



Regulation and inspection: What is to be done?

At its last meeting Management Board asked for some thoughts on what a long-term piece of work on regulation might encompass and how we might approach it. This paper scopes what the content of such a piece of work might look like but does not explore options for delivery.

The context for Management Board's discussion was the widespread and high profile regulatory failure in a number of sectors, most significantly in financial services and in safeguarding. A further contextual point was the failure of the Audit Commission to gain support from significant parts of the local government community for their plans for CAA. However, while failure in some sense is common across these examples, the nature of failure, the reasons for failure and lessons from failure are not necessarily the same. In the global financial system the failure of "light touch" regulation can be contrasted with the loss of confidence in disproportionately heavy touch, top down, "harder edged" regulation in public services. One system is accused of missing system-wide risk and not being tough enough on innovative financial products. The other is accused of being disproportionately burdensome and eliminating innovation. If both hard and soft regulation have failed to detect and deter poor performance, what does this tell us about how regulators approach their role, and what is to be done in the future?

History

Public bodies have long battled with the competing pressures of delivering services and the need to account for how they are delivered, particularly when the pressures and the importance of delivery is not always fully understood by those making the regulations.

In 1812 the Duke of Wellington wrote to the Foreign Office asking whether their orders to him were to 'train an army of uniformed clerks in Spain for the benefit of the accountants and copy boys in London or, perchance, to see to it that the forces of Napoleon are driven out of Spain'.ⁱ

Public audit and regulation have massively widened their scope since Wellington's time. Now public bodies must account not just for the spending of public money, they must also account to regulators for their impact on social problems.

Regulators – defined as an organisation that has an official mandate to oversee and seek to shape the behaviour of another organisation – now use and commission a range of tools in their role. These include inspection (assessment against predetermined criteria), quality regulation (providing assurance re minimum standards), performance assessment (publication of judgements about service quality), economic regulation (VFM, pricing and fair competition) and public audit (probity and good governance).ⁱⁱ

While these definitions may seem obvious, within public services and local government there is significant debate about the purpose of regulators and the right balance between their different roles. While some regulators emphasise their role as a catalyst for improvement, others concentrate on their duty to report.

A significant point in the recent history of this debate is the 2001 Byatt and Lyons report on the role of “external review” which concluded that “there is not a clear enough link between external review and those responsible for delivering change. We want to emphasise the role of leadership, be it by elected councillors, chief constables, or managers of local authorities, agencies or other public bodies. Future external review activity should recognise these accountabilities and be **designed to support such leadership in effecting change.**”ⁱⁱⁱ

In 2003, picking up the Byatt/Lyons finding, the Prime Minister’s Office of Public Service Reform began to advocate a more “performance-focused” approach to inspection. External scrutiny was no longer an end itself; it had to impact on and improve the performance of the organisation. OPSR proposed 10 principles of inspection designed to place expectations on inspection providers and on the departments sponsoring them. The first of these principles was “the purpose of improvement”. OPSR said, “There should be an explicit concern on the part of inspectors to contribute to the improvement of the service being inspected. This should guide the focus, method, reporting and follow-up of inspection. In framing recommendations, an inspector should recognise good performance and address any failure appropriately.” Other principles included a focus on outcomes, a user perspective, be proportionate to risk, inspectors should continue to learn.^{iv}

SOLACE’s previous positions

SOLACE has written a lot about regulation – and its tools - over the years.

In 2004, in our response to the consultation paper on CPA: Next Steps, we wrote:

“SOLACE continues to support the objective of CPA which is to help councils put in place systems to deliver continually improving services. We welcome the opportunity that CPA presents for external review as well as the emphasis that it places on internal challenge and self-assessment.”

