



Home Office

# **Giving Police and Crime Commissioners greater powers of competence**

## Government Consultation

This consultation begins on 1 September 2021

This consultation ends on 27 October 2021

# Introduction

The Government's manifesto committed to strengthening the accountability of Police and Crime Commissioners (PCCs) and expanding their role. PCCs were introduced in 2012 to give the public a direct say over policing in their area. It is important that PCCs are strong, visible leaders in the fight against crime and have the legitimacy and tools to effectively hold their police force to account.

In July 2020, we announced a two-part review into the role of Police and Crime Commissioners. During Part One of the Review we collated views and evidence from stakeholders across policing, fire and local government as well as voluntary and community organisations. We heard from PCCs and their Chief Executives that they need greater powers of competence to help them get upstream of crime issues and form partnerships with local authorities, criminal justice agencies and health bodies to reduce crime as well as to drive efficiency and make better use of police estate.

PCCs currently have a functional power of competence which enables them to do anything to facilitate or which is conducive or incidental to the exercise of their functions<sup>1</sup>. However, we have heard that PCCs feel constrained because the existing powers limit their ability to undertake innovative activity; particularly where that activity might only be indirectly linked to policing.

In concluding Part One of the Review, the Home Secretary announced in March 2021 that we will consult on giving a general power of competence to PCCs. We intend to use this consultation to seek views on the benefits and risks of giving PCCs (including Mayors with PCC functions) greater powers of competence to improve the levers they have to tackle crime and anti-social behaviour and give them greater flexibility to drive efficiency.

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<sup>1</sup> Paragraph 14, Schedule 1 of the Police Reform and Social Responsibility Act 2011

# Approach

This is a targeted consultation that will run for 8 weeks from 1 September 2021 to 27 October 2021. We will specifically invite views from the following organisations, although welcome views from any other individuals or bodies:

- PCCs (including PFCCs and Mayoral PCCs)
- Chief Constables
- Fire and rescue authorities
- Principal local councils in England and Wales
- Association of Police and Crime Commissioners
- National Police Chiefs' Council
- National Fire Chiefs' Council
- Local Government Association
- Welsh Local Government Association
- Independent Office of Police Conduct
- Association of Police and Crime Commissioner Chief Executives
- Police and Crime Commissioner Treasurers' Society
- Mayoral Combined Authorities and Greater London Authority
- Chartered Institute of Public Finance and Accountancy (CIPFA)
- Her Majesty's Inspectorate of Constabulary and Fire & Rescue Services
- College of Policing
- Chief Police Officers' Staff Association
- Police Federation
- Police Superintendents Association
- Police Staff Council

# Legislative Background and Existing Powers

## *Existing PCC Powers*

PCCs must act within their statutory powers. These powers are set out in the Police Reform and Social Responsibility Act (PRSRA) 2011 and are principally; the power to appoint, re-appoint and dismiss the chief constable; the power to set the force's budget; and the power to establish local priorities for the force through the police and crime plan. PCCs also have the functional power to do anything which is calculated to facilitate, or is conducive or incidental to, the exercise of their functions. That includes entering into contracts and other agreements (whether legally binding or not), acquiring and disposing of property (including land) and borrowing money.

A PCC's ability to charge for services is also determined by statutory provisions. Section 25 of the Police Act 1996 gives chief officers a power to charge for special police services (such as concerts and football matches) and section 15 of the PRSRA 2011 provides PCCs a power to charge for the supply of goods and services by referring to the power Local Authorities have in section 1 of the Local Authorities (Goods and Services) Act 1970.

The powers of PCCs are limited to these purposes. If a PCC did anything that they did not have the specific power to do, this would be deemed to be *ultra vires* – or acting beyond one's legal power, which could be subject to legal challenge. In using their functional power, PCCs therefore have to judge what "facilitates" or is "conductive" or "incidental" to the exercise of their functions.

## *General power of competence held by local authorities*

Historically, local authorities were also constrained by the specific statutory powers granted to them in legislation, but in 2011, a general power of competence (GPC) was provided to local authorities through section 1 of the Localism Act 2011. This gives local authorities the legal capacity to do anything that an individual can do that is not specifically prohibited by law. This puts beyond doubt a local authority's ability to undertake activity and was introduced to encourage innovation as well as facilitate efficiency and best value.

The general power of competence afforded to local authorities has some limitations such as it cannot be used to raise taxes or precept, nor does it expand authorities' powers to make byelaws. It also cannot be used to do things like change the political structure of an authority. The Secretary of State also has broad powers to restrict (subject to consultation) what local authorities can do under the general power or to provide conditions under which the power can be used. Usual public law constraints (rationality, relevant considerations, procedural fairness, disregard of irrelevant considerations) would also be applied by the courts to the exercise of the power of general competence were they to be challenged.

