer duties
- \_ Sequence of events
- \_ Unlawful expenditure incurred by the Council in respect of Members' Allowances and officers' remuneration
- \_ Governance and other related issues
- \_ Standards of conduct

\_ The way forward

## Acknowledgments

I am pleased to record my appreciation to those Members and officers who have assisted me in the course of my investigation. My thanks are also due to Members of the Council and to members of the public who raised their concerns with me.

1 The responsibility for the appointment of auditors is now vested in the Auditor General for Wales pursuant to Chapter 1 of Part 2 of the Public Audit (Wales) Act 2004.

I remain the appointed auditor for the purposes set out in paragraph 1.

2 Re-enacting, with minor amendment, section 8 of the Audit Commission Act 1998.

**1** I am the auditor appointed by the Audit Commission to audit the accounts of the Council in respect of Members' Allowances and related increases in the remuneration of the Chief Executive and certain Directors of the Council<sup>1</sup>.

**2** The audit of the accounts of a local authority is a means whereby the public are informed as to how public funds have been used so that the public may form a judgement on the stewardship exercised by those who have responsibility for the funds. This report is made under section 22 of the Public Audit (Wales) Act 2004<sup>2</sup> which requires me to consider whether, in the public interest, I should make a report on any matter coming to my notice in the course of the audit in order for it to be considered by the Council or brought to the attention of the public. I consider that there is a compelling case to bring to the attention of the public the matters to which I refer in this report. I further consider that those matters should be considered by the Council.

**3** The Council submits that I should not make a report in the public interest for various reasons including that "the issues are now a matter of academic history". I do not agree. In my view, the public are entitled to be informed of the actions that were taken in their name and at their expense and to be informed of the actions taken by the Council with a view to avoiding a repetition of the unlawfulness and departures from standards of conduct expected of those in public life to which I refer in this report.

**4** A review of the Council's scheme of Members' Allowances was included in the audit plan for the financial year 1999/2000 as part of a review of a new (Cabinet style) decision making structure adopted by the Council on 28 May 1999. As a result of concerns expressed to me by some Members of the Council and several members of the public and following a request from the Council to review the new scheme in the light of all the media and public criticism, I brought

forward the timing of that review and commenced an investigation into the development of the Council's scheme of Members' Allowances. My investigation became more wide ranging as a result of matters which came to my attention, including an increase of some £400,000 in allowances paid to Members in the financial year 1999/2000, which represented an increase of some 56% over the level of allowances paid in 1998/1999, and as a result of legal advice which I received. My investigation covered the period from 4 May 1995 to 31 October 2001.

**5** As a result of my investigations, I was minded to conclude that there were matters in relation to the Council's scheme of Members' Allowances and related increases in the remuneration of the Council's Chief Executive and four of its Directors that should be brought to the attention of the public and I therefore prepared a draft public interest report. That draft report was the subject of extensive consultation with the Council and was amended from time to time.

There were numerous meetings with Council officers, including meetings to discuss a "working draft" of the report.

**6** On 10 May 2002, a further draft of my proposed public interest report (the "consultation draft report") was submitted to the Council and to individuals referred to in that report and representations in response were invited.

**7** In a letter dated 20 May 2002, the Council proposed a joint application to the Court to seek a declaration on the correct interpretation of the relevant legislation but this was not a course of action open to me as the Courts had previously expressed concern as to the appropriateness of such a procedure. I endeavoured to resolve matters without an application to the Court but eventually felt that I had no alternative but to commence legal proceedings in view of the Council's approach.

**8** The Council's two-stage detailed written response to my consultation draft report, ran to some 1600 pages. By a letter dated 9 August 2002, Solicitors acting on behalf of the Council threatened to issue legal proceedings to prevent me issuing my proposed report in the public interest on the subject of Members' Allowances. My Solicitors replied by a letter dated 27 August 2002. That letter explained that I would not be deflected by the Council's

threats of legal action from taking decisions in accordance with my view of the public interest, reached after consideration of representations received from the Council and from others. In the event, no such legal proceedings were served on me.

**9** My offer to the Council and other consultees to attend before me to make representations orally was taken up by the Council and by the then Leader of the Council<sup>3</sup> in September and November 2002 respectively.

Written representations were also received from the Chief Executive and other officers.

I interviewed the former Director of Personnel in order to obtain clarification of conflicting evidence presented to me in response to my consultation draft report.

**10** I carried out further investigations, sought further information and documentation from the Council and took legal advice from time to time to assist me in evaluating the representations made to me. One of the difficulties I have faced is the absence of a proper audit trail of payments of Members' Allowances. My investigation has not been assisted by a Council decision-making process which, on occasion, has not been transparent or well documented.

**11** In July and August 2003, I wrote to the Council making formal requests for further information and documentation. The responses received in the period September to November 2003 did not provide all of the information and explanation that I had requested. I decided, however, that I should not defer taking action pending receipt of that information and/or documentation.

**12** On 17 November 2003, my Solicitors wrote a pre-action letter to Solicitors instructed by the Council in which the Council was afforded an opportunity to respond, including in relation to issues identified in an annex to that letter and to a formal requirement, made under section 6 of the Audit Commission Act 1998 ("the 1998 Act"), for the Council to provide information and/or explanation.

<sup>3</sup> Referred to in the remainder of this report as the Leader.

**13** In that letter, my Solicitors informed the Council that, having completed my consideration of all the written and oral representations I had received, and having obtained further legal advice, including from Leading Counsel, I had even greater concerns both as to the legality of decisions taken and expenditure incurred by the Council and as to whether the manner in which



the Council had proceeded was in accordance with the requirements of good administration and with the standards to be expected of those in public life. Given that the Council did not accept that it had acted unlawfully, I decided to refer various matters to the High Court for a ruling. My view was that local taxpayers were entitled to know whether substantial increases in Members' Allowances, substantial increases in salaries paid to certain officers and payments of purported "arrears" to both Members and officers were lawful.

**14** In that letter of 17 November 2003, my Solicitors also indicated that I remained minded to issue a report in the public interest under section 8 of the Audit Commission Act 1988 ("the 1998 Act") but that I would not make any decision as to the matters in respect of which I would seek a ruling from the Court and/or as to the form and content of my proposed report in the public interest until I had considered such representations as I might receive from the Council.

**15** Having given careful consideration to the further representations made to me by the Council in a letter dated 19 December 2003, I decided:

**a** to issue an application under section 17 of the 1998 Act and to invite the Court to resolve questions of legality relating to items of account appearing in the Council's accounts for the financial years 1999/2000, 2000/2001 and 2001/2002 recording the payment of Members' Allowances and officers' remuneration; and

**b** to defer the issue of a report in the public interest pending obtaining the decision of the Court. I was concerned that there should be no further avoidable delay in obtaining the ruling of the Court.

**16** Under section 17 of the 1998 Act, where it appears to the auditor carrying out an audit under that Act that an item of account is "contrary to law" and that item has not been sanctioned by the National Assembly for Wales, the auditor may apply to the Court for a declaration that the item is "contrary to law". The Council applied to the National Assembly for Wales to sanction the items of account the legality of which was in issue but the National Assembly for Wales refused to grant a sanction.

**17** Paragraph S1.25 of the Code of Audit Practice in force at the relevant time stated that "Auditors should not be deflected from making a report because its subject matter is critical or unwelcome, if they consider it to be in the public interest to do so". Critical public interest

reports and applications under section 17 of the 1998 Act and its statutory predecessors are often unwelcome to audited bodies. However, it is inherent in the nature of independent audit that, on occasion, auditors will be critical of audited bodies.

**18** The audit of the Council's accounts for the financial years 1999/2000 and subsequent years remained open. The Council's accounts for the financial year 1999/2000 included items of account recording expenditure on, among other things, retrospective payments of "arrears" of allowances purportedly made under the Council's "scheme" of Members' Allowances. Those payments were made in the financial year 1999/2000 but included items of account referable to earlier financial years, namely 1996/1997, 1997/1998 and 1998/1999, as a result of the Council making

(i) retrospective payments of allowances relating to those financial years, (ii) increases in payments of Members' Allowances made pursuant to what has been termed an automatic review mechanism<sup>4</sup> and (iii) increases in payments of remuneration to the Chief Executive and certain Directors and retrospective payments of "arrears" of such remuneration.

**19** The relevant sums appearing in the accounts of the Council in respect of payments of Members' Allowances in the financial year 1999/2000 amounted to **£1,110,606**. It appeared to me that the following items of account totalling **£678,039** were "contrary to law" for reasons which I explain in this report:

**a £5,793** paid in respect of the period 1 April 1999 to 6 May 1999 in consequence of increases in Members' Allowances effected by the application of the automatic review mechanism to annual pay awards and increments in the period 1 April 1997 to 31 March 1999;

**b £119,971** in consequence of increases in Members' Allowances effected as a result of the retrospective application of the automatic review mechanism to backdated increases in the remuneration of the Chief Executive and the highest paid Director in respect of pay point assimilation;

**c £15,451** in consequence of increases in Members' Allowances effected as a result of the retrospective application of the automatic review mechanism to backdated increases in the remuneration of the Chief Executive in

respect of returning officer duties;

**d £17,330** in consequence of increases in Members' Allowances effected as a result of the retrospective application of the automatic review mechanism to backdated increases in the remuneration of the Chief Executive and the highest paid Director as a result of national pay reviews;

**e £366,063** in respect of backdated increases in Members' Allowances following the premature implementation of the Council's 1999 "scheme" of Members' Allowances; and

**f £153,431** in respect of the premature implementation of the Council's 1999 "scheme" of Members' Allowances in respect of the period 1 January 2000 to 31 March 2000.

**20** It appeared to me that the following items of account appearing in the accounts of the Council in respect of payments of officers' remuneration in the financial year 1999/2000 and totalling **£75,250** were also "contrary to law" for the reasons which I explain in this report:

**a £56,186** in respect of backdated increases in the remuneration of the Chief Executive and four Directors in respect of pay point assimilation; and

**b £19,064** in respect of a backdated increase in the remuneration of the Chief Executive in respect of returning officer duties.

**21** The relevant sums appearing in the Council's accounts in respect of payments of Members' Allowances for the financial year 2000/2001 amounted to **£831,098** plus **£238,494** set aside

4 It was not correct to refer to the mechanism for increasing Members' Allowances as an automatic review mechanism since the mechanism established did not review any allowance so as to ascertain whether it remained appropriate. The mechanism was one for automatically increasing the Allowances in question.

in a "reserve". It appeared to me that the items of account recording those amounts and totalling **£1,069,592** were "contrary to law" for reasons which I explain in this report.

**22** My investigation was limited to the period to 31 October 2001<sup>5</sup>. The relevant sums appearing in the Council's accounts in respect of payments of Members' Allowances for the financial year 2001/2002 up to and including 31 October 2001 amounted to **£629,242** plus **£56,400** set aside in a "reserve". It appeared to me that the items of account recording those amounts and totalling **£685,642** were "contrary to law" for the reasons which I explain in this report.

**23** On the basis of the legal advice it had received, the Council did not accept that any of the above items of account were "contrary to law".

In order to obtain a definitive ruling from the Court as to the legality of the expenditure which appeared to me to be unlawful, on 23 January 2004 I instituted proceedings under section 17 of the 1998 Act for a declaration that various items of account in the Council's accounts recording payments of Members' Allowances totalling **£2.433m** and recording payment of remuneration to officers totalling **£75,250** were "contrary to law". The Council opposed my application maintaining that each of the above items of account was lawful.

**24** The purpose of my section 17 application was to invite the Court to resolve the questions of legality to which I refer above. In making such an application, an auditor is not acting in his/her own interests. He/she is acting in the public interest: such an application is a means of establishing, for the benefit of the public, whether the items of account in a local authority's accounts are lawful and in that respect how the funds the public have provided have been managed by the authority.

**25** My affirmation in support of my section 17 application ran to 112 pages and was accompanied by three exhibits respectively comprising documents and correspondence, legislation and two reports. The Council asked for three months to file and serve its evidence in reply.

**26** Given the extensive consultation exercise that I had conducted prior to the commencement of the section 17 proceedings, I and my legal advisers assumed that the evidence to be filed by the Council would be limited in extent and would set out its grounds for contesting the claim.

**27** Under cover of a letter dated 26 April 2004, the Council's Solicitors served five witness statements and an expert's report together comprising 529 pages, supported by an exhibit in 10 lever arch files (3,441 pages), a substantial proportion of which was not referred to at all in the witness statements and expert's report served on behalf of the Council.

**28** Despite the volume of the Council's evidence, the Council did not serve any document setting out the Council's grounds for contesting my section 17 application, leaving me and my legal advisers to speculate as to what was the Council's case. The timetable, which the Council had agreed without disclosing the volume of

evidence which it proposed to serve, allowed me four weeks to serve evidence in reply. In the light of the volume of evidence served by the Council that timescale was unrealistic, all the more so as the Council's Solicitors refused to

5 On 25 October 2001, the Committee of the Council resolved to "adjust" the Council's "scheme" of Members' Allowances to broadly reflect the levels recommended by the Hall Report: see below.

provide a statement of the Council's case in relation to the legal issues arising in the section 17 proceedings (a state of affairs which I am informed is and was unprecedented).

Despite that state of affairs, the Council (through its Solicitors) claimed that I had "stalled the proceedings".

**29** On 14 June 2004, Mr Justice Collins directed the Council to produce a statement of its case (in the form of a reply to a schedule setting out my case), on the basis that no judge would be "happy to be faced with 10 lever arch files and an unfocused indication" [of the Council's case], and approved a revised timetable. He refused to allow the Council to rely on the expert's report but permitted the Council to serve a revised report which sought to address the issues in the case. Mr Justice Collins subsequently wrote: "I was singularly unimpressed with [the expert's report] since it did not seem to me to assist on the issues which were to be determined in the claim. I was equally unimpressed by the approach of the [Council] in (a) producing an enormous quantity of unfocussed material and (b) refusing to identify the issues and which parts of the evidence dealt with them. I was and am satisfied that the problems that have arisen in relation to the preparation and service of evidence in reply by the claimant are largely due to the [Council's] approach. That rather than anything done or omitted by the claimant has led to delays."

**30** In September 2004, following receipt of the schedule setting out the Council's case and of the expert's further report accompanied by three lever arch files of appendices (together comprising some 1307 pages), my Solicitors served two Affirmations in reply (143 pages including exhibits). The Council responded with seven witness statements, a supplemental report from its expert and one further exhibit, together comprising 299 pages.

**31** On 22 September 2004, Solicitors on behalf of the Council indicated that the Council had authorised its officers to explore the possibility of a negotiated settlement of the proceedings. I was mindful of the cost to the public purse

and the taxpayers of Cardiff and considered that it would be in the best interests of the taxpayers of Cardiff if a settlement could be agreed. In my response to the Council, I suggested that the Council enter into "without prejudice" mediation and that I would wish negotiations to take place as a matter of urgency with a view to maximising the saving of time and costs if agreement could be reached.

**32** Following a mediation of some 14 hours on 10 December 2004, terms of settlement of the section 17 application were agreed and a consent order was drawn up. The Council accepted that each of the various items of account to which I refer above were "contrary to law". The Court has now made, by consent, a declaration to that effect (which was the purpose of my section 17 application) and ordered the Council to pay my expenses (including legal costs) of bringing the section 17 application.

**33** I was and am pleased that the very substantial costs of a two week hearing scheduled for January 2005 were avoided. I express my appreciation to those officers and Members who promoted a settlement which involved the acceptance by the Council that all of the challenged expenditure was unlawful.

**34** However, in view of the fact that the Council capitulated on *all* of the items of expenditure challenged, I am critical that for some three years the Council mounted, at significant expense to the public purse, hostile opposition to my conclusions as to the legality of expenditure on Members' Allowances and related increases in officers' remuneration

leaving me with no alternative but to commence section 17 proceedings.

**35** I am further critical of the Council's approach to the Court proceedings (as summarised by Mr Justice Collins: see above). I accept that the Council was entitled to put its case before the Court. However, the Council prepared and served "an enormous volume of unfocussed material" which cost Council taxpayers a correspondingly enormous amount to prepare and which resulted in my having to incur significant costs in responding to that material. The Council's approach appeared to be to divert attention from the legal position by burdening the Court and me with evidence and documentation regardless of whether that material was relevant to the legal issues to be decided by the Court.

In the event, the Council conceded that all of the

challenged items of accounts were "contrary to law". In my view, the public interest required that concession to have been made before the section 17 proceedings were commenced or, at the latest, following the service on the Council of my application and supporting Affirmation. I consider that the Council conducted its defence of the section 17 proceedings in an unreasonable manner, involving maximum expense. The Council's response to this criticism is that it acted in accordance with the legal advice it received from its external Solicitors.

**36** With the consent of the Council, the Court made a declaration that items of account amounting to **£2,433,273** recording payments of Members' Allowances (including items of account totalling **£294,894** recording sums paid into a reserve) are "contrary to law". As a result of the outcome of the section 17 proceedings, those sums paid into a reserve may not lawfully be paid to Members. It is nevertheless the case that, save in so far as the Council made unreasonable increases of some **£152,7526** in Special Responsibility Allowances, it would have been open to the Council to set Members' Allowances at the level that it did subject to following proper procedures including giving publicity to what was being done at the expense of local taxpayers.

**37** With the consent of the Council, the Court also made declarations that:

**a** items of account amounting to **£56,186** recording payments of "arrears" of salary made to the Chief Executive and four Directors in respect of pay point assimilation are "contrary to law"; and

**b** items of account amounting to **£19,064** recording payments of "arrears" of salary made to the Chief Executive in respect of returning officer duties are "contrary to law".

**38** In the financial years 1995/1996, 1996/1997, 1997/1998 and 1998/1999, the Council incurred additional unlawful expenditure amounting to **£339,773** in respect of Members' Allowances which was not the subject of an application to the Court. The unlawful items of account which were not the subject of an application to the Court were:

\_ **£219,112** as a result of backdating the implementation of the 1996 "scheme" to 4 May 1995; **£41,624** as a result of the premature implementation of the 1996 "scheme" in respect of the period 8 February 1996 to 31 March 1996;

\_ **£8,918** in respect of increases in Basic Allowances as a result of the application of

the automatic review mechanism, in part retrospectively, in respect of the period 1 April 1997 to 31 March 1998; and

6 The Recovery Committee of the Council is seeking the repayment of this amount from 34 existing members and former members of the Council.

