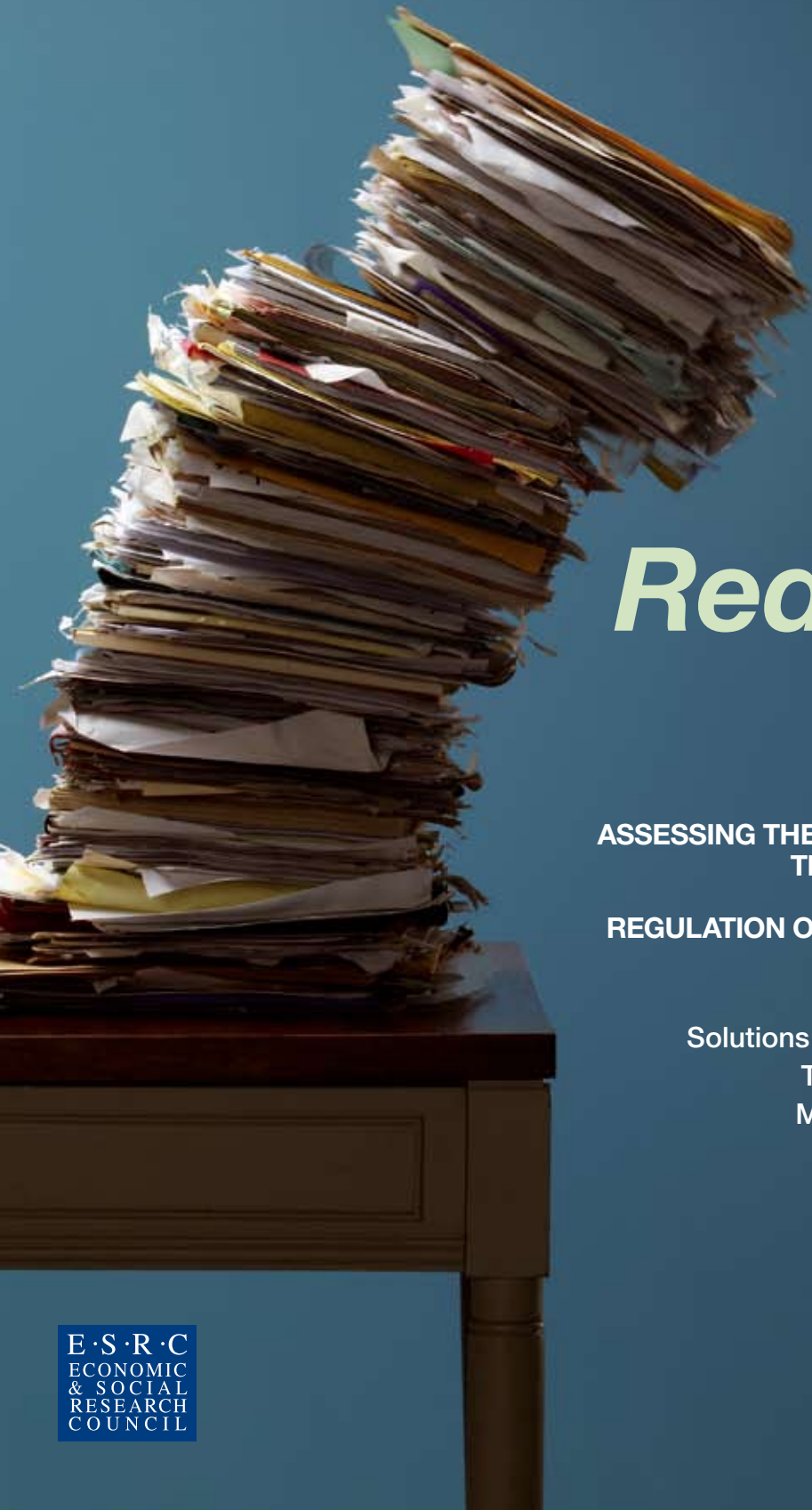


Risk & Regulation

Magazine of the ESRC Centre for Analysis of Risk and Regulation

No 14 Winter 2007



Reducing the burden

ASSESSING THE COSTS AND BENEFITS OF REGULATION
THE RISKS OF REGULATING BY NUMBERS
COSTING, CURING AND QUANTIFYING
REGULATION ON THE BOOKS AND IN THE REAL WORLD

PLUS

Solutions to the failure of self-regulation in the NHS
The different worlds of the regulatory state
Meet the Maritime and Coastguard Agency

CONTENTS



RISK®ULATION: CARR REVIEW
NO 14 WINTER 2007

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3 CARRECTORIAL: More or Less?

CARR Director **Bridget Hutter** discusses the difficulties of balancing different interests in risk regulation, with demands for more or less regulation in a changing world.

4 Changing regulatory paradigms: Health care quality in England

All changed, changed utterly. **Gwyn Bevan** and **Jocelyn Cornwall** consider possible regulatory solutions to the failure of professional self-regulation in the NHS.

5 CARRNEWS

The latest news from CARR.

6 Meet the Regulator: The Maritime and Coastguard Agency

We talk to **Peter Cardy** about the regulation of shipping and the marine environment.

7 The Health and Safety Commission and Executive – A modern regulator in a modern world

Former Chair of the Health and Safety Commission, **Sir Bill Callaghan** reflects upon Britain's flexible and modern system of health and safety regulation.

8 The risks of regulating by numbers: Costing, curing and quantifying

Peter Miller and **Liisa Kurunmäki** ask whether regulating health care by numbers itself creates risks, and might come at the expense of patient choice.

10 CARRFORUM: Talking point: Assessing the costs and benefits of regulation

Philip Cullum and **Alexander Ehmann** discuss the balance between the costs and benefits of regulation.

12 CARRBOOKS: The different worlds of the regulatory state

Roger King considers the growth and evolution of regulatory configurations and approaches in higher education, healthcare, accounting and legal services in the United Kingdom.

14 On the books and in the real world? The regulatory work of the National Audit Office

Ed Humpherson discusses the recent track record of regulatory impact assessments and the importance of understanding how regulation affects organizations 'in the real world'.

14 CARRCONFERENCES: Risk and Regulation: Sixth Annual Research Student Conference

First-time attendee, **Kati Kangar**, provides her reflections on the conference.

16 Product innovation or customer satisfaction? Different hospital performance measurements and common challenges

Nao Kodate considers different trajectories of performance measurement in healthcare in Sweden, England and Japan.

17 CARRBOOKS: Internationalization, Performance and Economic Institutions

Mark Thatcher examines the effects of technological and economic internationalization on those national institutions that regulate markets.

18 CARRINPRINT

New publications by CARR members.

19 CARRPEOPLE

CARR staff and their expertise.



Risk&Regulation is also published on CARR's website.

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www.lse.ac.uk/collections/CARR/

More or Less?

CARR Director **Bridget Hutter** discusses the difficulties of balancing different interests in risk regulation, with demands for more or less regulation in a changing world.

Balancing different interests is a recurring risk regulation theme and one which runs through this edition of *Risk&Regulation*. As contributors make clear, regulators 'can't always be everyone's friend' although they may endeavour where possible to take a pragmatic approach rather than a legalistic one, so they accept 'good enough' solutions to risk management problems. This is done in a changing world. There has been an erosion of trust, for example in the 'knightly caring professions' and in economic expertise. But this runs alongside vehement demands from the regulated for less regulation of themselves and ironically more regulation of regulators. But this is a world where we need to beware simple caricatures, for example, 'consumers are pro regulation and all businesses against it'. As the contributions from the National Consumer Council and Institute of Directors reveal, things are considerably more complicated than this. Consumers can be much more sophisticated than they are often credited with being and they do not always demand regulation whenever they are presented with problems. Indeed, there are some problems the public fails to get excited about at all. On the other hand, as events in the UK's recent financial markets have revealed, consumer understandings of risk and their levels of financial knowledge can leave them vulnerable and ill-equipped in their panic. Businesses also understand that there are many scenarios where they need and benefit from regulation and where they may not manage their risks to themselves and others well.

A theme apparent in several of the articles in this issue is a renewed emphasis that it is businesses that are primarily responsible for risk management. Indeed, some regulatory agencies are incorporating self-assessments into their regulatory monitoring. The importance of the regulated taking and owning responsibility for their risk management was forcefully made by the Governor of the Bank of England in an open letter to the Treasury Select Committee in September. He argued that the Bank should not underwrite banks with poor risk management records and he emphasized that primary responsibility for managing risk lies with the banks¹. Changes in the social and economic contexts of regulation, however, mean that regulators constantly have to adapt. And within days the government was forced to compromise these views for the 'higher cause' of stabilising the banking sector and economy. Such dilemmas are the stuff of risk regulation where regulatory demands and objectives may well be in conflict.

Another trend in contemporary government is the attempt to quantify issues and then make decisions according to the numerics. Regulatory Impact Assessments (RIAs) are a controversial example of this. Articles in this issue present different perspectives on RIAs, some finding them highly problematic and others regarding them as important vehicles for improving policy making and regulation. The use of such measures is not new to regulation. Cost benefit analysis has long been used, its advocates arguing that it is neutral and objective; transparent regarding what is at stake; and is better

than nothing – 'it doesn't tell us all we need to know. But without it, we'll know far too little' wrote the American lawyer Cass Sunstein². Its critics argue that it is '...a deeply flawed method that repeatedly leads to biased and misleading results'; '...is reliant on the impossible attempt to price the priceless' and is value laden to the exclusion of questions of fairness and morality³.

