

# NOTHING TO DO WITH ME?

*Modernising ministerial accountability  
for decentralised public services*

# Foreword

The idea that Ministers are personally accountable for everything that happens on their watch is deeply ingrained. Anyone who has been a Minister knows that what you are held responsible for may not bear much resemblance to what it is actually in your power to resolve. This mismatch is only likely to grow as the Coalition government seeks to push power away from the centre.

This is not a new problem. Ministerial accountability to Parliament is one of this century's inheritances from the 'golden age' of mid-Victorian politics but in recent decades each batch of public service reform has raised anew the questions of who is accountable for what, how they should be held to account and who is deemed responsible when things go wrong. Few believe that these questions have been satisfactorily resolved.

When to intervene and in what ways are questions all Ministers have to address. Violence on protest marches and snow on runways are simple examples of the daily disruptions which can lead to mounting public and parliamentary pressure. Faced with a failing service and a threatened reputation, it can be difficult for a Minister to hold the line that responsibility and accountability lie largely or wholly elsewhere; and he or she can only do so if that accountability is genuine.

There is no neat and simple answer. Decentralisation poses new challenges to the workings of Westminster and Whitehall. Parliament's ability to scrutinise the executive and to maintain oversight of public services funded by taxpayers' money is essential.

This report is intended to start a debate about how to modernise ministerial accountability. Our aim is to help policy makers and parliamentarians consider how and why existing principles and practice may need to change as the government's public service vision is implemented and shaped by the unpredictable course of events.

A handwritten signature in black ink, reading "Andrew Adonis". The signature is written in a cursive style with a long horizontal flourish underneath.

Andrew Adonis

Director, Institute for Government

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# Executive summary

*“Ministers standing at the despatch box will continue to be held responsible for local decisions over which they no longer have any control. This will feel uncomfortable, to say the least: responsibility without power, the curse of the decentralising Minister.”*

*Deputy Prime Minister, Nick Clegg MP, speaking at the Institute for Government, 9th September 2010.*

1. In his speech, the Deputy Prime Minister recognised an inherent tension in continuing central accountability for the local delivery of services. This tension reflects an underlying difference between the top down focus of parliamentary accountability, primarily through Ministers, and the nature of decentralised services in which responsibility and authority are localised. Given the coalition government’s plans to further devolve operational responsibility for many core public services, this report considers how the Government and Parliament might re-shape ministerial accountability to maintain effective parliamentary oversight while sustaining decentralisation.
2. Re-shaping ministerial accountability is necessary because the tendency of the public, media and members of Parliament – and sometimes of Ministers themselves – is to assume that Ministers are, and should be, accountable for everything that happens in public services. This assumption, if it was ever fully valid, has been seriously frayed around the edges by successive reforms to public services. It derives in part from the constitutional convention of individual ministerial responsibility, which reflects the broad legal basis of ministerial powers and helps to protect the neutrality and anonymity of the civil service. The most recent guidance on ministerial accountability, contained in both the 2010 Ministerial Code and a 1997 House of Commons resolution, reflects the convention in stating that Ministers are accountable *“for the policies, decisions and actions of their departments and agencies”*.<sup>1</sup>
3. There is a clear distinction between the model of how government operates implied by the convention and the reality that many modern public services are delivered beyond departments and their agencies. The guidance also reflects unresolved debate about whether it is possible and desirable to separate ultimate accountability for operational

decisions from the implications of actual policy choices made by Ministers.<sup>2</sup> As a result, ministerial accountability currently embraces both direct accountability for decisions Ministers and their departments have taken and influenced, and indirect accountability for the actions of others operating within the frameworks set by Ministers.

4. Ministers are also subject to, and currently accept, differing degrees of accountability depending on factors which include political circumstance and personal inclination. In practice, the case examples in this report suggest that most local problems in current decentralised services like Foundation Trusts, Academy Schools and Universities can be managed within well-designed systems and without overt parliamentary or ministerial intervention. In the face, however, of significant service failure which raises constituency concerns for members of Parliament, the way ministerial accountability works increases pressure for top down intervention. Irrespective of their actual powers or the impact on the decentralised system, such pressure can prove difficult for Ministers to resist, even with a healthy commitment to self-denial.
5. These pre-existing issues are likely to intensify as the Coalition implements commitments to decentralisation and to reduce top down intervention in local services. As services are decentralised, effective ministerial responsibility is constrained by the extent that Ministers themselves, with the agreement of Parliament, create frameworks which limit their control over front line services. These are most evident in new relationships, often defined in law, between Ministers and service commissioners, regulators and legally independent public service providers. The result is that Ministers have differing degrees of effective responsibility depending on the legal and managerial arrangements in place within specific public services. When Ministers' actual responsibilities and their accepted or assumed accountability are not aligned, they may be held to account – and led to act – over matters for which they have limited operational control and may lack a statutory basis to intervene.
6. In placing limits around Ministers' access to information and powers to intervene, and introducing alternative local and direct forms of accountability, decentralisation also constrains the effectiveness of some forms of parliamentary scrutiny. Ministers for decentralised services may be unable to substantively answer parliamentary questions, respond to debates about local matters or provide enlightening evidence about local service performance to Select Committees. Introducing alternative sources of elected accountability can – as in Scotland and Wales – shift public perceptions about who is accountable for services, but this shift is gradual and any fragmentation or absence of elected oversight may slow the pace of transition. Accountability gaps may, therefore, emerge in which Ministers continue to be held accountable but lack the information to

explain or the powers to intervene, while scrutiny is frustrated because those with key responsibilities are not directly accountable through parliamentary processes.

7. Left unchanged, the continuing impact of ministerial accountability is likely to be to amplify the inevitable problems that emerge when local services fail and, partly as a result, to undermine decentralisation by retaining a potent and visible source of pressure for top down ministerial intervention. Countering the inherent tensions of 'responsibility without power' requires more, however, than battenning down the hatches and passing off criticism at the despatch box as 'nothing to do with me'. The decentralisation of service delivery has not, so far, been accompanied by decentralisation of revenue. Irrespective of who spends it, 95 per cent of public money is raised via Parliament, which understandably expects to exercise effective scrutiny over how it is spent.<sup>3</sup> While there is potential for other democratic institutions to hold local services to account, it is not yet clear whether all of the alternative forms of accountability proposed by the government will be regarded by Parliamentarians, service users, the public or the media as acceptable substitutes for accountability to Parliament.
8. Re-shaping ministerial accountability therefore depends on supporting the continuing legitimacy of parliamentary oversight and on creating the greatest possible degree of clarity and consensus about what Ministers' real responsibilities are and, by extension, what they should be held to account for. Some debate about whether specific service performance is wholly attributable to operational management or policy decisions is inevitable. The starting point for such debate, however, should be a realistic understanding of the respective responsibilities and accountabilities within decentralised services, not the default assumption of ministerial accountability. Ministerial accountability cannot be considered in isolation from the accountability of others, and it is no longer sensible to automatically assume that the span of effective ministerial control and the proper limits of Parliamentary oversight are appropriately balanced.
9. We therefore suggest that two overarching principles should be applied in considering accountability for decentralised services. Accountability should be:
  - *Democratic*: the use of public money should always be subject to ultimate scrutiny and oversight by elected public representatives, acting on behalf of taxpayers; and
  - *Congruent*: accountability should be aligned with effective responsibility, and scrutiny and oversight focused first on the person or body with the most appropriate remit and powers.

10. On the basis of these principles, we suggest that Ministers should remain accountable to Parliament for the overall effectiveness of a decentralised service and, therefore, for the effect of their policy decisions to delegate responsibility and control. They should also be accountable for the exercise of specific powers remaining with them or their Department. While this report does not directly address the respective accountabilities of Ministers and civil servants within Whitehall departments, these principles may also be relevant to on-going debate about this equally important issue.
11. Ministers should not accept, or be expected to assume, indirect accountability for actions if the Minister has no means to assume responsibility and secure operational change without subverting the roles and responsibilities of others in a decentralised system. This implies that, in practice, Ministers would be accountable for aggregate outcomes and for the overall effectiveness of the system of regulation, commissioning and inspection set up to manage a decentralised service, but not for local performance failures or operational decisions made at arm's length.
12. Our recommendations cover three areas and are intended to support policy makers and parliamentarians in considering how to embed a new understanding of ministerial accountability which provides for an effective balance between the interests of Parliament and the government's decentralising mission:
  - First, government needs to **create as much consensus as possible about who is accountable, to whom, for what and how**. This is likely to require action at a generic level, involving changes in the formal statements governing the accountability of Ministers to Parliament, and on a service by service basis. We consider it is in the interest of government, as well as Parliament, to facilitate genuine debate, extending to parliamentarians, the media and the public, before the resilience of any decentralised service is tested by failure.
  - Second, government needs to **embed devolved responsibilities in decentralised services** and so counter the tendency to default back up the line. This is likely to involve clearly specifying the statutory framework distributing powers within the decentralised service including the retained powers of Ministers and their departments; ensuring the effective independence of regulators and others; and establishing clear failure regimes with alternatives to ministerial intervention.
  - Third, to avoid accountability gaps and support effective scrutiny both government and Parliament should seek to **enhance direct parliamentary oversight of decentralised public bodies**. Doing so is likely to embrace enhanced pre-

appointment and re-appointment scrutiny, more consistent and better supported select committee oversight, and the introduction of scrutiny processes which focus on regulators, commissioners and – where appropriate – local providers as much as Ministers.

## Creating consensus around ministerial accountability for decentralised services

**Recommendation 1:** the Government and Parliament should amend the Ministerial Code and update existing House of Commons Resolutions to more accurately reflect the statutory roles, structures and responsibilities in decentralised public services.

These documents should formally recognise that ministerial responsibility is constrained by law and that ministerial accountability for the acts and omissions of Departments should not incorporate operational decisions made by front line service providers, independent regulators or commissioners, so long as there are other routes of accountability to Parliament or the bodies are subject to oversight by another democratically elected body.

These documents should also be complemented by the publication, in the interests of transparency and shared understanding, of the codified statutory duties of individual Secretaries of State.

**Recommendation 2:** As part of the consultation process for each service in which significant decentralisation is proposed, policy-makers should publish an 'accountability map' setting out the main accountabilities of Ministers and others and the impact of decentralisation on parliamentary oversight.

These documents should explain any specific powers retained by Ministers – and those explicitly not retained - and set out the relevant Minister's view of their personal accountability once reforms have been enacted. These assessments should be open for discussion with the relevant departmental select committee and, where appropriate, with the Committee of Public Accounts, as part of pre-legislative scrutiny.

**Recommendation 3:** The Accounting Officer responsibilities governing the personal responsibility of permanent secretaries and other senior officials for the use of public money should be jointly reviewed by HM Treasury and the Committee of Public Accounts.

The review should challenge the cascade of Accounting Officer responsibilities from Permanent Secretaries to arm's length bodies and service providers with a view to refocusing this accountability through public service regulators and commissioners; and seek consensus about the information required to provide sufficient assurance to Parliament about the use of public funds.

## Embedding devolved responsibilities in decentralised services

**Recommendation 4:** In developing decentralised reforms, policy-makers should, where possible, set out the role and powers of the Secretary of State in statute so that the potential for direct ministerial intervention in decentralised services is constrained through primary legislation.

Effective retained powers should be specific and limited to the levers required at the centre. They should be based on a clear understanding of the future accountability system and the regime for managing failure. Pre-existing legislation should also be reviewed to ensure that all retained powers remain necessary and are understood throughout the decentralised service.

**Recommendation 5:** Where regulatory, standards assessment or other market management functions form part of decentralisation; policy-makers should ensure these functions are set up at arm's length from government departments to embed their independence and help clarify accountability to Parliament and stakeholders.

In determining the organisational form for such bodies, policy makers should have regard to the key characteristics of independent public interest bodies set out in the Institute for Government's recent report 'Read Before Burning':

- the heads of such bodies should be ministerial appointments approved by Parliament;
- they should set their own strategy within a statutory framework, but with their budget approved by the department where necessary; and
- there should be limited potential for ministerial direction of these bodies, and any directions should be subject to parliamentary oversight by the relevant select committee.

**Recommendation 6:** Clear failure regimes need to be established and publicised on a service by service basis, addressing the responsibilities for monitoring and managing failure, the overall appetite for failure in a specific service or locality, the approach to maintaining services in the event of institutional failure, and the conditions and consequences of government intervention.

Such regimes should seek to insulate Ministers and their Departments from primary responsibility for responding to local service failure, either through contractual mechanisms or via the role of arm's length regulators and inspectors. Ministers should, though remain responsible for the success or failure of the architecture of the decentralised system as a whole.

**Recommendation 7:** Where new forms of engagement are not based on existing democratic structures, or replace well-embedded forms of local oversight with different governance arrangements policy-makers should invest significant time and resource in building local capability.

In determining forms of local oversight, policy-makers should review the risk that fragmented structures lead to accountability returning to Ministers by default, with the consequence that potential benefits of local engagement may be lost. What makes for effective local accountability is the subject of separate work by the Institute for Government.

### Enhancing parliamentary oversight of decentralised services

**Recommendation 8:** The House of Commons' Liaison Committee should conduct a review of the scrutiny of decentralised services by departmental select committees. The review should address how select committee inquiries obtain evidence from, and focus recommendations on, those with key responsibilities in decentralised services, and how the accountability of public officials and service providers to Parliament can be strengthened.