**£70,119** as a result of the application of the automatic review mechanism to annual pay awards in respect of the period 1 April 1998 to 31 March 1999 and increments in respect of the period 1 April 1997 to 31 March 1999.

**39** I did not seek a declaration of unlawfulness from the Court in respect of those items of account as they appear as items of account in the accounts of financial years in respect of which the audit is not open. The Council does not accept my view that it was unlawful (and unreasonable) to backdate the 1996 scheme to 4 May 1995 – my reasons for coming to this view are set out in detail later in the report. However, the Council has now accepted that at the relevant time it had no power to operate an automatic review mechanism to increase Members' Allowances and no power to backdate increases in Members' Allowances (other than the limited backdating required by the Local Government Reorganisation (Wales) (Transitional Provisions No 2) Order 1995: see below.

**40** Following the declarations of unlawfulness made by the Court with the consent of the Council on 19 January 2005, I gave careful consideration as to whether I should issue a report in the public interest. Having notified the Council that I was minded to do so, I provided a draft report to the Council and certain individuals and invited their representations on the provisional views which I expressed. I received written representations in September 2005. The Council and two individuals met with me on 2 November 2005 and made oral representations. Following that meeting further written representations were received in December 2005, January 2006 and February 2006. Further oral representations were made in January and February 2006. I have given careful consideration to all the oral and written representations that I have received from the Council and individuals.

**41** I now turn to consider the legal framework relating to Members' Allowances, officers' remuneration and the payment of fees for returning officer duties.



**45** The Council was required as soon as practicable after 4 May 1995 to make a scheme for the payment of such allowances in respect of the period up to 1 April 1996 and for subsequent years and, specifically and exceptionally, that interim scheme was to have retrospective effect as from 4 May 1995, the date on which the Council came into existence: see Article 4(2) of the Local Government Reorganisation (Wales) (Transitional Provisions No. 2) Order 1995 ("the 1995 Order").

**46** By regulation 13 of the 1991 Regulations, a scheme was required to specify in respect of any year to which it related the **amount** of the entitlement by way of Basic Allowance; the **amount** of the entitlement by way of Special Responsibility Allowance and, where different amounts applied to different responsibilities, the **amount** applicable to each; and (where the scheme provided for such an allowance) the rates applicable to payments by way of Attendance Allowance.

**47** Regulation 8 of the 1991 Regulations provided that any scheme of Members' Allowances was required to provide each councillor with an identical payment by way of a Basic Allowance. By virtue of regulation 9 of the 1991 Regulations, a scheme could provide for payment of a Special Responsibility Allowance for councillors in certain categories who had special responsibilities in relation to the authority.

7 In Wales, these powers have been vested in the National Assembly for Wales with effect from 1 July 1999.

8 On 9 August 2002, the Local Authorities (Allowances for Members of County and County Borough Councils and National Park Authorities) (Wales) Regulations 2002

made by the National Assembly for Wales came into force. I refer below to changes brought about by those Regulations ("the 2002 Regulations").

## Members' Allowances

**42** Section 18 of the Local Government and Housing Act 1989 ("the 1989 Act") as amended provides the statutory framework for the payment of Members' Allowances. That section empowers the Secretary of State<sup>7</sup> to make regulations authorising or requiring relevant authorities (including the Council) to make a scheme providing for the payment of certain allowances including:

**a** a basic allowance for every Member of the Authority who is a Councillor;

**b** an attendance allowance in relation to the carrying out by any such Member of such

duties as may be specified in or determined under the regulations; and

**c** a special responsibility allowance for any such Member who has special responsibilities in relation to the Authority as may be so specified or determined.

**43** At all times relevant to this report, the relevant regulations were the Local Authorities (Members' Allowances) Regulations 1991 as amended ("the 1991 Regulations"). The 1991 Regulations continued to apply in Wales up to and including 8 August 2002<sup>8</sup>.

**44** Payments of Members' Allowances may only lawfully be made in accordance with a lawfully adopted scheme.

The scheme of Members' Allowances was required to specify the amount of each Special Responsibility Allowance, although the amount paid as a Special Responsibility Allowance could differ as between Members.

**48** A scheme could also provide, by virtue of regulation 10 of the 1991 Regulations, for the payment of an Attendance Allowance.

The amount of the Attendance Allowance paid was required to be specified in the scheme and although the amount might vary according to the time of day and duration of the duty in respect of which it was paid, the amount was required to be the same for all Members of the Authority entitled to the allowance in respect of a duty of any description at the same time of day and of the same duration.

**49** Under the 1991 Regulations, a scheme of Members' Allowances could be amended at any time but, in accordance with regulation 7 of the 1991 Regulations, a scheme could only be revoked with effect from the beginning of a financial year. Provision was made in regulation 7(2) of the 1991 Regulations for the apportionment of an allowance where an amendment to the scheme was made part way through a financial year.

**50** Neither the 1989 Act nor the 1991 Regulations made provision for increases in Members' Allowances to be effected by the operation of an automatic review mechanism.

**51** Neither the 1989 Act nor the 1991 Regulations made provision for the backdating of increases (or decreases) in Members' Allowances. However, as noted, the initial (interim) scheme of Members' Allowances made by the Council was required to have retrospective effect from 4 May 1995.

**52** Every local authority was required, by virtue of

regulation 26 of the 1991 Regulations, to keep and make available for public inspection a record specifying the name of the recipient of any payment under any scheme and the amount and nature of each payment.

**53** The 1991 Regulations conferred a discretion on local authorities as to the amounts they could specify by way of allowances in any scheme they made but that discretion was initially limited by certain prescribed maxima.

That limitation on their discretion was removed in 1995<sup>9</sup>. As a counterpart to that increased discretion, new additional requirements as to publicity were imposed to improve accountability. Until then, in addition to the record of payments required by regulation 26 to be kept and made available for public inspection and the right of interested persons (under what is now section 29(1) of the Public Audit (Wales) Act 2004) to inspect an authority's accounts and all books relating to them, members of the public had been entitled under Part VA of the Local Government Act 1972 to inspect the minutes (and any report and any listed background papers relating to any item on the agenda) of an authority or one of its committees or sub committees that may have related to decisions in respect of a scheme for Members' Allowances. Regulation 26A, inserted by the 1995 Regulations, imposed new duties requiring publication within an authority's area of certain matters. It provided that:

"26A. (1) Every authority shall, as soon as practicable after the making or amendment of any scheme made pursuant to these Regulations, make arrangements for its publication within the authority's area.

<sup>9</sup> By the Local Authorities (Members' Allowances) (Amendment) Regulations 1995.

(2) As soon as practicable after the end of a year to which a scheme relates, every authority shall make arrangements for the publication within the authority's area of the total sum paid by it in that year under the scheme to each member in respect of each of the following, namely, basic allowance, special responsibility allowances and attendance allowance".

**54** In summary, the Council was required to adopt and operate a scheme of Members' Allowances which specified the amount of allowances to be paid. An amended scheme could be introduced part way through a financial year. A new scheme could only take effect from the beginning of the next financial year. Save in relation to the interim

scheme (which was required to have effect from 4 May 1995), backdating was not allowed. The scheme and any amendment to the scheme had to be published in the Council's area, as did the sums paid to each Member.

### **Officers' remuneration**

**55** Local authority officers are employed under section 112 of the Local Government Act 1972 which section requires a local authority to appoint such officers as it thinks necessary for the proper discharge of its functions and obligations. Under that section officers are appointed on such reasonable terms and conditions, including conditions as to remuneration, as the appointing authority thinks fit.

**56** A local authority has no power to pay more for services rendered by one of its officers in accordance with his/her contract of employment than the authority has agreed in that contract<sup>10</sup>. A local authority has no power to vary the terms and conditions of an officer's employment so as to increase retrospectively the amount to which he/she was entitled in accordance with those terms and conditions<sup>11</sup>. In the absence of a specific power to do so, a local authority cannot give gratuities out of public money to its officers over and above their fixed salaries<sup>12</sup>.

### **Returning officer fees**

**57** The Council is required to appoint one of its officers to serve as the returning officer for elections to the Council and to community councils in their area. The Council may pay an inclusive salary to the officer appointed to serve as returning officer for those local elections.

**58** The Council is also required to appoint one of its officers to be registration officer for the purpose of the Representation of the People 1983 Act. That officer is not appointed as acting returning officer by the Council but discharges, as acting returning officer, the duties of the returning officer in Parliamentary elections and in European elections and may discharge the functions of a constituency and regional returning officer for the purpose of elections to the National Assembly of Wales. It is not a function of the Council to remunerate that officer for the discharge of his/her duties as (acting) returning officer. The Council is not empowered to pay an inclusive salary in respect of those duties. Such an officer is entitled to recover his/her fees in respect of services rendered in connection with such elections from the Secretary of State out of the Consolidated Fund or from the

10 Such contractual terms may include provision, for example, for amounts to be determined in accordance with national negotiations.

11 The position would be different in a case where an officer was asked to perform extra services on the understanding that as soon as the work was complete, the authority would determine the amount of his/her remuneration for that work.

12 Local authorities are empowered by regulations made under section 7 of the Superannuation Act 1972 to pay certain gratuities but those powers do not provide statutory authority for what the Council did.

National Assembly for Wales as the case may be. That officer is also entitled to a separate pension in respect of such duties but that pension is required to be calculated by reference to the number of years spent in discharging those functions and on his/her final remuneration in respect of those duties. (By contrast such an officer's pension in respect of his/her employment as a council employee is based on the whole of his/her service in local government and his/her final remuneration as a council employee; treating returning officer fees (other than in respect of local elections) as part of an officer's remuneration as a council employee is unlawful and would unlawfully lead to a higher lump sum and periodical pension payments.)

## Local government reorganisation in Wales

**59** This section of my report sets out the sequence of events starting with the reorganisation of local government in Wales, provision for which was made by the Local Government (Wales) Act 1994. The new arrangements came fully into operation on 1 April 1996.

**60** The reorganisation of local government in Wales involved the Council becoming responsible for the discharge of functions previously discharged by Cardiff City Council and, in relation to parts of its area, by South Glamorgan County Council, Mid Glamorgan County Council and Taff Ely Borough Council. Elections to the new Council were held on 4 May 1995. In the "transitional period" until 1 April 1996 the Council had a limited range of functions conferred on it by the 1995 Order. During the transitional period the Council's remit was to prepare for the assumption by it on 1 April 1996 of operational responsibility for the provision of local government services in its area. The Council did not have that responsibility prior to 1 April 1996; its functions during the transitional period included functions relating to Members' Allowances and the appointment of officers. Article 4(2) of the 1995 Order required "each new authority as

soon as practicable after 4 May 1995... to make a scheme for the payment of allowances in respect of the period up to 1 April 1996 and for subsequent years". By virtue of article 4(3) of the 1995 Order, the scheme made in accordance with that provision was to have retrospective effect from 4 May 1995.

**61** At a meeting of the Council held on 15 June 1995, the Chief Executive submitted a report referring to the need to adopt a scheme for the payment of Members' Allowances. At that meeting, the Council adopted a scheme of Members' allowances based on the scheme of Members' Allowances operated by South Glamorgan County Council prior to the reorganisation of local government in Wales and the Council decided that this interim scheme for Members' Allowances was to be implemented as from 4 May 1995 (as required by the 1995 Order): at the same meeting, the Council agreed the recommendation set out in the report of the Chief Executive to appoint an independent Commission, which I shall refer to as the "1995 Commission", to advise the Council on a scheme of Members' Allowances.

**62** In 1995, the Council was one of the first authorities to establish an Independent Commission to advise on its scheme of Members' Allowances. That approach was subsequently cited in 1997 as an example of 'best practice' in the Audit Commission's Management Paper 'Representing the People'. The Council adopted the same approach in appointing a further Independent Commission in 1999.

**63** Under the Council's interim scheme of Members' Allowances, a Basic Allowance of **£2,375** was payable to all Members and Special Responsibility Allowances were payable to leading Members who held specific posts. No Attendance Allowance was payable. The Leader and the Deputy Leader of the Council were entitled to receive annual Special Responsibility Allowances of **£7,675** and **£3,840** respectively; Chairs of major committees were entitled to receive **£2,900**; Deputy Chairs of major committees were entitled to receive **£1,410**; the majority party Chief Whip and Leader of the largest opposition party were entitled to receive **£1,964** and **£2,985** respectively.

**64** In the transitional period, the Council also had to appoint such staff as were required in order

that the Council would be able to assume its full responsibilities on 1 April 1996. On 18 May 1995, the Council established an Appointments Sub Committee to make the appointments of Chief Executive and Directors and to conclude contractual matters on behalf of the Council with the successful applicants. The Chief Executive was appointed with effect from 1 June 1995 and other individuals were appointed as Directors. In each case, the individual concerned remained employed by his/her existing employing authority and the Council undertook to pay in the transitional period an additional salary equal to 10% of the individual's salary with his/her existing employer to reflect his/her additional responsibilities in the transitional period. With effect from 1 April 1996, the individuals concerned were employed only by the Council at a specific amount per annum on a specified point on a salary scale. Subsequent progression through that salary scale was linked to satisfactory performance. In each case, the specified amount payable as from 1 April 1996 meant that the individual was "no worse off" (and in many cases was better off) in terms of salary than if he/she had remained in employment with his/her previous employing authority on 1 April 1996. In the case of the Chief Executive, this specified amount was also "inclusive of Returning Officer fees".

**65** On 10 and 11 October 1995, the Chief Executive and the Directors were asked by the Council to accept revised conditions of service. The main change sought in their contracts of employment was a reduction in the maximum number of days annual leave so as to accord with national conditions of service. The Chief Executive and Directors were also told that a commitment had been given to review the local conditions of service for all staff. This review, which was completed by 1998, dealt with matters such as annual leave but not with the salaries payable to these officers.

### **The Report of the 1995 Commission**

**66** The 1995 Commission was appointed to advise the Council on a scheme of Members' Allowances. The Commission was established through public advertisement, appointed against pre-determined criteria and comprised representatives from various backgrounds.

**67** The 1995 Commission considered alternative schemes in place at that time in Government, in 'quasi governmental bodies', police authorities and other local authorities as well as

the concept of 'notional time commitments'. It also focused on the additional responsibilities placed upon Members by virtue of Cardiff's Capital City status.

**68** The 1995 Commission considered the impact of the role of leading Members and concluded that "people should not be financially disadvantaged through representing their communities".

The 1995 Commission also considered that a wide range of people needed to be

encouraged to seek election to local government office and that any new scheme needed to recognise the special status of Cardiff as the Capital City of Wales.

**69** The 1995 Commission also took into consideration the levels of allowances recommended by the Consortium of Scottish Local Authorities (COSLA) and recommended that "the basic rates recommended by COSLA, as adopted by all Scottish unitary authorities, should apply. For Edinburgh, a city comparable to Cardiff with its role as regional capital and a population exceeding 150,000, the minimum basic allowance recommended by COSLA is £6,000 per annum and we therefore recommend this as the basic minimum payable to all Councillors".

**70** However, the 1995 Commission considered that "given that some part of the notional day commitment directly reflects attendance at committees.....a proportion of the allowance should be conditional, payable only for actual attendance at committees or other meetings called by the Chief Executive in consultation with the Leader of the Council". As a result, the 1995 Commission recommended a Basic Allowance of £5,200 per Member with an additional Attendance Allowance of £20 per meeting being payable up to a limit of £800 per Member per annum.

**71** The 1995 Commission also recommended that "additional Special Responsibility Allowances should be payable to holders of specific posts based on an assessment of the level of responsibility carried by that post. We [the 1995 Commission] have carefully considered the responsibilities of a number of posts and consider them to be comparable with those of the Scottish Regional Capital, Edinburgh".

**72** In January 1996, the 1995 Commission submitted its report to the Council. That report recommended (inter alia) specific amounts to be paid as: (i) a Basic Allowance of **£5,200** for each Councillor; (ii) an Attendance Allowance of **£20**



per meeting (subject to a maximum annual amount of **£800**); and (iii) an additional Special Responsibility Allowance should be payable to holders of specific posts.

**73** The proposed allowances for the Leader and Deputy Leader were **£17,800** and **£13,550** per annum respectively which in each case included a sum of **£800** representing the recommended maximum annual Attendance Allowance; the proposed Special Responsibility Allowance for the Chairs of Committees was **£10,000** per annum; the proposed Special Responsibility Allowance for Deputy Chairs of Committees was **£3,500** and the proposed Special Responsibility Allowances for the Leader of the largest opposition party and for the Chief Whip of the majority party were **£4,500** each. The Special Responsibility Allowances recommended by the 1995 Commission were determined by reference to the level of responsibility to be carried by each post; they were not based on or linked to the salary of any officer.

**74** Having established what, in the view of the 1995 Commission, was an appropriate scheme of Members' Allowances, it recommended an "automatic review mechanism which would relieve the Council of revisiting the issue of settling their own allowances in future years". The Commission recommended that increases in Special Responsibility Allowances should be linked to "an appropriate [salary] scale for example Chief Officer and Local Authority APT&C staff levels", that the Special Responsibility Allowances payable to the Leader and Deputy Leader of the Council should be linked to the salary scale of the Chief Executive, that the Special Responsibility

Allowances payable to Committee Chairs and Deputies should be linked to the salary scale of the "appropriate" Chief Officers and that Special Responsibility Allowances payable to other posts should be linked to the salary scale of "appropriate" Administrative, Professional, Technical and Clerical ("APT&C") staff. The 1995 Commission considered that this mechanism would provide an effective and independent annual review and prevent any criticism that Members were setting their own allowances.