Debates about the use of quantitative measures spill over into another area of modern government and risk regulation, for example the use and effects of performance indicators. Several articles in this issue address performance measurement. One of the aims of the National Audit Office is to help government improve its performance and included here is assessing the real impact of performance measures. Research by a CARR graduate considers performance reviews from a comparative perspective. He examines the move in health care language from 'patient' to 'consumer' and the accompanying prominence of quality assessment indicators. He notes that this is a trend across a number of countries yet his research reveals that the triggers for these moves vary from country to country as does the involvement of politicians and media interest. Indeed the performance criteria themselves vary from assessing clinical innovation to measuring customer satisfaction. Other articles pick up similar themes and also indicate the value of comparative approaches in teasing out the influence of the social, cultural and organizational contexts of risk regulation. ■

Bridget Hutter
CARR Director



IMAGE: PA PHOTOS

- 1 www.bankofengland.co.uk/publications/other/monetary/treasurycommittee/paper070912.pdf
- 2 C. Sunstein 'Is It Moral To Create Markets In Human Health And Lives?' (Environmental Forum, Vol. 21, No. 5, September/October, 2004, pp. 44-50)
- 3 Frank Ackerman and Lisa Heinzerling, *Priceless: On Knowing the Price of Everything and the Value of Nothing* (New Press, 2004)

Changing regulatory paradigms: Health care quality in England

All changed, changed utterly. **Gwyn Bevan and Jocelyn Cornwall** consider possible regulatory solutions to the failure of professional self-regulation in the NHS

The crisis of the failure of professional self regulation

For the first 50 years of the National Health Service (NHS) the dominant paradigm was professional self-regulation of quality of care. This reflected the trust of the public in the 'knightly' 'caring professions' and also, perhaps, the alarming implications of the rejection of that paradigm. The organizational DNA of the NHS, from its creation in 1948, allowed clinical professions autonomy over the delivery of care throughout fundamental reorganizations in the 1970s, 1980s, and 1990s.

Richard Smith, the then editor of the British Medical Journal, saw the Bristol Royal Infirmary case in 1998 as the anomaly that shattered the paradigm of 'knightly' behaviour by the 'caring professions'. At Bristol, between 1991 and 1995, at least 30 more children died than might have been expected in a typical unit. Smith's leader (echoing Yeats) was titled: All changed, changed utterly: British medicine will be transformed by the Bristol case. He described the tragedy as Shakespearean in its scale and structure and asserted that trust in doctors would never be the same again, but argued that 'that will be a good thing if we move to an active rather than a passive trust, where doctors share uncertainty'. Smith's assertion was strengthened by other scandals that came to light in the 1990s, such as the general practitioner Harold Shipman who killed over 215 of his patients between 1975 and 1998.

What is striking about these scandals was an extraordinary refusal to act promptly when disturbing information first became available. In the Shipman case the failure of the police inquiry to act on suspicion of murder was fortunately followed soon after by the arrest of Shipman who drew attention to himself by incompetently forging a will. But that failure illustrates the general problem of disbelief in what the evidence suggested to be the case: that a popular GP was murdering his patients. In all these cases we have the classic problem of a series of anomalies at variance with the paradigm of trusting all doctors to act in the best interests of their patients.

The changing regulatory response

The Labour government's response to the crisis of quality was to require NHS organizations in England to implement the new concept of clinical governance, which was defined as 'a framework through which NHS organizations are accountable for continuously improving the quality of their services and safeguarding high standards of care'. In 2000, the government also created a new regulator of

quality, the Commission for Health Improvement (CHI) with its principal task being to review implementation of clinical governance by inspections based on visits to all NHS organizations in a rolling programme.

Later in 2002, it abolished both the CHI and the National Care Standards Commission (which regulated private health and social care). This reflected the new emphasis on pluralism in delivery and resulted in two new regulators for public and private health and social care: the Healthcare Commission and the Commission for Social Care Inspection. The question we explore here is how to achieve targeted and proportionate inspections of providers of health care, one of the Government's principles of good regulation.

Targeted and proportionate inspections

It seems to us that the logic currently driving the regulation of quality of care is that some other means is required than a rolling programme of inspections based on visits: it is neither feasible nor affordable to organize a comprehensive programme of visits to the vast number, and heterogeneous mix, of private providers. From this it follows that regulation has to be organized around data that is collected routinely and available on a consistent basis for all organizations. This poses a serious problem for two reasons. First, CHI found that it was not possible to organize its inspections using only the limited data that was routinely available. Second, even where available data appear to have potential for organizing targeted and proportionate inspections, we suspect this potential is realised best with the advantages of hindsight.

The solution to these obstacles has been to develop another source of data through self assessment by organizations. Self assessment is a useful process by which departments and organizations prepare themselves for an inspection. But, as CHI found serious weaknesses in local Trust Boards' engagement with issues of clinical quality and safety, do such data provide the assurance patients and the public need about quality and safety? This is especially worrying as the ongoing development of a quasi market provides incentives to publicize the good and conceal the bad.

There seems to us to be several flaws in the current strategy of targeted and proportionate inspections. First, the seminal text on responsive regulation by Ayres and Braithwaite (1992) argues for regulation

being organized to be responsive not to signals generated by agents, but to their conduct. Second, as CHI found, hospitals and primary care trusts are so complex that none are without problems. Third, the importance of a service visit in gathering data to assure quality is shared by many other regulatory agencies.

Our recommended strategy of targeted and proportionate regulation would be based on inspections organized around visits, as only in this way can an inspector tackle the variability in performance and quality of sub-units and clinical departments within organizations. These inspections need to be designed to take account of different characteristics of organizations and there are three obvious types. First, NHS organizations, which for the foreseeable future will dominate delivery of care, must provide the core of regulation of quality with a comprehensive system of visits. Second, within the NHS, it is vital to pay particular attention to long-stay institutions for older patients and people with serious mental illness and learning disability, as history shows that in such organizations, especially when geographically or professionally isolated, things can go seriously wrong for patients. Third, the vast number, and heterogeneous mix, of private providers offer an obvious difficulty organizing inspections based on visits. One way of tackling this would be to require each to join a local geographical network for assuring quality of health care in which failure of any provider puts the whole network at risk of losing its licence. This would end their isolation and encourage peer review, and generate a feasible number of organizations to be visited in inspections.

Gwyn Bevan is a CARR Research Associate.
Jocelyn Cornwall is a Visiting Fellow of LSE Health.



CARR IMPACT

Liisa Kurunmäki and **Peter Miller** have received the John Perrin Best Paper Award from the *Financial Accountability and Management Editorial Board*, for their article 'Modernising Government: The Calculating Self, Hybridisation and Performance Measurement,' *Financial Accountability and Management*, 22(1), 2006, pp. 87-106.

Michael Power delivered plenary addresses at three recent European conferences: 'Do we expect too much from Risk-based Auditing?' at the Annual Congress of the Institute of Internal Auditors, in Amsterdam; 'Organized Uncertainty: Implications for the Comparative Analysis of Risk and Security' at the Europa im Zeichen von Sicherheit und Risiko conference in Berlin; and 'The Rise of Internal Control and the Standardization of Risk Management' at the European Risk Conference in Munster.

Bridget Hutter gave a keynote address on 'Risk Management and Governance' at the Joint NPIA, ACPO and Home Office Research Conference on *Managing Risk To Improve Policing in Birmingham* in October.

Will Jennings recently presented various papers on public policy, bureaucracy and opinion polling at events in Chicago and Bristol. He also appeared in a July episode of ITV's *Tonight with Trevor McDonald*, where he was interviewed about the budgeting process and economic impact of London 2012.

Jakob Vestergaard presented 'Convergence and resilience in the global economy' at a *Varieties of Capitalism* workshop, held at Roskilde University, Denmark in August.

David Demortain spoke on 'The importance of being transnational' at the *Annual Conference of the European Group for Organisational Studies*, in Vienna in July.

ACADEMICS ABROAD

Bridget Hutter has visited Berlin twice this summer. In June, she was part of the international review team evaluating the Humboldt University of Berlin as part of the German Excellence Initiative. Upon her return in July, Professor Hutter attended the *Law and Society* Annual conference and participated in a panel on Law, Society and Compliance Behaviour.

In September, **Martin Lodge** travelled to Jamaica with **Lindsay Stirton** to continue their work on telecommunications regulation in the Commonwealth Caribbean and to investigate the way in which the public service bargain at the top of the Jamaican bureaucracy has changed.

CARR VISITORS

Christina Garsten visited and gave a seminar at CARR in October. Professor Garsten is Senior Lecturer and Chair at the Department of Social Anthropology (Stockholm University) and Research Director at Score (Stockholm University and Stockholm School of Economics). Her research interests are in the anthropology of organizations and markets, processes of globalization and emerging forms of regulation and accountability in the labour market and in transnational trade.

Morten Broberg also visited and gave a seminar at CARR in October. Dr Broberg is the Associate Professor in European Union Law at the University of Copenhagen, Faculty of Law. Dr Broberg's research considers whether the EU's movement from a 'free' food safety regime to one based on 'risk analysis' has unintended legal consequences.