The review should also address the case for:

- developing a consistent protocol for tabling and responding to parliamentary questions on issues where Ministers have statutorily ceded responsibility to others;
- ensuring greater consistency in the use of pre-appointment and reappointment confirmation hearings for senior public officials carrying out strategically significant roles in decentralised systems;
- select committees holding annual hearings with the relevant Chair and/or Chief Executive of key commissioners and regulators in decentralised services;
- updating the Osmotherley rules governing the appearance of officials at select committee hearings so that where civil servants and heads of Executive Agencies carry out key roles in decentralised services, they can be personally accountable to Parliament; and
- exploring how the support of the House of Commons Scrutiny Unit and external bodies, like the National Audit Office, can best be utilised by Committees to support evidence based assessments of operational performance in decentralised services.

**Recommendation 9:** The Liaison Committee should consider how, subject to the development of appropriate triggers, Members of Parliament with concerns about local

services could convene ad hoc or standing committees to scrutinise relevant decision makers.

This provision could be limited to cases of serious and sustained failure or where the relevant regulator, commissioner or ombudsman has made an assessment that there is a significant risk of such failure. 'Local services committees' would have similar powers to departmental select committees to call relevant witnesses and make recommendations.

# 1. Decentralisation and the role of ministers

*“We intend to do things differently, very differently... We want to replace the old system of bureaucratic accountability with a new system of democratic accountability... We want to turn government on its head, taking power away from Whitehall and putting it into the hands of people and communities... We want to give people the power to improve our country and public services, through transparency, local democratic control, competition and choice... It really is a total change in the way our country is run.”*

*Rt Hon David Cameron MP, Civil Service Live, 8 July 2010*

1. The Prime Minister’s speech in July 2010 set out the coalition’s intent to usher in a new era of reform by decentralising the operation of many core public services. The vision implies significant limitations to Ministers’ direct involvement in the delivery of public services as top down management is replaced by the main elements of the coalition’s reforms – choice, competition within a regulatory framework, payment by results, managed failure, transparency and direct elections. If successful, previous experience and an analysis of current proposals suggests that these reforms will involve less ministerial control over what happens on the ground. It is not however clear that this reduction in effective ministerial responsibility will be accompanied by reduced expectations about what Ministers are accountable for. If accountability does not change in line with real levels of ministerial control there are risks to Ministers themselves and to the quality of decision making in relation to decentralised services.

## **The Coalition government’s approach to decentralisation**

2. Decentralisation is not inherently one size fits all. How the government decentralises services will have a direct impact on the effective role of ministers and on how accountability will operate within each service. The government’s choices about the principles and structure of decentralisation will result in different relationships and

responsibilities being established between services and these changes and previous decentralising reforms introduced by the last government. These choices drive the flow of accountability within government and the extent and nature of direct oversight from citizens and outside bodies, including Parliament.

3. For some services, like school education and healthcare, the broad structure of the coalition's reforms was signalled through announcements and legislation like the Health White Paper 'Equity and Excellence' published in July 2010 and the Academies Act, which received royal assent also in July 2010. The detail of policy in these and other areas, including Higher Education Funding, has emerged through consultation, planning, parliamentary debate and the passage of legislation. For other services, including many commissioned or delivered through local partnerships, new structures such as community budgets are being established.
4. While there remains the potential for some reforms to change or be amended through the parliamentary process, and for further detail to emerge as part of a broader public services reform White Paper, common features of the reforms are those which reject top down management, tend to limit ministerial powers and create new bodies to commission, regulate and deliver public services. The consequent limitations in ministerial control, to which the Academies legislation is a partial exception for reasons set out in Part 3, will also tend to reduce the extent to which Ministers routinely seek and obtain performance information, one use of which is to respond to parliamentary questions and enquiries.
5. Key elements of the government's reform approach individually imply constraints on ministerial engagement in front line services. In combination, while not all decentralised services will incorporate every element, these constraints will – and are designed to – significantly reduce the extent to which ministers and their civil servants directly influence the management, funding and performance of local services:
  - *Removing ring-fenced funding* to local providers or commissioners reduces the ability of Ministers and their civil servants to direct resources to specific ends.
  - *Establishing quasi-markets* further removes central capability to allocate resources to specific institutions and introduces non-public providers accountable to their owners or shareholders and to the commissioners who purchase their services under contract.

- *Channelling funding to providers through service commissioners* or other independent funding bodies, possibly with some element of price competition, places responsibility for contracting decisions and establishing value for money outside departments. In most cases, there is likely to be an accountability route from commissioners to the Secretary of State for delivering any national priorities or standards, for meeting the needs of the population they serve, and for maintaining financial controls.
  - *Regulators and inspectors* will play important roles in assessing service quality and in market management, including in identifying and managing the consequences of provider failure. These decisions may sit away from Ministers.
  - *Public sector employees and service users may form mutual enterprises* to deliver public services outside the managerial influence of Ministers.
  - *Public assets may be provided to mutual or other enterprises* to support the provision of services, putting them beyond effective central management control. Nonetheless, there may be controls over the circumstances in which disposal of assets is possible even if proceeds of sale remain with the service provider.
  - *Detailed information* will be published in a form accessible to service users rather than the primary purpose of management information being reporting back up to Whitehall; and
  - *Providers will be accountable to local bodies* not to the performance management functions of extended limbs of Departments.
6. These principles are being introduced to different degrees across different public services. In some cases, such as aspects of NHS reform and the growth in Academy schools, reforms also build on elements of the previous government's public service reform agenda, while rejecting national performance targets and centralised performance management. In the NHS, the White Paper set out proposals for an arm's length National Commissioning Board which would take over duties from Strategic Health Authorities and Primary Care Trusts, whose local commissioning role would move to privately owned GP commissioning consortia. All NHS hospitals would become Foundation Trusts, and the market would be opened to any willing provider who can meet national standards of quality and the tariff price, with Monitor converted to become a full economic regulator. Its duties would be to promote competition, ensure service continuity in cases of serious failure and set the national tariff prices in

cooperation with the National Commissioning Board, which will determine the structure of the tariff and the payment currencies. Oversight of local commissioning and provision will move to local authorities, alongside public health provision.<sup>4</sup>

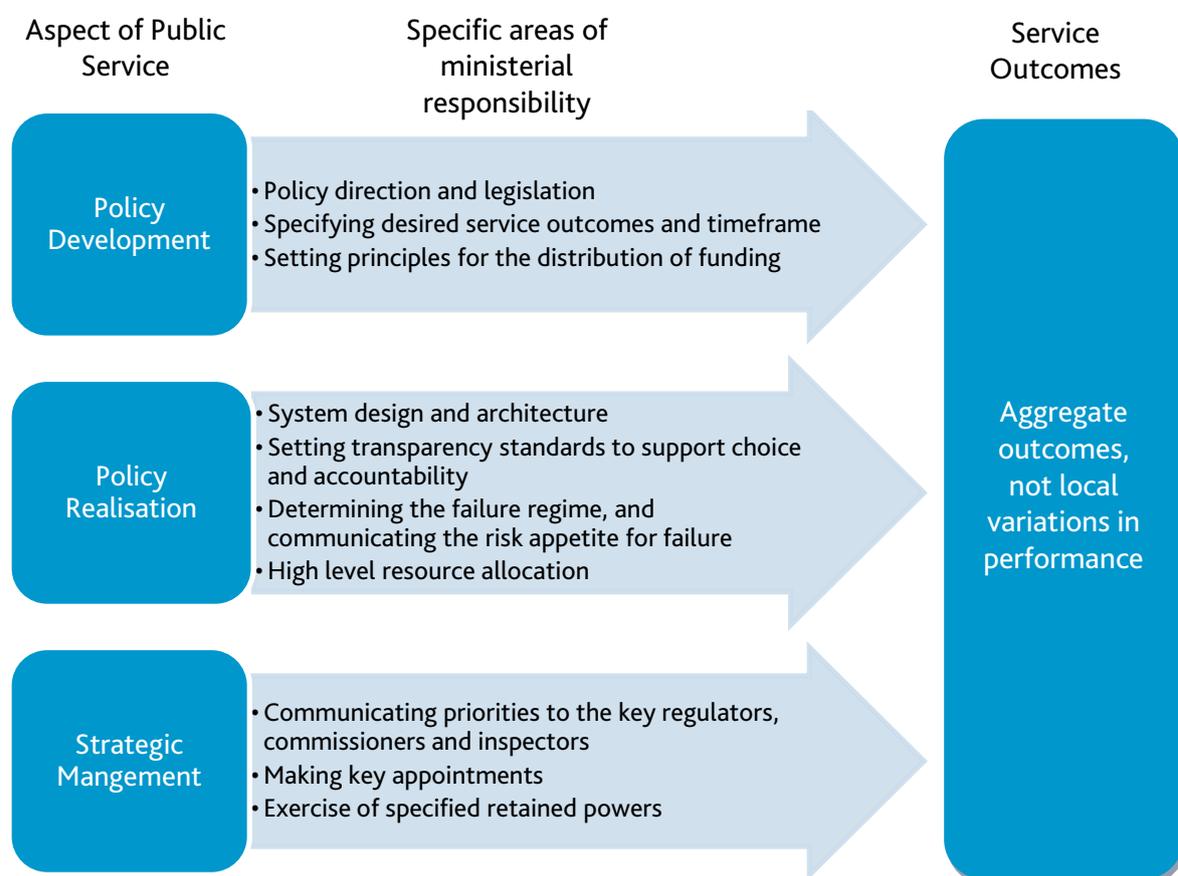
7. The 2010 Academies Act enabled the establishment of 'free schools' and the extension of the Academies programme<sup>5</sup> – whose numbers had increased to 407 by January 2011, including 126 'converter' schools.<sup>6</sup> A new funding body, the Education Funding Agency, is also to be established as an executive agency of the Department for Education. One role of the Funding Agency will be to build on the activities in funding, monitoring and advising Academy Schools delegated by the Secretary of State to the Young People's Learning Agency,<sup>7</sup> an executive non-departmental public body. The Education Bill 2010-11 proposes new powers for the Secretary of State as a consequence of the abolition of five arm's length bodies; removes certain duties on school governing bodies and local authorities, including the duty to appoint school improvement partners, and makes changes to the arrangements for setting up new schools.<sup>8</sup>
8. The proposed changes to the funding of Higher Education to be introduced from September 2012 will see the introduction of a "more market-based system" in which new providers are encouraged and funding for undergraduate teaching follows the student. As a consequence direct grants to institutions will be reduced and re-focused towards specific subjects or policy areas.<sup>9</sup> The Browne Review further recommended the amalgamation of four existing regulatory bodies in the Higher Education sector,<sup>10</sup> and a Higher Education White Paper is expected to set out the government's intentions for the future powers and functions of the Higher Education Funding Council.<sup>11</sup>
9. In other departments, decentralisation is taking on a variety of forms. Plans for directly elected police commissioners and referenda on city mayors for the largest 12 cities in England represent direct extensions of local democracy. The Ministry of Justice intends to trial Payment by Results for rehabilitation services and the Department of Work and Pensions is committed to an expansion of Welfare to Work schemes, also funded on the basis of payment by results and involving private and voluntary sector providers. The Comprehensive Spending Review removed central ring-fences on local government grants, except for public health and schools, and the expansion of community budgets would further extend the potential for funding decisions and trade-offs to be made at a local level. Finally, on transparency, the Department for Communities and Local Government has asked all councils to publish details of spending over £500 and other departmental business plans contain commitments to increase public availability of data, like the crime maps recently made available by the Home Office.

## Retained ministerial responsibilities for decentralised services

10. In many public service areas Ministers will, therefore, have less responsibility for the oversight of the day-to-day operation of that service and, with contractual relationships replacing performance management, less general facility for direct intervention. In some cases, the decisions made by commissioners about the location of services, the management of demand or the nature of the providers, or the consequences of the operation of the market for the continuation of specific services in specific areas may also be beyond ministerial control. Depending on the formal frameworks in place, Ministers' ability to direct or intervene in local providers can be constrained to specific limited circumstances defined in legislation. For example, in the current University funding system established in 1992, the Secretary of State's influence arises from policy decisions about the scale and nature of higher education funding and from his sponsorship of arm's length bodies. Under legislation the Secretary of State cannot frame grant conditions by reference to specific institutions, or to particular courses of study or programmes of research, or to the criteria for the selection and appointment of academic staff or the admission of students.<sup>12</sup>
11. The Department of Health recognised the implications for the changing role of the Secretary of State in developing a proposed framework of responsibilities as part of the 2010 White Paper 'Equity and Excellence'. Within this framework, the Secretary of State's role for the NHS would be limited in its essentials to.<sup>13</sup>
- *Setting a formal mandate for the NHS Commissioning Board*, this would be subject to consultation and Parliamentary scrutiny and include specific levels of improvement against a small number of outcome indicators.
  - *Holding the NHS Commissioning Board to account* for delivery of improvements against the agreed outcome indicators, delivering improvements in choice and patient involvement, and in maintaining financial control.
  - *Arbitration*. The Secretary of State will have a statutory role as arbiter of last resort in disputes that arise between NHS commissioners and local authorities, for example in relation to major service changes.
  - *The legislative and policy framework*. Responsibility for departmental functions will remain with the Secretary of State, including determining the comprehensive service which the NHS provides, and developing and publishing national service strategies.

12. While a more limited role is the general trend, decentralisation can increase formal ministerial involvement in local public services if contracts and powers are vested in the Minister. This does not necessarily mean Ministers' ability to intervene or direct services increases, since the relationship is governed by the terms of legally binding contracts. In a highly decentralised system displaying several of these common features, effective ministerial responsibility is likely to be limited to those set out in Figure 1, with the implication that Ministers should be held accountable for aggregate outcomes, not local variations in performance.

