

New legislative framework - update



Policy Briefing 14

December 2011

Report author: Ed Hammond, (020) 7187 7369,
ed.hammond@cfps.org.uk

Additional research Alison Yates

This briefing, the fourteenth in the Policy Briefing series, examines the provisions of the Police Reform and Social Responsibility Act, the Localism Act and the Health and Social Care Bill (expected to receive Royal Assent in Spring 2012), and draws conclusions from the new legislation about the future of scrutiny.

This briefing is complemented by the forthcoming revision to our comprehensive guide to scrutiny legislation, "Pulling it together", which will be published in the early spring (to coincide with the commencement date for much of the content of this briefing, in early April), and by other briefings that explore the implications of legislation in more detail and which are referenced throughout this document.

Contents

1. Introduction and background
2. Localism Act
3. Police Reform and Social Responsibility Act
4. Health and Social Care Act / Bill
5. Broad implications for scrutiny

1. Introduction and background

- 1.1 The Localism Act¹, Police Reform and Social Responsibility Act² and Health and Social Care Bill³ arguably form the bedrock of the Government's legislative programme for the first half of the 2010-14 parliamentary term. Significant structural reform in the NHS, in policing and in the powers and responsibilities of local government will mean big changes to formal accountability, and to the way that ordinary citizens interact with the state.

¹ 2011 ch 20: <http://www.legislation.gov.uk/ukpga/2011/20/contents/enacted>

² 2011 ch 13: <http://www.legislation.gov.uk/ukpga/2011/13/contents/enacted>

³ At the time of writing (late November 2011), at committee stage in the House of Lords: <http://services.parliament.uk/bills/2010-11/healthandsocialcare.html>

- 1.2 The new legislation has community power at its heart⁴ – exerted either at neighbourhood level (for example, the planning powers in the Localism Act) or by individual citizens, now empowered as “consumers” able to exercise control through choice⁵, made possible through increased transparency (as posited by all three reform packages⁶, and the education reforms covered separately in Policy Briefing 13⁷).
- 1.3 This will have an impact on existing accountability mechanisms, and particularly on overview and scrutiny. It is a truism to say that with change of this nature comes both opportunities and challenges, but those opportunities are there for the taking by effective, focused scrutiny functions. This will be possible in authority areas where scrutiny is able to find, and capitalise upon, a new and perhaps expanded niche in these new structural arrangements, that increases its profile by linking more directly to local people’s concerns.

Background to the legislation

- 1.4 Localism Act – the Localism Act was introduced as a Bill in December 2010, after a relatively long gestation. Many of the ideas in the Bill were long-standing Conservative party policy, brought together and fleshed out by the pre-election Green Paper, “Control Shift”, published by the Conservatives in early 2009⁸.
- 1.5 The Bill made slow progress through the Commons. Much was made of its length and of the large number of powers reserved for use by the Secretary of State⁹. A number of amendments were made before the Bill received Royal Assent in November 2011 – many of them relating to local democracy, but some pertaining to planning and housing. Most changes were introduced following report stage in the Lords, reflecting the subject of significant disagreement between the parties at committee stage in the Commons – issues about local referendums in

⁴ See “The Coalition: our programme for government” (2010), foreword, p7: “In short, it is our ambition to distribute power and opportunity to people rather than hoarding authority within government. That way, we can build the free, fair and responsible society we want to see.” (http://www.direct.gov.uk/prod_consum_dg/groups/dg_digitalassets/@dg/@en/documents/digitalasset/dg_187876.pdf)

⁵ For example, through personalisation in the provision of health and social care services, through the provision of “free schools” and additional marketisation of the further and higher education sectors (see Policy Briefing 13), and so on.

⁶ Both Acts, and the Bill, conflate accountability and transparency.

⁷ <http://www.cfps.org.uk/publications?item=7009>

⁸ Conservative Party Policy Green Paper No. 9: http://www.conservatives.com/News/News_stories/2009/02/Its_time_to_transfer_power_from_the_central_state_to_local_people.aspx

⁹ “Essential guide to decentralisation and the Localism Bill” (LGA, 2010), mentions that at the time of introduction 142 powers to make regulations had been reserved - <http://www.lga.gov.uk/lga/aio/16742200>

particular¹⁰. The Bill received Royal Assent in mid-November 2011 and the scrutiny elements are expected to formally commence in April 2012.

- 1.6 Police Reform and Social Responsibility Act – it had been Conservative and Liberal Democrat policy before the General Election to introduce a directly elected element to policing governance¹¹. The view was the police authorities were ineffective and had too low a profile¹², meaning that police forces were essentially seen as unaccountable. The introduction of directly-elected police commissioners became a prominent part of the coalition agreement and the subsequent plan for government¹³.
- 1.7 Notwithstanding this apparent agreement early on in the process, the Bill was beset by problems as it progressed through Parliament. Notably, Lib Dem peers in the Lords managed to amend the Bill to remove a single directly elected police commissioner, replacing them with a directly-elected body made up of a number of people (essentially a directly-elected, decision-making police and crime panel, which bore more than some similarities to police authorities)¹⁴. In order to overturn this amendment the Government had to make a number of concessions – notably, over the powers of the police and crime panel, whose role in holding the police and crime commissioner to account had previously been seen by some commentators as too weak¹⁵.
- 1.8 The Bill received Royal Assent in October 2011, earlier than expected¹⁶. However, the plans for commissioner elections, previously scheduled for May 2012, have been delayed by six months. Even with this delay, a number of those in the sector have raised concerns over the length of time, and resourcing, necessary to make the transition to the new arrangements¹⁷. It should be noted in this context that the Home Office are planning the introduction of secondary legislation to

¹⁰ These were challenged (with the relevant sections being removed from the Bill) on the fact that they would involve significant cost to local authorities, and that in any case the results would be non-binding.

