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Calling Regulators to Account: Challenges, Capacities and Prospects

Julia Black^{*}

Abstract: Since their inception, public lawyers and political scientists have fulminated at the lack of accountability of regulatory agencies. But, though it may surprise their critics, regulatory agencies do not go out of their way to be unaccountable. The difficulties of accountability, this article argues, lie in large part elsewhere: with the institutional position and accountability capacity of the accountors, and with the particular nature of the challenges that face them. The article focuses on developments in the roles of the four main accountors in the UK political domain in turn: the core executive, Parliament, the National Audit Office and consumer bodies, exploring their relationships both with the accountees (the regulators) and with other bodies which are calling those regulators to account. It examines their capacity to call regulators to account, and to meet the five core accountability challenges that face them: viz the scale and scope of the regulatory landscape, the number of organisations involved in any one regulatory domain, the complexity of their relationships and their propensity to blame-shift; the technical complexity and contestability of the regulatory task; the opacity of regulatory processes; and the willingness of the accountee to be called to account. These challenges produce deep-rooted tensions which are not easy to resolve, and create opportunities for blame-shifting which both accountors and accountees can, and do, seek to exploit. Moreover, the roles of accountors themselves are fluid, moving from accountor to participant to controller, bringing further complexity to the accountability relationship. However, it is the nature both of the relationship and the task of accountability that these tensions will exist, and it is right that they do, at least up to a point. For without those tensions both regulators and their accountors will become complacent, which will be to their detriment, as well as ours.

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INTRODUCTION

Since their inception, the accountability of independent regulatory agencies has been of concern to scholars of public law and political science. Writing in the 1930s in the context of the US, Landis observed that the literature ‘abounds with fulmination’ at the ‘inappropriate’ combination of legislative, judicial and executive functions within regulatory agencies and their lack of accountability.¹ Some 80 years later, a House of Lords committee commented, ‘The question of who regulates the regulators has not been answered and will not go away.’² In the interim, considerable energy has been spent by scholars on analysing what accountability is,³ and in developing frameworks of analysis, typologies of mechanisms, and categorisations of goals.⁴ Accountability, it has been said, is an ‘ever expanding concept’.⁵ It is also a Goldilocks one: for accountability can be argued to be too little, too great, but rarely just right.⁶ So whilst there are observations that accountability demands are counter-productive or subverted, prevent the agency from performing its role effectively⁷ or create cultures of blame,⁸ others (usually the majority) argue that accountability of independent regulatory agencies is deeply inadequate.⁹

This article does not attempt to evaluate the accountability of UK regulatory agencies across all the different dimensions of accountability, not least because it is not clear what success would look like.¹⁰ Instead it explores the current operation of the political mechanisms for calling independent regulatory agencies to account in the UK (or more specifically in England and Wales where regulatory functions

¹ J.M. Landis, *The Administrative Process* (Yale UP, 1938), 4.

² House of Lords Select Committee on Regulators, *UK Economic Regulators* 1st Report of Session 2006-07, HL 189-I (London: TSO, 2007), para 1.29.

³ Eg M. Bovens, ‘Analysing and Assessing Public Accountability: A Conceptual Model’ *European Governance Papers (EUROGOV)* 2006 C-06-01 (EUI, 2006); R. Mulgan, *Holding Power to Account: Accountability in Modern Democracies* (Basingstoke: Palgrave, 2003).

⁴ Eg J. Mashaw, ‘Accountability and Institutional Design: Some Thoughts on the Grammar of Governance’ in M. Dowdle (ed), *Public Accountability: Designs, Dilemmas and Experiences* (Cambridge: Cambridge UP, 2006), 115-156; C. Scott, ‘Accountability in the Regulatory State’ (2000) 23 *Journal of Law and Society* 38-60; M. Lodge and L. Stirton, ‘Accountability in the Regulatory State’ in R. Baldwin, M. Cave and M. Lodge (eds) *Handbook of Regulation* (Oxford, 2010), 348-370; C. Pollitt, *The Essential Public Manager* (London: Open University Press, 2003).

⁵ R. Mulgan, ‘Accountability – an Ever-Expanding Concept’ (2000) 78(3) *Public Administration* 555-73.

⁶ M. Bovens, T. Schilleman and P. t’Hart, ‘Does Public Accountability Work? An Assessment Tool’ (2008) 86(1) *Public Administration* 225-242.