**75** The use of salary scales (by reference to which the remuneration of individual officers may be calculated) is a common feature of the remuneration of officers in local government. Salary scales are revised each year with effect

from 1 July for Chief Executives and Chief Officers and from 1 April for APT&C staff. The Members of any one authority have no control over the national scales adopted. In my view, from the Report of the 1995 Commission it appears that the automatic review mechanism envisaged by the 1995 Commission was designed to uplift the level of Special Responsibility Allowances in future years (ie from 1997/1998 onwards) in line with the percentage increase of the linked salary scale representing the nationally determined annual "inflation increase" pay awards and not on the basis of incremental or other increases in the salary of the Chief Executive or other officers. Despite the Council providing me with a copy of a letter from the Chairman of the 1995 Commission, I have not changed my view of the effect of the recommendations contained in the report of the 1995 Commission.

**76** The levels of Members' responsibilities to which the 1995 Commission referred in its report, and on which its recommendations for Special Responsibility Allowances were based, were the levels of responsibility applicable from 1 April 1996, the date on which the Council assumed responsibility for discharging the full range of local authority functions in its area.

**77** On 7 February 1996, the Chief Executive (acting under emergency powers and on the recommendation of the Council's Policy Committee which met on 2 February 1996) decided on behalf of the Council that the recommendations of the 1995 Commission should be adopted with effect from 4 May 1995 and that the scheme of Members' Allowances contained in the 1995 Commission report should "replace" the interim scheme of Members' Allowances adopted by the Council on 15 June 1995.

**78** On 29 February 1996, the Council approved and adopted the proceedings of the Policy Committee of 2 February 1996 including its recommendation that the Chief Executive be requested to approve the recommendations contained in the Report of the 1995 Commission under emergency powers.

**79** Following the decision to replace the interim scheme with a new scheme and to backdate the effective date of that new scheme to 4 May 1995, "arrears" of increased allowances of **£219,112** were paid to Members in respect of the period 4 May 1995 to 7 February 1996. Furthermore, although the Council only had power to make a new scheme from 1 April

1996, increased allowance payments amounting to **£41,624** were paid to Members under the new scheme in respect of the period 8 February 1996 to 31 March 1996. The Council did not draw up a scheme of Members' Allowances and did not publish in its area its February 1996 "scheme" of Members' Allowances relied on by the Council to give effect to those retrospective and prospective increases in Members' Allowances.

### **Automatic review mechanism**

**80** At midnight on 31 March 1996, District Councils and former County Councils ceased to exist in Wales and, on 1 April 1996, responsibility for discharging the full range of local authority functions was vested in the Council. The Council continued to pay Members' Allowances in line with the "scheme" approved on 7 February 1996 under emergency powers.

**81** Although the 1995 Commission had proposed a mechanism for increasing Special Responsibility Allowances, the 1995 Commission did not specify a means of calculating any increase in Allowances. It was therefore impossible on the basis of the recommendations of the 1995 Commission for the Council to identify the relevant point on any salary scale by reference to which any increase in Special Responsibility Allowances might be calculated without a further decision being made by the Council as to what the relevant point on that scale should be. This fact was recognised by the Council's then Assistant Director (Members' Support)**13** in a briefing paper dated 29 April 1998 which stated that Council officers had considered "options for the linking of Members' Allowances to staff salaries in accordance with the recommendations of the 1995 Commission" and by the Council's then Solicitor**14**, in an e-mail dated 30 April 1998 to the Assistant Director (Members' Support), which advised that "...clear authority is needed before any payments can be made. This can be achieved by the Council taking a decision or (perhaps) by asking the Commission to meet again, review the system and then adopt its recommendations". No such decision was taken by or on behalf of the Council. The Commission was not asked to meet again. Nevertheless, increases in Members' Allowances were made purportedly pursuant to the automatic review mechanism recommended by the 1995 Commission.

**82** In the financial year 1996/1997, no increase in Members' Allowances was made under the automatic review mechanism. That was in accordance with the recommendations of the 1995 Commission which recommended the level of allowances to apply with effect from 1 April 1996. The first review date therefore was 1 April 1997. Some subsequent increases in Members' Allowances were nevertheless backdated to 1 April 1996.

**83** In August 1997, Basic Allowances, Attendance Allowances and Special Responsibility Allowances for the Chief Whip and the Opposition Leader were increased by 2.5% in line with the annual inflation increase for APT&C staff and in purported reliance on the automatic review mechanism with the increase backdated to 1 April 1997. Increases amounting to **£8,918** were paid to Members in the financial year 1997/1998. No decision to effect the increases was taken by or on behalf of the Council. Nor was any decision taken to amend the Council's 1996 "scheme" of Members' Allowances to provide for the making of the above increased payments.

**84** The Council did not publish in its area any amendment to its "scheme" of Members' Allowances required to give effect to those increases.

13 To avoid confusion, this officer is referred to in the remainder of this report by the designation which he held in April 1998 notwithstanding that his designation subsequently changed.

14 To avoid confusion, this officer is referred to in the remainder of this report by the designation which she held in April 1998 notwithstanding that her designation subsequently changed.

15 That statement was incorrect in that certain increases in Members' Allowances had been effected in August 1997 albeit without being authorised by or on behalf of the Council.

16 The Council had taken some 2½ years to address the recommendation of the 1995 Commission yet sought a reply from me by midday the following day because of

"a payroll deadline". The Council did however accept my request for a further period of time to respond.

**85** No consideration was given by the Council to increasing the level of Special Responsibility Allowances (other than those payable to the Chief Whip and Opposition Leader) until April 1998, some considerable time after local government reorganisation. On 9 July 1998, the Chief Executive wrote to me stating that the 1995 Commission had recommended that an automatic review mechanism be included in the scheme [of Members' Allowances] but that "this issue has, to date, not been addressed"**15**. The Chief Executive indicated that the Council had identified a "way forward" and he sought my comments by midday the following day as he was "under pressure to implement the scheme immediately, and [was] up against a payroll deadline of midday on Friday (10th July)"**16**.

As the Assistant Director (Members' Support) reported to the Chief Executive on 10 July 1998, I had "some difficulty" with the Council's proposals. In terms of quantum, I had no difficulty with Members' Allowances being increased by an inflation ("cost of living") increase but was concerned at a further proposal for "incremental additions".

**86** On 6 August 1998, the Assistant Director (Members' Support) sent a copy of revised proposals to the Council's Solicitor who approved a slightly revised paper. The revised proposals were: (i) to link the Special Responsibility Allowances payable to the Leader and Deputy Leader to the salary of the Chief Executive (not to the salary **scale** of the Chief Executive as recommended by the 1995 Commission and adopted by the Chief Executive on behalf of the Council in February 1996); (ii) to link the Special Responsibility Allowances payable to Committee Chairs and Deputies to "the salary of the highest paid Chief Officer as at the 1st April each year" (not to the salary **scale** of appropriate Chief Officers [Directors] as recommended by the 1995 Commission and adopted by the Chief Executive on behalf of the Council in February 1996); and (iii) that all other allowances "should rise in line with the Retail Price Index" (not be linked to the salary scale of appropriate APT&C staff as recommended by the 1995 Commission).

**87** My Audit Manager met with the Chief Executive and the Assistant Director (Members' Support) on 7 August 1998. At that meeting, my Audit Manager made clear that District Audit was not expressing, and was not in a position to express, a view as to the legality of the Council's proposals; he repeated the concerns that I had about the proposed link between allowances payable to the Leader, Deputy Leader, Committee Chairs and Deputy Committee Chairs and the salary of the Chief Executive or highest paid Director thereby providing a mechanism for increasing allowances payable to those Members over and above an inflation increase.

**88** Notwithstanding the views expressed by me and my Audit Manager, the Assistant Director (Members' Support) sent an e-mail to the Chief Executive on 10 August 1998 to "confirm that [he] will implement the pay award(s) for Members in accordance with the report that was tabled [attached]". The report accompanying that e-mail differed from that shown to my Audit Manager at the meeting on

7 August 1998 by including reference to backdating increases in allowances and to making payment of "arrears back to 1 April 1997 (the first review date agreed)" and by including reference to increasing Attendance

Allowances. The report also claimed that the above proposals had been discussed with District Audit and that "it was confirmed that this course of action was considered reasonable".

That is not correct although I had indicated that I considered inflation ("cost of living") increases to be reasonable, as had my Audit Manager on my behalf. I was not informed of the proposal to make retrospective increases in allowances in respect of previous years and/or of the proposal to make payment of "arrears" to Members.

**89** The said e-mail dated 10 August 1998 from the Assistant Director (Members' Support) to the Chief Executive included:

"These arrangements will be kept confidential, Members will be notified by a letter enclosed with their September payslips. Can you confirm that the attached draft is approved please".

**90** Final proposals on how the automatic review mechanism might operate were set out in a report submitted to the Chief Executive by the Assistant Director (Members' Support) on 28 August 1998 but not copied to District Audit. Those proposals restated the percentage link between allowances payable to the Leader and Deputy Leader and the salary of the Chief Executive and to the Committee Chairs and Deputy Committee Chairs and the salary of the highest paid Director by including the value of all allowances payable to those Members (not just Special Responsibility Allowances) in calculating that link. That had the effect, for example, of increasing the percentage link to the Chief Executive's salary from 25% to 32.4% in the case of the Leader of the Council and from 19% to 26.4% in the case of the Deputy Leader. That report by the Assistant Director (Members' Support) refers to the meetings with my Audit Manager held on 23 July 1998 and 7 August 1998 and claimed that "District Audit confirmed that this course of action was considered reasonable". No such confirmation was given. The Chief Executive states, however, that he was "satisfied that District Audit had been consulted, and believed there were no impediments to implementing the [automatic review mechanism] proposed".

**91** The proposals ["the August 1998 automatic review mechanism"] set out by the then

Assistant Director (Members' Support) were that: (i) with effect from 1 April 1997 the total allowances for the Leader and Deputy Leader of the Council should be respectively 32.4% and 26.4% of the salary of the Chief Executive; (ii) the total allowances for any Committee Chairs and Deputy Committee Chairs should, again with effect from 1 April 1997, be respectively 28.1% and 16.1% of the salary of the highest paid Director; and (iii) other allowances (Basic Allowances, Attendance Allowances and other Special Responsibility Allowances) should be increased in line with the Retail Price Index (in the case of Basic Allowances and other Special Responsibility Allowances with effect from 1 April 1997<sup>17</sup> and in the case of Attendance Allowances with effect from 1 August 1998).

**92** The decision to link certain Special Responsibility Allowances (including his own) as a direct percentage of the Chief Executive and highest paid Director's salaries stemmed from a request made by the Leader. Although the Leader denies making such a request, an e-mail dated 3 July 1998 from the Assistant Director (Members' Support) to the Council's Solicitor, copied to the Chief Executive, records that "the Leader has suggested that his allowance might have a more direct link to the Chief Executive's salary than we are proposing ...".

<sup>17</sup> Increases of those other allowances in line with the annual inflation increase for APT&C staff, with effect from 1 April 1997, had been effected in August 1997: see above.

**93** Backdated increases in Members' Allowances in accordance with the August 1998 automatic review mechanism were implemented in September 1998 on the basis of an instruction from the Chief Executive to proceed.

No authorised decision was taken by or on behalf of the Council to effect those increases. No decision was taken to amend the Council's 1996 "scheme" of Members' Allowances to give effect to the August 1998 automatic review mechanism and/or to provide for the increased payments of Members' Allowances effected in September 1998.

**94** The Council did not publish in its area any amendment to its "scheme" of Members' Allowances required to give effect to those increases.

**95** By a letter dated 8 September 1998, Members of the Council were informed that "Members Allowances have now been adjusted in accordance with the Commission's framework, which is linked to the increases that have been awarded to staff through the appropriate

National Agreements" and that "the revised allowances are reflected in the individual Members' September payments". In fact, the adjustments were not made in accordance with the recommendations of the 1995 Commission and, in the case of increases in Special Responsibility Allowances (other than those payments to the Chief Whip and the Opposition Leader), were not linked to increases awarded to staff through National Agreements.

**96** Increases of Members' Allowances were effected, backdated to 1 April 1997, and increased payments including "arrears" amounting to **£70,119** were made to Members as a result of the application of the August 1998 automatic review mechanism to annual pay awards in respect of the period 1 April 1998 to 31 March 1999 and to increments in respect of the period 1 April 1997 to 31 March 1999 despite the fact that no decision was taken by or on behalf of the Council so to do.

### **Increases in the remuneration of certain officers and further increases in Members' Allowances**

**97** On 6 May 1999, Council elections were held to elect councillors for the ensuing four years (subsequently extended to five years). Councillors elected in May 1995 (or at any subsequent by-election) were at the end of their term of office. However, on election day (6 May 1999) substantial retrospective increases in the salary of the Chief Executive and certain Directors were "agreed", as were consequential retrospective increases in Special Responsibility Allowances payable to certain Members purportedly pursuant to the August 1998 automatic review mechanism. Substantial payments of "arrears" were made to those officers and to all Members in receipt of Special Responsibility Allowances, except the Chief Whip and the Opposition Leader. Of the 67 Members of the Council 39 benefited financially.

**98** On 6 May 1999, the then Director of Personnel implemented a proposal (a) that the Chief Executive's salary should be increased with retrospective effect from 1 April 1996 to give effect to pay point assimilation and (b) that an amount should be paid to the Chief Executive equal to the returning officer fees for all elections and a Welsh Assembly referendum for the period to 1 April 1999 (less £3,000 per annum included in his salary in respect of such fees in those years) even though his fixed salary had been agreed to be inclusive of such fees. Also on 6 May 1999, the Chief Executive implemented a proposal that the salaries of the then Directors of



Finance, Education, Property and Personnel should be increased retrospectively with effect from 1 April 1996 to give effect to pay point assimilation in their cases.

**99** The increases for pay point assimilation were said to give effect to a principle that, where an officer carried out the same role in a predecessor authority and the relative seniority of that grade did not change in his employment with the Council, that officer should receive a salary that reflected the same point of the (different and higher) pay scale adopted by the Council as he would have reached with his predecessor authority on 1 April 1996 had it not been abolished.

**100** The Chief Executive and those Directors received payments totalling **£56,186** in respect of "arrears" of salary as a result of pay point assimilation. The Chief Executive received an additional payment of **£19,064** for "arrears" of remuneration in respect of returning officer fees.

**101** The payment of (unlawful) "arrears" of salary and (unlawful) "arrears" of remuneration in respect of returning officer fees was used to trigger (unlawful) "arrears" payments to those Members (other than the Chief Whip and the Opposition Leader) in receipt of Special Responsibility Allowances.

As a result, the following payments were made in respect of Members' Allowances following those increases in the salary/remuneration of officers and the payment of "arrears" of remuneration:

(a) **£119,971** to leading Members (including the Leader and Deputy Leader) as a result of the application of the August 1998 automatic review mechanism to the backdated increases in the remuneration of the Chief Executive and the highest paid Director in respect of pay point assimilation, (b) **£15,451** to the Leader and Deputy Leader as a result of the retrospective application of the August 1998 automatic review mechanism to the backdated increase in the remuneration of the Chief Executive in respect of returning officer fees. In addition, payments of **£5,793** in respect of Special Responsibility Allowances were also made in respect of the period from 1 April 1999 to 6 May 1999 as a result of the prior application of the August 1998 automatic review mechanism to annual pay awards and increments received by the Chief Executive and the highest paid Director in the period 1 April 1997 to 31 March 1999.

No authorised decision was taken by or on behalf of the Council to authorise any of those payments. No decision was taken to amend the

Council's 1996 "scheme" of Members' Allowances to provide for any of those payments.

**102** The Council did not publish in its area any amendment to its "scheme" of Members' Allowances required to give effect to those increases in Special Responsibility Allowances.

**103** On 8 July 1999, the Chief Executive, in the purported exercise of emergency powers,<sup>18</sup> decided that adjustments should be made to the salaries of Directors and others with effect from 1 January 1999 to give effect to a national pay review. At the same time, an increase was made to the salary of the Chief Executive with effect from 1 April 1998 to give effect to a national pay review. I have seen no authorisation for that increase.

**104** Those decisions led to the making of (unlawful) payments of a further **£17,330** "arrears" in Special Responsibility Allowances in consequence of the application of the August 1998 automatic review mechanism to those backdated increases in the remuneration of the Chief Executive and the highest paid Director as a result of national pay reviews. No authorised decision was taken by or on behalf of the Council to make those payments. No decision was taken to amend the Council's 1996 "scheme" of Members' Allowances to provide for any of those payments.

<sup>18</sup> The Council informs me that its use of emergency powers was part of "custom and practice" albeit the Council now recognises that it was not good practice.

**105** The Council did not publish in its area any amendment to its scheme of Members' Allowances required to give effect to those increases in Special Responsibility Allowances.

### **The 1999 Commission and further increases in Members' Allowances**

**106** The Government's White Paper, 'Local Voices, Modernising Local Government in Wales' (1998) referred to the need for councils nationally to review the ways in which they operated to meet the challenges of the 21st Century.

**107** In the summer of 1998, the then Secretary of State for Wales and Leader of the Welsh Local Government Association wrote to all Council Leaders in Wales encouraging them to commence the modernisation process and to introduce new political management systems in advance of legislation. The letter from the Secretary of State included a list of matters that councils should address themselves (ie matters on which there was no need for a collective approach). The impact of the new arrangements on Members' Allowances was included in this list.

**108** Within the White Paper were a number of suggestions for revising political structures intended to make local authorities' decision making processes more efficient, transparent and responsive to the needs of the electorate. In May 1999, the Council embraced the modernisation agenda and became one of the first authorities in Wales to introduce cabinet style local government. On 28 May 1999, the Council in Committee resolved to adopt a Leader and Cabinet model for its executive arrangements, which necessitated a review of the arrangements for the payment of Members' Allowances. The Council in Committee also resolved that:

**a** the current scheme of Members' Allowances "as recommended by the 1995 Commission" remains unchanged but that the designation of certain of the Members entitled to receive a Special Responsibility Allowance should be changed;

**b** a further Commission ("the 1999 Commission") should be appointed "to review the time commitment" of Members in receipt of Special Responsibility Allowances and whether it remained valid for the new arrangements;

**c** the Chief Executive was to make any consequential adjustments without further consultation with Members, backdating changes to the dates upon which the respective responsibilities were assumed; and

**d** until the Chief Executive acted on the report of the 1999 Commission, all Members should only receive the Basic Allowance and any Attendance Allowance.