**Figure 1: Core responsibilities of Ministers for decentralised services**



Source: Institute for Government analysis of ministerial roles in existing decentralised public services and government proposals

### Independent providers and the limitations of ministerial control

13. Prior to the public service reforms of the last government most providers of key public services, like hospitals and schools, were ultimately owned by and accountable to the relevant political authority – either central or local government. For example, NHS

Trusts are established under statute as corporate bodies with their own Boards, but they were ultimately owned and performance managed by the Department of Health.<sup>14</sup> Maintained schools were run by their governing body but the majority were community schools owned, funded and supported by local authorities.<sup>15</sup> The establishment of new forms of local providers, such as NHS Foundation Trusts and Academy Schools, which were and are legally bodies independent of ministerial or local authority control and ownership, added new texture to the existing landscape. This type of independent provider body pre-figures further similar changes proposed by the current government, and presented new challenges to the traditional operation of ministerial accountability. Where, for example, legislation removes the Minister and Department from effective control of a front line organisation it is questionable whether the Secretary of State should be regarded as either responsible or accountable for activities which occur beyond this 'statutory wall'.

14. Both NHS Foundation Trusts and, in a different context, Academy Schools were established with the deliberate intent of removing their operational management from political and bureaucratic oversight, on the assumption that this would reduce interference, encourage innovation and help drive improved performance. Although taking different forms, the ownership structures and governance arrangements reflected this objective, and are akin to the arrangements for historically independent bodies receiving public funding for delivering a public service, like Universities. Universities are a diverse group of institutions but all are legally independent corporate institutions owning their own assets. Almost all have charitable status and some are companies limited by guarantee. In each University, the governing body carries ultimate responsibility for all aspects of the institution. Some features of Academy Schools and Foundation Trusts are similar:

- *Academies* are run by charitable companies (Academy Trusts), with their own Directors. All academies have the same legal basis, irrespective of their route to Academy status.<sup>16</sup> As companies limited by guarantee they sign an academy agreement with the Secretary of State, and receive payment to run the school directly from the Young People's Learning Agency. The academy sponsor was given sole right to form the trust board and appoint a majority of members, although initially parent and Local Authority governors were also mandatory.<sup>17</sup> The trust board appoints the principal or head teacher, as well as the governing body of each individual Academy school.
- *NHS Foundation Trusts* are independent 'Public Benefit Corporations'. They have a representative membership which, while not formally owning the Trust, elects a

majority of the board of governors, who in turn appoint the Board of Directors of the Trust.<sup>18</sup> In addition key partners like the Primary Care Trust and local authorities were given the right to appoint members of the board of governors. NHS Foundation Trusts sign legally binding contracts with commissioning bodies such as the current Primary Care Trusts.

15. In contrast to Universities, both Foundation Trusts and Academy Schools are classified as central government bodies by the Office for National Statistics (ONS).<sup>19</sup> In the case of Foundation Trusts this was because the ONS judged there was “sufficient control of general corporate policy through legislation and regulatory power for NHS Foundation Trusts to be classified as public sector”. Classification as a public sector body does not, however, imply ministerial control over the activities of individual Trusts. The main elements of control cited by the ONS in its classification of Foundation Trusts, for example, related to legislative, contractual and regulatory constraints rather than to direct control over operations.<sup>20</sup> The existence of a public sector body entails public accountability; it does not necessarily imply ministerial control.
16. The existence of initial asset transfer and of asset reversion clauses does not mean that Ministers have control over the use of those assets by independent providers. The extent of effective ministerial control after the initial transfer of assets varies from service to service. Neither the governors nor the members own the assets of an NHS Foundation Trust. Although Foundation Trusts may dispose of unprotected assets and retains the proceeds, were a Foundation Trust to go out of business and be wound up, its assets would revert to the Consolidated Fund. Ministers, however, have no control over the use, disposal or creation of assets transferred to Foundation Trusts. To support Academy Schools, public land and buildings are transferred to the new charity through powers held by the Secretary of State, commonly on a 125 year lease, and other school assets are also transferred to the Academy Trust.<sup>21</sup> By contrast with Foundation Trusts, an Academy may only dispose of transferred assets with significant value with the approval of the Secretary of State.<sup>22</sup> Where Ministers exercise retained powers which constrain full and free use of assets this implies specific ministerial responsibility rather than overall responsibility for the actions of the decentralised body.
17. The independent status of these decentralised public service providers creates multiple lines of accountability, only some of which are shared with traditional providers. Aside from direct responsibilities to Parliament, which are addressed in Part 3, a Foundation Trust is accountable to its governors and to Monitor (the independent regulator) for remaining compliant with its terms of Authorisation. It is accountable contractually to commissioning organisations for performance against legally-binding contracts. In

common with all health providers, it is also accountable to a range of inspectorates. But it is not accountable to the Secretary of State.

18. Similarly, academies are accountable to their Trust Boards, to the Charity Commission, and – on a contractual basis – to the Secretary of State for continued funding in return for meeting the conditions set out in the academy agreement. Universities are also accountable to their own governing bodies and the Charity Commission and to a number of regulatory bodies, primarily at present the Higher Education Funding Council through its funding grant. In all three examples, contractual relationships govern the relationships with central government, rather than the direct performance management of traditional public service provision, even when carried out ‘at arm’s length’.
  
19. In addition to the general reduction in the role of Ministers arising from creating multi-tiered public service systems, ministerial influence over NHS Foundation Trusts, Academy schools (and Universities) is explicitly limited through specific statutory provisions. While the scale of these retained powers varies depending on the service and the overall system architecture, the intent is to support the independence of provider bodies by limiting the scope for intervention. Retained powers for Academy Schools rest with the Secretary of State not local authorities. While once an academy agreement is signed the retained powers are few in number, they represent a significant intervention if exercised. The Secretary of State may, for example, request an Ofsted inspection, appoint members directly to the academy board or terminate the Academy agreement (with seven years notice to protect current pupil cohorts). In extremis, the Secretary of State can remove the academy from the register of independent schools. By contrast, Figure 2, overleaf, illustrates the relatively minimal retained responsibilities of the Secretary of State for Health in regard to NHS Foundation Trusts, and the contrast with examples of Ministers’ broader general responsibility for traditional NHS Trusts.

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**Figure 2: Retained powers of Ministers for NHS Foundation Trusts**

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Foundation Trusts	NHS Trusts
Overarching responsibility for improving the health of the nation	
National policy and outcome setting, including defining NHS services	
Commissioning, through Primary Care Trusts and Strategic Health Authorities	

<p>The power to require Foundation Trusts to provide such information as the Secretary of State or Monitor may specify.</p>	<p>Responsible for hospital performance through Strategic Health Authorities which are part of the Department</p>
<p>The issuing of a certificate that a PFI agreement is an “externally financed development agreement” which a Foundation Trust has the power to enter into</p>	<p>Answering parliamentary questions on hospital performance and finances</p> <p>Control over disposals and capital investment and retention of proceeds of asset disposals</p>
<p>The duty to make an order for a hospital to cease to be a Foundation Trust when he receives a notice requiring this from Monitor. The duty to lay before Parliament a request to Monitor to issue such a notice.</p>	<p>Determination of national terms &amp; conditions for all managerial and clinical grades of staff appointments to NHS boards (through the Appointments Commission),</p> <p>Approval of controversial service closures</p>
	<p>Determination of the form of accounts</p> <p>The issuing of a certificate that a PFI agreement is an “externally financed development agreement” which a Trust has the power to enter into</p>
	<p>The consideration of applications to become Foundation Trusts or to merge with a Foundation Trust.</p>

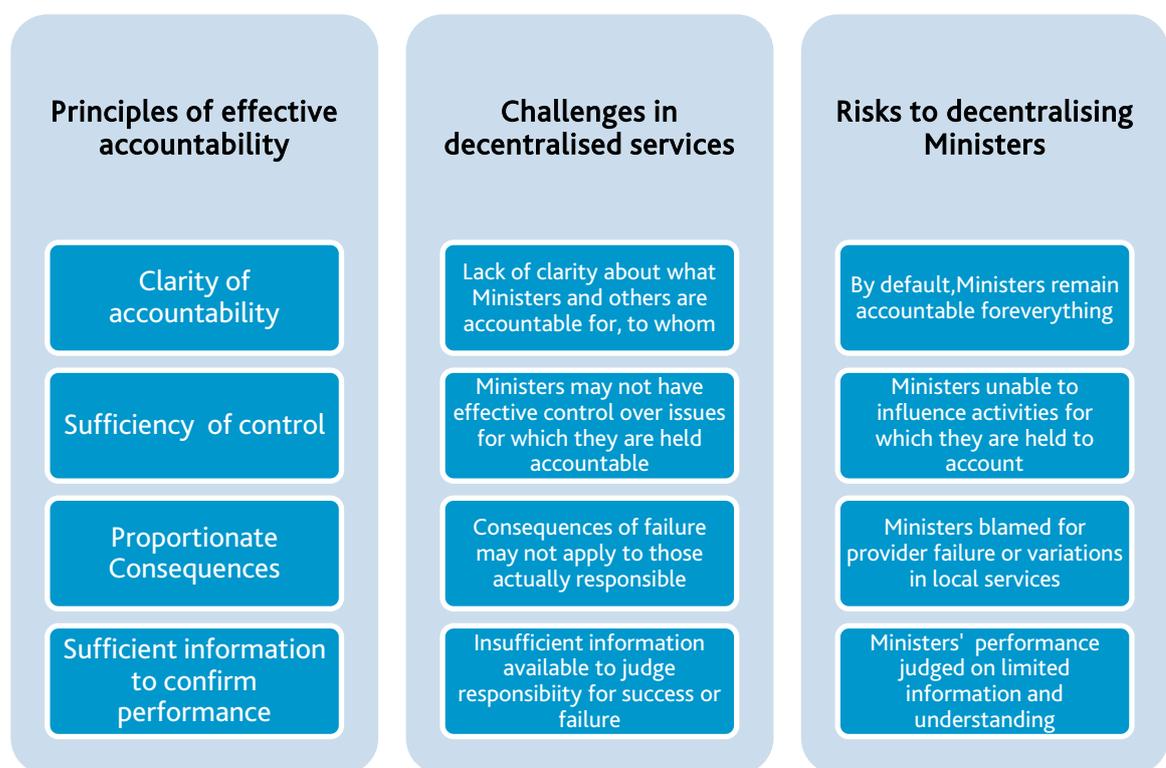
Source: IfG analysis of legislation

20. Taken together, the system changes implied in the government’s vision of decentralised services and the specific constraints arising from the introduction of legally independent providers mean that ministerial capacity to influence front line service performance in any individual provider is limited. Accepting ‘the curse of the decentralising minister’ means that Ministers could nonetheless still be held accountable in Parliament for what happens on the front line. This fracturing of responsibility and accountability would see Ministers remaining accountable to Parliament without having control or even, necessarily, the basis to intervene, and commissioners, providers or regulators potentially exercising control without being accountable to Parliament.

21. Figure 3 highlights the challenges that fracturing responsibility and accountability pose to basic principles of accountability, and the risks these challenges pose to decentralising ministers. How far these risks materialise will be influenced by how far Ministers’ actual

responsibilities are aligned with the accountability of others, and how far consensus develops about who should be accountable and for what. The next section considers whether the understanding of ministerial accountability held by Ministers themselves, by Parliament and by the wider public and media is compatible with the characteristics of decentralised services set out above, when these are put into practice.

**Figure 3: Risks of fractured accountability for decentralising ministers**



Source: Institute for Government synthesis of sources, including Pollitt and Bouckaert 2004 and Bovens 2007<sup>23</sup>

## 2. Ministerial accountability for decentralised services

*“If a bedpan is dropped on a hospital floor in Tredegar, its noise should resound in the Palace of Westminster”*

*Aneurin Bevin, Minister of Health*

22. Ministerial responsibility and accountability are two sides of the same coin. The constitutional convention of individual ministerial responsibility is given teeth by ministerial accountability to Parliament. There is no clear definition of ministerial responsibility, and traditionally government and Parliament have tended to a broad construction of both responsibility and accountability. Key elements of this broad construction are that:

- ministerial powers are not limited to those set out in statute;<sup>24</sup>
- Ministers remain accountable to Parliament for the exercise of their powers;<sup>25</sup> and
- the personal accountability of Ministers is deemed to extend to the decisions and actions of their departments and agencies'.<sup>26</sup>

Behind these key judgements lie other factors such as protecting the legal 'anonymity' of civil servants<sup>27</sup> and, of course, the role of Parliament in scrutinising the executive. This broad assumption about what constitutes responsibility and accountability is a product of constitutional inheritance informed by longstanding political debate.

23. Like a coin recently retrieved from a muddy field, however, this broad construction suffers from wear and tear when applied to decentralised services. This is not because of an inherent flaw in ministers being held to account by Parliament for public services organised on decentralised lines. Instead, it is because a broad assumption of what Ministers are accountable for in relation to such services does not reflect their actual roles, as illustrated in the last section. Ministers already have differing degrees of effective responsibility depending on the legal and managerial arrangements in place to deliver specific public services. Changes in the structure of public services have led to an underlying difference between parliamentary process – which focuses accountability primarily on Ministers – and the management of public services where responsibility and

authority is localised and embedded on others in statute. Implementation of the government's reforms promises to compound this existing dissonance.

24. Ministerial accountability currently embraces both *direct* accountability for the decisions of Ministers and their departments, and *indirect* accountability for the actions of others operating within decentralised frameworks set by Ministers and agreed by Parliament. When Ministers' actual responsibilities and their accepted or assumed accountability are not aligned, the upshot can be that through increased parliamentary and external pressure they are held to account – and led to act –over matters for which they have limited operational control and where they may lack any statutory basis for intervention. This can lead to “bumps in the road” which may undermine decentralisation if ministerial intervention leads to the muddying of public perceptions of accountability, to the creation of proxy control measures and new information requirements, or to poor decision making in the absence of appropriate information and powers.