Steven Kelman visited CARR in June. Dr Kelman is the Weatherhead Professor of Public Management at Harvard University's John F. Kennedy School of Government. His time at CARR was spent on the development of a research project on Crime and Disorder Reduction Partnerships. The project seeks to learn more about connections between how these partnerships are managed and their success in reducing crime.

NEW RESEARCH PROJECT

Sally Lloyd-Bostock, CARR Visiting Professor, has been awarded an ESRC research grant to explore whether information held by the General Medical Council on doctors' fitness to practice can be used to develop effective regulation.

STAFF NEWS



Jeanette Hofmann joined CARR as an ESRC Research Officer. Prior to joining CARR, Dr Hofmann has been a senior researcher with the Social

Science Research Institute Berlin (WZB), Germany. Her research areas include internet regulation and the development of Intellectual Property Rights.

David Demortain has been appointed as an ESRC Research Officer. We are delighted that David will continue working with us.

Sarah Dry is leaving CARR to pursue a career as a freelance science writer and journalist.

Jakob Vestergaard is leaving to become an Assistant Professor at the Copenhagen Business School.

CARR also bids farewell to **Dr Tola Amodu**, **Dr Niki Panourgias** and **Dr Sue Kerrison**, and congratulates them on the completion of their PhDs. We welcome our new and returning research students.

CARR is very sorry to learn of the death of **Richard Ericson**, Professor of Criminology at the University of Toronto. As a CARR Research Associate, Richard was a great supporter of CARR. His work on the sociology of risk, insurance and regulation has been very influential and his contributions to scholarship on risk regulation was widely appreciated. He will be sadly missed.

MEET THE REGULATOR

The Maritime and Coastguard Agency

The Maritime and Coastguard Agency is responsible throughout the UK for implementing the Government's maritime safety policy. This includes co-ordinating search and rescue at sea through Her Majesty's Coastguard, and checking that ships meet UK and international safety rules. We talk to **Peter Cardy** about the regulation of shipping and the environment.



Peter Cardy

How did Maritime and Coastguard Agency (MCA) come about?

The MCA was born in 1998 from the Marine Safety Agency (the former Surveyor General's Organisation) and The Coastguard Agency (Her Majesty's Coastguard), bringing together surveyors, coastguards, scientists, registrars and enforcement officers.

What does the MCA do?

Like many regulatory agencies, the MCA has multiple roles. We are an emergency service, a routine service provider, a public information body and an education service. We also discharge some historic roles like the Receiver of Wreck. The general public knows us as the Coastguard: commercial shipping knows us as the MCA. We are an executive agency and part of the Department for Transport (DfT).

Our job is to sustain and improve the quality and safety of the ships on the UK Ship Register and the seafarers who work in them, and to help protect the marine environment by preventing pollution or limiting its impact. We do this by surveying and inspecting ships (including control of foreign flagged ships arriving in the UK as the Port State), certifying their safety, examining seafarers, enforcing regulations, auditing ships' and shipping companies' safety management systems, auditing those organizations to whom we delegate work, and providing emergency response for salvage, search and rescue and pollution control when incidents do occur. Our mission is safer lives, safer ships and cleaner seas.

What has the MCA achieved so far?

We have attracted 400 per cent more tonnage to the UK Ship Register which now has 1,450 ships. We have introduced measures to support young people training for careers at sea. We have improved the

UK's ability to deal with pollution, to fight fires at sea, and are bringing new Search and Rescue helicopters into service. We have completely replaced the coastguard communications and command systems.

We deal with about 17,000 rescue, counter-pollution, and salvage incidents each year and some 6,000 of those require us to co-ordinate assistance, for example tasking our MCA or military helicopters, and RNLI or independent lifeboats. We have strong influence within the International Maritime Organization (IMO), which sets the framework for much of our maritime law.

The Secretary of State's Representative in Marine Salvage and Intervention (SOSREP) works within MCA. He has overriding powers of command and control during major shipping emergencies, and the position is an envied world first amongst marine safety agencies. It was SOSREP's decision to beach the huge container ship NAPOLI in a January gale after the ship's hull fractured, preventing a disaster on both sides of the Channel. We have customer account managers and because shipping is a truly global industry, many of our services run round the clock.

Is there a secret to being a successful regulator?

Yes: retaining a keen sense of balance, proportionality, consistency, quality, openness and fairness, but never forgetting that we can't always be everyone's friend. One of the issues is to regulate a successful UK maritime industry which earns £322 per second for the UK and where ships are responsible for 95 per cent of the UK's visible trade. UK ships, and foreign ships visiting the UK, transport 65m passengers per year. This must be done safely, without disproportionate loss to the UK economy, damage to ships, equipment and cargo, or harm to the environment. So the challenge is to be a regulator that actively supports a safe and successful industry.

How do you try to incorporate evidence into your policy-making?

The DfT's use of evidence in policymaking was rated highly in the recent Capability Review and the MCA shares the Department's approach. We have a research programme with respected partners and we watch trends and incidents carefully, some obvious, others more subtle.

The Marine Accident Investigation Branch of the DfT (MAIB) reports are one important source; in recent years it has identified fatigue among ship watchkeepers as an important cause of accidents, so we are working on international policy while also routinely inspecting and auditing ships' manning records. The rate of fatalities in commercial fishing remains the highest of any UK industry sector, so our surveyors and coastguards work to advise fishermen as a precursor to enforcement. We follow the UK government systems of assessing the impact of policy on industry and the public, and we consult widely and openly with maritime interests.

What is the most common myth about your organization?

That the MCA runs the lifeboats – we don't! We co-ordinate the entire Search and Rescue response to incidents, and this often includes tasking our partners in the RNLI to deploy their world-class lifeboats. Remarkably, the RNLI is a totally independent charity, funded by public donation and mainly staffed by volunteers. It's not widely known either that the largest part of our workforce is also voluntary, the 3,500 Coastguard Rescue Officers.

What sort of measures do you have to ensure the MCA's independence from the shipping, marine, and maritime leisure industry?

We engage very closely with the sector and have 14 advisory groups whose membership balances the trades unions, industry and independent representation. Many of our responsibilities are enshrined in law: there is oversight from our parent department, our non-executive directors and external auditors, and by the UK offering its national maritime administration for audit by the IMO. It is also underwritten by the uncompromising professional pride and ethics of our surveyors, inspectors and coastguards. Another important safeguard is the published MAIB reports; these do not prevent us from taking enforcement and prosecution action, but nor are we immune from their criticism. Finally, there is regular, penetrating Parliamentary scrutiny by the Transport Select Committee.

How do you see risk-based regulation being used as a tool for regulators?

Using the HSE's guidance in Reducing Risks, Protecting People (R2P2) we have measured the risk in commercial shipping under our national statutory and international convention obligation. We've done the same in 21 marine and coastal sport leisure and recreational activities where we provide safety advice and Search and Rescue. We ask ourselves – should we act or is the sport representational body, for example, better placed? How big is the risk? Does the public think this is a risk? How costly are the control options? Is this



Maritime and Coastguard Agency



MSC NAPOLI – deliberately beached in January 2007 by direction of SOSREP to minimize the pollution risk. The empty forward section has now been removed, soon to be followed by the stern.

proper use of taxpayers' money? If the level of risk warrants control and if other options (communications, guidance, education, publicity) are done or discarded, then regulation remains.

Can you give me an example of good regulation? And bad regulation?

The most obvious effect of good maritime regulation is evident on the entire coast of the UK. Not long ago, a major component of every beach was 'tar', the congealed residue from ships' tanks and bilges. The MARPOL International Convention for the Prevention of Pollution From Ships has now made it a rarity. The best maritime regulation is the International Safety Management Code. The UK can take much credit for the design and introduction of this Code, and we are one of very few national maritime regulators who have decided to keep in-house the audit of ships and shipping companies under the Code, which gives us practical authority. This in turn means we can confidently take a proportionate approach to the audits. We have also introduced a Human Element Assessment Tool to establish the degree of commitment to safety management on board ships and in shipping companies. It is commonly held that people are responsible for 80 per cent of accidents, so that's where we concentrate – on the people.

Regulators have been encouraged by the government's Hampton Review to risk-base their regulatory activities – how is the MCA responding to Hampton?

Our response has been to review where our activities were already risk-based, to align our previous approach with current good practice. Our inspections of foreign flag vessels arriving in the UK, our allocation of effort to audit organizations to which we delegate work, the maintenance of emergency support ships in high risk areas, the staff levels in our maritime rescue centres – these were already risk-based activities. We are extending the theme of evidence-led and risk-based response to our oversight of offshore renewable energy installations and port operations.

How far is the MCA able to target its activities towards high-risk sectors of maritime activity?

In commercial shipping we use an algorithm to identify the most at-risk ships and we inspect and enforce rigorously where ships and owners are known to be sub-standard. Where standards are high we confer more responsibility on the companies. Though safety standards have risen, we still aim to reduce the rates of death and injury to crew and passengers. But there are sectors of the commercial industry, fishing vessels and smaller general cargo vessels where there is still much to do, and we target resources at their safety in proportion. In maritime sport, leisure and recreation we know which of them cause the most incidents, and we are starting to find out much more about the causes – again we will apply enough effort here, but as much through our safety partners as by our own direct actions.