¹¹ Conservative and Liberal Democrat Manifestos, 2010

¹² A view expressed in particular in the aftermath of the summer riots on 2010. The APA response to the Home Secretary's criticisms can be found at http://www.norfolk-pa.gov.uk/user_files/article/APA%20to%20Rt%20Hon%20Theresa%20May%20MP%20170811.pdf

¹³ "The Coalition: our programme for government", p13

¹⁴ Full details at <http://www.parliament.uk/business/news/2011/september/police-reform-and-social-responsibility-bill-lords-amendments/>

¹⁵ Principal among the amendments was the reduction in the threshold for the operation of the "veto" from three-quarters to two-thirds of the PCP's membership.

¹⁶ Home Office Structural Reform Plan (July 2010), <http://www.homeoffice.gov.uk/publications/about-us/corporate-publications/structural-reform-plan/pdf-version?view=Binary>

¹⁷ The Electoral Commission have expressed concerns about low turnout and high cost if elections are run in November 2012 – the APA have suggested a further delay, to May 2013 or beyond, to enable the transition process to work more smoothly.

deal with a number of ancillary issues, which will have an effect on the commissioner and his/her relationship with the panel¹⁸.

- 1.9 Health and Social Care Bill – the health reforms are the ones that, while they had the shortest gestation in policy terms post the formation of the Coalition Government, are taking longest to progress through Parliament.
- 1.10 Introduced shortly following the General Election, following the initial publication of a White Paper¹⁹, the Bill quickly became in the focus for arguments about the realities of GP commissioning (through which control of NHS spending would be vested almost entirely in the hands of GPs). Concern was expressed that the proposals to relocate public health in local government, replace Strategic Health Authorities and Primary Care Trusts with GP commissioning and an NHS Commissioning Board were too radical, and had not been subject to adequate research and consideration beforehand. Added to this was opposition based on the fact that this kind of structural reform in the health service had not been mentioned in the manifesto of either coalition party, nor was it present in the coalition agreement. There were also concerns expressed about the lack of obvious checks and balances in the new architecture.
- 1.11 For scrutineers, the most concerning element was the proposal in the Health Reform White Paper to transfer of the statutory health scrutiny powers to new Health and Wellbeing Boards, which would be executive bodies with decision-making responsibilities around joint needs assessments and joint health and wellbeing strategies. It was felt that these proposals represented a clear conflict of interest between decision-making and scrutiny responsibilities on “substantial variations” to health services²⁰. After listening to the views of a range of stakeholders, the Government decided to retain a separate health scrutiny function.
- 1.12 The Government temporarily withdrew the legislation, tasking the NHS Future Forum to carry out a review into the plans and make suggestions for changes. This not only significantly delayed the legislation, and the proposed introduction of the changes²¹, but also resulted in some substantive alterations. .

¹⁸ Home Office Plan of Secondary Legislation (October 2011), <http://www.homeoffice.gov.uk/publications/about-us/legislation/secondary-legislation?view=Binary>

¹⁹ “Equity and excellence: liberating the NHS” (DH, July 2010), http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_117353

²⁰ Powers originally given by sections 7 and 11 of the Health and Social Care Act 2001.

²¹ It had initially been planned that new commissioning arrangements would be introduced from 2013, across the country – now, the plan is to introduce them during 2013/14, at a speed to be defined more by local circumstances.

1.13 Now, new clinical commissioning groups (bodies involving GPs, together with other health professionals and lay people) will be introduced, with the bulk of the changes happening in 2013/14. Local accountability arrangements will also be strengthened, with scrutiny retaining its powers and Local HealthWatch, the successor body to LINks, having a more clearly defined role.

2. Localism Act

2.1 We discussed the main provisions of the Localism Act, when it was introduced into Parliament, in Policy Briefing 7, published in December 2010²². Since then, a number of amendments have been made. This briefing focuses on scrutiny and governance issues rather than the community rights to challenge and to “buy”, and associated changes to planning, which are covered in the previous Policy Briefing. .

2.2 The Act contains provisions on a wide range of services delivered by local authorities, or in which councils might have an interest. Licensing, planning, housing and governance are all covered. The broad policy intention behind the Act is to devolve power over a range of services to local people and local communities (although some dispute that there is any clear vision behind the legislation at all)²³.

Powers for scrutiny

2.1 The Act will see increased powers for local government scrutiny functions in a number of key areas.

2.2 Powers over partners – as it stands, the Local Government and Public Involvement in Health Act 2007, and the Local Democracy, Economic Development and Construction Act 2009, between them give general powers to O&S to look at the work of partners – so long as that work relates to a local improvement target under the Local Area Agreement.

2.3 The Localism Bill retained the link to Local Area Agreements and local improvement targets. It was known that these were being abolished and consequently it was planned that, at some point in the Bill’s progress, a new form of words would be substituted. It was, however, not known how expansive this form of words would be.

2.4 In the Act, the relevant section has been changed to encompass any activities carried out by a named partner (the list is at s104 of the 2007 Act). This could (and will) include services funded not by the local council, but from other funds. This important change makes it clearer that ever that scrutiny’s future lies in a view of public services as they are delivered across a given locality – not just those for which the council has a direct responsibility. CfPS’s recent work on health

²² <http://www.cfps.org.uk/publications?item=104&offset=0>

²³ “Plain English guide to the Localism Act” (DCLG, November 2011), <http://www.communities.gov.uk/documents/localgovernment/pdf/1896534.pdf>

inequalities, summarised in “Peeling the Onion”, explores this potential in more detail²⁴.