More recently, in relation to CAA in early 2008, we argued that assessments must:

1. Be based on self-awareness by local councils and partnerships, and work in the context of the commitment of the sector to peer review and mutual support in improvement
2. Be linked to the rhythm of strategic planning, local progress review, and improvement processes.
3. Be set within a fully understood process of progression and improvement in service delivery and place shaping – for all the agencies that have a contribution to make at local level
4. Add an independent judgement to local considerations, in a way that ensures high quality: in the understanding of local contexts and improvement agendas and in the application of learning from elsewhere.
5. Be sufficiently rigorous to ensure that performance that lies below floor standards, or that implies unacceptable risk to the standards of care for vulnerable groups, can be spotted. This process must be strong enough to be relied on: by local people, but also by Government and its inspection agencies – to the extent that rolling programmes of inspection are rendered unnecessary and are replaced by targeted inspections in circumstances where performance or risks to vulnerable groups transgress thresholds.
6. Encourage ambition, local leadership, and intelligently-managed risk taking
7. Be set within an approach to improvement that also considers the collective impact of processes at local, regional and national levels
8. Have a learning and adaptation process built into the design, so that it keeps pace with changing contexts and challenges

9. Be proportionate: to what is needed in areas with different track records and levels of risk; in the balance of financial and energy requirements between its demands and those of delivery at local level

Most recently, in our evidence to Lord Laming's Inquiry and in correspondence with Ofsted, we argued that inspection has limitations.

"Inspection focuses minds on defined measures of success; it induces defensiveness; invites self delusions about competence and distracts staff. It has an important place but is not sufficient. A periodic MOT test catches badly maintained vehicles. It does not mean the vehicle will drive well or safely the rest of the year.

"Performance indicators have been raised to an importance that they are unsuited to. Yet within local government, reputation calibrations turn on minute differences in PI performance. As the recent Haringey JAR stated – reliance on national and local performance indicators does not enable understanding of the quality and effectiveness of service provision on the ground. If we all agree that PIs are not enough, then we need to see systems which generate and judge performance information anew and in proportion.

"We have a concern that Ofsted focuses too much on measuring the measurable, rather than measuring what matters. This leads to an over emphasis on monitoring processes, at the expense of a focus on outcomes for children. We believe this leads to a risk that busy chief executives could take false comfort from good PI figures, and indeed good Ofsted reports.

"Of course what and how one inspects influences the judgements one comes to. And judgements about complex, risky services are difficult to get right. We are concerned Ofsted has insufficient numbers of inspectors with the right skills and experience in child care and child protection, which compounds the current focus on process rather than outcomes. Increasing the number of inspections may exacerbate this problem, while giving a misleading impression that children's services are being made safer.

"We believe that inspectorates need to be more humble, content to offer insights into what might be important to explore further rather than claiming to be definitive about quality."

In February this year we outlined some principles in a paper to Ofsted on which, we argued, we could build a high-trust model of inspection.

1. Inspection is not the same as regulation. Inspectors should be wary of passing themselves off as regulators.
2. Inspection cannot and should not cover everything. It must be seen as a snapshot of quality, offering insights for improvement. Inspection should be risk-proportionate and should be reliable.
3. Inspection is a proper part of modern public services where there is risk to public safety; or where local services are delivering unambiguous, high priority national policy or standards. Inspection provides necessary checks and balances on government as well as a review function that helps drive improvement. However, for that to be realistic, and for the inspected to see it as such, inspectors and their regimes need to inspire their trust.
4. Inspection will work best where the inspected welcome the extra insight that critical friends can provide; where the context for inspection is acknowledged and

- where perceived strengths as well as weaknesses are reported.
5. Inspection outcomes will lack traction as a spur to improvement where inspectors lack credibility; where inspection is not underpinned by agreed standards or where facts, evidence or interpretation are hotly disputed.
 6. Trust is therefore an essential pre-condition for inspection to lead to improvement. Inspection that reports deficits without trust will have to rely on separate formal powers to force changes in the delivery arrangements.
 7. Such enforcement is contrary to a principle of subsidiarity; is itself likely to be acceptable only as a last resort and may well have unforeseen effects.
 8. Trust can itself be calibrated:

Mistrust – where inspection is confronted and dismissed as irrelevant or worse. Where the principle of inspection is resented and not welcome. Where much of the activity is seen as not important. Inspection outcomes may be used only as sticks to beat political opponents or individual officers.