Peter Cardy is Chief Executive of the Maritime and Coastguard Agency.

The Health and Safety Commission and Executive – A modern regulator in a modern world

Former Chair of the Health and Safety Commission, Sir Bill Callaghan reflects upon Britain's flexible and modern system of health and safety regulation.

The world of regulators and regulation never stands still. Some specific incidents lead to demands for new or tighter regulation. Regulators are charged with making law that reflects both the traditional and the new risks posed, in the case of health and safety, by the changing world of work – and with removing obsolete law. And Government must balance protecting those people at work, or affected by work activities, whilst maintaining the economic prosperity of the country and all those who work in it.

Great Britain has a flexible and modern system of health and safety regulation. Whatever the business, whatever its size, whatever the hazard, the same goal-setting, non-prescriptive, risk-based model applies. It is based on the view that 'those who create the risk are best placed to manage them'.

It is in this context that the Health and Safety Commission have responded positively to the challenge of the better regulation agenda. We believe that better, more effective regulation that is easier to understand and apply can help secure stronger commitment to compliance from business and improve overall health and safety results.

Sensible health and safety

An excellent example of our work is the Sensible Risk Management campaign. Feedback from our stakeholders indicated that 'risk assessment' had become a technical term and the perceived complexity of the process was putting some businesses off undertaking one.

So the key message of our campaign is that risk assessment should be about what practical steps you need to take to protect people. We have produced a range of risk assessment examples so business can see what a risk assessment looks like in practice. If we get this right, it should result in less time dealing with bureaucracy and encourage more businesses to comply. Early feedback on the campaign has been very favourable.

Reducing administrative burdens

The HSC is enhancing our understanding of the perspective of the regulated; those people and businesses affected by regulatory law and practice. We are continually looking at the advice and support we provide to ensure it is easily accessed and understood by its target audience.

It has to be pitched at the right level and provide the regulated with examples of what 'good enough' looks like.

We also think it is important that modern regulators identify links and overlaps with other regulators and then work collaboratively with them to minimise the accumulative regulatory burden. For our part, we aim to reduce the administrative burden by 25 per cent before 2010.

For the credibility of the health and safety regime, all of us involved must work together, recognizing and delivering the same priorities and applying consistency in our approach and advice. This is key to our partnership working with Local Authorities and we can report very significant progress on this.

A firm but fair regulator

As well as being a catalyst for change in the better regulation arena, the HSC must also be a critic of failure. Thus, we apply firm but fair enforcement of health and safety law. And when we prosecute, these are carefully targeted cases to serve the interest of justice, and to send a strong signal to deter others. A recent review of our enforcement policy statement confirmed that our stakeholders support this approach.

Conclusion

The health and safety record in Great Britain is one of the best in the world – a fact in which I take considerable pride, whilst recognizing the many contributors that make it so. However, improvements can still be made. So, the HSC strives to ensure we operate in the most effective way possible both with, and for, our many stakeholders.

Sir Bill Callaghan is the former Chair of the Health and Safety Commission.



The risks of regulating by numbers:

Costing, curing and quantifying



IMAGE: STOCKXPERT.COM

Peter Miller and **Liisa Kurunmäki** ask whether regulating health care by numbers itself creates risks, and might come at the expense of patient choice.

How might we know the costs of curing? And what are the risks of regulating or managing healthcare according to accounting numbers? Ever since the founding of the welfare state, it has been the dream of successive governments to make medicine calculable. Yet that dream has been constantly thwarted.

Under New Labour, those who wanted to know the costs of curing obtained a new weapon in their crusade – ‘Reference Costs’. Introduced in 1998, Reference Costs represented a crusade of ‘transparency’ and ‘making costs visible’ that identified ‘unacceptable’ variation between service providers. The comparing of unit cost data would, so it was proclaimed, raise overall standards in the NHS. And this could be achieved without the need for overt competition, with its possibly destructive results.

Since then, things have moved on. In 2003, Reference Costing came to be harnessed for new uses, and gained greater significance, as the primary mechanism underlying the new NHS funding system called ‘Payment by Results’. Payment by Results aims to pay providers of healthcare fairly and transparently for services delivered. It pays providers according to a ‘standard national tariff’, based on the national average (ie, ‘Reference Cost’) of a given

procedure. Under this new funding system, total hospital revenues depend on the volume, type and mix of activity undertaken. The financial success, and ultimately the survival of hospitals, depends on the efficiency with which the chosen set of services is delivered.

Payment by Results changed the regulatory landscape within which hospitals function, and altered the risks of providing healthcare. Regulating or governing by accounting numbers rapidly became the norm to be aspired to, and a spate of predictions quickly followed concerning the likelihood of hospitals failing financially. Monitor, founded in 2004 to act as the independent regulator of NHS foundation trusts, was given responsibility for overseeing and supporting this aim of improving financial management. Multiple guidelines and tools were issued to help hospitals improve the understanding of their income and costs, and to enhance their ‘performance’, ‘productivity’ and ‘profitability’. Even if some pain was to be experienced in the short-term, this was held to be needed in order to ensure financial robustness in the long run.

Prima facie, this system of regulation by numbers sounds reasonable. For who could object to

the sharing of information, the benefits of cost comparisons, and the rewarding of efficiency? And why should one doubt the promise of future benefits, while the system adjusts? But regulating health care by accounting numbers itself produces risks which go beyond these supposedly temporary adjustments. For Monitor is not the only regulatory actor in the healthcare arena, and other forms of expertise exist also. The risks arise to a large extent out of the interaction and potential conflict among the set of regulatory actors and related forms of expertise in the domain.

Let us look at this schematically, and in terms of a triumvirate of costing, curing and quantifying. Costing – represented by accounting numbers, and by Monitor as the relevant regulatory body – can produce incentives to hospitals to alter the volume and mix of activities and even to cut certain treatments or even entire departments within individual hospitals. Quantifying – represented by health economists, and by the National Institute of Health and Clinical Excellence (NICE) as the relevant regulatory body – can make visible the costs and benefits of particular drug regimes or treatments. And the aspiration of curing – as represented by medics and their associated professional associations – can make it appear that we live in a world of unconstrained resources in which all that matters is the treating of patients according to their needs and wishes, regardless of cost. Viewing the arena in these terms alerts us to the possible conflicts between these different regulatory actors and expertises.

Take the example of renal failure, and the choice between hospital and home based dialysis care. First, we have the ‘curing’ aspiration of medics, and the advice provided by the professional association of physicians. Their guidance is unambiguous: ‘In case of no medical contraindication, the choice of initial dialysis modality should be based on patient choice’. Put differently, the views of the patient should be paramount, and cost is not an issue.

Second, take NICE, and the quantifying models of health economists that it deploys. In the case of renal failure its advice is largely consistent with that of the professional medical associations. While ‘mindful of the need to ensure that its advice takes account of the efficient use of NHS resources’, and in the absence of clear evidence of the superiority – on either clinical or cost effectiveness grounds – of one form of care over the other, NICE suggests that all suitable patients should be offered a choice of the form of care. Again, the view of the patient should

prevail, although a concern with cost effectiveness lurks in the background.

Finally, take the 'costing' component of the triumvirate. Under the banner of 'service line reporting', the focus of Monitor is on the hospital as the accounting entity, and the comparison of costs of treatment relative to national tariff (or indicative national tariff in the case of renal dialysis). The latter refers to the 'price' at which a trust is reimbursed per individual treatment. Consider a trust where the costs of hospital based dialysis are £158, but where the indicative tariff is £163. This produces a 'profit' of £5 per treatment. Consider alongside this (for the same trust) a cost of £281 for home based care, relative to an indicative tariff or reimbursement of £105, producing a 'loss' of £176 for each dialysis session. Of course, individual trusts are not obliged to discontinue particular treatments simply because the costs for that treatment exceed the national tariff. But what is counted counts. Thus, in so far as the hospital is taken as the accounting entity and obliged to operate as a going concern, Monitor's risk-based focus on accounting numbers can come to dominate the triumvirate of actors and expertises in the regulatory domain. For instance, a monthly reporting of income and earnings by 'service line' is required for trusts with the poorest risk ratings. And such intense and fine-grained monitoring is not limited to such entities. Any well-governed trust, according to Monitor, should have a good understanding of its service-line incomes and costs for purposes of business planning and control.

The implications are clear. Within the triumvirate of costing, curing and quantifying, patient choice may end up taking second place to financial assessments of the 'profitability' of particular service lines or treatments. Patient choice over treatment methods, as illustrated above for the case of dialysis care, may be compromised as a result. Or, put differently, the hospital may come to be viewed as the dominant entity, and the financial management of the hospital and possibly even its existence may override the guidance of medics and the potential societal benefits of particular modes of treatment. Of course in practice, and in the context of individual trusts, matters will be much more complex. Decisions about discontinuing particular treatments are highly unlikely to follow automatically from cost variations. Medics are unlikely to accept this, and patient groups would almost certainly protest. In any event, hospitals could respond to an unfavourable reimbursement 'price' by seeking to improve efficiency and costs, as indeed the Payment by Results regime hopes. And medics might, over time, start to acquire greater knowledge of costs and prices, resulting in a 'hybridizing' of medical expertise. Meanwhile, however, the risks of regulating by accounting numbers remain.