Under the general power of competence, local authorities are able to charge for discretionary services where a person has agreed to them being provided, but only on a cost recovery basis and only when they are not under a statutory duty to provide them. Local authorities are also able to undertake commercial activities, but this must be done through a trading company so that the authority does not have a tax advantage over other businesses. Charging beyond cost recovery is also deemed to be trading and must be done through a company. Authorities cannot trade in services that they already have a statutory duty to provide; for example, collecting household rubbish.

The general power of competence applies to the 333 local authorities in England (including county councils, unitary authorities, district councils and London borough councils) and also applies to parish councils where that council has resolved that it meets the relevant conditions (including a minimum number of elected members). When the provisions of the Local Government and Elections (Wales) Act 2021 come into effect in November 2021, a general power of competence will also be conferred on Welsh local authorities, which largely replicates the general power granted to English local authorities.

### *Functional Power of Competence held by fire and rescue authorities*

Where a fire and rescue authority (FRA) is embedded in a county council in England (a “county FRA”), the council holds the general power of competence in respect of their fire functions as it falls within the definition of a local authority under section 1 of the Localism Act 2011. The Localism Act 2011 also inserted section 5A into the Fire and Rescue Services Act 2004 to give relevant FRAs<sup>2</sup> in England and Wales wider functional powers that are broader than the power currently held by PCCs, although not as wide as the general power of competence provided to local authorities under the Localism Act.

Under the power provided by section 5A of the Fire and Rescue Services Act, a relevant FRA is able to do anything it considers appropriate for the purposes of carrying out any of its functions, as well as anything incidental or ‘indirectly incidental’ to those functions. The section 5A power of competence also enables an FRA to do anything it considers to be connected with any of its functions or connected to activity that is incidental to its functions. Fire and rescue authorities can also act for a commercial purpose under the section 5A powers, although section 5B of the 2004 Act provides that any commercial activity must be done through a trading company and FRAs cannot act commercially in respect of functions they have a statutory duty to provide. All FRAs can also charge for services, and have a separate power set out in section 18A of the Fire and Rescue Services Act 2004 (also inserted by the Localism Act 2011). This ability to charge is subject to limitations in section 18B which includes not being able to charge for extinguishing fires, except at sea. Charges must also not exceed the cost to the authority of taking the action.

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<sup>2</sup> “relevant fire and rescue authorities” are defined in section 5A(3) of the Fire and Rescue Services Act 2004. This includes metropolitan county fire and rescue authorities, combined fire and rescue authorities, police fire and crime commissioners (in respect of their fire functions), the London Fire Commissioner and the London Fire and Emergency Planning Authority

Where a Police, Fire and Crime Commissioner (PFCC) is created in England under section 4A of the Fire and Rescue Services Act 2004, they fall within the definition of a relevant FRA and have the general power under section 5A FRA in relation to their fire functions but not in respect of their PCC functions. There are currently four PFCCs with this responsibility. The Government will shortly consult on further proposals to mandate the transfer of fire governance to other PCCs across England. Fire and rescue services in Wales are a devolved matter for which the Welsh Government is responsible.

### *Powers of Mayors of Combined Authorities*

The Cities and Local Government Devolution Act 2016 (the 2016 Act), amends the Local Democracy, Economic Development and Construction Act 2009 (the 2009 Act) to provide for the establishment of mayoral combined authorities as well as providing these authorities with extra powers. Section 113D of the 2009 Act provides that the general power of competence can be given to combined authorities, including mayoral combined authorities (MCA), and section 107D(8)(b) of the 2009 Act further provides for the general power of competence to be exercised by the mayor for that authority as well as the combined authority itself. The mayors of the West of England and Cambridgeshire and Peterborough mayoral combined authorities are currently the only two mayors that have been conferred the power to use the general power of competence. The mayor of a combined authority can only be conferred this power with the consent of the combined authority and its constituent authorities, as well as that of the mayor.