⁷ Eg J. Meyer and K. Shaughnessy, ‘Organizational Design and the Performance Paradox’, in R. Swedberg (ed), *Explorations in Economic Sociology* (New York: Russell Sage, 1993), 53-72; C. Pollitt, X. Girre, J. Lonsdale, *Performance or Compliance?: Performance Audit and Public Management in Five Countries* (Oxford: Oxford University Press, 1999); P. t’Hart and A. Wille, ‘Living Together, Growing Apart? Politicians and Bureaucrats in The Netherlands’ (2006) 84(1) *Public Administration* 121 – 146.

⁸ C. Hood, *The Blame Game: Spin, Bureaucracy, and Self-Preservation in Government* (Princeton, 2011).

⁹ Eg R. Behn, *Rethinking Democratic Accountability* (Washington, DC: Brookings Institution Press, 2001); M. Dowdle, ‘Public Accountability: Conceptual, Historical, and Epistemic Mappings’, in M. Dowdle (ed.), *Public Accountability: Designs, Dilemmas and Experiences* (Cambridge: Cambridge University Press, 2006), 1-26.

¹⁰ For a detailed discussion of the legal powers and accountability arrangements of ten UK regulatory agencies see T. Prosser, *The Regulatory Enterprise: Government Regulation and Legitimacy* (Oxford, 2010).

are devolved). It argues that whilst it would be an exaggeration to say that there is a 'crisis' of regulatory accountability,¹¹ nor can we be complacent. This is not, however, because regulatory agencies on the whole try to be unaccountable – on the whole they do not, and indeed there are many examples where regulators 'go beyond compliance' with the accountability requirements placed on them, even if they conflict.¹² Rather it is often because the tension between independence, political control and political accountability creates an ambiguity in the responsibilities of the core executive and regulatory agencies which both, but particularly the executive, can seek to exploit. As a result, lines of responsibility and thus of accountability can be unclear, to say the least.

Problems of accountability are exacerbated by the fact that all UK regulators sit within the multi-level governance structure of the EU. Significant elements of the regulatory requirements that they have to implement are written at EU level; EU regulations and directives can also contain quite prescriptive requirements on regulatory processes, for example the number of inspections that have to be performed in areas such as food safety, medical devices and environmental regulation; they also in some areas stipulate the governance and funding structures of regulatory agencies themselves, notably in the areas of telecommunications and energy regulation. In turn, those requirements can emanate from international regulatory bodies, which can themselves impose requirements as to the content of regulatory provisions and the nature of regulatory structures.¹³ As a result, there can often be a mismatch between the national-level accountability structures and the EU or international-level locus of decision making. And with neither national government nor regulators accepting responsibility for critical aspects of regulatory decisions (on the basis that those decisions are for the other to make or for neither to make because they have been made elsewhere) trying to pin down responsibility can be akin to trying to catch a will o' the wisp, an image of apparent solidity which recedes and dissipates as it is approached.

There are numerous ways in which discussions of accountability can be organised: by goals, mechanisms, institutions, and each mode of organisation serves a different purpose. The aim of this article is to explore accountability by looking at the significance of capacity and institutional position in an organisation's ability to call a regulatory agency to account, ie to act as 'accountor'. These concepts are explained in the first section. The second section builds on this analysis to explore some of the key challenges facing the accountors in

¹¹ C. Graham, *Is there a Crisis of Regulatory Accountability?* (Bath: Centre for Regulated Industries, 1995).

¹² Eg M. Dowdle (ed.), *Public Accountability: Designs, Dilemmas and Experiences* (Cambridge: Cambridge University Press, 2006); J. Black, 'Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes' (2008) 2 *Regulation and Governance* 1-28.

¹³ Eg Basle Committee on Banking Supervision, *Core Principles for Banking Supervision* (Basle: BIS, 2006); Directive 2009/72/EC concerning common rules for the internal market in electricity, articles 35-37; Directive 2009/140/EC amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services.

performing their role. It also looks at some of the strategies regulators have adopted to manage their legitimacy, often ‘going beyond compliance’ with their formal accountability requirements. The third section then focuses on recent developments in the roles of the four main accountors in the political domain in turn (the core executive, Parliament, the NAO and consumer panels), exploring their relationships both with the accountees (the regulators) and with other bodies which are calling those regulators to account, noting throughout how accountability relationships can turn to blame games in times of crisis. The fifth section concludes.