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'Risk and Public Services' Joint ESRC Public Services Programme/CARR Conference 13-14 December 2007

Risk is fundamental to the provision of public services. Often risk is what makes public services like health publicly visible and politically sensitive. Yet the links between risk and public services have not received the analytic attention they deserve. Debates about public services across at least the past two decades have tended to frame any issues wholly or primarily in terms of markets, choice and monitoring.

This conference, jointly organized by CARR and the ESRC Public Services Research Programme, seeks to address the links between risk and public services. It explores three main analytic issues:

What, if anything, is distinctive about risks that arise in the provision of public services, as compared to other kinds of activity?

In one sense public services can be seen as just another domain for identifying and managing operational, financial and reputational risk. But several features of risk in public services may be special. One is that the state is the social 'risk bearer of last resort' and it has the legal power to determine who runs what risks, for example in military conscription. Another is that public services are pervaded by a special kind of reputational risk – the risks of political blame.

So blame avoidance activity is often dominant, for example when police chiefs concentrate their energies on forecasting terrorist disasters to lower public expectations or on shifting blame away from police performance by attributing crime to social breakdown. Third, where public services are provided through multiple organizations, the distribution of risk among them is shaped by political clout rather than by market forces.

What are the risk consequences of different ways of managing and organizing public services?

Claims about the risk consequences of different ways of providing public services (such as self-insurance versus external insurance) tend to be largely proverbial. For example, sometimes it is claimed that effective risk management in public services requires putting all the relevant activities into a single organization (such as a single defence ministry rather than a separate army, navy and air force). But sometimes it is argued that effective risk management can be achieved through 'partnership' forms of organization to share risks between the public and private sector and produce a richer combination of information and modes of action than any single organization would supply. Can we move beyond claims resting on folk wisdom and forceful advocacy to more systematic and dispassionate evidence on such matters? Can we rely on 'the intelligence of democracy'?

What is the scope and limits of formal risk management systems to control financial, operational and reputational risks in public services?

Formal risk assessment and management systems have grown sharply in public management over the last decade or so. Even for the private sector where such systems began in their modern form, there are question marks about the return to investment in such systems and about the relationship between formal risk management and the 'real' management of risk. But, for public services there is no market check on whether providers approach risk management by box-ticking or by whole-hearted engagement. And the premium on political blame avoidance in public services may provide strong incentives to use such systems for blame avoidance rather than 'real' risk management.

The conference will examine risk issues in public services, and consider risk management issues in health, social care, education and custodial services. The intention is to promote a dialogue between people in different public service domains and between academics and practitioners.

The conference will be convened by Christopher Hood (Oxford) and Peter Miller (LSE), and speakers will include Sally Lloyd-Bostock, Ellie Scrivens, Sue White, Tony Travers and Rod Morgan.

Numbers for the conference are limited and attendance will be on an invitation-only basis. If you would like to register your interest in attending the conference, please email Mr Rikki Dean, at rikki.dean@politics.ox.ac.uk.

Talking point: Assessing the costs and benefits of regulation

There is an ongoing and longstanding debate about whether society is regulated too much or too little. After its successful March event on the costs and benefits of regulation, CARR asked representatives from the **Institute of Directors** and **National Consumer Council** about their views on the balance between the costs and benefits of regulation. Some key questions included: How do you define cost-benefit analysis and what do you regard as its place in regulation? How do you go about assessing costs and benefits and weighting them? What is 'better regulation'? How would you go about promoting it?



Weighing up the pluses and minuses of regulatory intervention is critically important; getting it wrong comes with a heavy price. We know it is consumers and taxpayers who often bear the brunt of regulatory failure, through increased costs, greater complexity and reduced innovation.

But all too often, cost-benefit analyses (CBAs) of proposed regulation have felt like pointless bureaucratic exercises, with regulators ticking boxes instead of subjecting decisions to tough scrutiny. And like the rest of regulatory decision-making, such processes have tended to exclude the public – even when the primary purpose of the regulation is the protection of consumers.

The National Consumer Council (NCC) would like to see regulators do more to engage people in dialogue about the objectives, costs and benefits of regulation – and greater assessment afterwards of which regulation worked and which didn't.

There's a perception that people are risk averse, and that given half a chance they'll call for yet more regulation. Our research suggests that nothing could be further from the truth. We found that consumers have a pretty sophisticated view of regulation, and are willing to be bold. While officials may tiptoe round the issues, consumers often give a much sharper, human response when they see what they consider to be nonsensical rules.

We have found that the principles of good regulation, developed by the Better Regulation Commission, are pretty robust – proportionality, accountability, consistency, transparency and targeting. We've yet to come across an ordinary person who has heard of the formal list, but it is striking how consumers effectively embrace the principles – such as the need for consistency in local enforcement rates, and the importance of not lumbering small retailers with disproportionately detailed rules.

Most of all, consumers tell us they want to see the back of unnecessary regulation, with a greater focus only on that regulation which really advances the consumer interest.

Where regulation does fail, it is often because it lacks focus or has become disconnected from its original purpose. The application of the money-laundering regulations caused huge problems for many consumers who wanted to open a bank account, while doing little to deter criminals. The restrictions on the number of taxi licences in many towns simply protect incumbent operators – and mean you can't find a taxi. Failing pieces of regulation such as these restrict competition, limit choice and raise prices. Far from protecting consumers, such rules and restrictions harm them – so they should be swept away.

There are just two key types of consumer-focused regulation; and in both instances critics are simply wrong to characterise regulation as a problem.

The first is lifeline regulation, which safeguards consumers. The CORGI rules about gas safety save lives – no-one today seriously argues that CORGI has been anything other than a good thing for consumers and business alike. In a similar vein, lifeline regulation governs access to affordable energy and water for vulnerable consumers.

The second is market-making regulation. Common technical standards can help establish competitive product markets; and ensuring that advertisers are not allowed to make misleading claims helps to promote choice. Standards on food labelling can help consumers make informed decisions and promote new ranges of healthy food. Regulators can also make markets work by cracking down on anti-competitive practices or by sweeping away barriers to switching between companies.

We believe the most effective way to promote better regulation would be to treat the public not just as prime beneficiaries of regulation, but as co-producers of it. We'd like to see regulators doing far more to engage consumers in decision-making. All the evidence is that people are willing and able to get involved in helping make tough decisions; that they are comfortable about

issues around risk and prioritization; and that public involvement leads to better regulation that commands widespread support and is fit-for-purpose.

Regulators could, for example, do more to enable consumers to share their experiences of different companies, and make available more of regulators' own data, so that those who deliver good products and high service standards benefit, while those who don't lose out. The Food Standards Agency is piloting ways for consumers to see food businesses' performance in food hygiene inspections, harnessing consumer power to encourage compliance.

It is encouraging to see pockets of real innovation by individual regulators, which help to bring the better regulation agenda to life. For example, we support greater use of principle-based regulation, through which regulators can aim at sustainable cultural change not just narrow compliance with detailed rules. The duty not to trade unfairly, which will come into effect next year, is a welcome step towards this, as is the Financial Services Authority's 'Treating Customers Fairly' initiative.

Such initiatives work because they avoid thinking of regulation as an end in itself. Instead, they aim to achieve sustained change in business behaviour. Cost-benefit analysis can support this drive towards better regulation – but only if regulators stop thinking of it as a closed bureaucratic process. Instead, each CBA should help open up a debate on when and how to intervene to safeguard consumers and make markets work.

Philip Cullum is the Deputy Chief Executive of the National Consumer Council

costs and benefits of regulation



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Winston Churchill once said; 'If you have ten thousand regulations then you destroy all respect for the law.' Yet, in 2006 alone, the British Government produced 3,621

pieces of legislation. Has the large amount of regulation damaged respect for regulatory interventions?

Like me I suspect your answer to the above question is no, not least because judgements based on quantity alone offer crude yardsticks for success.

Decreasing the amount of 'sausages' coming out of the 'Westminster sausage factory' or indeed 'euro-sausages' coming out of Brussels will have profound effects, but unless the 'factories' themselves are tackled to ensure the 'sausages' are better quality, the slowing of the process will not correct the regulatory squeeze on UK businesses.

So how do we improve policy making and regulatory intervention for the benefit of all society? The answer is not as complex as many commentators, civil servants and management consultants would have us believe. We have equipped ourselves with a number of useful tools such as Regulatory Impact Assessments (RIA), targets for reducing administrative burdens, broader regulatory sanctions and improved mechanisms for regulatory enforcement and intervention.

These innovations are slowly beginning to bite, but the time has come for the Government to bring to an end its work of regulating vicariously through the FSA's and Ofgem's of this world and instead work on the job of regulating its own regulators. Most of the regulators have done a good job, but there remain some legitimate questions about their future role.

Costs and benefits have permeated the regulatory language for some time now, but regulators themselves seem to have evaded this reformist spotlight. Perhaps this is partly due to an increasingly polarized regulatory debate; focussing on the detail of specific regulations or being drawn into discussions of broad governmental culture.