**109** The terms of reference for the 1999 Commission invited it (inter alia) to review the time commitment of Members under the revised Council structure and to recommend any consequent amendments to the specified scheme of Members' Allowances for implementation. The 1999 Commission, however, had no authority to change the current notional daily rate of allowances. The terms of reference given to the 1999 Commission by the Chief Executive did not correspond to the resolution by the Council in Committee on 28 May 1999. The review which the Chief Executive asked the 1999 Commission to undertake was not limited to the time commitment of Members in receipt of Special Responsibility Allowances.

**110** The 1999 Commission identified a real time commitment to undertake the duties attached to being a Member and holding certain posts reflected in a statement of responsibilities. The 1999 Commission, however, did not recommend what allowances should be paid, given those time commitments. It did recommend that there should be a review mechanism whereby the Special Responsibility Allowances for certain Members should be linked to the salary of certain officers (without specifying how they should be linked) and that Basic Allowances should be linked to the annual increase in APT&C staff salaries (again without specifying how they should be linked). The 1999 Commission, however, proceeded on the mistaken assumption that the 1995 Commission had recommended a link to actual salaries whereas the recommended link had been to an appropriate scale and for increases only.

**111** Following receipt of an advance copy of the report of the 1999 Commission on or about 15 December 1999, the Chief Executive purported to decide, on 16 December 1999, that additional and different payments by way of Members' Allowances should be made, backdated to May 1999. The increased payments to the Leader and Deputy Leader were backdated to 7 May 1999 before they were re-appointed to those positions following the local elections on 6 May 1999. The Leader responds to this unlawful procedure by explaining that the Majority Party Group met on 7 May 1999 and that he and the Deputy Leader assumed their position "by convention" following that meeting. No document recording or containing the Chief Executive's decision exists, merely an e-mail sent to the Assistant Director (Members' Support) at 10.34 pm on 16 December 1999. That e-mail (which was copied to the Leader of the Council) stated:  
"Members Allowances – Draft  
If possible allowances will be paid (backdated as appropriate to May) next week. You can process on Monday – payslips to arrive with Members Thursday.

...A letter to explain the payments as per our Press Release could be faxed to Members on Tuesday evening.

Can you let me check the draft Press Release of payments and the calculations asap".

**112** The Chief Executive decided in December 1999 (without any delegated authority to do so) that Members of the Council should be paid an increased annual amount of Basic Allowance

**(£6,845)** but no Attendance Allowance and further decided the total (increased) allowances payable each year to certain Members who would receive Special Responsibility Allowances. The total (increased) allowances appear to have been calculated by expressing the weekly real time commitment identified by the 1999 Commission as a percentage of a five day working week, and then applying that percentage to the actual salary of a specific officer. The total (increased) annual allowance payable to the Leader was **£58,500**; that for the Deputy Leader was **£38,610**; that for the Executive Members/Chairs was **£22,950** and that for Deputy Chairs was **£14,897**. The Chief Executive also purported to decide that increased payments in respect of these new amounts of allowances should be made backdated to May 1999. No authorised decision was taken by or on behalf of the Council to effect those increased allowances or to make those backdated payments.

**113** No new scheme of Members' Allowances or amended scheme or amendments to the existing scheme of Members' Allowances

required to authorise such payments was drawn up by the Council and/or published by the Council in its area.

**114** Payments (unlawful) of Special Responsibility Allowances and Basic Allowances totalling **£366,063** were made to Members as a result of backdating the implementation of the 1999 "scheme" to 7 May 1999 in the case of the Leader and Deputy Leader and to 28 May 1999 in the case of other Members. Further (unlawful) payments to Members amounting to **£153,431** were made as a result of the premature implementation of the 1999 "scheme" in respect of the period between 1 January 2000 and 31 March 2000.

**115** In consequence of the Chief Executive's decision on 16 December 1999 and, as a result of the implementation of the 1999 "scheme" of Members' Allowances, (unlawful) payments amounting to **£831,098** were made by the Council in respect of Members' Allowances in the financial year 2000/2001. Further (unlawful) payments amounting to **£629,242** were made in respect of the period 1 April 2001 to 31 October 2001. These payments included increases in Members' Allowances effected by the application of an automatic review mechanism in 2000/2001 and 2001/2002 but were less than they otherwise would have been as,

following discussions with the National Assembly for Wales, a voluntary limit was placed on the actual payments made in respect of Allowances. The National Assembly for Wales indicated that it would impose a "cap" if Council Members' did not agree to do so voluntarily. The difference between the sums paid by way of Allowances in accordance with the voluntary limit and the level at which they would otherwise have been paid under the 1999 "scheme" had that limit not applied was paid into a "reserve".

**116** The sum of **£238,494** said to be due to Members in respect of Allowances above the voluntary cap was paid into the reserve in 2000/2001 and **£56,400** was paid into that reserve in respect of the period 1 April 2001 to 31 October 2001. The total amount paid into the reserve therefore was **£294,894**. The position of the Council in relation to those Allowances was that those amounts were "due in law to those Members who have requested them to be held in reserve and they are entitled to call to have them paid at any time". As a result of the section 17 proceedings those sums may not lawfully be paid to Members.

**117** In July 2001, the National Assembly for Wales published its report on Members' Allowances "Recognising Councillor's Worth to their Communities". This report (known as "the Hall report") proposed an all-Wales framework for Members' Allowances and suggested annual allowances for each of the 22 Welsh authorities.

**118** On 25 October 2001, the Committee of the Council considered and adopted a Cabinet Proposal setting out proposals to "adjust" the Council's scheme "to broadly reflect the levels set out in the Hall Report" with effect from 1 April 2001.

## Introduction

**119** In this section of my report, I consider the legality of actions taken by the Council and of expenditure incurred by the Council.

**120** As a statutory corporation, the Council may only do that which it is required or authorised by legislation to do. The legal framework relating to Members' Allowances (as it was in the period May 1995 to October 2001), officers' remuneration and fees for returning officer

duties is set out above. Such powers as were conferred on the Council had to be exercised reasonably, in accordance with public law principles.

### Members' Allowances

The legality of an automatic review mechanism

**121** The Council was empowered to pay Basic, Attendance and Special Responsibility Allowances to Members in accordance with a scheme made by the Council which complied with regulations made pursuant to section 18 of the 1989 Act.

**122** The 1991 Regulations required that any scheme had to "specify" in respect of any year to which it related "the amount of the entitlement by way of" Basic and Special Responsibility Allowances for which it provided and that "the amount of the attendance allowance shall be specified in the scheme".

**123** It was not sufficient if the scheme had provided a means by which the amount of the entitlement could have been ascertained or if it had contained a formula by reference to which the amount can be calculated. To comply with the relevant requirements the scheme had explicitly to state what the relevant amounts were.

**124** That approach promoted transparency and ensured that a proper review was conducted of the appropriateness of any new amounts to which a Member might become entitled. Stating the relevant amounts makes the amount of the entitlement for the year clear and readily understandable by the public. A formula by contrast may be framed by reference to a fact (such as, in the case of the August 1998 automatic review mechanism, the salary of a particular officer), information about which may not be published by a local authority in its area or readily obtainable. Moreover, stating the relevant amounts themselves in any scheme and requiring them to be amended also required the Authority to address specifically the justification for any variation in the amount to be paid in respect of any year.

**125** In Wales, since August 2002, a scheme may now specify "the amount or a means to ascertain the amount" of Basic and Special Responsibility Allowances and it may make provision "for an annual adjustment of allowances by reference to such index as may be specified by the authority" to take account

of inflation: see Regulation 12(1) and (2) of the Local Authorities (Allowances for Members of

County and County Borough Councils and National Park Authorities) (Wales) Regulations 2002 ("the 2002 Regulations"). The Council, in its representations to me, draws attention to this change of the law. The Leader even asserts that "key elements of the Cardiff approach to Members' Allowances (for example the automatic review mechanism) now form central pillars of the national framework".

I do not agree. The 2002 Regulations do not make provision for what the Council did in linking increases in Special Responsibility Allowances to the remuneration of the Chief Executive and the highest paid Director. Nor do the 2002 Regulations make provision for backdating increases in allowances to previous financial years (which is what the Council did). The use of an automatic review mechanism by the Council

**126** The 1995 and 1999 Commissions recommended that the Council include in its scheme of Members' Allowances an automatic review mechanism which, according to the 1995 Commission, would "relieve the Council of the task of revisiting the issue of settling their own allowances in future years".

**127** As indicated above, the use of an automatic review mechanism was inconsistent with the 1991 Regulations and was not authorised by the 1991 Regulations or otherwise. Although the "scheme" adopted by the Chief Executive, on behalf of the Council, in February 1996 incorporated the amounts of the allowances recommended by the 1995 Commission, the 1995 Commission did not recommend relevant amounts for financial years later than 1996/1997. Thus, the Council's 1996 "scheme" specified relevant amounts for the financial year 1996/1997 but not the (increased) amounts for subsequent financial years which were implemented without any such mechanism even being purported to be authorised by or on behalf of the Council (indeed sums in excess of those specified were paid as a result of the backdated application of the August 1998 automatic review mechanism). Sums in excess of those specified were even paid in August 1997 as a result of the operation of an automatic review mechanism.

**128** The Council's apparent intention in adopting an automatic review mechanism was to relieve the Council of "revisiting the issue of settling their



own allowances in future years". The intention of the 1991 Regulations, however, was to make local authorities accountable for their own decisions on the amounts of allowances specified by them and paid to relevant Members. This is also apparent from Regulation 26A (which makes provision for publicising in an authority's area the making or amendment of a scheme of allowances and the total sum paid each year to each Member under that scheme in respect of Basic Allowance, Special Responsibility Allowance and Attendance Allowance).

**129** In consenting to the declarations of unlawfulness that I sought in my application to the Court under section 17 of the 1998 Act, the Council accepted that there was no statutory authority which empowered it to operate an automatic review mechanism to effect increases in allowances payable to Members.

**130** Increases in allowances paid pursuant to the mechanism for automatic review were therefore unlawful and give rise to items of account in the Council's accounts which are "contrary to law". In December 2004, the Council accepted that to be the case. With the consent of the Council, the Court has now made a declaration to that effect.

#### The backdating of increases in payments of Members' Allowances

**131** At all times relevant to this report, the Council had no power to make retrospective (backdated) increases in Members' Allowances. It nevertheless made backdated increases of Members' Allowances (in respect of three financial years in some cases) and made substantial payments of alleged "arrears" (without complying with the publicity requirement of Regulation 26A(1) of the 1991 Regulations).

**132** At all relevant times there was no statutory authority to backdate a change in the amount of an allowance so that it has effect from a date which is either (a) earlier in the financial year in which any change is made; or (b) in an earlier financial year. The 1991 Regulations did not authorise the making of any changes which have such an effect. Article 4(3) of the Local Government Reorganisation (Wales) (Transitional Provisions No 2) Order 1995 required limited backdating of the interim scheme made by the Council so that such a scheme of allowances made after 4 May 1995

would have effect from that date.

However, apart from that (spent) transitional provision there was, at the relevant time, no statutory provision authorising the backdating of increases in Members' Allowances<sup>19</sup>.

**133** The Council acted unlawfully in backdating increases in allowances payable to Members and in making payments of "arrears" to Members in the absence of statutory authority providing for such payments to be made.

**134** The consequence of that backdating is that taxpayers in later financial years have borne the costs of increases in Special Responsibility Allowances paid by the Council which are referable to earlier financial years, in breach of the principle that local government finance is to be conducted on an annual basis. That expenditure did not benefit local taxpayers in earlier years and there is no lawful basis for making later taxpayers subject to compulsory taxation to meet that unlawful expenditure.

**135** Payments of "arrears" representing backdated increases in allowances made to Members in the financial year 1999/2000 were therefore unlawful and those payments give rise to items of account which are "contrary to law". In December 2004, the Council accepted that to be the case. With the consent of the Council, the Court has now made a declaration to that effect.

The legality of expenditure incurred by the Council

Items of account not covered by the Settlement Agreement and Court Order

**136** The settlement agreement relates only to those items of account challenged in the section 17 proceedings and does not relate to items of account in any financial year before 1999/2000. However, by parity of reasoning, items of account in the financial years 1995/1996 to 1998/1999 are, in my view, "contrary to law".

**137** The interim scheme of Members' Allowances adopted by the Council on 15 June 1995 with

<sup>19</sup> The 1995 Order required that the interim scheme adopted by the Council have effect from 4 May 1995. Regulation 6(2) of the 2002 Regulations now makes limited provision for the backdating of an amendment to a scheme to apply with effect from the beginning of the financial year in which the amendment is made. The Council, in its representations to me, draws attention to this change in the law. However, the 2002 Regulations do not make provision for backdating to previous financial years (which was what the Council did).

effect from 4 May 1995 was lawful and expenditure on Members' Allowances incurred pursuant to that scheme was lawful.

**138** On 7 February 1996, the Chief Executive (acting under emergency powers and on the

recommendation of the Council's Policy Committee which met on 2 February 1996) decided on behalf of the Council that the recommendations of the 1995 Commission should be adopted with effect from 4 May 1995 and that the scheme of Members' Allowances contained in the 1995 Commission report should "replace" the interim scheme of Members' Allowances adopted by the Council on 15 June 1995. It is not apparent that there was any urgency justifying the use of emergency powers pursuant to the Council's Standing Order 39.

**139** The Council contends that my view does not reflect the context of the use of such powers in local government at that time and does not fully reflect the actual criteria as set out in the Council's Standing Order 39 which provides that the Chief Executive:

".....is authorised to act for the County Council in respect of any matter which, in his opinion:

- i. requires immediate attention; and
- ii. does not justify holding a special meeting of the body which would ordinarily consider the matter, or is of such urgency as not to allow time for such a meeting ...".

**140** The purported justification given for the use of emergency powers was "payment of outstanding balances to members". I do not accept that as a reason for urgency. Nor do I accept that there was a risk of Members suffering personal financial hardship as the Council contended in the section 17 proceedings. Of the 67 Members elected to the Council 50 were concurrently serving as elected Members of predecessor authorities. During the transitional period, those 50 Members continued to receive the allowances to which they were entitled under schemes adopted by those authorities. The 17 new Members of the Council had no such pre-existing entitlement. But the Council had adopted an interim scheme for the transitional period based on the full amounts payable under the scheme of Members' Allowances operated by South Glamorgan County Council. Thus during the transitional period the 17 new Members received allowances under the Council's interim scheme whilst 50 Members in fact received full allowances under two schemes. In my view, there was no risk of Members' suffering personal financial hardship such as to give rise to justification for the use of emergency powers.

**141** I have nevertheless taken the February 1996 "scheme" amounts to be amounts which the

Council could lawfully have paid by way of Members' Allowances in 1996/1997 and subsequent financial years. I have also assumed in favour of the Council that the Council drew up a "scheme" of Members Allowances notwithstanding that there is no evidence that it did so. But for these assumptions, all expenditure by the Council on Members' Allowances in the period to 31 October 2001 would be unauthorised and unlawful save for that authorised by the interim June 1995 scheme of Members' Allowances.

**142** The levels of Members' responsibilities to which the 1995 Commission referred in its report, and on which its recommendations for Special Responsibility Allowances were based, were the levels of responsibility applicable from 1 April 1996, the date on which the Council assumed responsibility for discharging the full range of local authority functions in its area.

That is apparent from the section of the report of the 1995 Commission headed "The Commission's Approach: Assessing Levels of Responsibility" which states: "We [The Commission] had, by now, agreed that our proposals should be based on the different levels of responsibility which were accepted by individual Councillors **and our next task was to assess the nature of their various roles, and the level of responsibility, which they would be taking on in the new unitary authority**" (emphasis added). Nevertheless, the increased allowances were backdated to 4 May 1995 and applied throughout the transitional period when the Council did not have that responsibility.

**143** The Council argues that the "scheme" introduced as a result of the 1995 Commission's recommendations was not a new scheme but merely an amendment to the interim scheme based on the South Glamorgan County Council Scheme. I am not persuaded by this argument. The levels of allowances recommended by the 1995 Commission were based on the responsibilities that Councillors would be taking on in the new authority that assumed the full range of local authority functions in its area on 1 April 1996.

**144** The Council has also argued that in this case the backdating was authorised by the 1995 Order. I am advised, and am of the view, that the power to backdate to 4 May 1995, provided by the 1995 Order, was spent when the interim scheme was backdated to 4 May 1995 as it could only be used once.

**145** The Council incurred unlawful (and unreasonable) expenditure of **£219,112** as a result of backdating the implementation of the February 1996 "scheme" of Members' Allowances to 4 May 1995 and unlawful expenditure of **£41,624** as a result of the premature implementation of the February 1996 "scheme" in respect of the period 8 February 1996 to 31 March 1996. The February 1996 "scheme" was a new scheme which replaced the interim scheme (the latter applied until the Council assumed its full operational responsibilities) and therefore, to comply with the 1991 Regulations, the February 1996 "scheme" could not have effect until 1 April 1996.

**146** In August 1997, payments of Basic Allowances and Attendance Allowances and Special Responsibility Allowances for the Chief Whip and the Opposition Leader were increased by 2.5% with the increase backdated to 1 April 1997. The Chief Executive disputes the reference to backdating. He says that what happened was "merely late payment of increases". That is sophistry. The Chief Executive also claims that authority to effect those increases was given by the Policy Committee on 2 February 1996 and by the Council on 29 February 1996. That is not the case. In any event, the Council accepted in the Settlement Agreement that the 1991 Regulations "did not authorise [the Council] to make amendments to allowances payable to Members so as to have retrospective effect or by the use of an automatic review mechanism".