- 2.5 The Government plans²⁵ to lay in Parliament regulations that will replace the regulations issued pursuant to the Local Democracy, Economic Development and Construction Act 2009, relating to information requirements²⁶. Those regulations referred extensively to LAAs and local improvement targets and will need to be altered to reflect the position described above.
- 2.6 These powers should also be seen in the context of the “general power of competence”. Local authorities generally will have far wider powers to influence policy and public service delivery in their area²⁷. As a function of the council, scrutiny can use these powers to investigate issues beyond its traditional remit, but which nonetheless affect local people. The lack of formal powers for scrutiny to explicitly carry out a particular review, or to work in a certain way, cannot be used by a recalcitrant executive who would prefer that scrutiny stays within a limited and unchallenging “box”²⁸.
- 2.7 Increased powers for districts – under existing legislation, the scrutiny functions of district councils have been circumscribed in the way that they can engage with local partners. The Localism Act will expand the existing partnership powers (explained above) to districts in two tier areas. Districts will also be able (but not required) to designate a “statutory scrutiny officer”.
- 2.8 Changes to the Councillor Call for Action – the Act also amends the provisions relating to the Councillor Call for Action²⁹. The reference to “local government matters” has been removed, providing the opportunity for councillors to bring CCfAs on issues that relate to partnership business (so long as that business is within the scope of a committee’s terms of reference). The existing statutory guidance relating to CCfA remains in force.
- 2.9 Putative future changes – DCLG have advised³⁰ that they may consider, in the near future, a change to the “list of partners” under section 104 of the Local Government and Public Involvement in Health Act 2007. In CfPS’s view, this would involve either an expansion in the current list of partners to bring in more organisations over which

²⁴ <http://www.cfps.org.uk/tackling-health-inequalities>

²⁵ Information given to the National Overview and Scrutiny Forum, 2 November 2011

²⁶ Local Authorities (Overview and Scrutiny Committees) (England) Regulations 2009 (SI 2009/1919)

²⁷ “Localism Bill: General power of competence – impact assessment” (DCLG, 2011), <http://www.communities.gov.uk/publications/localgovernment/localismcompetence>

²⁸ See section 5 below on “resistance from partners/executive”

²⁹ Originally brought in via s119 of the Local Government and Public Involvement in Health Act 2007, and subject to statutory guidance produced on behalf of DCLG by CfPS in March 2009.

³⁰ Minutes of the National Overview and Scrutiny Forum, 2 November 2011

scrutiny currently has no formal powers – for example, the Highways Agency – or the replacement of the list with a “class” of organisation over which scrutiny would have some powers. CfPS has previously suggested a description such as, “any organisation in receipt of public funds delivering services to the local community”.

Governance changes

- 2.10 Councils will have the option to change governance arrangements, moving to a committee-based model of governance, or to a directly-elected executive mayoral model.
- 2.11 Elected mayors - The 12 “core cities” in England are holding confirmatory referendums on the establishment of a directly elected Mayor. The Government is currently (December 2011) consulting on the powers for directly elected mayors, through the document, “What can a mayor do for your city?”³¹. The consultation makes clear that the Government wishes the core cities to approach the Government with their own ideas of what powers will be given to Mayors. However, given amendments made to the Localism Bill/Act in September 2011, which make Mayoral powers available to other authorities, it seems difficult to consider that a decision to adopt this form of governance will be taken because different powers will be provided³². It seems more likely that – as has been suggested by a number of commentators³³ - the Mayor’s role will be a “strategic” one (reflected in the offer made in December 2011 to city regions on these wider strategic issues³⁴). This mirrors, in many ways, the strategic, partnership-building role of the Police and Crime Commissioner (see below) – both will have a responsibility to go out and forge positive relationships outside the authority, with the leaders of other councils and partners across the conurbation. The CfPS response to the mayoral powers consultation³⁵ makes clear that stronger partnership powers for O&S should go alongside a partnership-focused Mayor – equally, we and others have noted the particular importance, in Mayoral authorities of dedicated officer support for scrutiny³⁶.
- 2.12 It has been confirmed³⁷ that elected Mayors will be able concurrently to hold the post of Police and Crime Commissioner, although this appears

³¹ <http://www.communities.gov.uk/publications/localgovernment/mayorsconsultation>

³² See comment on this issue at <http://www.birmingham.ac.uk/schools/government-society/departments/local-government-studies/news/2011/11/elected-mayors.aspx>

³³ See publications by the Institute for Government, NLGN and the Core Cities Group. In particular, see Sims, “Making the Most of Mayors” (Institute for Government, 2011), <http://www.instituteforgovernment.org.uk/publications/40/making-the-most-of-mayors>

³⁴ LGC, 7 December 2011 (£) - <http://www.lgcplus.com/topics/economic-development/exclusive-ministers-set-out-new-offer-to-cities/5038931.article>

³⁵ INSERT REF

³⁶ As noted by Andrew Adonis, Director of the Institute for Government, in a letter to Eric Pickles, <http://www.instituteforgovernment.org.uk/publications/39/mayors-and-the-localism-bill>

³⁷ LGC, 22 November 2011 (£) - <http://www.lgcplus.com/policy-and-politics/official-mayors-can-stand-as-police-commissioners/5038233.article>

to be at odds with the guaranteed place on the PCP available for Mayors, and would create a conflict of interest between authority-specific, and Force-wide, priorities.