The Institute of Directors (IoD), far from waging war on sectoral and competition watchdogs, recognises that there is a missing link – an absence of the organizational cost benefit analysis of regulators. Without sufficient analysis, regulators cannot be judged on their progress to completion and withdrawal from markets. If we use the following analogy the current absence of such an 'exit strategy' becomes troubling.

Using a builder to resurface my home's driveway I would certainly have a list of questions to ask before engaging the tradesman, including what quality of materials he would use (benefit), the agreed outcomes of the project (benefit), financial costs (cost) and how long the task would take (cost).

The current regulatory environment is no different from the above building situation; we are presented with a selection of cost and benefits, but the current provision of information about end products and timescales is unquestionably flaky in most instances.

Most regulators understand that their role is to fashion an environment where it is possible to leave the market to function without the need for further intervention. However, successive UK governments have failed to set out any measurable 'roadmap to withdrawal' for these regulators.

To be fair to government, such a task is not easy. Markets develop differently, and the imposition of uniform performance indicators would result in a straight jacketing of regulators that may need some flexibility.

What is the alternative? Existing attitudes to regulators and their shelf-life are not sustainable and more clarity over costs and benefits may be part of the answer. However, I'm going to take this opportunity to float a new proposal that at the very least deserves some thought.

Instead of placing the burden of proof on regulators to demonstrate that their own job is done, government should only empower regulators with defined periods in which to achieve market competition.

If a given regulator were set up to regulate its market with a ten year mandate to deliver competition, its clarity of purpose would be clear. Moreover,

markets and businesses would be able to plan for the incremental withdrawal of the regulator as its 'sell-by-date' would be evident from inception. In instances where the regulator could not discharge its obligations within the prescribed timeframe, it might even be permissible for Ministers to intervene and replace the regulators' key personnel as well as making alterations to the regulator's mandate.

The practicalities of implementation would need to be bottomed out, but fixed terms for regulators would at the very least eliminate any hint of job preservation.

At present, committing to the eradication of one's own employment within a regulator and having the confidence to say that a given market is sufficiently developed to 'let go' are powerful disincentives to a de-regulatory regime. As a result, sunset clauses for regulators would prove to be a powerful tool in the liberalization of markets.

By floating this idea, the Institute of Directors is not encouraging a 'wild west' approach to regulation. In fact, it is worth remembering that regulation would still exist even in deregulated markets, whether through the Competition Commission, Office of Fair Trading or by adherence to a weighty bank of consumer law.

Less regulation is not the sole call of businesses driven by profit maximisation or a desire to escape clear public obligations. Freeing business to innovate, compete and engage has clear and tangible benefits to the public as a whole, whether through cheaper goods, better products or increased wealth generation and employment. In setting markets free, the benefits are immense and the costs, well they are negligible.

Alexander Ehmann is the Head of Regulation and Enterprise Policy at the Institute of Directors.

The different worlds of the regulatory state

Roger King considers the growth and evolution of regulatory configurations and approaches in higher education, healthcare, accounting and legal services in the United Kingdom.

The regulatory state in the UK (and elsewhere) is generally characterized by the growth of market policies and the development of independent regulatory agencies operating in the public interest. Yet the regulatory state is not monolithic. It is comprised of 'different worlds' that equate to particular policy domains. Effectively, the regulatory state 'plays out' differently in these domains in ways that indicate distinctive configurations and approaches.

In this article, four such sectors are explored: higher education, healthcare, accountancy; and legal services. We describe these respectively as a) the ambiguous regulatory state (higher education); b) the insuring regulatory state (healthcare); c) the globalized regulatory state (accountancy); and d) the meso-regulatory state (legal services).

The regulatory state has not proceeded in a uniform manner across different policy sectors. Further, marked variations for the respective domains in the UK countries are also observable, with higher levels of public expenditure and less reliance on market approaches found in Scotland and Wales particularly. This article will concentrate primarily on various policy domains of the regulatory state as they are found in England.

Higher education: the ambiguous regulatory state

Until the 1980s, the regulatory model for what was then a much smaller and relatively homogenized higher education system was more that of state-backed professional autonomy. Rather than government interventions and market forces, the major driver of the institutional framework of rules and incentives was the tradition of collegial governance and academic autonomy. In addition to individual socialization by the disciplines, the collective action designed to assure academic standards was professional self-regulation, as found, for example, in departmental decision making and external examining. At the university-state interface self-regulation was based more on close ties between institutional leaders and politicians – elite intimacy – than on the formal incorporation of a professional academic occupation, the basis of which was historically undeveloped.

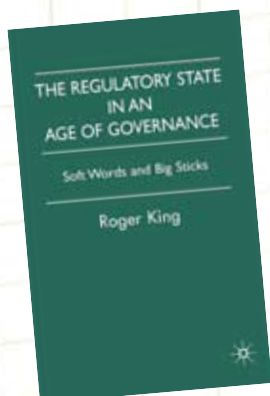
The development of the higher education regulatory state in recent years (with more statutorily-prescriptive instruments for government funding and with highly-codified procedures for the external quality

assessment of the university output by government-backed regulatory agencies) has not been a straight-line development away from professional self-regulation to external state intervention. It is best characterized by regulatory oscillation and ambiguous intentions. The regulatory pendulum has swung between versions of hierarchical and formalized controls, on the one hand, and continued reliance on self-regulation and normative professional codes on the other. The Quality Assurance Agency (QAA), for example, has moved back from its original application of detailed forms of quality assessment, to a lighter-touch, meta-regulatory approach where internal institutional procedures are the focus of external auditors with close relational links to those that they review. For the most part, periodic Research Assessment Exercises by the Funding Council rely not only on peer-review but on a system operating at the level of individual subjects, despite moves towards a more metrics-based approach in the future.

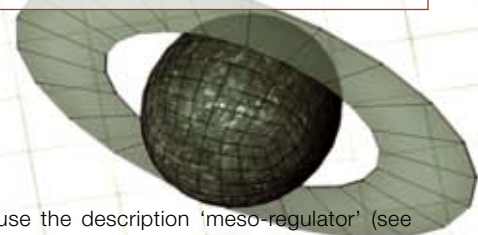
Policy 'see-sawing' between state and profession stems from a form of in-built 'capture' in the regulatory designs adopted. Professional peer review is retained as part of state-backed external regulation and is a key methodology for establishing the legitimacy of the regulatory systems for higher education. Regulatory ambiguity stems in part also from the 'semi-detached' nature of the market reforms for higher education that have been primarily focused on the demand-side rather than the supply-side. That is, the aim has been to secure more private contributions to tuition and other costs from students, and increased financial revenue from employers and other sponsors of research. The regulatory approach to new suppliers, however, has been essentially permissive and lacking the public funding support for private providers and their students found in the USA and Australia. Moreover, it contrasts markedly with the approach to the introduction of market forces in the English healthcare state.

Healthcare: the insuring regulatory state

We use the term 'insuring' for the regulatory state in the domain of healthcare in England to describe a process by which the state provides the funds from general taxation for the NHS but secures the supply of its services from a range of providers, including the private sector. The description of 'the insuring regulatory state' for healthcare does not refer to funding dependencies on social insurance



To order a copy of Roger King's new book *The Regulatory State in an Age of Governance* for the special discounted price of £25, simply enter the promotional code **WRISK2007a** when ordering online at www.palgrave.com/politics



but to the role of the state as the insurer or funder, and to the state's acceptance of healthcare provision (largely) free at the point of use as part of people's citizenship and human rights' entitlements.

There are a number of features that the healthcare state shares with the higher education regulatory state, such as the continued encircling of peer dominance and clinical autonomy by increasing managerial empowerment in hospital trusts. We also see the introduction of more external regulatory processes – a mixture of competitive, quality assurance and bureaucratic processes. Despite the maintenance of the public taxation model for the primary financing of the NHS, healthcare in England has undergone major reorganizations in recent decades. However, the aim has been to vigorously seek out new providers for the delivery of NHS procedures, both private and from abroad, while retaining agreed and common prices for these (in contrast to the use of variable fees in the higher education sector).

Rather than requiring wholesale user payments to help to contain costs (as found in higher education) and to enhance accountability, the approach is to maintain freedom from payment at the point of consumption whilst using supply-side choice and competition as means for improving quality. Anxious to reduce NHS waiting times – a sensitive political issue – the Labour government has turned, especially since its re-election in 2001, to the private health sector for much of the increased capacity required for England and has become a bulk purchaser from it. Overseas suppliers have been brought in to run fast-track NHS treatment centres to provide at least 250,000 operations a year for patients. It is estimated that a minimum of 15 per cent of all NHS operations will be undertaken by the private sector by 2010, although the new Brown government has yet to confirm its commitment to this target. Nonetheless, the outcome is that an authentic market involving public and private provision in healthcare supply is being created. On the demand side, nonetheless, the state rather than the individual consumer remains the purchaser.

Accountancy: the globalizing regulatory state

The accountancy profession in the UK is moving rapidly from professional self-regulation to more state-directed forms of accountability, predominantly in response to recent crises in audit and related practices (such as at Enron and Parmalat) and which is reflected in the strengthened statutory powers of the Financial Reporting Council. However, regulatory provision is more globalized than found in higher education and healthcare. The Public Company Accounting Oversight Board (PCAOB) in the USA, for example, operates abroad whenever foreign auditors have US-listed clients, relying on home-country

regulators only where that body is independent of the profession. The FRC has responsibility in the UK for undertaking inspection of auditors under EU Directives from 2008 requiring that auditors of non-EU companies listed in any of the EU member states be registered with a European audit regulator and be subject to regular inspections.

