

# Reading the Runes of Future Regulation

*Standards for England (SfE) was established by the Local Government Act 2000 and works with local authorities, their monitoring officers and standards committees to promote high standards of conduct in local government.*

*This article examines the pressures exerted on regulation today and where these may lead it in the future, plus how leaders of regulation need both focus and vision to serve their end consumers well.*

## The Future of Regulation – where next?

We are used to regulation, and indeed it has a long history. Ancient societies regulated to combat bribery and corruption while more recently in modern Britain the professions (most particularly the Health professions) have led the way. Regulation, however, really came into its own with the 1980's programme of privatisation, as state monopolies were sold off.

### What is the purpose of regulation?

We expect regulation in areas where public safety is at risk. Beyond that, we know that economic regulation is critically important in markets where there is an asymmetry between the powers of supply and consumption. Here, the role of the regulator is to exert influence on areas where market forces cannot be brought to bear, for example where there are economic dangers of market failure due to monopolies or cartels preventing proper competition.

Monopoly or near monopoly situations aren't confined to the private sector. They exist in the public sector as well, and tend now to be regulated. Relatively new regulators have taken a key role in recent years in raising and maintaining performance and improving value for money in public services, most particularly in those areas where government itself is judged if provision is found wanting.

A third group seek to influence individual behaviours, societal norms or government policy. Like economic regulators, they are dealing with market imbalance, but in social rather than economic markets. Consumer facing, they seek to protect the individual citizen's health, wealth, rights and expectations more generally, and can be viewed as 'voice' regulators, speaking on behalf of interest groups or the public at large.

Of course there are overlaps, and regulators and regulation can be categorised in any number of ways. But the future for any individual regulator may well depend not just on the type of regulator it is, but whether it meets the needs of its audience. To consider that question we need to consider what one might call the audience for regulation.

## **Regulators as leaders**

The greatest attribute for a regulator is independence. For understandable reasons, those regulated seek to exert influence on regulators, while providers can seek to capture “their” regulator. Regulators must maintain a respectable distance from these audiences while at the same time continuing constructive engagement with them. These twin requirements necessitate regulators to display leadership with both strength and vision.

## **Recent developments**

Responding to concerns about the ways in which regulators exercised their functions, and recognising the financial impact regulation has on business, in 2005 and 2006 the government published the Hampton and then Macrory reviews of regulation. Together these reviews proposed migrating from an emphasis on inspection (and box-ticking) to a more proportionate and risk-based approach.

The five Principles of Good Regulation were spelt out: regulation should be transparent, accountable, proportionate, consistent and targeted only at cases where action is needed. And a clutch of regulators were independently assessed on the extent to which they live these principles, with the focus initially on economic and public safety regulators. Regulators modified their approaches both in line with Hampton and Macrory recommendations, and the then government’s firm commitment to ‘light touch’ regulation (in retrospect, seen by some not as ‘light’, but ‘soft touch’, with some accused of a failure of leadership).

These developments were welcomed by business, with government and business the two audiences particularly influential in shaping regulation at the time. The aim was to balance protection with prosperity by reducing the regulatory burden and so increasing the nation’s competitiveness.

## **Which factors will influence the future of regulation?**

Financial pressures are the obvious place to start, with all categories of regulators affected. As these pressures bear down on government, regulators represent an easy target and are well represented in the government’s unprecedented package of abolitions, mergers and other changes. For those retained, government remains committed to further substantial reforms over the medium term.

So far, it seems that the voice regulators will be hardest hit by the proposed reforms. Here, government promotes transparency and, ultimately, democratic accountability (rather than regulation) to constrain and guide social markets. With a good proportion of voice regulators to be abolished, we must expect voices to be exercised in other ways, aided by greater transparency in the public sector. Losing these regulators will, however, result in a loss of champions and leaders in these markets. It will be interesting to see whether new leaders from elsewhere take up their voice.

Economic regulation on the other hand is generally accepted as necessary, as presumably is regulation affecting public safety (although here we can expect the balance between personal and public risk is likely to be reviewed in favour of personal risk). But will regulators be expected to continue to apply risk-based approaches, and live the Principles of Good Regulation? It seems so (as we can detect no other developing philosophy at present) but

no doubt the regulatory approaches of regulators are much tighter than pre financial crisis, and are likely to remain that way. 'Light touch' and the related concepts of self-regulation and self assessment have a less enthusiastic, more qualified resonance, and this influences all regulators.