- 2.13 Committee system – CfPS’s Policy Briefing 4 goes into more detail on the committee system; a forthcoming publication will examine the practical issues in more detail.
- 2.14 The Act makes provision for authorities to either adopt a committee system of governance, or any other form of governance prescribed by the Secretary of State. Authorities choosing to adopt a committee system must first agree a resolution to his effect at Full Council, with the change itself happening following the subsequent Full Council AGM.
- 2.15 This is a change from earlier iterations of the Bill, which required the date of transition to different governance arrangements to be pegged to the date of ordinary elections. This would have meant that only 109 councils would have been able to change their arrangements in 2012³⁸ – others would have had to wait until 2013, 14 or 15. As it stands now, all English councils can opt to change in May 2012.
- 2.16 Councils can operate overview and scrutiny under a committee system. CfPS believes that, for most authorities who choose to change their arrangements, a “streamlined” or “hybrid” committee system, incorporating both subject committees and O&S, is the most likely outcome (on the basis of anecdotal information which we are collecting to support further research on this issue, to be published in February 2012)³⁹. This will allow committee system councils to exercise the scrutiny powers around healthcare, social care and health improvement, crime and disorder and external partners, as well as providing some independent challenge to decisions made by these committees.
- 2.17 DCLG plans to lay in Parliament regulations defining the operation of O&S in committee system authorities shortly. CfPS expects that these will be, for all intents and purposes, identical to the provisions on O&S for “leader and cabinet” authorities.

Tenant scrutiny

- 2.18 The Government is bringing in, through the Act, a more central role for the existing tenant scrutiny arrangements in social housing. The previous model of “co-regulation” is being extended as central government regulation is scaled back and more challenge to landlords at local level by tenants themselves replaces it⁴⁰. The Act will move

³⁸ “Impact assessment: governance arrangements” (DCLG, December 2010)

³⁹ As posited in Policy Briefing 4 (see above).

⁴⁰ <http://www.tenantservicesauthority.org/server/show/nav.14727>

two principal consumer protection responsibilities from regulators to tenant scrutiny, namely:

- Proactively monitoring landlords' compliance with service standards;
- Scrutinising landlord performance and driving service improvement generally.

2.19 A role around complaints is also envisaged for tenant panels, but they may choose not to exercise it.

2.20 Systems and arrangements will be built on existing practice – namely, the existing “Involvement and Empowerment Standard”⁴¹ developed and promoted by the TSA, which is currently consulting on a new Standard⁴². There is a clear steer from DCLG⁴³ and other national bodies that landlords will be expected to support tenant scrutiny panels or other arrangements, as a part of the co-regulatory environment. Earlier research on tenant scrutiny does provide numerous examples of good working relationships having been built up⁴⁴, but O&S may wish to explore how well arrangements are developing in their local area, both in relation to the council's own housing stock (either directly managed or by an Arms Length Management Organisation) and in relation to any social housing landlords with housing locally. Some areas, for example, are developing cross-landlord scrutiny arrangements across the area, and local authorities, with their continuing strategic housing responsibilities, may wish to take an interest in how effective local tenant scrutiny arrangements are.

2.21 Increasing powers and a stronger regulatory role for tenant scrutiny also suggests that local government O&S should seek to integrate its work more with these panels (or other local tenant scrutiny arrangements) – particularly given the importance of housing policy to a range of issues which will be of interest to local councillors. CfPS is carrying out research on this area, with a view to publishing a report and practical guide for tenants in early 2012. We believe that tenant scrutiny will play a valuable and complementary role alongside any scrutiny of housing carried out by council overview and scrutiny committees – tenants have day-to-day experience of living in their homes and bring a unique perspective. The National Tenant Organisations are also expected to produce a report on tenant panels in early 2012 which will provide further guidance and examples of current practice.

⁴¹ <http://www.tenantservicesauthority.org/server/show/ConWebDoc.19976>

⁴² <http://www.tenantservicesauthority.org/server/show/nav.15065>

⁴³ “Review of social housing regulation” (DCLG, 2010), <http://www.communities.gov.uk/documents/housing/pdf/1742903.pdf>

⁴⁴ “Local offer trailblazers – from planning to practice” (TSA, 2011), http://www.tenantservicesauthority.org/upload/pdf/Local_Offer_Trailblazer_Report_July_2011.pdf

Neighbourhood planning and “community right to challenge”

- 2.22 The Act will allow local people to directly influence policy, and the delivery of services, in neighbourhoods in two principal ways – through neighbourhood planning (the production by local people of planning documents which, as long as they complement the Core Strategy of the LDF, will be adopted by the Council as a Development Plan Document) and the “community right to challenge”, the system by which local people can challenge the delivery of a service by a certain provider, with a view to a procurement exercise for the delivery of that service being opened up. There have not been any substantive amendments or clarifications on these powers since the introduction of the Bill, and they are covered in more detail in Policy Briefing 7.

Referendums

- 2.23 The expansive referendum provisions in the Bill, as introduced, have been removed following lobbying by the LGA. Referendums will still need to be held on certain council tax increases.

3. Police Reform and Social Responsibility Act

- 3.1 We discussed the proposals in this Act, as they were introduced, in Police Briefing 8, published earlier in 2011⁴⁵. Unofficial guidance, drafted by CfPS and published in partnership with the Local Government Association, goes into more detail on the operation of police and crime panels⁴⁶.
- 3.2 The Act abolishes police authorities and replaces them with an elected Police and Crime Commissioner (PCC). The Commissioner will be responsible for holding the Chief Constable in the Force area to account. The PCC is perceived as having a more high profile and responsive role in relation to the public. Innovations such as crime mapping, and mandated neighbourhood meetings, along with direct elections, are designed to make the PCC more accountable.

Powers and responsibilities of the PCC

- 3.3 The PCC will have wide-ranging powers and responsibilities. On consultation and engagement, he or she will have a duty to consult local people – including victims of crime⁴⁷. There is a statutory requirement for the PCC to work in partnership with a range of other local agencies⁴⁸.

⁴⁵ <http://www.cfps.org.uk/publications?item=104&offset=0>

⁴⁶ <http://www.cfps.org.uk/publications?item=7002&offset=175>

⁴⁷ Section 14 (arrangements for obtaining the views of the community on policing)

⁴⁸ Section 10 (co-operative working)

- 3.4 The PCC will have sole responsibility for disbursing community safety funding from the Home Office⁴⁹ (currently provided through a range of funding streams to local authorities, police and community safety partnerships), and will also have responsibility for a range of other budgets. The PCC will be able to direct this funding where he or she wishes, in the form of grants, either to Community Safety Partnerships or other bodies.
- 3.5 The PCC will also have wider powers over criminal justice, in partnership with criminal justice bodies, under section 10(3). The precise scope of this work is as yet unclear and may be subject to more detailed discussions at local level.