ANALYSING ACCOUNTABILITY DYNAMICS – AN INSTITUTIONAL PERSPECTIVE

The term accountability is usually used to mean a relationship between an actor (accountee) and another (accountor) in which the accountee is called to explain and justify its actions against one or more sets of different criteria after the fact. In some definitions, there is an added element, which is that the accountor may impose consequences.¹⁴ However, given the highly variable nature of the consequences that can be imposed, in identifying a body as an ‘accountor’ this article focuses on their capacity to perform at least the first, core element of accountability: calling to account.

The cast of accountors for regulatory agencies in the UK is a familiar one. There is the core constitutional triumvirate of judiciary, legislature and executive. Accountability also extends upwards, outwards and / or downwards (depending on your perspective), to consumer panels, advisory groups and other ‘stakeholder’ bodies,¹⁵ to the media, to the EU institutions, and even to transnational regulatory organisations and / or international institutions.¹⁶ Regulators¹⁷ thus have accountability relationships with a number of different bodies or ‘accountors’, in the sense that they are asked, and often agree, to give an account of their operations and performance against a range of criteria. That criteria may relate to one or more sets of issues, such as whether they have acted in accordance with their legal mandate; whether they have used their financial resources appropriately;

¹⁴ Bovens, n.3 above.

¹⁵ The term ‘stakeholder’ is often used by regulators, government and others to refer to interested groups, such as trade associations and business groups, trade unions, consumer groups, non-governmental organisations and others with particular interests in a policy area.

¹⁶ Scott, n.4 above.

¹⁷ The terms ‘regulators’ and ‘regulatory agencies’ will be used interchangeably throughout to refer to independent regulatory agencies, ie organisations which have a separate legal status and mandate, which are not chaired or staffed by elected politicians or subject to their operational control, which are charged with a specific set of objectives and / or functions, and given a set of powers to achieve those objectives / carry out those functions.

whether they have operated in accordance with fair procedures; whether they have engaged in adequate consultation and participation in decision making; and / or whether the goals that they are seeking to achieve are normatively acceptable.

In orthodox legal descriptions of accountability, it is normal to map the legal powers: who is required to give account to whom, when, how and in respect to what. However, if we view accountability arrangements through a more sociological and / or political lens, then it becomes clear that the ability of those accountors to call to account and to impose consequences can be highly variable, notwithstanding their legal powers. A highly critical media campaign can be more effective in causing the resignation of a chief executive of a regulatory body than any legal power to sack him, for example.

Moreover, accountability relationships are just that: relationships. Again, standard legal accounts tend to focus on the accountor: what powers does it have, what criteria is it using. However, the accountee is also a part of the process. An effective accountability relationship requires the full engagement of both accountor and accountee. For just as those who are regulated can appear to be complying with the rules to which they are subject, whilst in fact subverting them, those who are being held to account can conform with the formal requirements (producing annual reports and accounts, for example), whilst in practice operating in quite a different way. Furthermore, roles can be fluid: an organisation may act as an accountor with respect to a regulator, but also at different times as a participant in regulatory decision making, as discussed below. The boundaries between accountability and control can also become blurred, again as discussed below.

If we are to really understand how accountability relationships are operating, we therefore need to look beyond formal legal structures. Moreover, we need to bear in mind that those formal structures may not have been created in order to achieve any functional purpose, but rather for reasons of history or constitutional convention, or for symbolic purposes. Thus in the international regulatory context in which most national regulators sit, those accountability arrangements may have been put in place simply because they are required by EU regulation, or by international organisations.¹⁸ Alternatively, or in addition, they may exist to legitimise the regulator and the goals which it is pursuing in the eyes of different legitimacy communities.¹⁹ In such cases, we should not be surprised if there is a de-coupling of formal processes of accountability from the organisation's de facto operations, or if accountability arrangements 'look good' but turn out to be functionally weak: they were introduced for primarily symbolic, not functional, purposes.

Analysing accountability relationships thus requires us to go well beyond formal legal powers and constitutional conventions. It is argued here that the

¹⁸ Eg Basle Committee on Banking Supervision, *Core Principles for the Supervision of Banks*, n.13 above; OECD *Recommendation of the Council on Regulatory Policy and Governance* (Paris, 2012); OECD, *Guiding Principles for Regulatory Quality and Performance* (Paris 2005).