Low trust – where the positions of responsibility are acknowledged but interpretation is routinely disputed; credibility is judged harshly; politicians are briefed to think ill of the inspectors and inspection outcomes are low energy contributions to improvement

High Trust – where inspectors are welcomed and provided with good cooperation and facilities. Where inspection outcomes are fed into a rich array of assurance activity and honoured for their objectivity and freshness. Where any differences over interpretation are the opportunity for emotionally intelligent, mutually respectful discussion. Inspection outcomes will add energy and vitality to strong programmes of continuous improvement.

9. The development and maintenance of high trust cultures is a leadership obligation across the inspectorate and inspected sectors.
10. This shared leadership obligation can be assisted by investment in joint training, shared competencies, detailed protocols and jointly served repertoires of preferred behaviours.

The new Conservative approach

The Conservative Party recently outlined its thoughts on the future of regulation. In its local government green paper they wrote:

“The fact that, despite persistent general reductions in user satisfaction, the Government's most recent inspection scores show three quarters of councils to be “improving strongly or well”, suggests that the main effect of the inspection regimes has been to teach local authority officers how to play the inspection regime, rather than reflect local performance. This is a classic example of councils' energy and resources being diverted away from delivering local services into delivering a tick in a government box. Against the backdrop of a recession, we need to ensure that all pressures on council budgets, and hence council tax bills, are minimised.

“A Conservative government will cut back local government inspection and abolish the Comprehensive Area Assessment. The Audit Commission's role will be to ensure the propriety of local government's spending and to investigate complaints.

“There are several other bodies that inspect aspects of local government services. As the Baby P case in Haringey has highlighted, these inspections should be risk-based, and targeted at areas where public welfare is most at stake – such as local authority social

services. Should such inspections identify a failing local authority service which endangers public safety, then, in those rare cases, the Secretary of State should consider using the Government's reserve powers to intervene."

Despite the pledge to abolish CAA, the final paragraph suggests that a Conservative government would continue to inspect and regulate services in such a way that would provide a national picture of risk, allow targeting of resources and justify and support government intervention.

Bringing it all together

So bringing this all together what does it tell us about what a long-term look at regulation might encompass? It seems to me that there are a number of key points that emerge from the foregoing.

1. Regulation will remain a significant factor in the local government/public service environment whoever wins the next General Election.
2. Regulation can have a limited effect on improvement, assurance and accountability. There is not a linear relationship between more regulation and better outcomes. Regulators' and inspectors' understanding of complex services and organisations can only ever be partial, incomplete and imperfect. Causation in organisational performance is often difficult, and sometimes impossible, to establish. Regulators need to be more humble in their findings and more qualified in their judgements.
3. Some local government services – e.g. teaching, or safeguarding children - are more like craftwork or art than mass production (where cause and effect can clearly be established). Perfection, or "this must never happen again" is unrealistic. For perfection to be attained human behaviour would need to be predictable and there would need to be clear and correct responses to every eventuality.
4. Effective regulation requires better and more balanced ways of assessing performance. An overreliance on quantitative measures leads to a distortion of organisational focus and gives a false sense of insight into organisational reality.
5. Improvement, assurance and accountability in local government are more reliant on good management, trust and political leadership than regulation.
6. Effective regulation requires the consent and trust of those being regulated. This must have a material impact on the nature and amount of regulatory activity. Regulatory schemes and inspection regimes that are not accepted by managers and professionals will be adhered to where they must be but not in ways which are always conducive to the general good. If there are shared criteria about how regulation happened this is much more likely to focus the minds of managers and professionals on what they know themselves they should be doing.

If these tentative propositions do outline a way in which we could think about the future of regulation then they tell us that the future of regulation is not about hard or soft, light or heavy. Regulators need to stop overstating what they can achieve, they need to find different, perhaps more qualitative, ways of understanding the complex and changing world that they seek to shape and they need to build trust and consent among those whose support they require.

Mike Bennett

8 March 2009

ⁱ C. Grace in *Local Government Studies*, 2005

ⁱⁱ S. Bundred in *Public Policy and Management*, 2006

ⁱⁱⁱ Byatt and Lyons, *Role of external review in improving performance*, Public Services Productivity Panel, HM Treasury 2001

^{iv} OPR, *Inspecting to Improve*, 2003