The relationship with CSPs

- 3.6 The relationship between the PCC and Community Safety Partnerships (CSPs) – and, consequently, with CSP O&S – is potentially complicated.
- 3.7 As noted above, the PCC will have sole responsibilities for making grants of cash on community safety issues. There is consequently a funding accountability relationship between the PCC and those CSPs in receipt of this money. This is backed up by a formal power for the PCC to call CSP chairs to meetings to discuss Force-wide issues⁵⁰. This could be seen as a way for the PCC to enforce control over chairs for the spending of money.
- 3.8 This will see community safety moving to a more commissioning-led approach, depending on the ambition of the individual PCC. Ringfencing seems likely to be removed⁵¹. With this widespread power, the PCC may choose innovative business models for the delivery of certain services – involving the third or private sector in certain areas. Whatever happens, it seems likely that contract management will take a more central role in the delivery of community safety priorities. It may result in mergers of some CSPs⁵², the adoption of shared services between some partners, potential TUPE issues for community safety staff, and a renewed focus on “value for money” – as well as more data transparency.
- 3.9 These powers should be seen in the context of the remaining CSP scrutiny powers for local government, as well as the likely role of the PCP in scrutinising the PCC’s commissioning activities. The CSP scrutiny powers will not be amended but it is clear to see that the wider

⁴⁹ Sections 21 – 27 (financial matters)

⁵⁰ Schedule 11

⁵¹ “Police and crime commissioners: a guide for councillors” (LGA, 2011), http://www.local.gov.uk/c/document_library/get_file?uuid=30614eb6-7cad-4d50-af52-33b7158b0c73&groupId=10161

⁵² While the PCC will not be in a position to “force” CSP mergers, he or she will be able to approve such mergers.

accountability arrangements in play will have a profound impact on the way that CSPs operate. We will explore this tension in more detail in section 5.

The Police and Crime Panel⁵³

- 3.10 The Commissioner will him/herself be held to account by a Police and Crime Panel, a body made up of local councillors from all authorities in the Force area⁵⁴.
- 3.11 The Police and Crime Panel will be a joint committee⁵⁵ of all the authorities in the Force area and must be politically and geographically balanced⁵⁶, as far as possible – as well as incorporating in its members the key skills necessary to deliver the PCP’s functions.
- 3.12 A lead authority will need to be assigned to co-ordinate arrangements between the authorities involved. The CfPS/LGA guidance suggests the establishment of a “shadow PCP” to consider the role, responsibilities and composition of the final Panel⁵⁷.
- 3.13 The role of the Panel will need to be considered first. The Panel is a scrutiny body. Under the Act the PCP has certain “special functions”⁵⁸ – including considering the PCC’s Police and Crime Plan, reviewing the planned police precept and reviewing certain senior appointments. The PCP will also have formal duties around dealing with certain complaints against the PCC (to be exercised as a last resort⁵⁹).
- 3.14 Beyond these statutory powers there is a hinterland of other work in which the PCP could engage. From anecdotal evidence, CfPS understands that many areas are planning a “compliance” approach – mainly for resource reasons. CfPS’s view is that the PCP will find it difficult to transact its statutory functions – particularly scrutiny of the Police and Crime Plan – without carrying out scrutiny-style investigations into issues of local concern. The “set piece” scrutiny outlined in the “special functions” will, for its success, need to rely on a wider – but not overwhelmingly detailed – body of evidence from more detailed scrutiny investigations, in order to be meaningful⁶⁰.
- 3.15 This could well involve the PCP drawing evidence from community safety O&S functions in the Force area, and drawing on feedback from neighbourhood beat meetings, to inform its scrutiny work.

⁵³ Detailed technical information on the PCP can be found in the joint CfPS/LGA guidance on the subject.

⁵⁴ Ibid, 6.1

⁵⁵ Ibid, 5.2

⁵⁶ Ibid, 7.3 onwards

⁵⁷ Ibid, section 8

⁵⁸ Ibid, 5.21

⁵⁹ Ibid, 3.16 – 3.18

⁶⁰ Ibid, 5.14 – 5.19

- 3.16 The composition of the Panel will need to be considered after the role. It is for authorities in the area to decide how the Panel should be composed, subject to the principles mentioned above on “balanced representation”. CfPS has strongly recommended, for reasons set out in detail in the CfPS/LGA guidance, that the Panel should be made up of non-executive members⁶¹.
- 3.17 Although there is a guaranteed place for an executive mayor on the Panel, the mayor has the power to delegate this if he or she wishes. The prospect of this occurring, and a non-executive member from the relevant authority attending in the mayor’s place, should not be discounted as unrealistic. Indeed, in the only example of a directly elected mayor being given the express statutory power to direct policing policy (the powers given to the Mayor of London in 2008 to chair the Metropolitan Police Authority), those powers were delegated by Boris Johnson to Kit Malthouse as a Mayoral appointee.