25. The exercise of indirect ministerial accountability also blunts the hard edge of accountability because it applies consequences at the wrong level of government. What has developed is an apparent paradox whereby the broad scope and primacy of ministerial accountability is deemed sacrosanct but Ministers are (rightly) not expected to fall on their swords every time the noise of a dropped bedpan echoes around the House. The draft Cabinet Manual states that,

*“Parliament will normally understand that the many comparatively routine administrative decisions that Departments make in carrying out their responsibilities are not ones for which the Minister can be held responsible, unless he or she was personally involved in the decision or any problems were symptomatic of a systemic issue.”<sup>28</sup>*

Ministerial responsibility is, therefore, honoured in the breach. In practice, recent examples from decentralised services suggest that Ministers are subject to, and accept, differing degrees of accountability depending as much on political circumstance and personal inclination as on actual responsibility or need.

### **Ministerial responsibility and the changing structures of public services**

26. The government's decentralisation proposals mark a further stage in changes to the structure of public services which have occurred since the notions of ministerial responsibility and accountability to Parliament took root. Individual ministerial responsibility for the action and inaction of government departments, and their arms-

length bodies, is a constitutional convention forming part of the unwritten British Constitution.<sup>29</sup> In principle, the Secretary of State, holding office direct from the Crown, is responsible to Parliament for all acts and omissions committed by their Department and its agencies. Accountability follows this distribution of responsibility: “civil servants are accountable to ministers, who in turn are accountable to Parliament”,<sup>30</sup> in a classic vertical accountability chain. It is this model which, in principle, supports Aneurin Bevan’s famous assertion of how accountability was to work in the newly nationalised National Health Service.

27. The personal accountability of Ministers to Parliament reflects constitutional, historical and practical factors:

- *Constitutional* factors include the convention that while Secretaries of State and other Cabinet Ministers hold office direct from the Crown, they should be members of one or other House of Parliament and the absence of clear separation of powers between executive and legislature in the United Kingdom.<sup>31</sup>
- *Historical* factors include the development of the convention in the 18th and 19th centuries when the scale and scope of central government activity was contained within individual departments small enough for there to be a reasonable expectation that a Minister could be fully aware of their activities and therefore responsible for their conduct.<sup>32</sup>
- *Practical* factors include the need for Ministers seeking a durable ministerial career to retain the confidence of their fellow Members of Parliament, and the legal anonymity of civil servants which funnels accountability towards Ministers.<sup>33</sup>

28. The expansion of government activities over the twentieth century, and in particular during and after the two World Wars, led to a related growth in the breadth and depth of Ministers’ responsibilities but, with the partial exception of nationalised industries, within the same framework of accountability which had grown up in the Victorian era.<sup>34</sup> From the late 1980s, with the introduction of Next Steps Agencies, new tiers of public organisations developed with their own accountabilities but, as the Institute’s recent report on arm’s length government, *Read Before Burning*, highlighted, inconsistency in governance arrangements and accessibility to Parliament.<sup>35</sup>

29. Arm’s length government can provide sharp personal accountability of officials, as the resignations – without Ministerial casualties – of the heads of Her Majesty’s Revenue and Customs (a non-Ministerial Department), the Rural Payments Agency (an Executive

Agency) and the Qualifications and Curriculum Authority (an executive non-departmental body) following operational failures each demonstrated. But the fuzzy division of responsibility between Minister and public servants at different levels of government has also led to perceptions of accountability gaps and to political controversy when services delivered “at arm’s length” have been perceived to fail, as in the case of Derek Lewis’s departure from the Prison Service in 1995.

30. The last government’s public service reforms therefore added to an increasingly varied array of public service deliverers. Administrative responsibility was already devolved within many areas of government, but within ownership and statutory structures which maintained ministerial oversight and implied parliamentary accountability. In front line services, the establishment of, for example, NHS Trusts in 1991 and Primary Care Trusts in 1992 created new organisations with clear accountability lines to ministers through a variety of intermediate organisations, (the last of which were Strategic Health Authorities) and the Department of Health. Grant Maintained schools, established under the 1988 Education Reform Act, were public bodies wholly owned by their governors but funded directly from central government. Ministerial powers in relation to Universities, following the 1992 Further and Higher Education Act, were more constrained, but even here the ability of the Secretary of State to exercise indirect influence through the Funding Councils raised questions about the appropriate balance between autonomy and accountability.
31. Decentralisation was, therefore, balanced by pressures on Ministers and the centre of government to retain oversight and control, in part because their retained powers implied responsibility, albeit to differing degrees. The challenges these structures presented to the decentralising Ministers of the day, and the behaviours that could result, were neatly summarised by the Committee on Standards in Public Life’s reflection on the ministerial role in relation to grant maintained schools:

*“the present arrangements tend to bring issues too quickly to Whitehall, with the result that... Ministers are too likely to be involved in what are issues of local management rather than policy. There is something faintly ludicrous in the idea that only the Secretary of State in London can intervene if the governance of a village school in Cumbria breaks down, while the additional media attention which can arise from Ministerial involvement is unlikely to help a school.”<sup>36</sup>*

32. The question of the appropriate boundaries of ministerial responsibility for decentralised services is not, therefore, new. Nor is the question of how, through the exercise of ministerial accountability, that responsibility should be given practical effect. The challenge of satisfactorily addressing these questions as the structures of public service delivery changed is reflected in the limitations of the guidance available to Ministers and parliamentarians about ministerial accountability.

### The limitations of existing guidance on ministerial accountability

33. Alongside concerns about the proper standards of public business, changes to the structures of public service delivery contributed to the development of the Ministerial Code and the passing of a parliamentary Resolution on Ministerial Accountability in 1997. The relevant elements of these documents remain extant in 2011 but, in common with the Draft Cabinet Manual, neither explicitly addresses the applicability of ministerial accountability to frontline public services. In particular, they do not address the implications of the changes in the roles and powers of Ministers and the accountability structures of public services which add further challenges to the pre-existing ambiguity.

34. The Ministerial Code is primarily concerned with the personal behaviour of Ministers and the need to avoid conflicts between their personal interests and their public responsibilities, but it also addresses ministerial accountability. The Code is published by each new government and the key phrase – also found in the 1997 Parliamentary Resolution on Ministerial Accountability to Parliament – is that,

*“Ministers have a duty to Parliament to account, and be held to account, for the policies, decisions and actions of their departments and agencies”.*<sup>37</sup>

The version of the Ministerial Code published by the Coalition Government in May 2010 restated an ‘overarching duty on Ministers to comply with the law’ and made it clear that ministerial accountability cannot be delegated,

*“The Minister in charge of a department is solely accountable to Parliament for the exercise of the powers on which the administration of that department depends.”*<sup>38</sup>

These extracts are consistent with the 1943 Carltona Principle and the 1985 Armstrong Memorandum which help govern the relationships between Ministers and Civil Servants, and the Osmotherly rules which help guide the relationship between civil servants and Parliament.<sup>39</sup>

35. They are also consistent with the preeminent legal determination of the basis of ministerial power. The Ram doctrine, based on a memorandum written by the then First Parliamentary Counsel in 1945, explains that as a matter of law a Minister of the Crown may exercise any powers that the Crown has power to exercise, except to the extent to which the Minister is precluded by statute either expressly or by necessary implication. According to Ram, Ministers do not need 'express statutory permission' to exercise powers,

*"In other words, in the case of a Government Department, one must look at the statutes to see what it may not do, not.....to see what it may do."*<sup>40</sup>

36. It is unsurprising that these interpretations have encouraged Ministers and Parliament in adopting a broad conception of ministerial accountability, as the exercise of executive power is devolved to Ministers from the Crown and is limited only to the extent that Ministers and Parliament themselves have legislated to do so. They do not, however, fully address two questions which are important for how ministerial accountability operates:

- whether a meaningful distinction can be drawn within a minister's responsibilities between "comparatively routine administrative decisions"<sup>41</sup> and those for which a minister should properly be held responsible? and
- whether the circumstances in which Ministers' duty to Parliament to account for the actions of their Department should extend to decentralised services are clear to both Ministers and parliamentarians?

37. In principle, the flexibility of the convention allows for the broader context of public services and political debate to be taken into account at the time of any individual event. There is, however, ambiguity and disagreement about whether a distinction can be drawn between operational decisions and those a Minister should be responsible for. This view is inherent in the classic statement from a government minister on the convention, made by the then Home Secretary, Sir David Maxwell Fyfe following the Crichton Down affair in 1954,

*"The Minister is not bound to defend action of which he did not know, or of which he disapproves. But... he remains constitutionally responsible to Parliament for the fact that something has gone wrong, and he alone can tell Parliament what has occurred and render an account of his stewardship."*<sup>42</sup>

38. The implication that a Minister can render an account of events without accepting responsibility for them or for ensuring corrective action is taken where necessary has been challenged by Parliament. The 1997 House of Commons Public Services Committee report stated that,

*"It is not possible absolutely to distinguish an area in which a minister is personally responsible, and liable to take the blame, from one in which he is constitutionally accountable"*

Indicating the extent to which these problems have been longstanding and underlying, the Committee also commented that as far back as 1968 the Fulton Report had "recommended an early and thorough review of the whole question of Ministerial accountability in relation to the hiving off of functions, but no such review was then carried out". The Public Service Committee itself recommended in 1997 that a further review be carried out by Government into "accountability arrangements in relation to NDPBs and private companies involved in public service delivery".

39. The existing ambiguity about the division of accountability into operational and non-operational spheres for longer standing forms of public service delivery is unlikely to help clarify the appropriate boundaries of 'responsibility without power' for the forms of decentralisation described in Part 1. In principle, ministerial accountability for these services should reflect their retained responsibilities and the statutory frameworks which define ministerial powers and parliamentary reach. A detailed understanding of this framework for each public service rarely exists. It is not always the case, for example, that incoming Ministers receive a clear explanation of their statutory duties and powers, and their constraints.<sup>43</sup> Furthermore, these frameworks are, as Part 1 highlighted, different in each public service.
40. The existing guidance on ministerial accountability is, therefore, partial and cannot reflect the distinctions between the statutory frameworks for individual public services. It tends to reinforce a broad conception of ministerial accountability but fails to address

the difficult issues of the division of operational and political responsibility. In practice, the response of Ministers and members of Parliament to several examples of major service failure in existing decentralised services also suggests a difference between the political and parliamentary process informed by this guidance and the actual responsibilities for the management of decentralised public services.

## Ministerial accountability in practice

41. Special focus on ministerial responsibility tends to arise when there are calls for ministerial resignation or intervention as a result of policy or service failure. Ministerial accountability, though, also operates day to day as Ministers face questioning in and from Parliament. This workaday exercise of ministerial accountability arguably has a greater impact on public services as routine information requests, control requirements and occasional instructions cascade down to the front line. Nonetheless, major failure generally results in media and parliamentary pressure on Ministers to act, and crises in individual institutions have the capacity to shake the pattern of responsibilities for decentralised services. For example, the public inquiries into Mid-Staffordshire raised questions about the coherence of the regulatory system,<sup>44</sup> while the financial problems at London Metropolitan University led to consideration of a significant extension of the Funding Council's powers to replace Accountable Officers.<sup>45</sup>
  
42. This report does not seek to set out a full explanation of the nature and causes of failure in decentralised institutions, or evaluate the individual examples highlighted below. Our focus is on how failure or perceived failure has impacted on the accountability of Ministers and the arrangements set up in each decentralised service to address and manage failure. Most frequently, cases of failure or potential failure identified in NHS Foundation Trusts, Academy Schools and Universities were managed without ministerial intervention or formal parliamentary interest. We identified three types of institutional failure and response:
  - *The Norm: retaining accountability within a decentralised system.* Under-performance by a local institution which was successfully addressed through the regulatory and/or inspection regime set up to support decentralisation.
  
  - *The Borderline Cases: contained parliamentary and ministerial interest.* Under-performance by a local institution which was primarily addressed by the regulatory and/or inspection regime but which led to some parliamentary interest and ministerial involvement.

- *The Game Changers: major failure leading back to top down accountability.* Major service or financial failure in which the systems established as part of decentralisation were bypassed or came under sustained pressure from one or more of ministerial, parliamentary and public pressure.

Problems in individual institutions highlight the pressures which can be brought to bear on Ministers even where there may be limited evidence of systemic failure across a decentralised service. Ministerial responses indicate the challenge of maintaining distance from failure in individual institutions when public, media and parliamentary concern are combined.

### **The Norm: retaining accountability within a decentralised system**

43. These were the most numerous examples and did not escalate to significant political or parliamentary pressure for ministerial involvement. Examples include the entry into special measures of Unity City Academy in 2005 and Shireland Collegiate Academy in 2010; the roughly thirty occasions in which Monitor judged individual Foundation Trusts to be significantly in breach of their authorisation, including the small number of instances in which Monitor used or seriously considered using its statutory powers of intervention; and the less visible interventions made by HEFCE to support Universities at financial risk. Even in the more controversial of these cases, such as that of the Shireland Academy, the issues were contained and addressed by the institutions themselves working in tandem with regulatory, funding and inspection bodies. Most commonly, these interventions resulted in a temporary period of special focus followed by a return to normal conditions of operation. Local public and press concern was not accompanied by an expectation of action by Ministers and parliamentary concerns were muted.

### **The Borderline Cases: contained parliamentary and ministerial interest**

44. These examples were infrequent. They tended to occur either early on in the lifetime of a decentralised service or where there was underlying local concern about the viability of an institution. Despite the greater level of ministerial and parliamentary interest, the supporting arrangements set up as part of the decentralised service were generally allowed to run their course. Nonetheless, they highlight the level of parliamentary interest in local public services and the potential use of lines of accountability and communication with Ministers to seek explanation or intervention.