**147** In consequence, the Council incurred increased expenditure amounting to **£8,918** in respect of the period 1 April 1997 to 31 March 1998. That increased expenditure was unlawful as the increases in Members' Allowances were made by the application of an unlawful automatic review mechanism and were in part backdated. These increased payments were unlawful on the further ground that there was no decision by or on behalf of the Council to make those increased payments; they were purportedly authorised by the Assistant Director (Members' Support) apparently with the agreement of the Chief Executive. Neither had delegated authority to authorise the making of those increased payments.

**148** In August 1998, the Chief Executive approved the August 1998 automatic review mechanism although there is no written decision to that effect. Increased payments of Members' Allowances in accordance with that

mechanism were implemented in September 1998 with the increase backdated to 1 April 1997<sup>20</sup>. In consequence, the Council incurred increased expenditure amounting to **£70,119** as a result of the application of the August 1998 automatic review mechanism to annual pay awards in respect of the period 1 April 1998 to 31 March 1999 and to increments in respect of the period 1 April 1997 to 31 March 1999. That increased expenditure was unlawful as the increases in Members' Allowances were made by the application of an unlawful automatic review mechanism and were in part backdated. These increased payments were unlawful on the further ground that there was no authorised decision by or on behalf of the Council to make these increased payments. Unlawful increases in Members' Allowances covered by the Settlement Agreement and Court Order

**149** The audit of the Council's accounts for the financial years 1999/2000, 2000/2001 and 2001/2002 remained open. In December 2004, the Council accepted that the items of account that were the subject of the section 17 proceedings were "contrary to law" and, with the consent of the Council, the Court made a declaration to that effect. Details of those items of account are set out below:

1999/2000  
(1 April to  
6 May 1999)

**£5,793** Increases in Special Responsibility Allowances (other than those payable to the Chief Whip and Opposition Leader) arising from the application of the August 1998 automatic review mechanism to annual pay awards and increments in the period 1 April 1997 to 31 March 1999.

The use of an automatic review mechanism was unlawful and the Council failed to comply with the procedural requirements of the 1991 Regulations.

1999/2000 **£119,971** Increases in Special Responsibility Allowances (other than those payable to the Chief Whip and Opposition Leader) arising from the retrospective application of the August 1998 automatic review mechanism to increases in the remuneration of the Chief Executive and the highest paid Director backdated to 1 April 1996.

The use of an automatic review mechanism was unlawful as was backdating increases in Members' Allowances.

1999/2000 **£15,451** Increases in Special Responsibility Allowances payable to the Leader and Deputy Leader arising from the retrospective application of the August 1998 automatic review mechanism to increases in the remuneration of the Chief Executive in relation to returning officer duties backdated to 1 April 1996.

The use of an automatic review mechanism was unlawful as was backdating increases in Members'

## Allowances.

20 1 August 1998 in the case of Attendance Allowances.

21 For a number of these items of accounts there are further grounds of unlawfulness which were not conceded by the Council in the Settlement Agreement. These grounds (increases effected without delegated or other authority, increases in Special Responsibility Allowances based on unlawful increases in officers' remuneration, unreasonableness and unlawful participation in the decision making process) are dealt with in the section of this report on Governance.

1999/2000 **£17,330** Increases in Special Responsibility Allowances (other than those payable to the Chief Whip and Opposition Leader) arising from the retrospective application of the August 1998 automatic review mechanism to increases in the remuneration of the Chief Executive and the highest paid Director in relation to National Pay Reviews backdated to 1 January 1998 and 1 January 1999 respectively.

The use of an automatic review mechanism was unlawful as was backdating increases in Members' Allowances.

1999/2000

(May to December 1999)

**£366,063** Members' Allowances paid arising from the backdated implementation of the 1999 "scheme" to May 1999.

Backdating increases in Members' Allowances was unlawful.

1999/2000

(January to March 2000)

**£153,431** Members' Allowances paid arising from the implementation of the 1999 "scheme".

Implemented without satisfying the requirements of the 1991 Regulations.

2000/2001 **£831,098** Members' Allowances paid arising from the implementation of the 1999 "scheme".

Implemented without satisfying the requirements of the 1991 Regulations and (in part) because increases were made by the use of an automatic review mechanism (and that was unlawful).

2000/2001 **£238,494** Members' Allowances above the voluntary cap paid into a "reserve" arising from the implementation of the 1999 "scheme".

Implemented without satisfying the requirements of the 1991 Regulations and (in part) because increases were made by the use of an automatic review mechanism (and that was unlawful).

2001/2002

(April to October 2001)

**£629,242** Members' Allowances paid arising from the implementation of the 1999 "scheme".

Implemented without satisfying the requirements of the 1991 Regulations and (in part) because increases were made by the use of an automatic review mechanism (and that was unlawful).

2001/2002

(April to October 2001)

**£56,400** Members Allowances above the voluntary cap paid into a "reserve" arising from the implementation of the 1999 "scheme".

Implemented without satisfying the requirements of the 1991 Regulations and (in part) because increases were made by the use of an automatic review mechanism (and that was unlawful).

## Unlawful Increases in officers' remuneration covered by the Settlement Agreement and Court Order

**150** Officers of a local authority are appointed on such terms and conditions as the appointing authority thinks fit. An authority can only pay its officers in accordance with their contracts of

employment and has no power to vary the terms and conditions of an officer's employment so as to retrospectively increase the amounts payable. Nor can an authority give gratuities to its officers over and above their fixed salaries (without specific power to do so). However, this is what the Council did by awarding retrospective increases in remuneration to the Chief Executive and certain Directors.

**151** It appears that, following local government reorganisation, a number of senior officers employed by the Council had expressed concerns that the adoption of National Conditions of Service and, in particular, changes to their annual leave entitlement following reorganisation had left them financially "worse off". That concern was dealt with by a process which the Council describes as pay point assimilation.

**152** The Council's position on pay point assimilation in the section 17 proceedings (which argument the Council ran for the first time in 2004) was that it was obliged to implement pay point assimilation in consequence of an alleged variation, effected in October 1995, to the contracts of employment of the Chief Executive and Directors of the Council which variation required the Council to review officers' salaries and local conditions of service so as to ensure that from 1 April 1996 "no officer would be in a position which overall was less favourable than that which they had enjoyed in their previous employment".

**153** Despite the "new" case that the Council put forward, it was not under any contractual obligation to give effect to pay point assimilation or to ensure that any officer was "no worse off" after pay point assimilation or on any other basis. There is no contemporaneous documentation which provides support for any such alleged contractual obligation. The Council was not under any contractual obligation to give effect to pay point assimilation but nevertheless made payments of "arrears" amounting to **£56,186** to the Chief Executive and four Directors.

**154** The Council appointed the Chief Executive as the registration officer for the purposes of the Representation of the People Act 1983. As such he discharged, as acting returning officer, the duties of the returning officer in Parliamentary elections and in European elections and the functions of a constituency



and regional returning officer for the elections to the National Assembly of Wales. The Chief Executive was entitled to recover his fees for those services from the Secretary of State out of the Consolidated Fund or from the National Assembly for Wales as the case may be. The Council had no power to pay him an inclusive salary in respect of returning officer duties other than for local (ie Council) elections.

**155** The payment of "arrears" of **£19,064** made to the Chief Executive in respect of returning officer duties relating to the period 1 April 1996 to 31 March 1999 was unlawful as the "arrears" were paid in respect of (non local) elections for which the Council had no power to pay the Chief Executive in respect of his duties as a returning officer.

**156** In December 2004, the Council accepted that the items of account that were the subject of the section 17 proceedings were "contrary to law" as having been paid by the Council under a mistaken understanding of the law. With the consent of the Council, the Court made a declaration to that effect. Details of those items of account are set out on page 41.

#### Summary of unlawful expenditure

**157** With the consent of the Council, the Court has declared that:

**a** items of account recording expenditure on Members' Allowances amounting to **£2,433,273** in the period 1 April 1999 to 31 October 2001 are "contrary to law"; and

**b** items of account recording expenditure on officers' remuneration (in respect of pay point assimilation and returning officer fees) amounting to **£75,250** in the financial year 1999/2000 are "contrary to law".

**158** In my view, in the financial years 1995/1996, 1996/1997, 1997/1998 and 1998/1999, the Council incurred additional unlawful expenditure amounting to **£339,773** in respect of Members' Allowances. In total, therefore, the Council incurred unlawful expenditure amounting to **£2,773,046** in respect of Members' Allowances.

1999/2000 **£56,186** Increases in remuneration of Chief Executive and four Directors as a result of the backdated application of pay point assimilation to 1 April 1996.

Paid under a mistake of law, namely that the Council was contractually bound to make the payments (when it was under no such obligation).<sup>22</sup>

1999/2000 **£19,064** Payment of "arrears" of remuneration to the Chief

Executive (backdated to 1 April 1996) in respect of returning officer duties.  
Paid under a mistake of law namely that they should not have been paid as part of the Chief Executive's remuneration.<sup>23</sup>

<sup>22</sup> These payments were also unlawful as offending the rule against retrospective increases in remuneration, because they were effected without delegated or other authority and because of unlawful participation in the decision making process. These further grounds are dealt with in the section of this report on Governance.

<sup>23</sup> These payments were also unlawful on further grounds because they were made without statutory authority, because they offended the rule against retrospective remuneration, because they were effected without delegated or other authority and because of unlawful participation in the decision making process. These grounds are dealt with in the section of this report on Governance.

## Introduction

**159** In this section of the report, I consider a range of governance issues relating to the way in which increases in Members' Allowances and increases in the salaries of the Chief Executive and certain Directors were dealt with. I do so under the following headings:

### Members' Allowances

- \_ Reasonableness and equity of treatment
- \_ Transparency
- \_ Authorisation
- \_ Compliance with statutory duty

### Officers' salaries

- \_ Decision making
- \_ Authorisation
- \_ Reporting to Members
- \_ Participation in the decision-making process

### Members' Allowances

Reasonableness and equity of treatment

**160** Whilst the 1995 Commission specifically recommended the introduction of an automatic review mechanism which linked increases in allowances paid to an appropriate salary scale, there was nothing in the report of the 1995 Commission to suggest how that mechanism should operate.

**161** In view of the lack of guidance provided by the 1995 Commission, the Chief Executive, having received advice from relevant officers, interpreted the recommendation and the manner of its application.

**162** In authorising the implementation of an automatic review mechanism, the Chief Executive took the view that its operation should reflect a number of key factors which he states that the 1995 Commission had used to set the level of Special Responsibility Allowances. These key factors included the comparative roles and responsibilities of different Members, the preservation of differentials and the notional day concept established by the

Association of County Councils.

**163** The 1995 Commission recommended that future increases in Members' Allowances should be linked to an appropriate salary **scale** and recommended links to various staff levels, for example Chief Officer and local authority APT&C staff levels. The August 1998 automatic review mechanism implemented by the Council was not in accordance with those recommendations since in the case of the Leader, Deputy Leader, Committee Chairs and Deputy Committee Chairs, it expressed the 1995 Commission's recommended levels of Members' Allowances as a percentage of the **actual** salary as at 1 April 1996 of the linked officer (as the salary then was). This meant the more that was paid to the relevant officer, the more the linked Member would receive by way of Special

Responsibility Allowance so that if the salary of a linked officer increased, whether as a result of additional responsibilities assumed by that officer or otherwise, the Special Responsibility Allowance payable to the linked Member increased even if that Member did not assume any additional responsibilities.

**164** The Council's position is "that the automatic review mechanism, based on a proportional link to the appropriate officer salaries, was a simple, transparent and reasonable application of the automatic review recommendations of the independent [1995] Commission Report. The link to the point of the actual salary within the salary scale of the appropriate officer ensured that the link was simply and directly effected. The proportional link was made to the overall Members' Allowances set by the [1995] Commission Report.....rather than separating out the component parts and applying different reviews, as to have done so would have detracted from the simplicity and transparency of the link." I do not agree that the automatic review mechanism implemented by the Council was in accordance with the recommendations of the 1995 Commission; nor was that automatic review mechanism simple, transparent or reasonable. In my view, the combining of the different allowances complicated the process and was inconsistent with the requirement that the Basic Allowance had to remain the same for all members. In consequence, the increases effected by the proportional link had to be split and, as a result, the Special Responsibility Allowances increased by a higher percentage than the appropriate officer's salary increase. In

addition, the above argument for the proportional link was not consistently applied as it was not applied to the Special Responsibility Allowances payable to the Chief Whip and the Opposition Leader.

**165** The Council also argues that “the application of inflationary increases only, as advocated by the District Auditor, would not have correctly reflected the [1995] Commission’s recommendations, as this would have taken no account of national reviews of officers salaries .....and would have therefore distorted the linkages recommended by the [1995] Commission between Members and the related officer salaries.” In my view, the only link between Members’ Allowances and officer’s salaries proposed by the 1995 Commission was in respect of the rate at which the Special Responsibility Allowances were to be increased. The Special Responsibility Allowances recommended by the 1995 Commission were not a proportion of any officer’s salary. Furthermore, if the 1995 Commission had intended the links to take account of national reviews of officer’s salaries (and of incremental increases) this principle should have been applied in determining increases in Special Responsibility Allowances payable to the Chief Whip and Opposition Leader. It was not so applied thereby distorting the relationship between Special Responsibility Allowances payable to those two Members and other Members in receipt of Special Responsibility Allowances.

**166** The unreasonableness of the Council's approach is exemplified by the fact that, in 1999, Special Responsibility Allowances payable to certain Members were increased and "arrears" of **£119,971** were paid to those Members as a result of pay point assimilation, even though Members' responsibilities remained the same. In addition, had the increase in the salaries of officers with effect from 1 April 1996 represented a "correction" of a previous error, as the Council contended but which I do not accept, that should have had no impact on the level of Members' Allowances whatsoever and allowances would have remained at the levels recommended by the 1995 Commission. The same arguments apply to the increases of **£15,451** paid to the Leader and Deputy Leader (even though their responsibilities remained the same) as a result of revised arrangements for remunerating the Chief Executive in respect of his returning officer duties which were backdated

to take effect from 1 April 1996. The Leader does not accept that this approach was unreasonable. The Chief Executive considers that this approach was reasonable. I do not agree with either view.

**167** The Council (supported by its financial consultants) has also maintained that the way it dealt with pay point assimilation was not unreasonable since it claims that in total the additional cost in Members' Allowances was "not material". I do not accept this explanation. In my view, the payment of "arrears" of Special Responsibility Allowances amounting to **£119,971** paid to Members in 1999/2000 in consequence of the application of the August 1998 automatic review mechanism to increases in officers' remuneration is both significant and unreasonable.

**168** The effect of these retrospective increases in allowances was to increase the Special

Responsibility Allowances payable to the Leader, Deputy Leader, Committee Chairs and Deputy Committee Chairs from 1 April 1996, within two months of the date of the 1995 Commission's recommendations and with effect from the date that Members assumed the full responsibilities on which those recommendations had been based.

**169** Those increases also changed the relationship between the Special Responsibility Allowances. The 1995 Commission recommended that the Chief Whip and the Opposition Leader should receive a higher Special Responsibility Allowance than that payable to Deputy Committee Chairs to reflect the more onerous responsibilities and role the former were required to perform. However, the above mentioned increases virtually removed that differential with effect from 1 April 1996 and by 31 March 1999 Special Responsibility Allowances payable to Deputy Committee Chairs were greater than those payments to the Chief Whip and Opposition Leader.

**170** The effect of the various retrospective increases made in Special Responsibility Allowances in terms of the annual amounts in respect of which payments were made was as follows:

Leader £17,000 £20,616 £24,426 44%  
Deputy Leader £12,750 £15,687 £18,731 47%  
Committee Chairs £10,000 £11,469 £14,738 47%  
Deputy Committee  
Chairs  
£3,500 £4,351 £6,102 74%  
Chief Whip/  
Leader of the  
Opposition  
£4,500 £4,500 £4,746 5%

**171** In the period 1 April 1996 to 31 March 1999, there was no change in the relative responsibilities of Members in receipt of Special Responsibility Allowances. Nevertheless, the Chief Whip and Opposition Leader only received inflation linked increases of 5% to their Special Responsibility Allowances (as did every Member in relation to their Basic Allowance) whereas other Members in receipt of Special Responsibility Allowances received increases to those allowances ranging from 44% to 74%. Neither the Leader nor the Chief Executive accepts that those increases were unreasonable.

**172** As a result of pay point assimilation, those Members whose Special Responsibility Allowances were linked to the Chief Executive or highest paid Director automatically received an increase in their allowances, backdated to 1 April 1996<sup>24</sup>. They also received increases in respect of annual increments and “annual inflation” pay awards from 1 April 1997 and in respect of National Pay Reviews from 1 January 1998 or 1999 depending on the linked officer. In contrast, the Chief Whip and the Opposition Leader received an increase in their allowances related only to “annual inflation” pay awards with effect from 1 April 1997. In my view, this resulted in inconsistent and inequitable treatment.

**173** Moreover, the way in which the August 1998 automatic review mechanism was applied took no account of the fact that, in future pay reviews, officers might receive different salary increases based on, say, merit or changes in responsibilities with the result that the initial relationship between the different Special Responsibility Allowances would change, without any change in the relative responsibility of Members, again resulting in inconsistent and inequitable treatment.

**174** In my view, the Council acted unreasonably. No local authority acting reasonably could have adopted, as part of a scheme of Members' Allowances a provision whereby Members should be paid an Allowance or Allowances equal to a percentage of the salary of a specific officer regardless of whether any resulting increase or decrease in that salary reflected any change in the responsibilities of that Member. The changes in Members' Allowances effected as a result of the implementation of the August 1998 automatic review mechanism altered materially the relationship between the Allowances paid to different Members without rational justification. In addition, the level of increases in Special Responsibility Allowances paid to some Members, representing an increase over a three year period ranging from 44% to 74% without any change in responsibilities was something in terms of quantum that no local authority acting reasonably could have adopted.

#### Transparency

**175** Parliament decided that Members should be responsible and accountable for the determination of their own allowances. Such an approach requires transparency. The statutory provisions provided that Members had to adopt a scheme specifying the amounts payable to them and publish that scheme. In such a case, the Members' interests and the allowances payable are overt, clear and readily recognisable. In addition, the statutory provisions required that the amounts received in each year had to be published.