Subsequent regulations and guidance, and “transition”

- 3.18 The Home Office is planning the publication of regulations relating to Police and Crime Panels and is likely to produce its own guidance in the New Year⁶². Regulations are definitely expected on complaints (a draft set have already been published⁶³) and on the operation of confirmation hearings.
- 3.19 Guidance will contain more detail on the expected timescale of the lead up to the new structural arrangements coming into force later in the year. At the moment it seems most likely that the Home Office will require councils to agree on “who leads” on PCP arrangements by April 2012, with arrangements having been established in shadow form by July 2012 at least. This timescale is of course subject to change and has not been confirmed by the Home Office.
- 3.20 On police reform more generally, Leaders and Chief Executives of local authorities, and senior officers in police authorities, expect a range of guidance on wider issues over the coming months⁶⁴. The chief uncertainty in preparation lies in who the PCC will be. It will be reasonably easy to establish new structural and support arrangements in individual Force areas, but ultimately the PCC may decide that he or she wishes to change these. As such, flexibility and responsiveness will be key to any plans being considered between now and November 2012.
- 3.21 To better assist the PCC in understanding their role, the context of policing and crime policy and in developing their budgets, some Force

⁶¹ Ibid, 7.8 – 7.10

⁶² Home Office Plan for Secondary Legislation (October 2011)

⁶³ <http://www.homeoffice.gov.uk/publications/about-us/consultations/policing-complaints-regulation/>

⁶⁴ Based on conversations with local authority and police authority employees

areas are considering the drafting of a “strategic assessment” of priorities and activities, to contribute towards a risk-based approach to planning.

4. Health and Social Care Bill / Act

4.1 The content of the Health and Social Care Bill as introduced into the House of Lords is substantially different from the Bill as originally introduced in the Commons. In response to concerns expressed inside and outside Parliament, the Government committed to a “pause” in the legislation in 2011, while the NHS Future Forum considered the changes in more detail⁶⁵. Subsequently, a revised Bill was introduced that gave other clinical professionals in local area (not just GPs) responsibility for commissioning decisions a role in clinical commissioning groups.

4.2 CfPS has produced detailed briefings on the way that accountability will operate under the new arrangements – in particular, “Accountability and the New Structures”, published jointly with the BMA (November 2011)⁶⁶.

4.2 CCGs and the NHS Commissioning Board - Commissioning remains at the centre of the Bill, with clinical commissioning groups (incorporating GPs, and other professionals, to be introduced by April 2013) taking responsibility for the commissioning of most healthcare services for local people. Local authorities will hold wide powers to steer healthcare, social care and public health policy, through health and well-being boards – in practice this will mean:

- The assessment and monitoring of the health of communities and populations at risk to identify health problems and priorities;
- The formulation of public policies designed to solve identified local and national health problems and priorities;
- Ensuring that all populations have access to appropriate and cost-effective care, including health promotion and disease prevention services, and evaluation of the effectiveness of that care⁶⁷.

4.3 CCGs will be authorised by the NHS Commissioning Board. Prospective CCGs will pass through three phases – an **initial development phase** (taking place from now up to and beyond April 2013), the **application and authorisation process** (from April 2012 to

⁶⁵ The Future Forum’s report, and the Government response, can be found at http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_127443

⁶⁶ <http://www.cfps.org.uk/publications?item=7007&offset=0>

⁶⁷ Based on the Government’s long term plans for public health in England, in “Healthy lives, healthy people” (DH, November 2010), http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_121941

April 2013) and finally (to assure quality and continuous improvement), **annual assessment** (from April 2014 onwards).

- 4.4 The process will begin with a risk assessment of the configuration of the CCG, followed by a “development period” in which the CCG builds up experience, expertise and capacity. This culminates in the formal authorisation process.
- 4.5 To be authorised, prospective CCGs will need to demonstrate their capability across six specific areas⁶⁸:
- A strong clinical and multi-professional focus which brings real added value;
 - Meaningful engagement with patients, carers and their communities;
 - Clear and credible plans which continue to deliver the QIPP (quality, innovation, productivity and prevention) challenge within financial resources, in line with national requirements (including excellent outcomes) and local joint health and wellbeing strategies;
 - Proper constitutional and governance arrangements, with the capacity and capability to deliver all their duties and responsibilities including financial control, as well as effectively commission all the services for which they are responsible;
 - Collaborative arrangements for commissioning with other CCGs, local authorities and the NHS Commissioning Board as well as the appropriate external commissioning support; and
 - Great leaders who individually and collectively can make a real difference.⁶⁹
- 4.6 For scrutineers, the element of most initial interest will be “proper constitutional and governance arrangements”, arrangements that will naturally need to include overview and scrutiny and collaboration between scrutiny, local Healthwatch and lay people involved in CCG governance..
- 4.7 Preparation of joint strategies – in addition to the joint strategic needs assessment⁷⁰ (JSNA), a joint health and wellbeing strategy (JHWS) will need to be signed off by clinical commissioning groups, working with other partners, Local HealthWatch, councils and other professionals through health and wellbeing boards. Local people must be central to the preparation of the Needs Assessment and the Strategy. Practically

⁶⁸ See for more detail, “Developing Clinical Commissioning Groups: Towards Authorisation” (DH, 2011), at http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_130293

⁶⁹ Ibid, p5

⁷⁰ DH Guidance on JSNAs from 2007 at http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_081097

speaking scrutiny will want, and need, to be involved in developing these as well.