45. For example, when in 2005 Monitor first used its statutory powers of intervention it required the board of Bradford Teaching Hospitals NHS Foundation Trust to appoint specified external advisers and subsequently to remove the chairman of the board and appoint an interim chairman. Local MPs initially sought meetings with the relevant Minister in the Department of Health. The Minister recognised that under the new

framework, the matter was the responsibility of Monitor and, instead, the MPs met Monitor on three occasions to discuss the actions Monitor had taken and its plans.<sup>46</sup> Concerns about the financial position of Thames Valley University over a number of years led to parliamentary questions by constituency MPs which, in July 2009 for example, focused on a 'secret' Higher Education Funding Council (HEFCE) list of institutions at risk of financial failure. Here again, the relevant Minister referred the questioner to the Funding Council as the body with the appropriate responsibilities.<sup>47</sup>

### The Game Changers: major failure leading back to top down accountability

46. While these examples were rare, they illustrate the challenge Ministers face in remaining committed to the processes supporting decentralisation when significant failure creates political challenges and may be taken to imply the potential inadequacy of the regulatory and/or inspection regime. The failure of clinical care at mid-Staffordshire NHS Foundation Trust, financial problems of London Metropolitan University, and the problems at the Richard Rose Academy each combined a set of challenges which pushed Ministers towards intervention irrespective of their statutory powers.
47. Common factors were risks to the viability of an institution, actual harm or potential loss of service to citizens, questions about the effectiveness of the supporting regime, and high levels of local political concern channelled through Parliament and local MPs. Ministerial responses differed in degree, but in each case the relevant Minister believed themselves to be ultimately accountable, considered themselves capable of positively influencing events, and recognised the risk that they would pay a personal and political price for failure, despite the existence of alternative, sometimes statutory, routes of responsibility for problems in individual institutions.
48. In Academy Schools, overt ministerial intervention occurred when, after opening in 2008, the Richard Rose Central Academy was judged by Ofsted as requiring special measures early in 2009. The course of action taken by the sponsor in introducing new leadership and working with partners to rectify the problems identified was similar to that at Unity City Academy, but the context increased the political sensitivity of the problem. With some parent's groups seeking the reestablishment of local authority control, the then Schools Minister visited the Academy in Carlisle, with the local MP, to seek assurances from the Academy sponsor and provide reassurance to concerned parents, stating that he would "do all I can to help turn this academy around and make a clean break with the past".<sup>48</sup>

49. Explaining why overt ministerial intervention was deemed necessary, the then Secretary of State suggested there had been a weakness in the system of oversight. Speaking to the departmental Select Committee he said,

*"No one thought it was their responsibility to understand what was actually happening and Carlisle is a long way from London. We were getting anecdotal feeds that there were some difficulties and it ended up with me saying to the schools minister at the time... that you need to go up to Carlisle by train. He went up when the Ofsted report fell on my desk and we eventually got [the interim head] in... There has been a huge turnaround there, but we could not micro-manage school improvement from the centre... That is why we have delegated that responsibility to the newly formed Young People's Learning Agency"<sup>49</sup>*

The combination of limitations in the support regime for the Academy system and heightened local political sensitivity combined to drive ministerial intervention in an individual school, although in this case there was no formal parliamentary pressure to do so.

50. When the longer established regulatory regime for Universities was tested by the financial problems of London Metropolitan University in 2009 the then Higher Education Minister was subject to more formal questioning in Parliament. A misreading of drop-out rates and subsequent audit by the Higher Education Funding Council resulted in a dispute about the Council's intent to claim back £36.5 million in overpayments to the University.<sup>50</sup> The potential collapse of the University and the dispute over the extent of and responsibility for the financial problem led to questions about the effectiveness of the Funding Council as well as the institution, with one local MP claiming a 'degree of collusion' between the two.<sup>51</sup> A series of parliamentary questions and a Westminster Hall debate on the subject presented a challenge in maintaining the delicate balance between accountable Minister and guardian of a decentralised system. The tension between the two was clear in the Westminster Hall debate, in which the Minister (also a local MP for a constituency served by the University) was drawn to announce an independent inquiry and an inquiry by the National Audit Office whilst also stating that,

*“It might be nice for the local Minister to go in and start organising a university’s finances, but we live in a democracy in which this Parliament has voted for [universities’] autonomy and maintains it”.<sup>52</sup>*

51. The Minister’s challenge was to reconcile his concern that the accountability system was moving too slowly, lacked consequences for those considered responsible for mismanagement and could rebound personally and politically, with the statutory and informal constraints on his freedom of action.<sup>53</sup> The latter were significant, because while the 1992 legislation gave the Minister the power to direct the Funding Council’s approach to the financial support of an institution in which financial mismanagement is deemed to occur, using these powers required consultation and would have been a significant act in the independent culture of the University system. Ultimately, the Minister – although active behind the scenes in encouraging a more vigorous response on the part of the Funding Council – remained publicly committed to the formal position that relationships with individual universities were a matter for the Funding Council.<sup>54</sup> His frustrations with the accountability system were, however, later revealed through Freedom of Information requests.<sup>55</sup>
52. Even more so than with Universities, as described in Part One, the Secretary of State for Health has no direct powers in relation to the organisation or management of an individual Foundation Trust or how the regulator, Monitor, discharges its statutory responsibilities. The attitude of Ministers and MPs to this system was tested in March 2009 when the Healthcare Commission reported on the high mortality rates of Mid-Staffordshire NHS Foundation Trust. This followed a similar report into failings in the care of patients at Maidstone and Tunbridge Wells NHS Trust in October 2007 where, as it was not a Foundation Trust, Ministers had the statutory powers and responsibility to intervene and did so vigorously.<sup>56</sup> There was scope in the regime set up around Foundation Trusts for coordinated and simultaneous action by the different regulatory, inspection and professional standards bodies and by the Secretary of State, but the management of the major failure at Mid-Staffordshire proceeded, under intense pressure from backbench MPs, as if the Secretary of State were wholly responsible, and therefore accountable.<sup>57</sup>
53. Mid Staffordshire was authorised as a Foundation Trust early in 2009 but within weeks the Healthcare Commission announced its intention to mount a full-scale investigation. As well as intense and prolonged media attention, local MPs from across party lines repeatedly expressed their concerns to the Secretary of State, and their desire for a public inquiry.<sup>58</sup> The recent transition status meant that many of the issues covered in

the report had occurred prior to Mid-Staffordshire becoming a Foundation Trust, and the Secretary of State made a Statement to the House on 18 March 2009 in which he announced a series of reviews and other actions focused on the Foundation Trust.<sup>59</sup>

54. The language of the Statement suggested that the Secretary of State was responsible for the further investigations and remedial action, although formally he had to rely on the powers of Monitor and the acquiescence of the Foundation Trust for some of his announcements. Such was the degree of concern about the issue, however, that it was clear to participants at the time that the Secretary of State would have sought to investigate the performance of the hospital with or without the support of Monitor.<sup>60</sup> Subsequently, the Secretary of State commissioned a further review into case notes of individual deceased and a limited inquiry from Robert Francis QC. Throughout, local MPs raised questions in Parliament and otherwise sought to influence events through the Secretary of State in pursuit of their constituency concerns.<sup>61</sup> Amongst the many lessons learned, the case illustrates that in circumstances where a health body is failing and the health or safety of individuals is threatened, MPs will seek action through the Secretary of State and the Secretary of State may consider himself to be accountable and responsible, irrespective of the legal position.
55. In practice, therefore, in most circumstances accountability for the failure of decentralised institutions can be contained within the arrangements put in place to support the system. In a small minority of cases, however, a combination of the seriousness of events, underlying problems in the system and parliamentary concern can create significant pressure on Ministers to intervene or share the consequences of failure. Some Ministers have accepted and pre-empted this pressure, as the then Secretary of State did with Mid-Staffordshire. Sometimes, the relevant Minister will be frustrated and active behind the scenes but maintain a public line consistent with the formal accountabilities, as was the case with London Metropolitan University. And sometimes Ministers will embrace personal responsibility for addressing failure, as the then Minister did in travelling to Carlisle to personally reassure parents when the Richard Rose Academy was placed in special measures. In such circumstances accepting accountability implies responsibility, which can lead to further interventions, and vice versa.
56. Overall, the fuzzy understanding of ministerial responsibility has contributed to controversy and potential overreach when severe operational failures have occurred in decentralised services. The absence of shared understanding and the consequent need to reach consensus about responsibility on an event by event basis, can lead to the processes and behaviour of Parliament reinforcing the default tendency of public and media to hold Ministers accountable for everything that happens in public services. As

decentralisation proceeds, distance and statutory insulation from ministerial control, separate accountabilities for arm's length and non-governmental bodies, and the existence of alternative sources of scrutiny, are only likely to exacerbate the problems of understanding and sticking to the multi-layered responsibilities prevalent in modern public services. The final section of this report considers how policy-makers can mitigate the risks to decentralisation, and how Parliament can address the implications for its own scrutiny processes.

### 3. Addressing the implications of decentralisation

57. The previous sections have illustrated how the decentralising reforms of recent governments, and those proposed by the Coalition, place effective limits on the powers and responsibilities of Ministers. By contrast the statutory responsibilities and autonomy of commissioners, regulators and providers can be enhanced. These changes are not explicitly recognised in guidance relating to ministerial accountability and the actual frameworks of responsibilities are not always adhered to by Parliament or Ministers when the latter are, or feel themselves likely to be, held to account for problems in decentralised services. Reinforcing top down accountability, even on an exceptional basis, creates 'bumps in the road' to decentralisation and reduces the likelihood of decentralised accountability sticking. This risk is increased in the transition from a more centralised to a more decentralised service, if there are gaps or failings in the system architecture set up to support decentralisation, and if there is heightened political sensitivity or major failure involving actual, or potential, harm or loss of service.
58. The implications of these changes pose challenges to policy-makers and parliamentarians. The appropriate statutory framework, retained powers of Ministers, independence and accountability of commissioners, regulators and providers, and the development of robust failure regimes all require careful consideration by policy makers designing decentralised systems. The effective and appropriate pursuit of constituency concerns through questions and influencing, the appropriateness of directing questions to Ministers and the scrutiny task of holding commissioners, regulators and providers accountable through select committees are all challenges which face Parliament. Both government and Parliament have a shared interest in developing a clear understanding of how ministerial accountability should be interpreted for decentralised services generally, and of the implications for ministerial accountability of the specific frameworks for individual decentralised services. Absolute precision about the limits of ministerial accountability is not the goal. There will always be debate about whether service failure is wholly attributable to operational failings or system flaws, but more can and should be done to provide a firmer foundation for these debates.

## Creating shared understanding about ministerial accountability

59. Clear accountability creates the conditions for innovative and resilient public services. To take risks in the design and delivery of public services, and to tackle major problems effectively, requires a common understanding of where accountability lies, who takes responsibility when things go wrong, and who has the authority to step in and put things right. Ministerial accountability operates as a safety valve for concerns, but the contrast between guidance and the real structures of many public services creates a lack of clarity about the effective limits of ministerial accountability.
60. In 'traditional' public services, this lack of clarity leads to common practice in which Ministers are expected to provide answers but not generally required to take personal responsibility for failures in front line provision. For decentralised services which share many of the common features set out in Part 1, the interpretation in practice of the current guidance risks failing to reflect the legal framework put in place to enable decentralisation. In the most extreme cases, this risks pushing Ministers to act beyond their powers, and thus being open to potential legal challenge. In different ways, this outcome could have arisen had Ministers acted only slightly differently in the cases of both London Metropolitan University and Mid-Staffordshire NHS Foundation Trust.

## An updated basis for determining ministerial accountability

61. Given the limitations of applying the current convention of individual ministerial responsibility to decentralised services, refining the understanding of ministerial responsibility would help provide a firmer basis for ministerial accountability to Parliament. Given the scale of change under the last administration, and the implications of the reforms proposed by the current government, it may no longer be sensible for the stated position to rely on a compromise parliamentary resolution from 1997. A two stage process could help produce a sounder basis for determining ministerial accountability. First, the Government and Parliament could work together to amend the Ministerial Code and update existing House of Commons Resolutions. Second, on a service by service basis government could produce and maintain a codified statement of Ministerial statutory duties for consideration by the relevant departmental Select Committee during their regular sessions on the role and responsibilities of Ministers.
62. An updated parliamentary resolution would more accurately reflect the statutory roles, structures and responsibilities in decentralised public services. A starting point for creating this new basis for ministerial accountability might be for both resolution and Ministerial Code to formally recognise that Ministers' overarching duty to comply with the law places constraints on their responsibilities for decentralised services, and hence on what they should be held to account for. In addition, to bring greater clarity to the

distinction between operational decisions and those a Minister should be considered responsible for, the guidance could reflect that accountability for the acts and omissions of Departments and their agencies ought not to incorporate operational decisions made by front line service providers, independent regulators or arm's length funding bodies. To avoid accountability gaps, revised guidance could suggest the proviso that this would be the case so long as other routes of accountability to Parliament exist, or the bodies are subject to oversight by another democratically elected body.

63. A necessary complement would be the subsidiary statements of Ministers' statutory duties. It is, clearly, important that Ministers and their civil servants are aware of their statutory duties, and those areas where they have no statutory authority. It appears, however, seldom to be the case that ministerial statutory duties are codified or published outside Departments to enable others, including Parliamentarians to unambiguously understand the Minister's responsibilities. It is not, perhaps, surprising that there are limitations on the understanding of specific statutory duties when these may, as is the case for the Secretary of State for Health, these are likely to run to some considerable length.<sup>62</sup> Nonetheless, it should be an important principle of ministerial accountability that Parliament, as the body holding Ministers to account has the opportunity to share the same understanding of ministerial responsibilities as the government.