**176** The intention of the 1995 Commission in recommending an automatic review mechanism was to "relieve the County Council of the task of revisiting the issue of settling their own

24 Backdating to a date earlier than 1 April 1997 was contrary to the Council's own 1996 "scheme".

25 Paragraphs 143 and 148 of the Hall Report rejected (i) the principle of relating special responsibility allowances to local authority positions since to do so contravened the Widdicombe principles, in particular the principle that "there should be no assumed relationship between member and local authority employee roles" and (ii) acknowledged the faint possibility of a "conflict of interest" if [Special Responsibility Allowances] were related to a local authority salary grade since "In theory, members could boost a particular local government salary grade to increase their own [Special Responsibility Allowances]". Hall thought that the chances of this occurring in practice were "slim".

allowances in future years". In his evidence to the Court, the Chief Executive claimed that the August 1998 automatic review mechanism implemented by the Council had the benefit of "simplicity and transparency". That is not the case. The links between the salary of the Chief Executive and that of the highest paid Director and Special Responsibility Allowances

(other than those paid to the Chief Whip and the Leader of the Opposition) were anything but simple and transparent. Those links were far less simple than an increase for inflation (which was applied to Basic Allowances payable to Members generally and to the Special Responsibility Allowances payable to the Chief Whip and the Leader of the Opposition) and were certainly not transparent.

**177** By a letter dated 8 September 1998, the Assistant Director (Members' Support) wrote to Members of the Council, informing them that "Members Allowances have now been adjusted in accordance with the Commission's framework, which is linked to the increases that have been awarded to staff through the appropriate National Agreements" and that "the revised allowances are reflected in the individual Members' September payments". In fact, the "adjustments" made were not in accordance with the recommendations of the 1995 Commission. Nor were they limited to [inflation] increases that had been awarded to staff through the appropriate National Agreements. The Leader, Deputy Leader, Committee Chairs and Deputy Committee Chairs in fact all received percentage increases in line with the annual pay award **and** incremental increases in the salary of the Chief Executive or the highest paid Director. Details of the August 1998 automatic review mechanism, its effect and the (unlawful) backdated payments of "arrears" were not disclosed to Members generally.

**178** The August 1998 automatic review mechanism implemented by the Council in which there were links between the Special Responsibility Allowances of the Leader, Deputy Leader, Committee Chair and Deputy Committee Chair and the salaries of the Chief Executive and the highest paid Director but no relationship between increases in Special Responsibility Allowances and increases/decreases in the responsibility of any Member made the establishment and operation of that mechanism perverse and provided an incentive for Members to initiate an increase in the remuneration of particular officers in order to obtain an increased allowance<sup>25</sup>. Whilst I have no reason to believe that that happened, the Council did not take steps to ensure that those Members who would benefit financially played no part in determining increases in the remuneration of those officers which increases in turn triggered increases in Members' Special Responsibility Allowances. Members' interest in the outcome of such salary



increases was not overt and clear to members of the public. The arrangements adopted by the Council lacked transparency (as did the decision making process).

**179** The Council's submission is that it took "extensive steps to put in place the appropriate segregations and checks and balances between members and officers and between individual officers; there was a clear separation of the roles of Members and officers in all processes, and all actions were taken in accordance with legal and financial advice." I do not accept that submission. It is inconsistent with what happened.

### Authorisation

**180** Decisions to incur expenditure had to be authorised by or on behalf of the Council ie by the Council or by a Committee, Sub-Committee or officer of the Council with delegated authority. At all times relevant to this report, a single Member was not entitled to take decisions on behalf of the Council.

**181** In August 1997, Basic Allowances, Attendance Allowances and Special Responsibility Allowances for the Chief Whip of the majority party and the Leader of the largest opposition party were increased by 2.5% in line with the annual inflation increase for APT&C staff and in purported reliance on an automatic review mechanism with the increase backdated to 1 April 1997. No (authorised) decision was taken by or on behalf of the Council to implement that automatic review mechanism or provide for the increased payments nor was any decision (authorised or otherwise) taken to amend the Council's 1996 "scheme" of Members' Allowances to provide for the making of the increased payments.

**182** In August 1998, It appears that the Chief Executive gave an instruction to proceed with the implementation of the August 1998 automatic review mechanism. There was, however, no authorised decision by the Chief Executive to adopt that mechanism and no written decision by the Chief Executive to that effect.

**183** No decision was taken (authorised or otherwise) to provide for the increased payments of Members' Allowances effected in September 1998 nor was any decision (authorised or otherwise) taken to amend the Council's 1996 "scheme" of Members' Allowances to provide for the making of the increased payments. The Chief Executive takes the view that these backdated

increases in payments were authorised by the Policy Committee decision of 2 February 1996 and that "there was no need for any further authority or decision". I do not agree.

**184** None of the payments of Members' Allowances made as a result of the retrospective application of the August 1998 automatic review mechanism both to the increases in salaries of the Chief Executive and highest paid Director in relation to pay point assimilation and to the salary increase of the Chief Executive in respect of returning officer duties was lawfully authorised by or on behalf of the Council although officers wrongly assumed otherwise. Nor was any decision (authorised or otherwise) taken to amend the Council's 1996 "scheme" of Members' Allowances to provide for any of those payments.

**185** No decision was taken (authorised or otherwise) to amend the Council's 1996 "scheme" of Members' Allowances to provide for increased payments made in consequence of the application of the August 1998 automatic review mechanism to the salary increases backdated to 1 January 1998 and 1 January 1999 respectively, paid to the Chief Executive and highest paid Director as a result of national pay reviews.

**186** The Council's view is that the authority for all of these decisions is contained in the 7 February 1996 decision taken by the Chief Executive on behalf of the Council that the recommendations of the 1995 Commission should be adopted with effect from 4 May 1995. The recommendations of the 1995 Commission included the use of an automatic review mechanism which the Council maintained not only provided authority for all the increases but obviated the need for the Council to amend its "scheme" of allowances to give effect to increases in allowances, notwithstanding the provisions of the 1991 Regulations.

**187** Whilst the recommendations of the 1995 Commission provided for an automatic review mechanism the details of the way in which it was to operate were not specified. Although I accept that the principle of an automatic review mechanism was approved, there was no decision to adopt the August 1998 automatic review mechanism or any of the increases made as a result of its application. As such the resulting expenditure was unlawful on the further ground that there was no decision taken by or on behalf of the Council to make the increased payments.

**188** On 28 May 1999, the Council in Committee resolved inter alia that a further Commission ("the 1999 Commission") should be appointed "to review the time commitment" of Members in receipt of Special Responsibility Allowances and whether it remained valid for the new arrangements and that the Chief Executive was to make any consequential adjustments without further consultation with Members, backdating changes to the dates upon which the respective responsibilities were assumed.

**189** On or about 15 December 1999, the Chief Executive received a final draft of the report of the 1999 Commission<sup>26</sup>. The 1999 Commission did not recommend what Members' Allowances should be paid. On 16 December 1999, without any delegated authority to do so, the Chief Executive purported to decide that additional and different payments by way of Members' Allowances should be paid backdated to May 1999.

There is no record of the Chief Executive's "decision". Basic Allowances were increased, partially offset by a decision that no Attendance Allowances should be paid, and Special Responsibility Allowances were increased.

**190** Although the Chief Executive, and officers advising him, thought that it did, the resolution on 28 May 1999 did not confer any discretion on the Chief Executive to do what he considered appropriate but unlawfully required him to amend the existing scheme in compliance with the 1999 Commission's recommendations. The 1999 Commission, however, did not make recommendations as to the amount of any allowance. In any event, that resolution did not authorise the Chief Executive to calculate any allowance in the manner he did, increasing the notional daily rate of allowances. That resolution did not, moreover, relate to, or authorise any adjustment to Basic Allowances which were purportedly increased by the Chief Executive from **£5,649** to **£6,845** per annum. The Chief Executive's response is that this period was one of major change in decision taking generally within local government in Wales and that there were no procedural documents relating to decision making under delegated powers at this time. If it is the case that there were no arrangements to record in writing decisions taken under delegated powers, that was a most unsatisfactory state of affairs.

**191** In my view, the expenditure incurred in consequence of the Chief Executive's

"decision" in December 1999 was unlawful on the further ground that there was no decision by or on behalf of the Council to make those increased payments.

**192** I am critical of the absence of authorised decisions, taken by the Council or pursuant to delegated authority, which authorised increases in Members' Allowances over the period 1997 to 2001. That was a significant departure from the required standard of governance.

26 The 1999 Commission sent its report to the Council on 17 December 1999.

#### Compliance with statutory duty

**193** The 1991 Regulations required the Council to adopt and operate a scheme of allowances which specified the amount of the allowances to be paid. An amended scheme could be introduced part way through a financial year. A new scheme could only take effect from the beginning of the next financial year. The scheme and any amendment to the scheme had to be published in the Council's area, as did the sums paid to each Member.

**194** In breach of statutory duty, the Council did not draw up a scheme of Members' Allowances and did not publish in its area its February 1996 "scheme" of Members' Allowances relied on by the Council to give effect to retrospective and prospective increases in Members' Allowances. In consequence, in breach of statutory duty, the "scheme" was not available for public inspection.

**195** In breach of statutory duty, the Council did not amend its "scheme" of Members' Allowances as required on each occasion to give effect to the increases in Members' Allowances resulting from the application of an automatic review mechanism in August 1997, September 1998, May 1999 and June 1999. In consequence, in breach of statutory duty, the amounts payable under the amended "scheme" were not available for public inspection.

**196** In breach of statutory duty, the Council did not publish in its area any amendment to its "scheme" of Members' Allowances required to give effect to the increases resulting from the application of an automatic review mechanism in August 1997, September 1998, May 1999 and June 1999. In consequence, in breach of statutory duty, the amounts payable under the "scheme", as amended from time to time, were not published by the Council.

**197** The Chief Executive defends the absence of publicity on the ground that the lack of publication was a "logical consequence" of the legal view taken by the Council with regard to an

automatic review mechanism. I am not impressed by that explanation. Even if increases in Members' Allowances could lawfully have been effected by the use of an automatic review mechanism, the Council would have remained under a statutory duty to give publicity to the amounts of the increased allowances and its "scheme", as amended.

**198** In my view, the Council had to make and publish a scheme not merely adopt the recommendations of the 1995 Commission. Whilst the 1995 Commission's recommendations included specific allowance levels each application of the automatic review mechanism increased the level of the allowances and constituted an amendment to the "scheme" and each such increase should have been published.

**199** I have further concerns about the way in which the increases arising from the implementation of the August 1998 automatic review mechanism were dealt with. An e-mail dated 10 August 1998 from the Assistant Director (Members' Support) to the Chief Executive included: "These arrangements will be kept confidential, Members will be notified by a letter enclosed with their September payslips. Can you confirm that the attached draft is approved please".

**200** The intention to keep the new arrangements and their effect confidential was contrary to the requirements of Regulation 26A(1) of the 1991 Regulations which placed a statutory duty on the Council to make arrangements for the publication of any amendment to its scheme of Members' Allowances.

**201** The Council maintains that the said e-mail simply recognised the need for confidentiality until Members had been notified of the changes. The Chief Executive asserts that "the intention was to keep the personal details of Members' individual payments confidential until the date of publication, as was normal payroll practice". The difficulty with that explanation is that, in breach of statutory duty, there was no publication of the amounts of the increased allowances before, on or after the payroll date.

**202** In addition to the failure to inform the public, Members generally were not informed of the increases in Special Responsibility Allowances effected by the application of the August 1998 automatic review mechanism.

**203** In breach of statutory duty, the Council did not draw up and did not publish in its area its December 1999 "scheme" of Members

Allowances. However, the Council did publish the amounts of Allowances payable pursuant to that "scheme". In further breach of statutory duty, the Council did not amend its 1999 "scheme" of Members' Allowances to give effect to the increases in Members' Allowances resulting from the application of an automatic review mechanism in 2000/2001 and 2001/2002.

**204** I am critical of the Council's various breaches of statutory duty, especially where the consequence was to deny to the public information relating to the amounts of Allowances and increases in Allowances being effected without transparency or even disclosure to Members generally as a result of the operation of an automatic review mechanism.

### **Officers' salaries**

#### **Decision making**

**205** The 1995 Commission recommended an automatic review mechanism to increase the level of Members' Allowances in future years. Increases in allowances for leading Members were linked to increases in the salary scale of the Chief Executive or that of the highest paid Director. I therefore considered the increases in the remuneration of the Chief Executive and Chief Officers. The most significant changes to their remuneration were made in the summer of 1999 when the Council started to implement its modernisation agenda.

**206** To complement the changes in its democratic structures and processes, the Council also wished to reorganise its operational structure. As this had implications for the Council's senior management, the Council addressed a number of issues including the concern of a number of senior officers that, following Local Government Reorganisation in April 1996, changes to annual leave and the abolition of a leased car scheme had left them financially "worse off".

**207** These issues were subsequently dealt with by means of what the Council described as pay point assimilation. The Council's arguments in relation to pay point assimilation have altered over time. None is convincing.

**208** Initially a minute of the Labour Group meeting held on 16 May 1995 was said, by the Leader, to support the approach that was taken in 1999 by the Council to pay point assimilation.

That minute states:

"Members felt that there should be a presumption against significant increases in the amounts paid due to the likely impact it will have

on other areas of spending in a climate of

capped and reducing budgets. Members were concerned to ensure that payments were made within the range of NJC scales for unitary authorities but appointments should be made at a point commensurate with the existing salary level for the post".

**209** The Labour Group's intention of how pay point assimilation should operate is not clear from this minute. But, in any event, the Labour Group had no formal standing within the Council and there is no Council minute or Committee resolution at that time which indicates that the Council expected pay point assimilation to apply and, if so, the way in which pay point assimilation was to apply.

**210** The appointment of the Chief Executive and Directors was undertaken by an Appointments Sub-Committee, appointed on 18 May 1995.

**211** The Chief Executive was appointed with effect from 1 June 1995 and subsequently other individuals were appointed as Directors.

Their terms and conditions of employment were set out in a letter to each individual which letter also enclosed statements of their duties, responsibilities and principal terms and conditions of service. The Chief Executive was appointed on the basis that his salary would be inclusive of returning officer fees and his salary was increased by **£3,000** per annum to make his salary an inclusive one for all elections.

**212** Pending the new local government arrangements coming into operation on 1 April 1996, each officer appointed by the Council's Appointments Sub Committee remained employed by his/her existing employing authority but the Council undertook to pay in the transitional period an additional amount equal to 10% of his/her salary with his/her existing employer to reflect his/her additional responsibilities with the Council. With effect from 1 April 1996, the individual officers concerned were employed solely by the Council, at a specified amount per annum, fixed within a particular salary scale, with progression upwards through that scale thereafter being linked to satisfactory performance. In each case, the specified amount payable from 1 April 1996 was such that the individual was at least "no worse off" (and in many cases better off) in terms of salary than if he/she had remained in employment with the original employing authority on 1 April 1996 since the Council used higher salary scales than the previous employing authorities.

**213** The principal terms and conditions on which

these officers had been appointed had been set out in the job application recruitment pack and, in each case, the annual leave entitlement agreed was 34 days in addition to statutory holidays. No mention was made of a leased car scheme or car allowances.

**214** On 10 and 11 October 1995, the Chief Executive and Directors were asked to accept revised conditions of service. The Council's intention was that conditions of service should be in accordance with national agreements. The main proposed change was to the conditions governing annual leave, ie the maximum entitlement was to be reduced to 30 days. No change was proposed to the salary to which the Council had agreed officers would be entitled with effect from 1 April 1996. However, the Council gave a commitment that it would review with the trade unions the local conditions of service for all staff.

**215** No commitment was expressed or undertaking was given by the Council that it would conduct any review of salaries. No commitment or undertaking was given by the Council as to what the outcome of any review would be and no commitment or undertaking was given that any officer would be "no worse off" after any review of local conditions of service.

**27 £12,237** after recovery from the Chief Executive of payments made by the Council towards the provision of a leased car.

**216** The review of local conditions of service for all staff was completed by 1998. Revised terms (covering annual leave, car loans, car leasing, car mileage allowance, flexible working hours and overtime for certain staff) were considered by the Council at a meeting on 28 May 1998 and it was decided that the revised terms should come into effect thereafter.

**217** In February 1999, discussions took place between the Chief Executive and the Leader as to increases in the salary of the Chief Executive and certain Directors, consequential increases in Members' Allowances payable to the Leader (who informed me that his involvement in these discussions was not "motivated by personal interest") and Deputy Leader, Committee Chairs and Deputy Committee Chairs and the payment of "arrears". Increases to the salaries of the Chief Executive and certain Directors were implemented in May 1999.

**218** Despite the Council's assertions, pay point assimilation was not applied so as to secure that the Chief Executive or other Directors who agreed to the variations in their contracts of employment in October 1995 would not be



"worse off" overall. It was applied to secure that one officer who was already better off became more so (without any justification), three officers who were better off in salary terms but "worse off" overall became considerably better off overall, whilst one officer who had lost the benefit of a one-off car leasing contract (which he had had prior to reorganisation) remained "worse off". The Chief Executive has informed me that there was "no ulterior and wrongful purpose on the part of the officers concerned".

**219** The following example demonstrates how pay point assimilation was in fact applied. The Chief Executive in his former role as the Chief Executive of South Glamorgan County Council had been paid at the highest point on the "pay scale" agreed for that post by South Glamorgan County Council. On his appointment as Chief Executive with the Council, he was placed on the lowest point of the (higher) "pay scale" agreed for that post by the Council. This meant that he received a higher salary but was at a lower point in the salary scale. Following pay point assimilation in 1999, he was moved to the top of the new "pay scale", backdated to 1 April 1996, which resulted in a substantial pay increase and payment to the Chief Executive of "arrears" of **£15,966<sup>27</sup>**.