- 4.8 The Health and Wellbeing Board for the area – a board comprising a number of local partners, including the local authority, local HealthWatch, CCG representatives and other professionals – must, under the Bill, encourage integrated working. This duty will be especially relevant in the development of the JSNA and the joint health and wellbeing strategy. The HWB cannot compel CCGs in its areas to do, or not do, something, but it will be able to challenge the CCG (through reference to the Secretary of State) if it feels that the CCG’s commissioning plans do not conform to the JSNA or the JHWS.
- 4.9 The HWB can also take on other responsibilities, beyond those set out in statute⁷¹. In this context, HWBs will have a stake in a range of decisions that affect health and health priorities in the area, but which might not be considered to be “traditional” areas for healthcare professionals – particular in respect of prevention and early intervention. For example, a significant focus of the Government’s current community budgeting agenda is on children’s services, which is seeing public health playing a leading policy role in other services that affect young people.
- 4.10 National structures – the existence of national structures will exert a significant effect on local policies. The NHS Commissioning Board, for example, has broad, continuing powers in the Bill over CCGs⁷², to ensure that they are properly commissioning services. Information will also be collected by DH to support national resource allocation – a process that has already begun in shadow form⁷³.
- 4.11 Economic regulation is to be provided by Monitor, the former Foundation Trust regulator. Monitor has a duty to consider VfM (the principles of economy, efficiency and effectiveness) as part of its regulatory role. It has a particular role in encouraging choice and personalisation. Monitor must ensure that services are provided in an “integrated” way, but also has a duty to stop “anti-competitive” practice. The two principles, for practical purposes, could be seen as coming into conflict⁷⁴.
- 4.12 The role of HealthWatch – at the moment it is still too early to make detailed predictions for how Local HealthWatch will work with overview and scrutiny – although it will certainly need to do so. CfPS has carried

⁷¹ “Great expectations: public health is coming home” (LGA, 2011), <http://www.idea.gov.uk/idk/core/page.do?pagelid=30085271>

⁷² “Developing Clinical Commissioning Groups: Towards Authorisation” (DH, 2011)

⁷³ See letter from Sir David Nicholson at http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/documents/digitalasset/dh_129401.pdf

⁷⁴ That is to say, that agreement between providers to provide services in a particular way could be regarded as being inherently anti-competitive.

out detailed studies of the development of LINks (Local Involvement Networks), since their establishment, which may provide some further guidance on this subject⁷⁵, and recently published a major evaluation of the lessons that Local HealthWatch can learn from the experience of LINks⁷⁶.

- 4.13 Health scrutiny's position and powers – the Bill amends the scrutiny provisions in the National Health Service Act 2006. Powers are now to be exercised by the authority, rather than by a health overview and scrutiny committee. This provides more flexibility to local authorities in how they manage the delivery of their scrutiny responsibilities – this could enable creativity but risks dilution of independent scrutiny. .
- 4.14 The Bill is expected to receive Royal Assent in the spring. At that point, it will be easier to draw out some of the practical implications, and it will become clearer in which areas Government plans to lay in Parliament subsequent regulations, or introduce guidance.

5. Broad implications for scrutiny

- 5.1 In this section we will look at the general implications for scrutiny arising from the new legislative framework. At the end, we will look briefly at the issue of effective resourcing and partner/executive resistance – two of the principal barriers in the way of scrutiny being able to capitalise on the opportunities we have set out in the sections above.

Thinking “external”?

- 5.2 Powers in all three pieces of legislation – and in other legislation enacted by the current Government – emphasise the importance of partnership working in the delivery of public services. Large-scale commissioning, more joint working (as evidenced by the tri-borough arrangements in London and the Combined Authority in Greater Manchester⁷⁷) and different attitudes to procurement will mean that the way that services are delivered will be subject to profound change in the coming months and years.
- 5.3 While this may initially suggest that scrutiny will need to look at more “external services”, the challenge is in fact more fundamental than this.

⁷⁵ For example, research carried out with the NHS Centre for Involvement in 2009.

⁷⁶ <http://www.cfps.org.uk/publications?item=6999>

⁷⁷ The tri-borough proposals can be found at http://www.westminster.gov.uk/workspace/assets/publications/tri-borough-proposals-report_aw3-1297241297.pdf - information on the Manchester combined authority is at <http://www.agma.gov.uk/gmca/index.html>

- 5.4 Increasingly, council business is delivered in partnership with others⁷⁸, and the contents of the Acts will only serve to accelerate this trend. It will become more difficult to distinguish between “internal” council-only services and “external” ones delivered by partners. The merging of the two will mean that the way in which scrutiny deals with all issues across a local area will need to be harmonised.
- 5.5 This may involve a number of changes:
- More proactive consultation and discussion with partners about the scrutiny work programme (most councils consult officers within the council but it is less usual to speak to partners more widely);
 - A better understanding of scrutiny by partners more generally. Even “listed” partners under s104 may be unwilling to participate in scrutiny work at the moment, sometimes because they feel that scrutiny is a confrontational process. Future expansion of partnership powers may provoke scrutiny functions to engage with partners to discuss mutual expectations from the process, and if necessary (as we have suggested before⁷⁹) develop a protocol to define relationships in the future, focusing on improvement and the avoidance of duplication;
 - More scrutiny on specific issues, that may involve partners, rather than “scrutiny of partners”. Traditionally, partners may have been invited to give evidence to scrutiny committees to give an account of their general work. It may make more sense to integrate evidence from partners into scrutiny reviews of “issues” affecting local people;
 - More joint scrutiny⁸⁰. The administrative boundaries of some partners or partnerships may not be coterminous with those of the local authority. More informal or formal joint working may be necessary – particularly in two tier areas.
- 5.6 We have explored the detail of these opportunities in more detail in Policy Briefing 11 (commissioning and shared services) and Policy Briefing 12 (equality impact assessments). We will be covering joint scrutiny in a forthcoming Policy Briefing.

Returning to the “web of accountability”

- 5.7 Our “Accountability Works” research proposed the existence of a “web of accountability”, encompassing a range of different actors at local and national level. This incorporates accountability through regulation and inspection, direct election, scrutiny by non-executives, the media, redress and complaints systems, and management systems. The different institutions – new and old – which will either be affected, or

⁷⁸ As we have previously explored in Policy Briefing 11 (shared services and commissioning) and in “Between a rock and a hard place” (2010).

⁷⁹ In relation to policing, in the joint CfPS/LGA unofficial guidance on PCPs (referenced above) and in various publications with reference to partnership working more generally.

⁸⁰ These issues will be explored in more depth in a subsequent Policy Briefing.

established, by the legislation we have discussed, will all have their own individual accountability arrangements.