More particularly, of course, there is a move towards worldwide convergence of accountancy standards under the aegis of the International Accountancy Standards Board (IASB). The IASB, despite the public importance of its activities, is privately funded, with the big four accountancy firms donating around 35 per cent of its income. Nonetheless, when the IASB was established in 2001, the aim was to reduce the powers of the professional accountancy bodies in favour of user investors and large transnational companies. That is, the nature of the 'private' in emerging transnational accountancy governance has changed. Financial market agents, and their commitment to the ease of global investment against common worldwide standards and the transparency of accounts, have challenged the dominance of professional accountancy organizations that often retain strong national partner traditions and connections at variance with the integrated corporate structures of many of their global clients. This move to capital market governance, and the steady lessening of professional influences in the IASB, has enabled inter-governmental bodies to gradually exert more influence, not least as these are the bodies that traditionally regulate capital markets.

Currently, government-endorsed regulators, such as the FRC in the UK, are effectively enforcers of international accounting standards rather than formulators. The problems with harmonizing accountancy standards across territorial jurisdictions with distinctive and strong regulatory traditions are formidable. In the USA, for example, the principles-based accounting found in the UK and elsewhere in the EU offers less certainty in the litigious culture of US regulation than traditional US rules-based and 'book-following' audit approaches.

Legal services: the meso-regulatory state.

Recent legislation for England and Wales has established the Legal Services Board, an overarching and powerful new and independent (of the profession) statutory regulator to control and direct the traditional professional bodies. One of the Board's key regulatory purposes is to open the sector to more competitive pressures by supporting new types of legal services suppliers ('alternative business structures') and encouraging them to utilize more flexible corporate business structures than the conventional partnerships.

We use the description 'meso-regulator' (see also Robert Kaye in the winter 2007 edition of *Risk&Regulation*) to describe the Legal Services Board because it will be an oversight regulator, regulating the self-regulation of the professional bodies and other legal regulators, rather than taking them over and leaving the professional associations as simply representative bodies. The LSB sets the professional bodies, such as the Bar Council and the Law Society, regulatory targets, monitors compliance and imposes financial penalties as necessary. However, as a meso-regulator the LSB is perched between the front-line and higher-level regulators, such as the state, and thus the stability of such regulatory arrangements may be questioned over the longer term.

We have described a number of key differences in the world of the regulatory state at the level of the nation state and by policy domain. A major characteristic of fast-growing global regulatory governance is that even more often it tends to be compartmentalized by sector. Unlike many state-based regulatory arrangements, transnational forms tend to be constructions of those who know the sector and tend to be based more on 'soft law'. It is likely that on further investigation we shall find the many different worlds of 'the regulatory state' at the worldwide level as well.

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On the books and in the real world?

The regulatory work of the National Audit Office

Ed Humpherson discusses the recent track record of regulatory impact assessments and the importance of understanding how regulation affects organizations 'in the real world'.



National Audit Office

A common strain of analysis in the legal world distinguishes 'law on the books' from law in operation. 'Law on the books' concerns itself with formal and substantive legal rules, documented in statute books, judicial opinions and textbooks. But an analysis of law in the world asserts that law on the books can only give a partial insight at best because it ignores the behavioural, sociological and institutional lenses through which written law is refracted – manifested in the decisions of regulators, enforcers, courts, lawyers and society at large.

This same distinction can be applied to the NAO's recent reports on regulation. We have certainly looked at 'regulation on the books' – how regulation is designed, conceptualized, justified and quantified. But we have supplemented this with a close analysis of regulation in operation – regulation as it impacts on the world at large.

The NAO's recent reports

The NAO has produced a range of reports on regulatory matters over the last five years. These cover regulation 'on the books' in two main phases: the flow of new regulation as laws are enacted by Parliament; and the 'burden' created by the stock of existing regulation. The reports move beyond 'on the books' regulation to consider the impact of regulatory reform initiatives on real world organizations. An important new report considered the effectiveness of the Financial Services Authority (a major regulator 'in the world') implementing and enforcing a regulatory regime crucial to the UK's economy. The report is discussed later in this article.

The flow of new regulation

In July we published our latest survey of the quality of Regulatory Impact Assessments (RIAs). RIAs are documents produced by Government to establish the case for a new regulatory measure. They consider options for achieving the relevant policy goals, the range of costs and benefits of each option, the compliance and risk factors the policy faces, and establish a rounded view on the best way to meet the policy objective.

The RIA has a chequered history as a tool of Better Regulation. When Better Regulation was first adopted as a guiding principle of regulatory reform in 1998, the RIA was seen as the leading instrument for helping policymakers pick the most proportionate and effective policy options. Impact assessment has become popular in other parts of the world, notably the European Commission. But the track record of RIAs has been less impressive. Successive NAO reports have concluded that RIAs are not used as they were intended, inadequately consider costs and benefits, and infrequently challenge the case for new regulation.

The latest NAO report echoed these rather disappointing findings. It found that Regulatory Impact Assessments (RIAs) often failed to consider fully the cost and benefit of regulation, and did not take account of the long term implications of regulation, particularly for issues of compliance and enforcement. We sampled RIAs from the Department of Health and the Department for Communities and Local Government. While the majority of RIAs in the sample were competent, with fewer cases of poor quality analysis, there were

continued weaknesses in the quality of cost benefit analysis and insufficient consideration of the impact of the proposed regulatory changes. The Government's Better Regulation Executive has responded to these concerns by significantly revising the guidance.

Our report also highlighted the wider context of the realities of policy making. A predetermined policy agenda can have a far greater influence on government action than the outcome or findings of the impact assessment – a good example of how regulation 'in the real world' has pre-eminence over regulation on the books.

The stock of regulation

On the stock of existing laws, rules and regulations, the NAO published in July the first report on progress in the Government's objective to reduce the administrative burden imposed by regulation on the UK economy. Following a report by the Better Regulation Task Force which in turn echoed work undertaken by the Dutch Government, the Government embarked on an ambitious and unprecedented programme to measure the cost imposed on companies and other organizations by the administrative activities required by regulation (which amounted to around £20 billion, according to the final measurement). Each department was then set a target – typically 25 per cent – to reduce these 'burdens'.

There are a number of possible objections to the government's programme, including the somewhat arbitrary nature of the 25 per cent target, the focus on 'burdens' rather than on giving a rounded assessment of costs and benefits, and the statistically questionable

Risk and Regulation: Sixth Annual Research Student Conference

20 and 21 September 2007

The conference provided a forum for intense and constructive discussion and debate between research students whose projects focus on a topic within CARR's agenda. More than 40 students attended sessions on health, the public and professional shaping of regulation, the politics of regulatory reform, the internal dynamics of regulation and conceptions of risk. We asked a first-time attendee to share their reflections on the event.

A participant's perspective

The conference was very rewarding for a first time student. The student presentations and the keynote talk by Mr Steve Wearne of the UK Food Standards Agency were fascinating, the academic research and writing sessions were very helpful, and the opportunity to meet students studying common themes within risk and regulation made the experience very worthwhile and enjoyable.

The student talks were the key element of the conference, and were memorable due to the variety of risk issues discussed, the diversity of student's approaches to research, and the

GUEST COLUMN



validity of the overall estimates. The NAO report instead took the programme's objectives on their own terms, and considered the evidence on whether this major programme is likely to make a noticeable and valuable difference to business and other organizations in the UK. Our starting point was therefore to assess two things: current perceptions of regulation; and the current state of plans by major departments to evaluate and reduce the volume of regulation for which they are responsible. Over time we will use this baseline to track whether specified measures to reduce regulation are noticed, valued and applauded by business and other organizations.

Regulators 'in the real world'

The main focus of the NAO's work has been the Financial Services Authority (FSA). With this autumn's talk of a credit crunch, sub-prime crisis, and queues outside Northern Rock, there can hardly be a more topical or important regulator.

This year saw the NAO's first ever review of the FSA. The review was undertaken at the request of the Treasury, who asked us to examine five areas: performance management; working with other

regulators; international representation; reducing financial crime; and improving financial capability (raising the financial awareness and aptitude of consumers). However, the terms of reference did not include financial stability or arrangements for handling market turmoil.

We concluded that, overall, the FSA is a truly risk-based regulator and is increasingly focussing on outcomes. Being risk-based does not mean that no bank should fail; simply that the FSA focuses its attention on the riskiest entities and problems.

The report also concluded that the FSA has good and improving relations with other regulators in the UK, such as the Office of Fair Trading, the Pensions Regulator and the Financial Reporting Council; it is effective in international representation and negotiation of EU legislation; and it is a world leader in financial capability. However, it could do more to focus its work on combating financial crime.

In addition to these detailed recommendations, the report reaches an overarching conclusion: the FSA in

2007 is an organization 'rich in process'. To become a coherent, risk-based regulator, which integrates and systematizes its regulation across a wide range of sectors, the FSA has had to adopt a stringent set of processes. In many ways, our report argues, this has been its great success, enabling it to achieve proportionate responses to a range of challenges and problems. Yet the report is also clear: the FSA cannot stand still and must consider regulatory outcomes, and the principles which underpin its regulatory decisions. The early signs are that the FSA recognizes this in full.