**220** Following the application of pay point assimilation and taking into account the effect of the national pay reviews effective from 1 January 1998 in the case of the Chief Executive and 1 January 1999 for other Directors, the Chief Executive was better off by **£10,719**, the then Director of Financial Services was better off by **£6,870**, the then Director of Education was better off by **£9,506** and the then Director of Personnel Services was better off by **£19,234**. The Chief Executive's view initially was that pay point assimilation should not be applied to the Director of Personnel Services. However, following consultation with the Leader, the Chief Executive agreed that pay point assimilation should apply based on the principle that "if the former Cardiff City Officer had been appointed rather than the South Glamorgan Director, then pay point assimilation would have applied". The Leader has informed me that he took the view "that to have done otherwise would have demonstrated a lack of consistency on the part of the Council". I regard both explanations as lacking any reasonable basis.

**221** Moreover, although the Council claims that pay point assimilation was intended to ensure that, following local government reorganisation,

officers were not in a "worse off" position than they might otherwise have been, the Director of Property Services remained "worse off" by **£4,977**. Pay point assimilation therefore did not have the effect of leaving any of the five officers concerned in the position that they would have been in had a pay increase equivalent to any worsening of conditions of employment been awarded and appears to lack any consistent or rational basis.

**222** By way of contrast, other Directors who were affected by the same variation to their terms and conditions of service in October 1995 and suffered a reduction in their annual leave allowance but who were not financially "worse off" overall were not recompensed for the reduction in their conditions of service.

**223** The Leader and the Chief Executive were involved in discussions as to increases in the salary of the Chief Executive and certain Directors, consequential increases in Members' Allowances and the payment of "arrears" to the Leader and Deputy Leader, Committee Chairs and Deputy Committee Chairs.

**224** On 26 February 1999, the Chief Executive wrote to the Leader on Directors' salaries and returning officer fees in the following terms: "...I have discussed the salaries issues with [the Assistant Director of Financial Services]. She understands the need for strict confidentiality and will verify the figures that have been used and go through them with you.

**SALARIES** – I am aware that I cannot deal with my own salary arrangements and I suggest that [the Assistant Director of Financial Services] prepares suitable authorisation forms that deal with any changes to my salary. With regard to Directors, I can deal with authorising any changes that you agree. I have asked [the Assistant Director of Financial Services] to go through these authorisation forms and agree a format with you and who should sign.

**RETURNING OFFICER FEES** – I have also asked [the Assistant Director of Financial Services] to verify these figures and to establish any payments due and what the annual salary should be from now on. Again she will agree authorisation of payment form with you and who should sign. I am also aware that you and I will both need to sign up to any agreement and again I have asked [the Assistant Director of Financial Services] to prepare a suitable form of agreement which she will discuss with you.

MEMBER PAYMENTS – as you and the Deputy Leader are linked to my payments then I will arrange for [the Assistant Director (Members' Support)] to deal with any arrears in the normal manner.

TIMESCALES – the March payroll closes at the end of next week and I have therefore asked [the Assistant Director of Financial Services] to deal with matters as soon as possible...

When you are in a position to discuss authorisation and agreements with me then let me know".

**225** On 31 March 1999, the Assistant Director of Financial Services sent the Leader "action points" including those on returning officer fees. On the following day, 1 April 1999, she also sent him two "suitable" memoranda (one dealing with pay point assimilation and one with the Chief Executive's returning officer fees) for the Leader to forward to officers if he "agreed" the details in order that "the Chief Executive and the Director of Personnel can authorise me to implement the necessary changes administratively". The memorandum to be sent to the Director of Personnel in relation to the Chief Executive stated:

"I have with the assistance of the Assistant Director of Financial Services examined the total package of remuneration in the light of the Appointment Panel's intentions. The outcome of this examination is that the following points need to be implemented.

As the Chief Executive would have been on the maximum point of the grade for the predecessor authority the Appointment panel's intention was that he should have been appointed at the maximum point of the grade for the new authority with effect from the 1st April 1996.

The Chief Executive had a sum added to his salary which was an estimate of the authorised payments for returning officer's fees. This sum has been reviewed in the light of actual payment entitlements and should be adjusted so that amounts arising since 1 April 1996 are paid and the actual payment revised with effect from 1 April 1999. The details are attached for your information and I should be grateful if you would make the necessary arrangements to implement those aspects of the Chief Executive's remuneration with immediate effect".

**226** Those details showed an amount of salary "due" to the Chief Executive of **£13,130** to which **£5,934** was to be added in respect of

the Welsh Assembly referendum as a "one off arrangement".

**227** On 8 April 1999, the Leader invited the Assistant Director of Financial Services to talk to the Chief Executive about these memoranda since "he knows the approach". On 9 April 1999, she received an e-mail from the Chief Executive informing her that "the memos will be signed off this month and we will action for the May payroll. I need to see you when I have the memos so that we can tie it all up before the May payroll deadline".

**228** On 6 May 1999, the date of the local government elections, the Chief Executive sent the Assistant Director of Financial Services an e-mail stating that he had spoken to the Leader that morning and the Leader confirmed that he had "processed the paperwork authorising the payment of salaries and returning officer fee as per your analysis" and "will let me/you have the relevant paperwork asap".

**229** On that same day, the Assistant Director of Financial Services was approached by the Assistant Director (Members' Support) for details of the changes to officers' salaries in order for him to adjust Members' Allowances. The Assistant Director of Financial Services confirmed to him in an e-mail that "it hasn't had political approval yet". As far as she was concerned there was still "no political clearance" later that afternoon (as confirmed by an e-mail of 6 May 1999 from her to the Assistant Director (Members' Support) sent at 14.07pm). The Assistant Director of Financial Services met the Leader later that day who confirmed to her (in her words) "that the proposals would not be out of line with members' intentions". The Leader's position is that he "confirmed that no political clearance was required and there was no paperwork to process". He denies that he approved the implementation of the payments. The Leader also asserts that he received legal advice that he was entitled to participate in the decision making process. I accept that he did receive such advice and that he was entitled to rely on that (erroneous) advice.

**230** The Leader 'approved' the implementation of: **a** substantial increases in the salary of the Chief Executive and certain Directors, backdated to 1 April 1996 in respect of pay point assimilation, giving rise to consequent

"arrears" of **£56,186<sup>28</sup>** ; in respect of the

financial years 1996/1997, 1997/1998, 1998/1999 and 1999/2000; and

**b** a substantial increase in the salary of the Chief Executive in respect of "returning officer fees" and the payment of "arrears" of **£19,064** in respect of the financial years 1996/1997, 1997/1998 and 1998/1999.

**231** On 6 May 1999, the Chief Executive asked the Assistant Director of Financial Services to implement "the agreed arrangements" that the salaries of the then Directors of Finance, Education, Property and Personnel should be increased retrospectively with effect from 1 April 1996 to give effect to pay point assimilation. The Chief Executive claims that he had been given delegated authority to act by the Appointments Sub-Committee in May 1995 but that claim is untenable.

**232** Also on 6 May 1999, the Director of Personnel sent a memorandum to the Director of Finance referring to the Assistant Director of Financial Services' memorandum (a copy of which was enclosed) in respect of increasing the Chief Executive's salary to give effect to pay point assimilation and authorising payment of "arrears" of remuneration in respect of returning officer fees asking the Director of Finance to implement the "agreed arrangements".

**233** The increases in the salaries of the Chief Executive and the highest paid Director as a result of pay point assimilation generated consequential corresponding substantial increases in the Special Responsibility Allowances paid to the Leader, Deputy Leader, Committee Chairs and Deputy Committee Chairs. Thus they also benefited financially from pay point assimilation and unlawful increases in allowances totalling **£119,971** were paid to them as the result of the retrospective application of the August 1998 automatic review mechanism.

**234** The Leader and Deputy Leader also received unlawful increases in Special Responsibility Allowances totalling **£15,451** as the result of the retrospective application of the August 1998 automatic review mechanism to the backdated increase in salary and consequent payment of "arrears" of returning officer fees to the Chief Executive.

**235** On 8 July 1999, the Council's then Solicitor decided in the purported exercise of emergency powers that (a) that element of the Chief Executive's salary in respect of returning officer duties should be increased from **£3,000** to **£7,584** per annum with effect from 1 April 1999 to be inclusive of returning officer's fees and

(b) that his inclusive salary should be revised, with effect from 1 July 1999, to a single point salary scale of **£89,916** to reflect the national pay review. Despite this, the effective date of the increase in the Chief Executive's remuneration from the Council on account of his returning officer duties was unlawfully backdated to 1 April 1996. Increases in the salaries of four Directors (including the highest paid Director) arising from the national pay review were authorised by the Chief Executive, purportedly acting under the Council's emergency powers procedure.

**236** On 22 July 1999, the exercise of emergency powers was reported in brief terms to the Committee of the Council. Members generally were not informed that:

28 £49,881 after recovery of some car leasing payments. The figure of £56,186 is taken from a report to the Committee of the Council on 11 October 2001 and is greater than the figure set out in contemporaneous (1999) documentation. The explanation appears to be that officers increased the "agreed" figures to provide for annual inflation increases!

**a** there had been an increase in the Chief Executive's salary in respect of his duties as returning officer;

**b** the increase in his salary was retrospective (to 1 April 1996) and that substantial "arrears" had been paid; and

**c** consequent retrospective increases had been made in the Special Responsibility Allowances payable to the Leader and Deputy Leader and that substantial "arrears" had been paid to them both.

The increases in salaries on account of national pay reviews was also reported in the briefest terms.

**237** The implications of these matters are considered further below.

#### Authorisation

**238** Increases in the salaries of the then Directors of Education, Property Services, Financial Services and Personnel Services arising from pay point assimilation were authorised in May 1999 by the Chief Executive as Head of Paid Service. At the same time, the Director of Personnel authorised the increase in the salary of the Chief Executive.

**239** The Council and the Chief Executive have asserted that the increased salaries and payment of "arrears" as a result of the implementation of pay point assimilation were authorised by or on behalf of the Council by its resolutions on 15 June 1995 to appoint Directors and the Chief Executive. That minute, however, only authorised the Appointments Sub Committee to conclude contractual matters with successful applicants, not to vary them once

concluded (as they had been). In any event, the Appointments Sub Committee did not purport to take any decision with respect to the variation of contracts of employment in October 1995 and did not authorise the payments which were made to the Chief Executive and the four Directors in 1999.

**240** The Council has further claimed that pay point assimilation was approved under delegated arrangements established by the former South Glamorgan County Council and adopted by the Council as an interim measure in 1995 and continued following local government reorganisation. However, even if otherwise applicable, the South Glamorgan delegation arrangements, only applied to Heads of Departments "where such arrangements have been previously agreed by the Policy (Personnel) Sub Committee". No such agreement was sought or given.

**241** The Council has also contended that no delegated authority was required to effect increases in the salaries of the Chief Executive and four Directors to give effect to pay point assimilation. That contention is based on the assertion that the higher salaries were not increases in salary but rather were "corrections" to existing salaries which did not require authorisation by the Council. The Council now accepts that that view is not correct but even if "corrections" to salaries were being made it would not take away the need for authorisation by or on behalf of the Council by a Committee, Sub-Committee or officer acting within his/her delegated authority. That explanation by the Council would only make sense if the contractual entitlement of officers to remuneration was by reference to a formula which had been misapplied. That was not the case. The Chief Executive's contract of employment entitled him to be paid **a specified sum** per annum, with effect from 1 April 1996. As a result of pay point assimilation and a further retrospective increase in remuneration in respect of returning officer fees, the Chief Executive's salary was increased,

29 No increase was made to the Special Responsibility Allowances paid to the Chief Whip and the Opposition Leader.

as at 1 April 1996, to **£11,181** more than his contractual entitlement.

**242** In my view, the Chief Executive and another senior officer of the Council should not have been allowed to authorise salary increases for each other without being required to report the increases to Committee for approval. This is particularly the case when the increases were

backdated over a three-year period and generated backdated increases in Allowances paid to leading Members.

**243** I am critical of the absence of authorised decisions, taken by the Council or pursuant to delegated authority, which authorised substantial, backdated, salary increases for the Chief Executive and four Directors. That was a significant departure from the required standards of governance.

**244** In addition, there was again a lack of transparency. No contemporaneous report was made to the Council or any Committee or Sub Committee of the Council in connection with pay point assimilation. The Council should have dealt with this matter more openly to ensure that allegations of impropriety could not be made, particularly given that those individuals who appear to have approved or participated in the assimilation exercise benefited financially from the process.

#### Reporting to Members

**245** My review of how the Council addressed the personnel issues relating to its chief officers immediately prior to its restructuring in the summer of 1999 has raised a number of issues which follow a common theme. This is that decisions were being made with some Member knowledge by a relatively small group of officers, without reporting full details of the outcome of those decisions to Members generally.

**246** I have already referred to what I consider to be the failure to report pay point assimilation to Members. Members generally were not informed that there had been substantial increases in the salary of the Chief Executive and four Directors in consequence of pay point assimilation and that substantial "arrears" had been paid. Nor were Members generally informed of the consequent retrospective increases in Special Responsibility Allowances<sup>29</sup> and that substantial "arrears" had been paid. The Chief Executive maintains that there was "no requirement" to report to Members in connection with pay point assimilation. He does accept however that the "transparency" of some of the Council's procedures "could have been improved on". The Leader states that what I regarded as inadequate reporting was "in line with the Council's agreed procedures that were in operation at the time". Even if that were so, it does not detract from my criticism.

**247** In addition, a report by the Chief Executive to the Committee of the Council on 22 July 1999 referred, without giving financial details or referring to consequent increases in Members'



Special Responsibility Allowances, to decisions taken under emergency powers in respect of, amongst other matters, the implementation of the “national pay review for the Chief Executive, Directors, Chief Officers and Assistant Directors” and “the payment of returning officer fees as an agreed element of salary”. I accept that the decision to implement the national pay review was made pursuant to the then Council practice on the exercise of emergency powers but I do not accept that the increase in the Chief Executive’s salary to take account of his duties as returning officer was dealt with in a procedurally appropriate manner. Moreover, the Committee of the Council was not informed that “the payment of returning officer fees as an agreed element of salary” referred to a significant

increase in the Chief Executive’s salary with a consequent increase in the Special Responsibility Allowances of the Leader and Deputy Leader.

**248** I am satisfied that increases in officers’ salaries arising from the national pay review were determined by reference to the national criteria and, as such, the revised salary levels resulting from implementing the national pay review were not unreasonable. However, I do not consider the documentation to be an adequate or informative record of the decisions reached although the Council claims that it was in accordance with its normal practice at the time. I am concerned that Members were not provided with details of the financial and budgetary implications of the salary increases or of the (unlawful) increase in the level of the Chief Executive’s remuneration to take account of his duties as returning officer or of the impact on the Council’s finances in future years. I am also concerned that the impact of these increases on the level of Members’ Special Responsibility Allowances and their budgetary implications for the Council were not reported to Members. As a result, Members generally would have been unaware of the financial implications of the actions that had been taken.

**249** The Council’s officers have consistently maintained that all increases in officer salaries at the time were transparent and properly authorised. The Council’s independent financial consultants concluded that “with the benefit of hindsight, it may have appeared more transparent to have reported to Members in detail, at least as to the broad effects of the increases to officers’ salaries. However, this

was achieved through disclosure of the bandings in the annual Statement of Accounts which was reported to the Council and therefore made public". I disagree; in my view, this latter assertion lacks credibility.

The disclosure of salary bandings of the Council's annual Statement of Accounts is no substitute for reporting in plain terms at the relevant time decisions purportedly taken under delegated powers and the financial implications of those decisions.

**250** On 11 October 2001, on the advice of the Council's financial consultants, the Committee of the Council considered a proposal from the Cabinet that set out details of the changes that had been made to the remuneration of senior officers between May 1995 and July 2001 and purported to approve the process, decisions taken and payments made as described in that proposal. In its representations to me, the Council recognises that in the Settlement Agreement it accepted that it had acted unlawfully in relation to officers' remuneration (pay point assimilation and payments in respect of returning officer duties). The Court made a Consent Order to that effect. However, in its representations to me the Council now asserts that these matters "were formally ratified by the Council in late 2001". One difficulty with this representation is that the Council cannot ratify that which is unlawful. Moreover, in the section 17 proceedings the Council accepted (correctly) that it could not rely on ratification.

**251** That proposal did not, in my view, provide full details of the way pay point assimilation was applied nor did it make any mention of the implications of salary increases on the level of Allowances of Leading Members. Officers have told me that it was considered inappropriate for Members, when considering levels of officer pay, to have regard to the effect this could have on their own allowances. Whilst I endorse that principle, the fact that certain Members had a financial interest in the decision to increase chief officers' pay is no justification, in my view, for not reporting the full financial

impact of those decisions to Members generally. I do not accept that the decision taken by the Committee of the Council ratified increases in remuneration referred to in that proposal.

**252** In my view, matters relating to changes in officer remuneration in the summer of 1999,

which had a direct impact upon Members' Allowances resulting from pay point assimilation could and should have been dealt with more effectively by the Council. I am critical of the inadequate reporting and lack of transparency.

**253** The Council contends that decisions were taken under delegated authority. I do not agree. But in any event, I am concerned that Members were not given full information on salary increases, their impact on the level of Members' Allowances and their implications for the Council's finances, either at the time salary increases were put into effect or subsequently, when the Council sought to regularise the position in October 2001. In my view, greater attention needs to be given to the content of reports provided to Members, so that decisions can be made on the basis of full information and to avoid criticism of a lack of transparency in the process.

Participation in the decision making process when disqualified from doing so

**254** As a general principle of conduct in public life, it is not enough to avoid actual impropriety. Officers and Members should at all times avoid any occasion for suspicion and any appearance of improper conduct, particularly where it could affect the reputation of the Council. Neither Members nor officers may participate in a decision making process when disqualified from doing so by reason of having a pecuniary or personal interest in the outcome of the decision in question.

**255** It appears to me from the representations that I have received that there is a lack of understanding as to what participation means. A person is disqualified from participation in a decision-making process if there is a real possibility (as seen by an informed observer) that he or she will be influenced by a pecuniary or personal interest in the outcome of the decision (see *R v Secretary of State for the Environment ex parte Kirkstall Valley Campaign Ltd* [1996] 3 All ER 304; *Porter v Magill* [2002] 2 AC 357).