Other combined authority mayors (including those who exercise PCC functions in Greater Manchester and West Yorkshire) hold a wide functional power of competence that is equivalent to the power held by standalone fire and rescue authorities. This is set out in section 113A of the 2009 Act. Greater Manchester Combined Authority (GMCA) also retains a wellbeing power under section 2(1) of the Local Government Act 2000, which permits local authorities to do anything they consider likely to promote or improve the economic, social and environmental well-being of their area. This was specifically preserved in relation to the GMCA by virtue of a saving provision in article 8(3) of the Localism Act 2011 (Commencement No 5 and Transitional, Savings and Transitory Provisions) Order 2012. The Greater London Authority also holds a functional power under section 30 of the Greater London Authority Act 1999 (the 1999 Act) to do anything which will further any one or more of its principal purposes, which is exercisable by the mayor acting on behalf of the Authority.

## The Government's proposed changes

In order to ensure PCCs have more of the tools and levers they need to prevent and tackle crime, the Government intends to provide PCCs with greater powers of competence.

As it currently stands, the narrow functional powers which PCCs hold mean that they can do anything which is calculated to facilitate, or is conducive or incidental to, the exercise of their functions. However, this means that they have to judge what facilitates, or is conducive or incidental to the exercise of their functions. This can create some doubt about their ability to act to prevent crime, particularly where those actions might be upstream of immediate police activity. Whilst PCCs can charge for certain police services (such as specialist police services like policing a concert or a football match), they also lack flexibility in their ability to act commercially by charging for discretionary services and cannot trade for profit. Regardless of which power of competence might be granted, if any, it would be drafted to retain the existing position that a PCC cannot charge for operational policing. Giving PCCs greater powers of competence would give them the confidence to act where there may be doubt. A wider power would also encourage greater ambition, innovation and creativity in their approaches to tackling crime and public safety issues.

The key areas where PCCs have identified wider powers of competence would support their objectives include;

- **Putting beyond doubt their ability to tackle crime and antisocial behaviour** – allowing PCCs to invest in activity that benefits the community and gets upstream of crime e.g. services to reduce offending, tackling mental health, youth diversion schemes.
- **Collaborative working** – the ability to take part in initiatives which are not current statutory responsibilities, for example with other emergency services or criminal justice partners; the opportunity to be a partner in local authority-private sector commercial arrangements.
- **Property regeneration and development** – the ability to borrow to invest in regeneration of existing land and property; generating long-term revenue streams (rather than one-off capital receipts).
- **Commercial ventures and initiatives** – the ability to develop innovative commercial opportunities, which yield additional revenue.

Through this consultation, we are interested in views on the benefits, opportunities and risks of granting PCCs either:

- (i) a wider functional power of competence as held by fire and rescue authorities, which will include giving them the power to do anything indirectly incidental to their functions; **or**
- (ii) a general power of competence as held by local authorities, which will give them the power to do anything that an individual can do so long as it is not prohibited by legislation.

## *Wider Functional Power of Competence*

The functional power of competence held by fire and rescue authorities (FRAs) is a wide-ranging power which means that, even if the proposed action is a number of steps removed from their core functions, they can still act as long as the action can ultimately be traced back sufficiently to their functions. FRAs can do anything which is related directly or indirectly incidentally to their functions and can enter into commercial arrangements. Under separate powers, they can also charge for services. For example, the powers have been used by FRAs to provide road traffic accident prevention courses, or mobility training for elderly members of the public. Hampshire Fire and Rescue Service (FRS) used the powers to form an insurance mutual across a number of fire services, known as the Fire and Rescue Indemnity Company (FRIC); attempts to establish this under previous powers were challenged due to lack of vires. A number of fire and rescue services now also have contracts with the Ambulance Service for the provision of medical response services (co-responding) which provide immediate life-saving intervention, which would not have been possible without the FRA functional power. The functional powers held by FRAs therefore enable greater freedoms, whilst maintaining their single purpose status.

Where a PCC takes on fire and rescue functions, they hold this wider FRA power of competence in relation to their fire functions, but only the narrower PCC one in relation to their policing functions. At the minimum, we therefore believe we should level up the functional powers that PCCs and FRAs hold so that there is no longer a disparity in the PFCC model. This would mean giving all PCCs more generally a wider functional power of competence. This would allow PCCs to fully explore any commercial collaborative ventures without worrying about vires and ensure that for PFCCs in particular that collaboration between police and fire can be maximised.

These powers would also extend the breadth of activity PCCs could undertake, enabling them to get further upstream of crime as well as support them to co-commission and achieve shared outcomes with other emergency services, Criminal Justice System partners, local authorities and other public and private partners. PCCs also argue that wider powers to charge for discretionary services, and to trade would provide them with greater scope to act in the interests of their forces, in particular by raising revenue through innovative commercial practices. For example, some PCCs have identified that the powers would enable them to set up a police mutual, similar to the FRIC mutual established by fire services and others have indicated that they could use wider powers to make more effective use of estates, for example investing in renovation of police property to provide key worker housing and charging third parties to make use of premises, such as the police firearms range, when not in use for police purposes.