#### Reviewing the arrangements for the accountability of public money

64. Accountability for public money runs separately and in parallel to ministerial accountability, but has a similar genesis and similar implications for the relationships between departments, decentralised services and Parliament. Parliamentary process focuses accountability for public money on to a department's Permanent Secretary, who is appointed as an Accounting Officer and "must be able to assure Parliament and the public of high standards of probity in the management of public funds" and "may be called to account in Parliament [to the Committee of Public Accounts] for the stewardship of the resources within the organisation's control".<sup>63</sup> This responsibility cascades as funds move down the layers of government. It is of particular importance for decentralised services because local services in the UK, whether provided by local or central government, are overwhelmingly funded by money raised centrally, with the approval of Parliament.<sup>64</sup>

65. Notwithstanding their independent status, as recipients of public funds the executive heads of public sector providers in decentralised services have personal responsibilities for public money, as part of this cascade process. The Chief Executives of NHS Foundation Trusts are designated Accounting Officers, as are Head-teachers or Finance

Directors of Academy Trusts. University vice-Chancellors, or their equivalent, are designated Accountable Officers, with similar duties to Parliament as Accounting Officers elsewhere. Each is expected to adhere to HM Treasury guidance (or for Foundation Trusts to the financial reporting framework and audit code set by Monitor) setting out the consistent standards of governance, decision making and financial management which Accounting Officers are expected to ensure in "the organisation, and any subsidiary to it or organisation sponsored by it."<sup>65</sup>

66. The implications of decentralisation for the accountability of public money, and vice versa, have been considered by the Committee of Public Accounts (PAC) and are the subject of a review commissioned by the Cabinet Secretary.<sup>66</sup> Members of the Committee have also expressed concern at the implications, for example, that accountability will need to be channelled via each individual provider and/or commissioner rather than residing centrally with, for example, the Head of the NHS Commissioning Board or, as now, the Chief Executive of the NHS.<sup>67</sup> The challenges faced at, for example, Bradford NHS Foundation Trust and London Metropolitan University demonstrate that significant financial risk can arise in decentralised bodies. The underlying tension between autonomy and consistent standards was clear in the conclusion of the PAC's January 2011 report on Academy Schools,

*"Many academies have inadequate financial controls and governance to assure the proper use of public money, and the Department and Agency have not been sufficiently rigorous in requiring compliance with guidance. In developing a new financial handbook and governance framework, the Agency should make it compulsory for all academies - sponsored and converter - to comply with basic standards of governance and financial management. This should include segregation of key roles and responsibilities, and timely submission of annual accounts."*<sup>68</sup>

67. In some regards, as was suggested by the Total Place pilots,<sup>69</sup> the current arrangement simply a culture of control which can reduce Whitehall's willingness to delegate decision making and forego ring fencing without layering administrative burdens onto devolved or local bodies. In addition, financial accountability arrangements may constrain attempts to decentralise to market systems. In creating distinctions between public bodies and private or community providers, current arrangements may create an uneven playing field. Alternatively, maintaining or adding such requirements to all providers in the market may increase compliance costs and focus accountability on to the provider, rather than on to the public sector commissioner for their contracting decision, or the regulator for their licensing or intervention choices.

68. The United Kingdom ranks highly on indicators of governance and accountability, and the system of public control for public money is often credited with ensuring probity and constraining corruption. Parliament has a legitimate interest, as the representative of taxpayers, in the oversight of public expenditure. To maximise the chances of consensus and shared understanding Government and Parliament will need to jointly consider the implications, building on the review commissioned by the Cabinet Secretary. To facilitate this, and any necessary revision of the guidance on 'Managing Public Money', the Accounting Officer responsibilities for the use of public money should be jointly addressed by HM Treasury and the Committee of Public Accounts. In doing so both parties should consider the scope to provide sufficient assurance to Parliament about the use of public funds in decentralised services through channelling accountability primarily via public service commissioners and regulators rather than providers.

69. Such an approach could also challenge the cascade within government of Accounting Officer responsibilities from Permanent Secretaries through arm's length bodies to service providers which creates dual lines of accountability. Limiting this cascade could more accurately reflect the accountability of providers to commissioners through legally-binding contracts and, as with other procurement activities within the public sector, focus accountability on the contracting body which could then be challenged on its ability to satisfactorily address issues such as:

- the standards of governance assessed before awarding a contract or licensing a body;
- the existence of information and arrangements to support proper monitoring of the contract;
- whether any service failure was identified in advance, what steps the service commissioner took and why;
- in cases of failure, whether the contract will be switched or, if not, the rationale for continuing to purchase services from a demonstrably poor provider;
- the contractual provision and management approach adopted towards incentivising good performance and high standards of governance; and
- the arrangements in place to ensure the effective stewardship of public assets transferred to the provider.

This is not an exhaustive list of the relevant issues, but it may provide a starting point for considering how to ensure that accountability for public money reflects the statutory frameworks for decentralised services in similar ways as we suggest for ministerial accountability.

### Generating consensus about accountability for specific public services

70. The issues relating to accountability for public money are one indication of the scale of the challenge in developing a consensus about where accountability for decentralised services should, in general, reside. The examples cited in Parts 1 and 2 of this report also demonstrate the variety of frameworks which exist within the umbrella label of decentralised or local services. The actions set out above should help develop a firmer general basis for application to specific circumstances. Nonetheless, the examples of the 'game-changing' failures in Part 2 highlight the importance of generating as much consensus about relative roles and responsibilities as is possible in a political context. A high degree of consensus is necessary if ministerial accountability is, in practise, accurately to reflect the actual responsibilities of Ministers and others and so that those who are truly responsible under statute are not able to avoid being called publicly to account.
71. On occasion, the pace of reform can be such that stakeholders are not always clear on the resulting changes in responsibilities, and uncertainty can be inevitable during transition periods like that for Academy Schools following the May 2010 election. It was in part to build understanding of the implications of decentralisation that the Department of Health developed the proposed framework of responsibilities as part of the 2010 White Paper 'Equity and Excellence' referred to in Part 1. In themselves, such frameworks prove useful to policy-makers for stress-testing proposed decentralising reforms. They also, though, provide a valuable basis for generating debate about the accountability implications of reforms which otherwise may only arise once legislation is passed or when the system is tested by failure.
72. For example, despite the significant political debate about the principle of the Foundation Trust policy, the impact on ministerial accountability for the performance of the hospital system was not raised during parliamentary debates, and nor did the promoters of the legislation specifically draw the potential ramifications to Parliament's attention. Only in 2004, after the legislation had received Royal Assent and was being progressively implemented, did the then Secretary of State write to the Speaker to say that,

*"I and my Ministerial team will no longer be in a position to comment on the detail of operational management within [Foundation Trusts]."*

and that in relation to the “..day to day management...” of an MP’s local [Foundation Trust] Health Ministers would tell the MP where the requested information could be obtained, but would not themselves provide it.

73. To help generate early debate and build consensus, as part of the consultation process for each service in which significant decentralisation is proposed, policy-makers should therefore publish an ‘accountability map’ setting out the main accountabilities of Ministers and others and any impact of decentralisation on parliamentary oversight. These documents should explain any specific powers retained by Ministers – and those explicitly not retained - and set out the relevant Minister’s view of their personal accountability once reforms have been enacted. These assessments should be open for discussion with the relevant departmental select committee and, where appropriate, with the Committee of Public Accounts, as part of pre-legislative scrutiny.

### Building blocks for resilient decentralised services

74. Key elements of ‘accountability maps’ would be likely to include the statutory constraints and retained powers of Ministers, the roles of arm’s length commissioners and regulators, the extent and nature of local accountability and engagement, and the responsibilities of each in the case of service failure. Each is an important building block in ensuring decentralised systems are robust enough to conform under pressure to the norm identified in Part 2 of this report. The norm situation should see the overwhelming majority of problems which arise addressed within the system architecture set up to support decentralisation, and therefore to minimise the pressures and opportunities for top down intervention.

### Statutory constraints on ministerial powers

75. As the theoretical basis of the Ram Doctrine and the practical experience of existing decentralised services suggest, there is no guarantee that simply to declare that Ministers will not be responsible for a particular service or category of decisions or actions will result in the sustainable absence of ministerial control. Nor would self-restraint on the part of one Minister at the dispatch box necessarily be continued by their successors. The average tenure of a Minister is around 16 months and ministerial succession can result in significant shifts in policy and attitude towards particular services, even amongst Ministers of the same political party.<sup>70</sup>
76. The distinction of degree in the attitudes of successive Secretaries of State for Health towards their responsibility for Foundation Trusts had, for example, a noticeable impact on their respective readiness to seek assurances in cases of performance failure.<sup>71</sup> The legislative constraint which provides the Secretary of State for Health, for example, with

no direct powers in relation to the management of an individual Foundation Trust or how the regulator, Monitor, chooses to discharge its statutory responsibilities provides the highest threshold for ministerial intervention. In extremis, this threshold may not prove a guarantee, as the example of mid-Staffordshire implied. In the case of London Metropolitan University it is probable that in the absence of a perceived legal constraint, ministerial intervention would have occurred.

77. The duty of ministers to comply with the law means that the strongest restraint on ministerial power is the statutory assignation of responsibility to others. Proper definition and constraint on the role of the Secretary of State and, by delegation, junior Ministers and Whitehall departments is therefore important in creating a sustainable system. Some statutory frameworks emerge as a natural complement to the establishment of other bodies with their own legal independence, as Part 1 illustrated. The extents of two other elements of statutory limitations on ministerial power also require consideration as part of the development of decentralised services: retained powers of direction and pre-existing legislative provisions.
78. When new bodies are created at arm's length from government, with specific legal or other governance forms, the retention of general powers of ministerial direction allow for particular emphasis to be given to new policy priorities without the need for fresh legislation, but they also provide the means for direct intervention in matters delegated to others in the decentralised system. The extent of these powers varies from system to system depending on standard practice at the time and the context of the individual service.
79. The absence of powers of Ministers to direct or issue guidance to the Foundation Trust regulator, Monitor, contrasts with the general power of direction which the legislation governing the Higher Education Funding Council, passed in 1992, provides to Ministers. With the exception of formalising the establishment of providers and asset protection, retained ministerial powers for decentralised services more often apply to intermediate bodies such as regulators, rather than to provider institutions themselves. Where retained ministerial powers do apply to providers, as with Academy Schools, this may be more likely to lead to ministerial engagement of the sort seen following the problems at the Richard Rose Academy. According to the then Secretary of State this was one reason for subsequently delegating the practical operation of those powers to the Young People's Learning Agency.
80. The precise nature of retained powers will require a determination on the part of Ministers about what levers should be available to the Secretary of State and which

should be located elsewhere in the system. This can be challenging when dealing with the expansion of existing programmes. For example, the progressive development of the Academies programme from a vehicle for transforming a small number of failing schools into a mainstream delivery vehicle was not accompanied by a whole-scale review of the sustainability of the supporting system architecture. As a result, contracting powers and formal decisions about intervention remain vested in the Secretary of State. How far these powers are subsequently vested in the proposed Education Funding Agency may determine the future extent of ministerial accountability for the performance of individual academy schools.

81. Properly defining retained ministerial powers depends on the existence of a considered understanding of the future accountability system and the proper role for Ministers once legislation is implemented. In turn, this requires a fleshed out regime for addressing and managing the consequences of performance failure to be developed in parallel with enabling legislation. Maintaining proper focus for ministerial accountability will be easier if, in relation to decentralised bodies, Ministers retain only those powers to direct which are deemed specifically necessary to discharge their own statutory duties and support essential service provision. How far this extends to specific powers of intervention in the case of major failure will depend on the particular circumstances of each decentralised service. Ministers and their officials may also want to consider the potential to review existing statutory duties falling to arm's length bodies and powers of intervention under pre-existing legislation, such as those dating back to 1970 which enabled the intervention of the then Secretary of State for Children, Schools and Families in Haringey's child protection arrangements.<sup>72</sup>

### **The role and accountability of arm's length regulators and commissioners**

82. How Ministers address the twin challenges of constraining ministerial powers through legislation and the explicit limitation of retained powers will help set the framework for their accountability in years to come, as will the roles and accountabilities allotted to other key players in decentralised systems. Arm's length bodies play crucial roles in most decentralised systems, and under government reform plans such roles will continue to develop. A national commissioning Board, full economic regulator and a continuing quality regulator will play key roles in the reformed NHS.<sup>73</sup> The Browne report recommended the merger of the four existing regulatory bodies for Higher Education, although plans for this have yet to be confirmed.<sup>74</sup> The Young People's Learning Agency will be dissolved and replaced by an Education Funding Agency with responsibility for funding Academies schools.<sup>75</sup> In all three cases, decentralised service provision will continue to be regulated, commissioned or funded, inspected and subject to independent oversight by organisations with varying, but generally significant, levels of independence.

83. The remits of the existing arm's length bodies vary according to the nature of the decentralised systems, but the examples of the management of failure in Part 2 demonstrated the important role these bodies have played in addressing routine challenges, and the risk that ministers get drawn in if these roles are do not exist or themselves become subject to challenge and concern. When working well, they help to establish a robust system by insulating the Minister from formal responsibility for the success or failure of individual institutions, and taking responsibility for the efficient operation of the decentralised system, much as economic regulators did for privatised utilities.

84. According to joint research conducted by PriceWaterhouseCoopers and the Institute for Public Policy Research in 2009, the independence of these bodies is essential if they are to maintain the confidence of the public and of providers,

*“it is possible to transfer risk to quangos, but only if the public believe that such bodies are genuinely independent and responsible for their actions. If the public suspect that the government has interfered with the way they work then accountability for their performance moves back to Westminster.”<sup>76</sup>*

In this context, minimising the powers of direction held by the Secretary of State to those which are genuinely essential is likely to entrench such independence.