**256** The applicable legal principle is that "an individual with a personal, pecuniary or proprietary interest in the subject matter of [a] decision is disqualified from participating in it" unless that interest is too remote or insignificant to matter. Participation in a decision making process is wider than, and is not to be confused with, taking the relevant decision. Participation extends to being consulted as to a proposed decision and giving advice which may

influence whether or not a decision is taken and, if so, in what terms.

**257** The Leader should not have participated in a decision making process in the outcome of which he had an apparent pecuniary interest by reason of the link between the Special Responsibility Allowance payable to him and the salary of the Chief Executive.

**258** The potential for a conflict of interest arising was acknowledged in 1998 by the then Director of Finance, who in an internal memorandum dated 8 July 1998, stated that “we need to recognise the potential for a personal interest arising when Members consider future [salary] awards for the Chief Executive and Directors. But as long as this is recognised and dealt with in an appropriate way it should not be a problem”. This view is not shared by other Council officers, who argue that there was no potential conflict of interest. I disagree. In the circumstances and

given the sensitivity of the subject matter, I consider that insufficient attention was given to the way the Leader’s actions could be perceived.

**259** I accept that the Leader received (erroneous) legal advice to the effect that his involvement in the decision making process relating to increases in the remuneration of the Chief Executive on account of pay point assimilation and returning officer duties was not unlawful and further accept that he (the Leader) did not participate in the decision making process knowing that he had a disqualifying interest. While it was reasonable for the Leader to rely on the legal advice that he obtained (even if erroneous) it does not change the fact that he did participate in a decision making process when disqualified from doing so (as he had a pecuniary interest in the outcome).

**260** The Council's own documents show that the Leader was involved in discussions about pay point assimilation as well as returning officer fees. The memoranda sent to him by the Assistant Director of Finance on 1 April 1999, and to which I refer above, dealt with this issue. In his written evidence served on 26 April 2004, in response to the section 17 application, the Leader denied that he sent the memoranda of 1 April 1999. This was the first occasion on which the despatch of the 1 April 1999 memoranda was challenged by the Council. Despite this assertion, it was apparent from a request for information and documentation made as part of the section 17 application proceedings, that the Council's files contained

copies of the memoranda from the Chief Executive and the Director of Personnel to the Assistant Director of Finance and the Director of Finance respectively instructing them to implement the "agreed arrangements".

The copies of these documents had attached to them, in the Council's files, the memoranda the Assistant Director of Financial Services prepared for, and sent to the Leader, on 1 April 1999.

As part of the consultation exercise on a draft of this public interest report, the Leader continued strenuously to deny that he sent the memoranda which he says "were drafted for his consideration but not sent". He points out, correctly, that the copy memoranda on the Council's files are unsigned by him.

The Leader's position is that "pay point assimilation should have been, and could only have been, dealt with by appropriate officers on the basis of the original Council decision made on 18 May 1995".

**261** Further evidence is, however, inconsistent with the assertion made by the Leader in his written evidence. For example:

**a** a report of the Chief Executive to the Council in October 2001 stated that in May 1999 "the Leader of the Council wrote to the Chief Executive confirming that Members supported the point to point option for affected individuals";

**b** in his response to my consultation draft report, the former Director of Personnel, stated that "the Leader of the Council wrote to the Chief Executive [and the Director of Personnel] on the matter and confirmed the position in relation to members' wishes relating to starting salaries";

**c** the memoranda of 1 April 1999 were provided to me by Council officers when I was first seeking to establish the authority under which pay point assimilation was implemented and references have been made thereafter in documentation sent to me by the Council to those memoranda having been sent; and

**d** in its response to my solicitor's letter of 17 November 2003 (prior to the issuing of the section 17 application), the Council

contended that the Leader (who was consulted on the Council's response) "was involved in the decision-making process only so far as necessary and this was limited to (1) in relation to the correction of salary anomalies ..., receiving information and passing it to the Director of Personnel and

(2) in relation to the National Pay Review and the correction of the returning officer fee element.....".

**262** Even assuming that the Leader did not send the memoranda of 1 April 1999, it is nonetheless the case that:

**a** he was involved throughout in respect of pay point assimilation and returning officer fees;

**b** no decision to make any increases of remuneration and/or to pay "arrears" would have been taken without "political clearance" from him; and

**c** in his evidence in the section 17 proceedings the Chief Executive stated that "the role occupied by the Leader of the Council [meant that] it would be difficult to find any matter of significance in the activities of the Council in which he were not 'involved' in any way".

The evidence of the Assistant Director of Financial Services in the section 17 proceedings was that "the Chief Executive informed me that he was content that the Leader had confirmed to him that my Report of 1 April 1999 had accurately confirmed Members' intentions at reorganisation.

I understood this to be confirmation that the proposals were in line with Members' intentions in 1995."

**263** I am critical of the approval given by the Leader on 6 May 1999 to substantial increases in the remuneration of the Chief Executive in respect of pay point assimilation and returning officer duties which in turn triggered increases in his Special Responsibility Allowance and the payment to him of "arrears".

**264** I am also critical of the failure of the Leader to ensure that decisions were taken in a way that was transparent and promoted public scrutiny and accountability. It is a matter of concern to me that decisions were taken without reporting to/informing Members generally as to what had been done in the name of the Council. I consider that the Leader must share responsibility for that unsatisfactory state of affairs.

**265** In reply, the Leader asserts that "decisions were taken in line with decisions and procedures approved by the Council in operation at the time". Even if that were the case, it does not detract from my criticism.

**266** The Chief Executive should not have participated in a decision making process in the outcome of which he had a pecuniary interest by reason of increases in his salary and the payment to him of "arrears".

**267** The Chief Executive maintains that he took no

part in the decision making process in relation to increases in his remuneration on account of pay point assimilation and returning officer fees. He contends that he "enabled the implementation of decisions taken by other officers". I am prepared to accept that the Chief Executive received (erroneous) legal advice to the effect that his involvement in that decision making process was not unlawful and that he did not participate in the decision making process knowing that he had a disqualifying interest. While it was reasonable for the Chief Executive to rely on the legal advice received (even if erroneous), in my view, he failed to recognise the need to avoid any occasion for suspicion and any appearance of improper conduct.

**268** The Council's own documents show that the Chief Executive was involved in discussions about pay point assimilation, the payment to him of returning officer fees and the payment to him of "arrears". He argues that, in his capacity as Head of Paid Service, he was acting on behalf of other Directors. In my view, however, it was impossible to separate his personal interests from his involvement on behalf of other Directors. If the latter benefited (as they did) so would the Chief Executive (as he did).

**269** The (unlawful and unauthorised) decisions to increase the Chief Executive's salary and to pay "arrears" in respect of both pay point assimilation and returning officer duties were therefore unlawful on the further ground that the Leader and the Chief Executive participated in the decision making process despite having an apparent pecuniary interest in the outcome.

**270** The consequent increases in Members' Allowances effected by the application of the August 1998 automatic review mechanism are likewise unlawful on that ground.

**271** I am critical of the failure of the Chief Executive to ensure that the decisions referred to in this report were taken in a way that was transparent and promoted public scrutiny and accountability. I also regard it as unacceptable that the Chief Executive and another senior officer of the Council authorised pay increases in respect of pay point assimilation for each other (without delegated authority to do so) and without reporting to/informing Members generally as to what had been done in the name of the Council. The Chief Executive has informed me that "there was no deliberate concealment of information" and that there was no "collusive

impropriety". I consider, however, that the Chief Executive must share responsibility for this unsatisfactory state of affairs.

**272** In my view, the way in which the above matters were handled supports the many complaints I have received about the lack of transparency surrounding the calculation and payment of Members' Allowances.

**273** The standards required from those in public office are high. The National Code of Local Government Conduct, issued by the Secretary of State under section 31 of the Local Government and Housing Act 1989 and in force at the time that the events referred to in this report occurred, required of councillors:

"You should never do anything as a councillor which you could not justify to the public. Your conduct and what the public believes about your conduct will affect the reputation of your council and of your party if you belong to one. It is not enough to avoid actual impropriety. You should at all times avoid any occasion for suspicion and any appearance of improper conduct."

**274** A member of a local authority occupies a position of trust. He/she is one of those individuals entrusted by Parliament and the electorate with making decisions and with deploying resources, contributed by others, to their best effect. As a person holding such a position of public trust, a member of a local authority has an obligation to act lawfully, carefully, reasonably and with due regard to the interests of those required to fund the authority's activities. That trust imposes a duty on a member to ensure that, so far as he/she reasonably can, the local authority of which he/she is an elected member acts reasonably and complies with the law.

**275** The same high standards apply to officers. Senior officers also occupy a position of trust. An officer's duties are not merely to refrain from doing those things that may not be done in the proper discharge of a local authority's functions. Such an officer also has a duty to ensure, so far as he/she reasonably can, that the Authority acts reasonably and complies with the law.

**276** The Council as a corporate body is a trustee of funds contributed by taxpayers and owes a fiduciary duty both to taxpayers and to those who benefit or might benefit from Council services.



**277** I do not suggest that any Member or officer acted in bad faith or other than in good faith. I am prepared to accept the Council, its Members and officers sought to act reasonably but I do not accept that the Council and all Members and officers did so.

**278** In my view, the Council as a body acted in a manner which was inconsistent with its position as trustee of monies contributed by taxpayers and its fiduciary duty to taxpayers and others in a number of important respects. In particular, the Council failed to act with transparency or in an accountable manner.

**279** It is a feature of the Council's handling of Members' Allowances and related issues of officer remuneration that decisions were taken:  
\_ without any delegated authority at all: that criticism applies to all of the decisions impugned in the section 17 proceedings, including the introduction of an automatic review mechanism, the implementation of pay point assimilation and the introduction of the 1999 "scheme" of Members' Allowances;

\_ in reliance on emergency powers when no urgency existed;

\_ without seeking a decision from Members on issues for which they were required to be accountable: that criticism again applies to all of the decisions impugned in the section 17 proceedings;

\_ without reporting to/informing Members generally as to what had been done in the name of the Council despite, on occasion, substantial expenditure being involved: not only were Members generally excluded from decision making in relation to Members' Allowances and the remuneration of senior officers, they were not informed of decisions taken and/or the implications of those decisions;

\_ on occasion, moreover, providing Members with an incomplete and/or misleading account of what had been done: as happened in the letter from the Assistant Director (Members' Support) of 8 September 1998 and in reporting to the Committee of the Council on 22 July 1999;

\_ proceeding in a way which prevented public scrutiny and accountability including, in breach of statutory duty, consistently failing to draw up and make available for public inspection a scheme (or amended scheme) of Members' Allowances and, in breach of statutory duty, failing to give publicity to increases in Members' Allowances: that was

the case throughout the period February 1996 to October 2001. The Chief Executive has informed me that it was not "the intention of officers or members to avoid openness and accountability, but that this may have been an incidental consequence of the actions which they took";

\_ relying on justifications which, on examination, do not withstand objective scrutiny: examples include the various justifications for pay point assimilation and the adoption of an automatic review mechanism which was anything but "simple and transparent" as the Chief Executive claimed; and  
\_ failing to keep records of decisions: for example, the decision to introduce the August 1998 automatic review mechanism and the decision to introduce a new scheme of Members' Allowances in December 1999 were not recorded in writing (despite substantial expenditure being involved).

**280** I regard these departures from required standards of public governance with great concern. The public had a right to expect higher standards. It is nevertheless the case that, save in so far as the Council made unreasonable increases of some **£152,752** in Special Responsibility Allowances, it would have been open to the Council to set Members' Allowances at the level that it did, subject to following proper procedures including giving publicity to what was being done at the expense of local taxpayers. The Chief Executive contends that the making of these increases did not result in a loss to the Council. I disagree. It is not my function to speculate as to what level of Allowances would have been set had decisions been taken openly and subject to public scrutiny. I note, however, that the Council did reduce some Allowances in the face of public criticism.

**281** The conduct of those who were party to "approving" increases in Members' Allowances and increases in officer remuneration which were not disclosed to Members generally and/or the public fell short of what it should have been and the Leader and the Chief Executive can hardly

be surprised that their conduct is the subject of public criticism. This conclusion is said by the Leader to be "unsubstantiated" and is "strongly rejected" by the Chief Executive.

**282** Both the Leader and the Chief Executive had a particular responsibility to promote transparency

and accountability within the Council. In my view, in relation to the issues raised in this report, they failed to do so. I consider that the responsibility for the unsatisfactory state of affairs recorded in this report rests with them. The Chief Executive does not accept this criticism. He considers that he acted "conscientiously and in good faith with a high degree of care" and that "every decision [he] took was informed by legal and financial advice". He can see "no justification whatsoever" for the criticism of his conduct contained in this report.

**283** The Council was required, under the High Court Order, to rectify its accounts to record the fact that various items of account have been declared by the Court to be "contrary to law". I understand that, with the agreement of the current Appointed Auditor, the Council's accounts have now been rectified.

**284** The Council is recommended to consider the extent to which it may be able to recover unlawful payments made to Members and officers. I am aware that the Council has already commenced this process and has set up a Recovery Committee to consider and to recommend such action as may be appropriate. In relation to the recovery of "arrears" paid by the Council to the Chief Executive in respect of returning officer duties and other subsequent payments, recovery should be without prejudice to the right of the Chief Executive to seek to recover from central funds any fees which may be due to him from that source.

**285** The Council must ensure that the payment of returning officer fees to the Chief Executive takes place in a way which complies with statutory requirements. In particular, the Council must ensure that:

- \_ the Chief Executive is not in receipt of an inclusive salary covering his duties as an officer of the Council and his returning officer duties (other than in respect of local elections);
- \_ remuneration in respect of those duties (other than in respect of local elections) is received from central funds and not from funds contributed by local taxpayers; and
- \_ that pension entitlements of the Chief Executive in respect of his employment as Chief Executive and in respect of returning officer duties (other than in respect of local

elections) are dealt with separately, strictly in accordance with the Local Government Pension Scheme Regulations 1997.

**286** The Council informs me that it has taken independent legal advice on this matter and that revised arrangements which comply with the statutory requirements and the above recommendations have been put in place. The Council should return to the Consolidated Fund or to the National Assembly for Wales (as the case may be) those payments of returning officer fees which it has received (as the Council should not have received or retained those payments). The Chief Executive may then claim from the Consolidated Fund or the National Assembly for Wales, such returning officer fees to which he is properly entitled. In no circumstances should those fees be taken into account in calculating the Chief Executive's entitlement to a pension in respect of his local government service. I have asked the new Appointed Auditor to satisfy herself that arrangements are in place which are lawful in every respect.

**287** The following recommendations are uncontroversial but the fact that they are necessary is an indication that what was done in the name of the Council fell short of acceptable standards of transparency,

accountability and conduct in public life. I have been informed by the Council that all of these issues have been addressed and I have therefore set out in the table below not only my recommendations but details of the Council's response to them.

**288** I am pleased to note the improvements introduced by the Council, particularly in relation to the use of emergency powers and reporting to Members. The Council's commitment to improvement is evidenced by the fact it instigated a corporate governance review under the chairmanship of Sir Michael Lyons. According to the Chief Executive, "the Council culture, processes and transparency has changed" as part of the action plan resulting from that review. However, I include a word of caution. I cannot emphasise enough that good systems and processes are not sufficient on their own, their effectiveness depends on the manner in which they are operated. For those systems and processes to operate as intended there must be, throughout the Council, a culture in

• any changes to the Council's scheme of Members' Allowances are made strictly in accordance with legal requirements

- any changes to the Scheme are now made in accordance with the statutory requirements
- decisions in relation to its scheme of Members' Allowances are taken on the basis of a proper report which sets out the law, the facts and considerations relevant to the matter being considered
- any decisions relating to Members' Allowances are now made on the basis of a full report to Council
- decisions in relation to its scheme of Members' Allowances are taken in public and given due publicity
- any decisions relating to Members' Allowance scheme are now made during Council meetings which are open to the public and the decisions are publicised
- decisions taken in relation to its scheme of Members Allowances are properly recorded
- records of decisions made in relation to Members' Allowances are now set out in the minutes of the relevant Council meetings
- there are proper records of all payments made to Members. A full audit trail should be maintained of all payments made, with the systems in place being subject to periodic review by the Council's Internal Audit
- there are now records of all payments made to all Members with a full audit trail and processes and systems in place which will be the subject of periodic review by the Council's Internal Audit
- decisions in relation to the remuneration of the Chief Executive and Directors should be taken at Member level on the basis of a proper report which sets out the law, the facts and considerations relevant to the matter being considered
- Council decisions relating to all senior managers are now taken by the Employment Conditions Committee on the basis of a full report with an independent Hay assessment of job and market rates
- in 2004 the Policy Scrutiny Committee examined the decisions of the Employment Conditions Committee that increased the salaries of Senior Managers
- decisions taken in relation to the remuneration of such Officers are properly recorded
- the decisions of the Employment Conditions Committee are now recorded in the minutes and there is a full audit trail to the reports that were considered in arriving at the decision
- delegated authority should only be exercised where it clearly extends to the decision under consideration
- any decisions of Council regarding specified delegated authority to officers are now recorded in the minutes with an audit trail of the considerations giving rise to the decision
- the officer scheme of general delegations is considered by the Constitution Committee
- processes are now in place to record the exercise of delegated authority by officers and all decisions taken by the Chief Executive and Directors under delegated authority are now recorded on the Council's website and available to all Members and the public
- no Member or officer should participate in a decision making process if he/she has a disqualifying interest (pecuniary or otherwise) in the outcome of that process
- this is fully accepted and endorsed and the Council will implement any guidance that the District Auditor wishes to provide on this matter as set out in the Settlement Agreement

which Members and officers are continually alert to the consequences of their actions and the way in which those actions might be perceived by others. This is essential if the public is to maintain confidence in the way the Council conducts its affairs. I consider that within the Council there is currently a will to ensure that the above mentioned improvements in systems and processes will be stringently applied so as to ensure that the errors of the past are not repeated.