PCCs do not possess the wide-ranging responsibilities that local authorities have and therefore a wider functional form of powers, as held by FRAs is likely to enable PCCs to undertake most of the activity they would need to be able to undertake to deliver their priorities in the interests of local communities. However, it could still create doubt about vires in circumstances where a link to PCC functions is difficult to prove.



## *General power of competence*

The general power of competence goes further than a functional power of competence in removing the need for a link between statutory functions and the exercise of powers. It provides greater freedoms to act, and therefore encourages greater innovation and creativity in the use of powers.

For local authorities, the general power of competence has enabled them to work in new ways to meet the needs of local communities, and to develop new services and partnerships. It has also been seen as a symbolic statement that promotes innovation and frees up thinking, whether or not the power is used to provide the specific legal basis for the actions taken. Some councils have used the power to set up companies for commercial purposes, including for the development and sale of land, and in relation to the setting up of shared services with other councils.

A general power of competence would put beyond doubt a PCC's ability to take action to help prevent crime and to strengthen their role in the wider criminal justice system. It would remove the requirement for there to be a demonstrable link to existing statutory functions and reduce the risk of legal challenge thus giving PCCs increased confidence in their legal capacity to act. It would also allow individual commissioners to innovate and develop bespoke local approaches to meet local needs and priorities. Some PCCs have argued that a general power of competence would allow them to enter into increasingly ambitious joint plans with combined authority and council partners. Depending on how such a power is drafted, it could also allow them to generate income beyond cost recovery and generate new revenue streams.

We recognise that there are some risks in granting PCCs a general power of competence. In giving PCCs the widest powers to innovate and act creatively, there are also greater risks that PCCs are distracted from their core focus on crime and policing or that they are engaged in activity that creates financial risk or cuts across other local mandates.

The PCC model places checks and balances on the actions of PCCs. PCCs are elected to represent local needs and are directly accountable to the public for the efficient and effective use of public funds. To ensure the public have the information they need to hold the PCC to account, PCCs are required by law to publish certain information, including their total budget, revenue sources, proposed and actual expenditure and details of their annual investment strategy. Police and Crime Panels also have powers to scrutinise the actions and decisions of PCCs, providing an additional layer of public scrutiny.

PCCs are also required by statute to appoint a Chief Financial Officer, whose duties include ensuring the proper administration of the PCC's financial affairs, reporting any actual or foreseen unlawful expenditure and advising whether particular decisions are contrary to policy or budget. There is also a statutory requirement for a PCC to have a Monitoring Officer, whose main role is to report to the PCC if it appears that any proposal, decision or failure within their

organisation constitutes, has given rise to, or is likely to break the law or a code of practice.

Further, there are existing limitations on the use of the general power which are applied to local authorities, and which could be mirrored for PCCs; namely we would not permit PCCs to do anything that is specifically prohibited in legislation, to raise taxes (other than in relation to existing policing precept) or to trade in services that they already have a statutory function to provide. The Secretary of State also has the power to apply further limitations to the general power of competence provided to local authorities, subject to consultation.

Through this consultation, we are also interested in any further safeguards or limitations that respondents consider might be necessary to ensure a proper use of any new powers granted to PCCs.

### *Mayoral PCCs*

It is our intention that mayors who hold PCC functions (such as in London, Greater Manchester and West Yorkshire) would have the same power of competence as other PCCs to maintain consistency of powers in the police governance model. Mayors of combined authorities currently hold wider functional powers of competence, in line with those held by FRAs. At a minimum, we therefore propose to level up the powers that PCCs and Mayors hold. This could be either by granting to the PCCs the wider functional power which Mayors currently have (except Cambridgeshire and Peterborough and West of England Mayors who have a general power of competence) or by extending the general power of competence to both PCCs and Mayoral PCCs. If we were to extend the general power of competence to PCCs and therefore to mayoral PCCs, we would need to consider whether this power of competence should also be exercisable by the combined authority and whether any such extension should be dependent on the consent of the constituent authorities. The Government will give further consideration to the powers of Mayors and combined authorities through the Levelling Up White Paper.

# Implementation

Subject to the outcomes of this consultation, we would require primary legislation to provide PCCs with either a wider functional or general power of competence. We would seek to implement the measures through the next appropriate legislative vehicle following Part 2 of the PCC Review.

Our intention would be to provide both English and Welsh PCCs with the same wider power of competence.