85. The extent to which arm's length bodies are subject to direction will depend on the role of the body in question. Commissioning bodies have generally been subject to greater influence than regulators or inspectorates, because they are the vehicle for transmitting political priorities into spending decisions. The Department for Business, Innovation and Skills for example, exercises the right to send an observer to Board Meetings of the Higher Education Funding Council (both quasi-regulator and funder) which also receives an annual remit letter from Ministers directing priorities for the year ahead. The Young People's Learning Agency also carries out its role in relation to Academies on the basis of an annual remit letter.

86. Where the policy intent is to develop a market for public service provision, separating the roles of regulator and funder supports the independence of the regulator by placing responsibility for decisions about financial support with the commissioning bodies and, as necessary, policy-makers and Ministers. This is broadly the position with the current system of Foundation Trust oversight in which Monitor assesses risk and can require

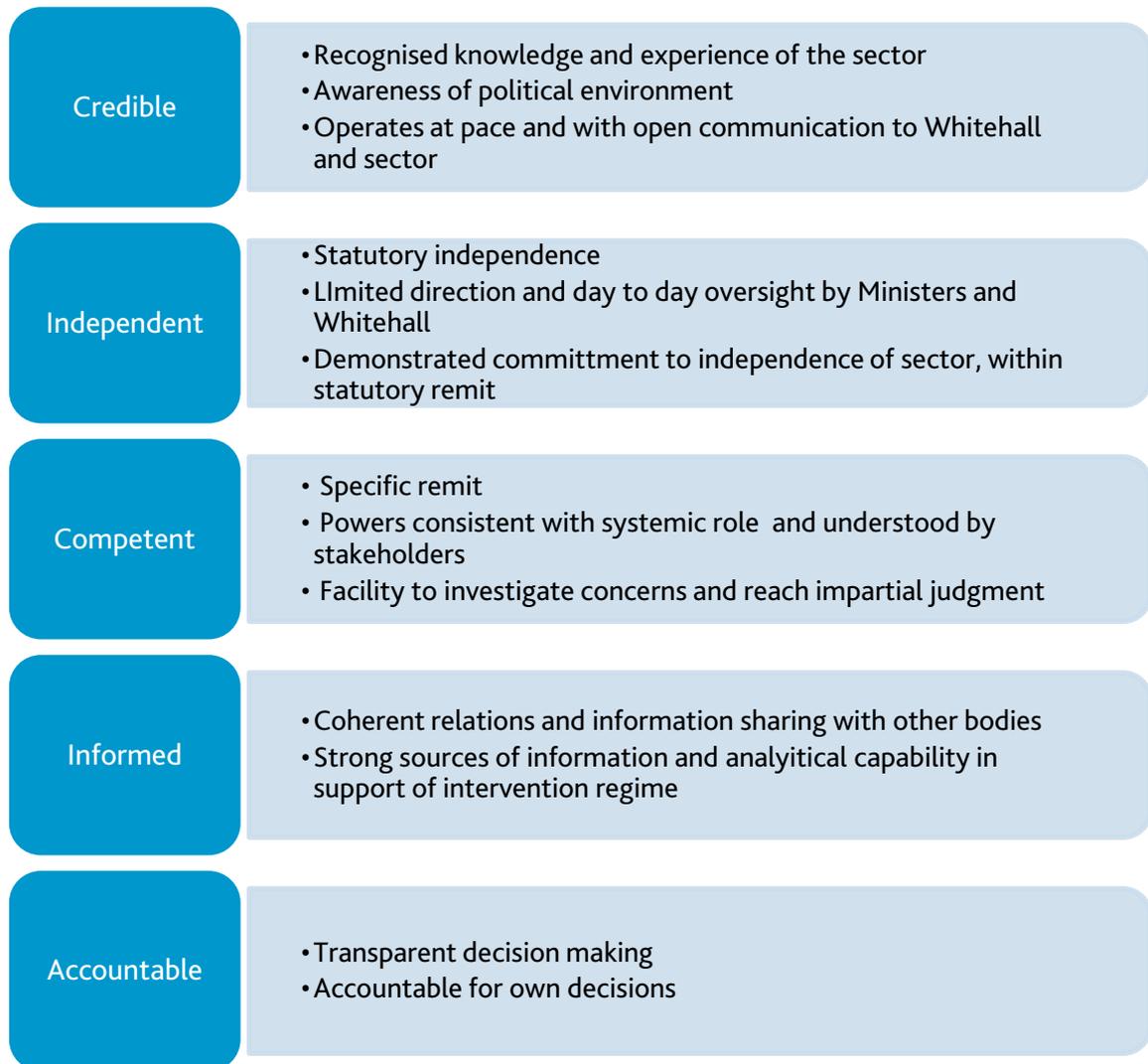
actions from individual Trusts to ensure they remain within the terms of their authorisation, but where the regulator has no powers to determine financial support for institutions in trouble, which would be a matter for commissioners, and ultimately, Ministers. This division of responsibilities, in future, would ensure that a regulator's role is not compromised by the need to take executive decisions about which institutions to support and which should suffer the consequences of financial or performance failure.

87. Relations between Ministers and the bodies with key systemic responsibilities will not always be easy. On occasion, of course, the priorities of such bodies may not be in line with those of the Minister. As with the problems with London Metropolitan University and the Richard Rose Academy, this can appear to be the case when Ministers face political pressure for, or desire, a quick resolution of institutional problems and do not feel that the responsible bodies are acting quickly or firmly enough. In such cases, the inherent quality and credibility of the body in question can become an issue, and be a determining factor in the ultimate course of action. Figure 4 overleaf sets out some generic hallmarks of success for different types of arm's length body with systemic responsibilities.
88. The accountability of arm's length bodies themselves is important for stakeholders, and in particular, so that Parliament can hold to account those with key responsibilities in decentralised services. The ability of arm's length bodies to reach independent judgments and, within the limits of their remit, adopt alternative positions to those Ministers might prefer strongly suggests that they should have independent organisational governance and clear accountability of their own.

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**Figure 4: Hallmarks of successful bodies with systemic responsibilities**

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Source: Institute for Government Case Studies and Read Before Burning

89. The Institute's recent report, *Read Before Burning*, recommended a new taxonomy for arm's length government in which form followed function. This taxonomy drew a distinction between bodies which directly implement government policy and those playing an important systemic role as standard setters or as independent watchdogs. Such 'independent public interest' status reflects the role played in the NHS by Monitor and the Care Quality Commission and, arguably, by the Higher Education Funding Council, although these bodies currently each have different governance arrangements with limited direct oversight by Parliament. The future powers of the Education Funding

Agency have yet to be determined, but if its role becomes closer to that of a regulator for Academies rather than a direct grant distributor, Executive Agency status may not provide sufficient independence or answerability for such a role.

90. Where regulatory, standards assessment or other market management functions form part of decentralisation; policy-makers should, therefore, ensure these functions are set up at arm's length from government departments. This will help to embed their independence and clarify accountability to Parliament and stakeholders. In determining the organisational form for such bodies, policy makers should have regard to the key characteristics of independent public interest bodies set out in the Institute for Government's recent report 'Read Before Burning':

- the heads of such bodies should be ministerial appointments approved by Parliament;
- they should set their own strategy within a statutory framework, but with their budget approved by the department where necessary; and
- there should be limited potential for ministerial direction of these bodies, with any directions subject to parliamentary oversight by the relevant select committee.

91. As well as being more directly accountable to Parliament, many of these bodies will have an important role in the provision of information to parliamentarians and in supporting Members of Parliament to address constituency concerns. Where applicable, consideration should be given to establishing a general duty for such bodies to assist and advise Parliament in the pursuit of its scrutiny role, consistent with the statutory remit of the body concerned. Where such duties already exist in public provider bodies, as in the terms of authorisation of Foundation Trusts, consideration should be given to refocusing these duties on commissioners and regulators.

### Managing failure in decentralised services

92. The role, or limitations in the role, of arm's length bodies in managing failure has, as the examples in Part 2 highlighted, a significant impact on the extent of ministerial intervention in cases of failure. Their role forms part of wider failure regimes which are important in clarifying who is responsible for what actions in the event of actual or potential failure in decentralised services. Previous reforms have instituted failure regimes primarily designed to pre-empt failure and allow corrective action to take place before public consequences have been felt. The perceived ineffectiveness of such a regime was the reason cited for direct ministerial intervention in a struggling Academy, but Ministerial ownership of individual institutional problems is likely to reinforce the centralised focus of accountability.

93. The pre-emptive approach has led to the creation of information and monitoring regimes, such as Monitor's compliance regime and the Higher Education Funding Council's risk management approach. These provide early warning of potential failure and facilitate overt or behind the scenes intervention, as with Monitor's power to require Foundation Trusts to have approved action plans for improvement. In some sectors, the government's reform plans seek the entry of new providers which, other things being equal, necessarily implies the shrinking or exit of existing institutions. The acceptance of institutional failure as necessary – and not a matter for direct Ministerial engagement – is likely to prove a politically and managerially testing aspect of decentralisation and represents a major cultural change for public services.
94. The concerns about Thames Valley University in the late 1990s suggest that the line between under-performance which reduces service quality and that which threatens service continuity is not hard and fast. The use of institutional failure as a policy instrument requires decisions about the risk appetite for failure in a particular service which require ministerial input. In practise, it will also require a decision making hierarchy which recognises the progressive political significance of different levels of failure and sets out specific circumstances in which ministerial involvement is expected, but which seeks as far as possible to locate operational responsibility for intervention, and non-intervention, decisions with regulators and commissioners. This may prove a particular challenge where the legislative architecture leaves formal powers of intervention in the person of the Secretary of State, as is currently the case for Academy Schools.
95. The response to failure in services with local democratic oversight but national policy frameworks or funding streams, such as local councils and, in future, elected police and crime commissioners, has an added dimension. There is a direct relationship between Whitehall departments as grant providers and such bodies as grant recipients, but the local bodies also have legitimacy conferred on by their own democratic mandate and entrenched geographic boundaries which render ultimate institutional failure implausible if not impossible. Where decentralisation of services involves devolution to democratically elected bodies, central government will still need to determine what powers it will retain, and what conditions will be applied to support for democratic institutions in financial trouble. Creating strong incentives for good management in these bodies may require the consideration of how, as in several US States and Canadian provinces where financial insolvency can be a trigger for recall votes, political consequences might flow from managerial failure.

## Local accountability and engagement

96. The introduction of a tier of more local democracy into services where accountability previously flowed to Whitehall and Ministers can be an effective means of transferring accountability in the mind of public and media. Nonetheless, this change takes time, and appears to depend on public clarity about the respective responsibilities of central government and the locally accountable body. Following devolution, the proportion of Scottish people who consider the Scottish Executive to have most influence over how Scotland is run grew from 13 per cent in 2000 to 33 per cent in 2009, while those thinking the UK government had most influence fell from 66 per cent to 39 per cent.<sup>77</sup> In Wales, by 2009, 40 per cent felt that the Assembly Government had most influence over how Wales is run compared to 29 per cent who believed this influence rested with the UK government.<sup>78</sup> In London, according to PwC and the IPPR,

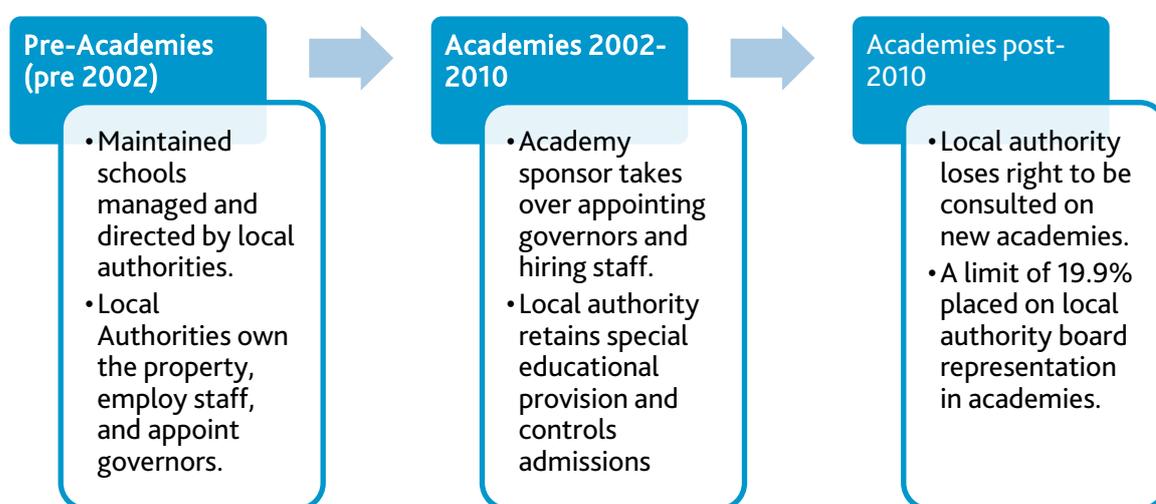
*“where the Mayor’s role is clearly understood – as in public transport - it appears that he soaks up responsibility for failures from Westminster. But the same is not true of policing, where the distribution of responsibility is much less clear.”<sup>79</sup>*

97. In some cases, existing decentralised services have provided increased opportunities for forms of democratic engagement in public service delivery. Each NHS Foundation Trust has a membership recruited from its staff, current and former patients and the population served by the hospital, which elects a majority of the Board of Governors. As at March 2010 there were some 1.76 million members of Foundation Trusts and only the governors and – currently – Monitor have the power to require changes to the Board of Directors.<sup>80</sup> The government plans to extend the Governors’ powers in its forthcoming legislation, whilst acknowledging that this will require a ‘significant cultural shift’ and increased support for governors. An evaluation carried out in 2008 suggested that the model is working “increasingly effectively” within Foundation Trusts and in Trusts’ relationships with their members. It is less clear, however, that local populations see the members and governors as primarily accountable for the success of the Trust.<sup>81</sup>

98. In some cases, the form of decentralisation may reduce local democratic oversight, particularly if national policy-makers view local authority control as a constraint on improvement. The Academies programme removed failing schools from local authority control, Figure 5 summarises some of the progressive reduction in local authority influence over Academy Schools following changes to the governance arrangements for Academies themselves. Neither parent governors nor Local authority membership of Academy Trust boards are mandatory, and local authority representation on these

boards is capped at a maximum on 19.9 per cent. There is no longer any requirement to consult Local Authorities on the foundation of a new academy school. By contrast, however, under the 2010 Academies Act existing governors, including elected parent governors, now have formal control over whether a school applies for academy status and will automatically become the new academy's governing body.