- 5.8 Into this complex landscape, scrutiny, with its broader powers over partners, will have to find a niche. We discussed in “Accountability Works” (2010) how accountability by non-executives, while not having primacy over other forms of accountability, alone has the legitimacy, credibility and utility in local areas to demonstrate that it can and should be involved⁸¹. While this is subject to the usual caveats about avoiding duplication, and focusing on those areas where value can be added, a strong argument can be made that scrutiny’s unique role and composition should be recognised as new accountability arrangements are created and developed over the next few months and years.
- 5.9 In practice, this may mean that overview and scrutiny will be carrying out more joint work with other bodies and agencies to pursue areas of mutual interest. For example, local authority scrutiny functions might collaborate with tenant scrutiny panels to jointly challenge housing providers in the local area, draw evidence from Local HealthWatch to challenge health and social care providers, share information with Police and Crime Panels, amongst other opportunities. Apart from enhancing the scope and profile of scrutiny work, this could provide a technique to target resources more effectively.

Fitting in with other developments (sector self-regulation)

- 5.10 Central inspection is largely being withdrawn in the new structural landscape, replaced by the use of marketisation, direct elections and transparency as means to ensure local accountability. Local people, and their representatives, are being expected to take a stronger role in securing accountable and effective services. For local government, this will be most evident through “sector self-regulation”, the approach outlined in the LGA’s “Taking the Lead” offer to local government⁸². A combination of sector peer challenge, and the sharing of best practice through the Knowledge Hub and LG Inform⁸³, this will see local authorities taking responsibility for improvement individually and collectively. “Taking the Lead” sees a key role for scrutiny in allowing councillors to drive the local improvement process, to maintain momentum and to provide constructive scrutiny based on challenging traditional approaches to service delivery.

Barriers

- 5.11 Partner/executive resistance - In many authorities, scrutiny has moved beyond the formal powers set out in this briefing. Positive working

⁸¹ “Accountability Works” (CfPS, 2010), p14,

<http://www.cfps.org.uk/publications?item=91&offset=0>

⁸² <http://www.lga.gov.uk/lga/core/page.do?pageld=12858175>

⁸³ Both collaborative tools for discussing issues and sharing data.

relationships have built up with partners and the council executive, with the result that the impact of scrutiny work has increased.

- 5.12 However, in some areas, there is resistance to scrutiny becoming involved with “external” bodies, or becoming involved in the way that the council’s executive negotiates, liaises or contracts with those partners. A number of justifications could be given for this. Ultimately, however, this tends to come down to a view – which, as we have seen, is not backed up by the Government, by the sector at large or by the available evidence – that scrutiny is ineffective or would “get in the way”. For partners, the perception may be that scrutiny is an antagonistic and confrontational process.
- 5.13 Ingrained attitudes such as these can be difficult to shift. However, as scrutiny finds itself working in new areas, and looking at existing issues in new ways, some resistance is inevitable. These will need to be addressed through negotiation and dialogue, and through proving scrutiny’s worth by producing high quality work. Having the formal legal powers highlighted in this briefing will help in shifting opinion – greater powers would not have been given to a function that is not seen as broadly effective. However, engagement with scrutiny because of legal compliance is not a good basis for an ongoing relationship. The focus should lie in positively changing minds by carrying out high quality work (whether based on robust, focused challenge, or in-depth policy review and development) that is seen as useful by those being scrutinised.
- 5.14 New powers, no new resources - Police and Crime Panels, new scrutiny powers over partners, the structural reforms in the health services and the wider issues mentioned in this section, all provide new powers and opportunities for scrutiny. However, resources are not expected to increase – in fact, a decrease in scrutiny resources seems more likely in the short term⁸⁴. It is all very well to talk positively about the possibilities and opportunities arising out of the new legislation, but in this financial landscape it is easy to be fatalistic about the capacity of scrutiny in many authorities to capitalise on these.
- 5.15 We cover resourcing in more detail in Policy Briefing 5, and touch on the issue in a number of other recent publications⁸⁵. It would be trite to assert that scrutiny should do “more with less”, but there are lessons from recent experience that suggest that scrutiny resources should be expended only on those areas where scrutiny can add the maximum value⁸⁶.

⁸⁴ The CfPS Annual Surveys show a mixed picture – a fairly static maintenance of the number of dedicated scrutiny officers per authority, but a consistent downward trend in the amount of discretionary funding available to the function. Anecdotally, we expect this trend to continue, and it seems likely that the number of officers dedicated to scrutiny will suffer a fall in 2011/12.

⁸⁵ “Global challenge, local solutions” (2009); “The lion that roared” (2011), “A cunning plan?” (2011)

⁸⁶ “A cunning plan?” (CfPS, 2011)

- 5.16 This may involve the recasting of the role to focus more on services delivered in partnership (helping the council to build and maintain partnership working in difficult financial circumstances), contract management (providing a different, and more public, approach to what is often considered to be a technocratic exercise⁸⁷) or using performance, finance and risk information to drive the scrutiny work programme⁸⁸. In all cases, it will involve more robust prioritisation of scrutiny work – an issue which we explore in more detail in our recent publication on developing an annual scrutiny work programme, “A cunning plan?” (2011).
- 5.17 Discussing these issues goes beyond the remit of this paper, and they are discussed in more detail elsewhere. The important point to note is that the structural and legislative changes laid out in this briefing should not be regarded as presenting opportunities for scrutiny that lie just out of reach for want of an additional resource. Instead, they might be considered as providing an opportunity to recast the way that overview and scrutiny works to fit within a public service landscape that, in a couple of years time, will be transformed from that in existence in 2000.

Centre for Public Scrutiny
December 2011

⁸⁷ Explored further in Policy Briefing 11.

⁸⁸ “A cunning plan?” (CfPS, 2011)