Localism's 'bottom-up' philosophy of local innovation seems in direct conflict with regulation's key interest in maintaining national standards, and a particular threat to public service regulators. And the proclaimed independence of regulators makes them an easy target for rhetoric that lambasts "unelected", "unrepresentative", and "bureaucratic" bodies. But it is not so clear cut, as government also recognises impartiality (in its emerging constitutional reform proposals) as a rationale for maintaining some bodies. And although we may see further rationalisation of public bodies in Scotland, Wales and Northern Ireland as the devolved administrations consider the proposed reforms, we do not immediately see the same appetite for change. Our different administrations may increasingly develop different regulatory arrangements and philosophies, albeit united by the austerity background music.

No doubt those regulators implementing fundamental changes to their organisations following the government's constitutional reform programme will need to divert management effort in that direction, and all will be seeking to reduce costs. With these pressures, regulators will do well to identify 'mission creep', and focus on the essentials of what they are trying to achieve, but there are dangers. Short-term cost reductions do not necessarily sit comfortably with the long-term approach a regulator must take, and leaders here need to think long term. Regulators need to continue to evidence the impact they are having over time, and to track changes in societal attitudes and expectations. But research budgets will be under scrutiny and real pressure. Keeping the end consumer in mind should help to guide decision-making.

As the new government beds in, new boundaries will be drawn as between Departments and the regulatory bodies they sponsor. The ground will need to be tested, and this is particularly tricky territory for public service regulators and for those they regulate. Surviving regulators must brace themselves for the transfer of some of their established policy and even delivery functions to their sponsor Departments. Nevertheless, in a 'Big Society' in which citizens exercise personal economic and democratic choice, that choice should be well informed, and while we see a reduction in voice regulators, other regulators have a continuing role to play in informing choice. Leaders of regulators must recognise the new rules being constructed by government and react appropriately.

Government philosophy and intentions aside, regulators and those regulated will continue to be subject to EU constraints and expectations, where we see little philosophical convergence on regulation.

Beyond Europe, the financial crisis has reinforced the need for financial regulation and regulatory approaches to be decided and overseen at a global level. Already we have seen a draft version of the Basel III accords for banks, whilst the possible expansion of the International Monetary Fund's role is being discussed. We wait to see to what extent can we agree a global approach to economic regulation.

Whatever the prevailing philosophy, regulators will always need to be ready for when risks materialise. They must work closely with others and usually at an international level in order

to manage the event and limit the damage – often a thankless task, but one where true ethical leadership can be seen by doing what is right and not by what is expedient.

### **The audience for regulation**

Times are changing for regulators, and thus it becomes more important than ever for individual regulators' leaders to consider the audience for regulation.

Business will always remain a key audience. For public service regulators, business includes those providers of services or commodities (e.g. housing stock) that are in turn regulated. Providers seek to influence regulators and often work closely with them. But when public service regulators begin viewing providers as their most influential audience, they risk ending up in 'provider capture', a charge laid in particular at the doors of regulators of the professions in recent years. Regulators need healthy relationships with providers, while maintaining distance and objectivity.

What of government? Early indicators suggest that where this government believes public service regulation is necessary it will want a robust and focused approach, and it is prepared to strengthen the powers of the relevant regulators. In healthcare, the Care Quality Commission is to be expanded to be "an effective quality inspectorate by giving it a clearer focus on the essential levels of safety and quality of providers". Monitor (the current independent regulator of foundation trusts) is to be developed into "an economic regulator for the health and social care sectors to promote competition, price regulation and the continuity of services".<sup>1</sup> In Education, the role of Ofqual is to be strengthened to enable it to drive up qualification standards, while Ofsted will be retained but reformed following criticism of its approach.

These moves may be unexpected to some, but government is always a key audience for regulation. Regulating the activity of others is always more cost effective than leaving markets (economic or social) unregulated, and is profoundly cheaper than any direct intervention by government. But more than this, these moves perhaps suggest that the government recognises regulation as one way of steering matters and ensuring policy delivery, a situation more palatable in government than in opposition. A number of regulators hold the ring across a range of private sector providers of public services and are instrumental in delivering government policy through markets, ensuring that government policy objectives are met as services are delivered.

And what of the end consumer of regulation, as the voice regulators reduce in number? Regulators may do well to ask themselves to what extent they continue to recognise regulation as the champion of the consumer, and whether they serve the end consumer sufficiently well. That is not to suggest that government, business or other providers do not have an important stake, or to challenge the Principles of Good Regulation.

### **The key question**

Increasingly, regulators need to steer a steady course between government, business, providers and end consumers. This is the challenge for regulators, now and in the future. While facing unprecedented financial pressures, each regulator must strike the right balance

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<sup>1</sup> Department of Health "Equity and excellence: Liberating the NHS," Health White Paper, 2010

between these competing audiences. The balance will be different for the differing types of regulator, and will change to some extent as circumstances change. But the key question for the leadership of regulators is this: in all that you do, and the way that you do it, have you considered and given due weight to the end consumer of regulation? Those regulators who get the balance wrong will be straying from the path.

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