Conclusion

It is this type of insight – about how a regulator 'in the world' such as the FSA evolves and behaves – that moves us beyond an analysis of regulation 'on the books'. This is particularly important if policymakers want to achieve reductions in what they describe as the 'burden' of regulation. The best, and probably only way to reduce the burden is to understand how regulation affects organizations 'in the world'. A world that is subject to wide-ranging pressures, risks and periodic perceptions of crisis.

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international scope of the topics. Eager and well thought through presentations showed how the dynamics of regulating risk and the cultures and discourses of risk established outside bureaucracies are still puzzling the minds of PhD students. The international scope of the case studies ranging from Singapore to Barbados and Holland to Japan indicates the interrelatedness of risk issues and ideas in an evermore united world.

Group discussion during Professor Bridget Hutter's session on research methodology established that, alongside academic rigour, interpersonal skills, forbearance and creativity are important aspects

of any good research project. This 'meta analysis' dovetailed nicely with the second day's more detailed methodology session. Led by Professor Michael Barzelay, the talk could easily be called 'How to get a good job done in three years, which too quickly melts into only three months left', and focused on the specifics of structuring a thesis argument well and as early in the project as possible, reducing an ambitious 'tell them everything' idea into a manageable workload, and accepting that PhD study is always limited, but can be a wonderful stepping stone into further study.

Overall, I found the conference to be an ideal meeting point to match the names and faces of the other students with their institutes and research centres in the UK and abroad. In contrast to some international conferences a first-year student may have the opportunity to attend, the CARR research student conference was well-balanced and friendly, and gave me a boost of encouragement and energy that will assist me in my sometimes tricky PhD study.

Kati Kangur is a PhD candidate at the King College Centre for Risk Management

Product innovation or customer satisfaction?

Different hospital performance measurements and common challenges

Nao Kodate considers different trajectories of performance measurement in healthcare in Sweden, England and Japan.

Quality assessment of health care can be useful for both medical professionals and patients in comparing the performance of different health care providers. However, whilst the aims of establishing performance measurement appear similar from country to country, close examination reveals different trajectories. Key variations can stem from differences in provider type (public or private) or control mechanism (centralized or decentralized). This research note describes and compares the development of quality assurance systems in Sweden and Japan, and highlights common recent trends.

Differing systems

In Sweden, with its decentralized public delivery system, the national quality registries (Kvalitetsregister) have been gradually developed as spin-offs from medical profession initiatives in the 1970s. Each registry is operated by the relevant specialized association (eg, heart surgery, breast cancer, diabetes) on the basis of voluntary participation. In contrast, health care in Japan is provided predominantly by private practitioners and covered by universal health insurance schemes. There, a third-party evaluation system (the Japan Council of Quality Health Care (JCQHC)) was founded in 1995.

Development of the performance schemes

In Sweden, the very first performance registry was created for knee arthroplasty in 1975, and other specialties gradually followed. The registries are based on industrial quality improvement models and are essentially a self-learning instrument for medical specialists to improve existing products and develop new ones. As a result of their successes, central government and the Federation of County Councils (FCC) invested in the further development of national registries and formed the National Healthcare Quality Registries in 1995.

In the market-like system in Japan, patients have enjoyed freedom of choice under the national health insurance schemes without being bound to catchment area. Due to the plethora of different providers and no effective control mechanism, the government and the Japan Medical Association

	Sweden	England	Japan
Regime	local/public	national/public	predominantly private
Trend in emphasis of evaluation	clinical innovation	(swings)	customer satisfaction
Current performance assessment	National healthcare quality registries	Annual health check (star ratings)	Hospital rankings (and government-supported JCQHC assessment)

Table 1. Tri-country comparison of performance measurement schemes

(JMA) realized that some form of evaluation and accreditation system would be necessary. A committee set up by the JMA and the Ministry of Health and Welfare in 1985 constructed a 105 item self-check manual for evaluating hospital structure, role in the community, patient satisfaction, clinical standards and management.

A key difference between the two schemes exists with regards to the motives behind their development. In Sweden, the scheme aimed for purely clinical innovation, while its Japanese counterpart was concerned with ongoing restructuring of the entire service provision, and controlling the flow of patients.

Political and media influence

One common feature of the Swedish and Japanese environment has been the absence until now of senior elected officials' involvement in the quality assessment schemes and the considerable autonomy with which the schemes operate. The Swedish and Japanese examples demonstrate the efficacy of decentralization and privatization for avoiding political involvement and liability.

However, increasing political, media and public scepticism about the health system has begun affecting both the Swedish and Japanese systems, albeit in different ways. In Japan, a series of medical malpractice scandals heightened media attention and encouraged media companies to embark on hospital 'ranking' projects. The ranking was meant to reflect patients' voices, not those of the providers. However, the authorities take little official account

of these rankings, considering them to be no more than marketing exercises.

In Sweden, a television programme caused controversy by pressing hospitals to make available all information regarding mortality rates and treatment methods. The report was followed by a tabloid newspaper article titled 'The most dangerous hospitals for heart-disease patients', calling for the registries to be more transparent. Voices calling for hospital rankings are also gathering support in Sweden under the banner of 'patient rights'.

So, as we have experienced in England, an increasing demand for governmental participation in ensuring safety and quality, may mean a move to a more centralized control system will be made. Given that performance systems in Sweden and Japan maintained a focus on, respectively, clinical innovation and customer satisfaction, there is concern that greater government involvement would create more risks, as politicians seek to assuage concerns highlighted in the media, rather than those that reflect health professionals' inside knowledge.

Nao Kodate is a CARR Research Student

Internationalization, Performance and Economic Institutions

Mark Thatcher examines the effects of technological and economic internationalization on those national institutions that regulate markets

We live in an increasingly internationalized world. This movement raises important questions about the effects of internationalization on national institutions that govern markets – what impact does regulation (in a broad sense of structuring and guiding economic activities) have?

One view is that internationalization involves transnational technological and economic developments – from global financial movements to cheap, high-capacity international communications linkages. Early 'strong globalizationists' claimed that the result would be cross-national convergence as better performing institutions drove out the weaker ones. More recent political economy work on 'varieties of capitalism' underlines that countries will adopt the institutions that are most efficient for their firms.

This book challenges such arguments. It distinguishes technological and economic modes of internationalization from policy forms and shows that, contrary to expectations, regulatory reforms by the US and EU have undermined long-standing national institutions.

These arguments are sustained by an analysis of markets in five strategic sectors in Britain, France, Germany and Italy, between 1965 and 2005. The evidence offers surprises. Revolutionary transnational technological and economic developments on their own failed to result in institutional reform, let alone cross-national convergence, because powerful vested interests defended existing institutions.

In contrast, policy forms of internationalization much more effectively influenced the strategies, arguments and coalitions of domestic decision makers. Regulatory changes in 'relevant' overseas nations can create 'performance worries' through fears of regulatory competition and by providing an example that reformers can brandish. Thus for instance, liberalization in the US airline, securities and telecommunications industries in the 1970s and 1980s played a significant part in British reforms. In turn, new British institutions had repercussions for continental European countries, which worried about competitive disadvantages and loss of business. EU regulation was also significant not only by creating legal obligations to end monopolies, but also motivating reforms that adapted national institutions to the new European single market.

Policy forms of internationalization have weakened long-standing economic institutions and contributed

to privatisation, the ending of monopolies and the creation of sectoral independent regulatory agencies. They have operated in industries that had transnational technological and economic developments such as securities trading and telecommunications. They aided alteration of deeply-rooted institutions that had survived these developments, such as two hour opening times for stock exchanges or public ownership of telecoms operators. Equally, they were effective in sectors less marked by rapid technological and economic changes, such as postal services.

Cross-national comparison of outcomes offers complex and intriguing conclusions. Internationalization 'hit home' differently across countries. Thus reforms in the US were influential in Britain, but EU regulation was not, and indeed was regarded with suspicion. In contrast, UK reforms were more significant for France, Germany and Italy than those in the US. Moreover, in these three continental countries, EU regulation was often crucial in creating change. But, the overall result was that economic institutions in four very diverse nations converged from the 1990s onwards. Today, in most sectors, there is a standard European model of privately-owned suppliers, competition, and regulation by independent regulatory agencies as well as governments.

One implication of these findings is that we need a broader analysis of the internationalization of markets, one that goes beyond technology or financial flows and includes policy decisions made by either nations or organizations. Another implication is that institutional change is a political matter – to achieve it, arguments, and coalitions are needed that can overcome the opposition of vested interests defending economically inefficient institutions. A final implication is that when forms of internationalization arise that resonate and persuade within domestic politics, even long-standing institutions can be altered and diverse countries can converge.

Mark Thatcher is a CARR Research Associate. *Internationalisation and Economic Institutions* was published by Oxford University Press in August 2007



Organized Uncertainty: designing a world of risk management

Michael Power
Oxford University Press 2007



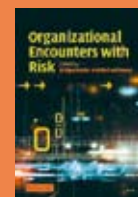
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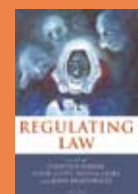
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