**Figure 5: Examples of changes to local authority oversight of Academies**



Source: IfG analysis of legislation

99. While local democratic oversight can help transfer accountability away from Whitehall and Westminster, it does not provide a silver bullet. The introduction of new forms of accountability takes time to have an effect on public perceptions. Where one relatively well-embedded form of oversight is replaced with new or different governance arrangements which take time to become effective there is a risk of creating a fragmented accountability landscape. In the absence of clearly understood alternative forms of democratic accountability, it is likely that the public perception will remain that Ministers are accountable for more than their responsibilities would imply. Where new forms of engagement are not based on existing democratic structures, or replace well-embedded forms of local oversight with different governance arrangements, significant effort will need to be invested in building local capability. How to make new forms of local accountability as effective as possible is the subject of ongoing work by the Institute for Government.

## Enhancing parliamentary oversight of decentralised services

100. Ministers are held to account by Parliament through written and oral questions, select committee appearances, the rough and tumble of debate and the less formal interactions facilitated by members' access to Ministers. Parliamentary process focuses accountability through Ministers drawn from the legislature. Members of Parliament use this accountability process to address issues of broad political concern, and to help them pursue constituency interests and the concerns of individual constituents. As the examples of the operation of ministerial involvement set out in Part 2 showed, the involvement of local MPs formally and behind the scenes is often a significant factor in stimulating ministerial engagement. Success in Parliament is an important factor in the development of a ministerial career, and many Ministers place great weight on effectively managing their relationships with fellow MPs and their accountability to Parliament.
101. The scope and scale of parliamentary scrutiny of the executive has increased since the development of the convention of ministerial responsibility. In 1847, the total number of parliamentary questions across the whole of government was 129.<sup>82</sup> The number of questions asked varies substantially with the number of days Parliament sits, but in 2009 the combined number of oral and written questions was over 60,000, which was consistent with recent years.<sup>83</sup> The Department of Health – an area in which significant decentralisation has already occurred and more is planned – is the largest recipient of parliamentary questions with, for example, 8,936 written questions for response in 2007-08.<sup>84</sup> In addition to questions and debate in the Houses of Parliament, Ministers and officials are frequent witnesses at hearings of the departmental select committees set up in 1979. For example, during the 2007-08 and 2008-09 parliamentary sessions, government Ministers gave evidence to the Health Select Committee on 15 occasions, and departmental officials provided a further 27 witnesses.<sup>85</sup>

## Scope for continuing parliamentary scrutiny

102. There is a clear contrast between the rules regarding parliamentary scrutiny for matters falling to the devolved administrations and those for decentralised services where policy ownership remains with Westminster Ministers. Questions cannot be tabled about matters which are the statutory responsibility of devolved administrations, but there is no equivalent rule about activities which fall within the policy remit of a Secretary of a State, but beyond their statutory control. In regard to local authorities, the draft Cabinet Manual states that,

*"Local authorities are statutory bodies created by Acts of Parliament. They are not accountable to Parliament as they are directly elected by their local communities."*<sup>86</sup>

The implication is that Parliament may cede accountability where alternative sources of democratic legitimacy have been established, but not elsewhere. How far reforms to individual services facilitate alternative democratic scrutiny may therefore be an important determinant of the level of ongoing parliamentary engagement.

103. Where this democratic threshold is neither passed nor accepted, ongoing parliamentary accountability will continue. Despite the general rule that a parliamentary question must relate to a matter for which the Minister addressed is responsible "as a Minister", members of Parliament may adopt the view that if a matter is of public concern it is an appropriate topic for ministerial accountability. This attitude was well illustrated by Lord Grocott in a 2009 question to the then Transport Secretary, Lord Adonis,

*"people still hold the Government responsible for failures in the system, even when the trains are operated by private companies"*<sup>87</sup>

The requirement for a question to relate to an actual ministerial responsibility does not rule out questioning or inquiry in policy areas where service delivery is decentralised. As noted earlier, there will always be an element of debate about where operational responsibility ends and ministerial responsibility begins. The decision on how to respond to such a question therefore becomes a matter for the responding Minister, either on an ad hoc basis or, as was the case with Foundation Trusts, to make known to the House an intention to respond to a class of questions in a particular way.

104. As has been highlighted, though, decentralisation also implies practical constraints on the ability of parliamentarians to access the information they want, or obtain redress on behalf of their constituents directly through Ministers. If these constraints do not exist, and Ministers continue to directly provide full access and information about local services to MPs, this is likely to reinforce existing top down accountability as information requests, explanations and concerns flow to and from the Minister's office. Some parliamentarians may prove reluctant to accept direction elsewhere, as was the case following the establishment of next steps agencies, while the expectation that Ministers would address unsatisfactory engagements with other public sector bodies was apparent in the concerns of local MPs about how to get to grips with the problems of London Metropolitan University. Without satisfactory alternative routes of access and accountability parliamentarians may not accept that Ministers are no longer accountable despite the reduced utility of parliamentary questions and debate as a vehicle for effective accountability.

## Enhancing the focus and role of select committees

105. If decentralisation reduces the utility of traditional ministerial accountability, Select Committees are likely to be required to do more as an alternative locus for parliamentary oversight and scrutiny of decentralised services. This would not require fundamental revision of the core tasks of Select Committees, but it may require a rebalancing of their activities in practice and a shift in powers, resources and approach. The ability of Select Committees to call multiple witnesses to account for activities, and to do so in a relatively in-depth way which utilises the questioning skills and varied perspectives of Members of Parliament, is well suited for effective scrutiny of complex systems. Unlike within the Chamber, or through written questions, Select Committees can obtain evidence from all the important bodies in each public service system and not just the relevant Minister. They can therefore form an evidential basis for ascribing responsibility. Select Committee Reports require a government response, and members of committees can therefore focus on improvement as well as ascribing blame.
106. Committees have wide ranging remits, and their core tasks extend from grand policy to appointment hearings, making the availability of time one of the crucial limitations on select committee activity. Since 2002 the core tasks of Departmental Select Committees have included the work of the department's Executive Agencies, NDPBs, regulators and other associated public bodies, and the scrutiny of major appointments made by the department. Select Committees do not, however, currently apply regular or consistent oversight to the decentralised systems within their remit. The approach of each committee varies, and can vary within committees over time depending on the priorities of the Chair or members.<sup>88</sup>
107. In the case of Universities, machinery of government changes hampered the development of a consistent approach by select committees. In Health prior to the May 2010 general election, the Select Committee spent much of its time addressing broad policy issues such as Alcohol and Health Inequalities or the work of specific arms-length bodies (especially the National Institute for Health and Clinical Excellence (NICE)).<sup>89</sup> This division of time did not provide for regular scrutiny of other major regulators and inspectors or regular review of the performance of the various parts of the NHS. Since 2005, for example, only two reports (based on two evidence sessions in total) focused directly on Foundation Trust issues. No inquiry appeared to be based on direct scrutiny by the Committee of the performance of an individual provider or commissioning body.<sup>90</sup> These examples do not mean that the Committee was not effective in its chosen areas of focus, but they illustrate the trade-offs involved in determining the best use of the Committee's time.

108. Regular scrutiny of the performance of decentralised systems could be built around the sessions many committees now hold on the annual report of Departments. In part, given the government's approach, it could replace the current requirement to consider departmental performance against now defunct public service agreements. Practically, it would require a change in focus away from one-off broad inquiries on policy areas and towards, for example, annual sessions with each of the key players in a decentralised system at which they would be held to account for their performance in the year gone by and questioned about their strategic approach.
109. One challenge for select committees seeking to objectively scrutinise performance is the limitation of the standard model of calling for evidence and then building a picture of performance on the basis of oral evidence hearings. This can provide a wide range of perspectives on policy issue, but means Committees necessarily use their hearings to create an evidential base. By contrast, the Public Accounts Committee is able to work from an agreed evidential base in the form of a National Audit Office report based on statutory rights of access to government information, and supplement this with other perspectives as required. This system means that the Committee can focus, in principle, on exploring the underlying causes of events rather than seeking to determine the facts of what happened. As resources permit, select committees may seek to expand their use of the NAO and Parliament's Scrutiny Unit, or of other bodies, to assist in their scrutiny of decentralised services. This may require changes to existing rights of access to information to facilitate objective reporting and judgement.
110. The introduction of pre-appointment hearings by Select Committees following the Governance of Britain White Paper in 2007 provided for formal engagement of select committees in some public service appointments. Currently, however, the leadership roles of some key bodies in decentralised services including, for example, the Higher Education Funding Council and Monitor, are not subject to pre-appointment hearings, whereas others are. There is understandable concern about the extent to which wide-ranging use of appointment hearings or, as with the Office of Budget Responsibility, the introduction of a formal veto over appointments may blur the lines of accountability. Nonetheless, for key players in decentralised systems, such as the Chairs of regulators and national commissioning or funding bodies to consistently face pre-appointment hearings would reinforce Parliament's interest in their roles, and help create the basis for regular and ongoing scrutiny of their performance, including their potential reappointment.

111. The Institute for Government's recent report on public appointments and the role of Parliament recommended a list of 25 appointments over which there should be an effective veto power granted to Parliament. This list includes two categories of body with particular relevance to decentralised services: Public service and utility regulators, and independent inspectorates. This categorisation provides a sound basis for further exploration of the potential for a more formal relationship to be established between Parliament and key bodies in decentralised systems. In addition to appointments subject to formal veto, there may also be value in considering the potential to add non-binding pre-appointment hearings for key commissioning and funding bodies to reflect their greater independence and importance in decentralised systems.
112. There will also be circumstances, particularly around local service failure, when a full select committee inquiry may not be appropriate. Failure in decentralised regimes can affect relatively small numbers of constituencies whose MPs are statistically unlikely to be on the relevant select committee. Currently, the only parliamentary routes by which they can seek answers or assurances about service issues are via the departmental Minister, either through questions or in Westminster Hall debates. As the examples of mid-Staffordshire hospital and London Metropolitan University demonstrate, responsibility for action is unlikely to lie with the Minister, but local MPs therefore have no formal means to hold to account those actually responsible.
113. Select Committees could consider holding hearings in which they ask questions on behalf of MPs with constituency interests, or the possibility of enabling some form of cross-party 'local interest committee' could also be explored. Such a committee could, if suitable thresholds can be determined, allow concerned MPs to summon public officials and other witnesses on a similar basis to select committees so that the legitimate interest of MPs in public service provision to their constituents could be maintained without automatically focusing activity through Ministers. This provision could be limited to cases of serious and sustained failure or instances where the relevant regulator, commissioner or ombudsman has made an assessment that there is a significant risk of such failure. Alternatively, local standing committees could build on previous proposals for regional select committees, as developed in the last Parliament.
114. The scale of proposed changes to decentralised services is such that it may be helpful for the House of Commons' Liaison Committee to conduct a review of the implications for parliamentary oversight in general and departmental select committees in particular. The review could address how select committee inquiries obtain evidence from, and focus recommendations on, those with key responsibilities in decentralised

services, and how the accountability of public officials and service providers to Parliament can be strengthened. Given the other potential implications, the review could also address the case for:

- developing a consistent protocol for tabling and responding to parliamentary questions on issues where Ministers have statutorily ceded responsibility to others;
- ensuring greater consistency in the use of pre-appointment confirmation hearings for senior public officials carrying out strategically significant roles in decentralised systems;
- select committees holding annual hearings with the relevant Chair and/or Chief Executive of key commissioners and regulators in decentralised services;
- updating the Osmotherley rules governing the appearance of officials at select committee hearings so that civil servants and heads of Executive Agencies carrying out key roles can be personally accountable to Parliament; and
- exploring how the support of the House of Commons Scrutiny Unit and external bodies, like the National Audit Office, can best be utilised by Committees to support evidence based assessments of operational performance in decentralised services.

Finally, the Liaison Committee could also consider how, subject to the development of appropriate triggers, Members of Parliament with concerns about local services could convene 'Local services committees' to scrutinise relevant decision makers.

115. Adopting new approaches to the scrutiny of decentralised services should help to preserve a balance between the legitimate and important interests of Parliament and parliamentarians and a new understanding of Ministers' real responsibilities. It is these real responsibilities for public services, and not an outmoded assumption of them, which should form the basis of scrutiny that ensures Ministers can be, as they should, properly held to account.

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<sup>21</sup> Department for Education, Frequently Asked Questions, <http://www.education.gov.uk/schools/leadership/typesofschools/academies/academiesfaq>

<sup>22</sup> Model Funding Agreement, Department for Education

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<sup>24</sup> Memorandum from Granville Ram, First Parliamentary Counsel, November 1945

<sup>25</sup> Ministerial Code, Cabinet Office, May 2010

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<sup>27</sup> See for example, the 'Armstrong Memorandum' (<http://www.civilservant.org.uk/armstrong.shtml>) and the "Carltona Principle" (<http://www.civilservant.org.uk/constitution.shtml#carltona>)

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