¹⁹ Black, n.12 above.

ability of an accountant effectively to call a regulator to account, and the consequences that it can impose, is largely dependent not on its legal powers *per se*, but on the accountant's 'accountability capacity' and the institutional position that it has *vis à vis* both the accountee and other accountors. By institutional position is meant not only the legal powers the accountant possesses to call an agency to account, but also the normative or cognitive acceptance by others (including the accountee) of its 'right' or appropriateness to act as accountant, and the strategic position that it has, political or otherwise, to do so. The institutional position of the accountant within the broader political and constitutional arrangements (widely defined), including but not limited to their legal powers, will affect the relationship that it has with the accountee. To give an obvious example, judges engaged in judicial review can impose legally binding decisions on agencies, but face institutional constraints in determining how interventionist to be (whether it is more appropriate for them to be 'red lights' or 'green lights')²⁰; Parliamentary Select Committees will have no such institutional qualms as to the appropriateness of criticising the decisions of ministers, but they have little practical ability to impose legal consequences directly. They can certainly inflict significant reputational damage, however, which itself may be a catalyst for legislative or operational changes.

Moreover, accountors also have different capacities to make use of the accountability potential that their institutional position gives them. By accountability capacity, I mean (by analogy with regulatory capacity)²¹ that the accountant has certain resources which it can use to call a regulator to account. In particular, it has (or access to) information, technical expertise, financial resources, appropriate organisational processes and practices to manage information and respond dynamically, and legitimacy and authority (its 'right' to call that person to account has to be recognised both by the accountee and by those on whose behalf, if any, the accountant is purporting to act). The capacity needed is relative to the nature of the task: greater capacity is needed to call to account regulatory agencies whose activities are opaque, technically complex, dynamic, difficult to assess, significant in scale and scope and who interact with a number of other organisations in performing their tasks and achieving outcomes. Unfortunately for accountors of regulatory bodies, that is exactly the scale of the task they face, and it is to this set of challenges that we now turn.

²⁰ C. Harlow and R. Rawlings, *Law and Administration* 3rd edition (Cambridge: CUP, 2009).

²¹ J. Black, 'Enrolling Actors in Regulatory Processes: Examples from UK Financial Services Regulation' (2003) *Public Law* 62-90; K. Abbot and D. Snidal, 'Strengthening International Regulation Through Transnational New Governance: Overcoming the Orchestration Deficit' (2009) 42 *Vanderbilt Journal Transnational Law* 501-578.

CHALLENGES FACING ACCOUNTORS

The challenges of calling regulators to account are many, but can be distilled for these purposes into five: the scale and scope of the regulatory landscape; the number and relationship between the different bodies involved (and their propensity to blame-shift); the technical complexity and contestability of the regulatory task; the opacity of regulatory processes; and the willingness of the accountor to be called to account.

THE SCALE AND SHIFTING TOPOGRAPHY OF THE REGULATORY LANDSCAPE

The scale and scope of the regulatory landscape is significant, and mapping it has been hindered by a number of definitional challenges, notably: what is ‘regulation’, what is an ‘independent agency’ and therefore what is an ‘independent regulatory agency’. Unfortunately, the legislation which creates an organisation does not always specify whether the organisation is a ‘regulatory agency’ or not, not all are constituted in the same way (for example whilst most are non-departmental public bodies, some such as the Food Standards Agency, are non-ministerial departments) and regulatory functions can also be performed by government departments or units within them. Successive attempts have been made by organisations such as the Better Regulation Taskforce, or indeed by Parliamentary Select Committees, to ‘map’ the organisational landscape of regulation but the task can exhaust even the most dedicated cartographers. As one report by the Better Regulation Task Force commented in 2003, ‘we question whether even Ministers could be certain that they know of all the independent regulators that surround their Departments’.²² The review of public bodies in 2010 identified over 900 organisations, which at least addressed the question of knowing what bodies existed, but the categorisation problem remained.²³ The Public Accounts Committee (PAC) recommended that the government introduce a taxonomy and common nomenclature and status for different types of bodies (at present some regulators are non-departmental public bodies, some are non-ministerial departments, some are companies) but the government responded that its aim was to reduce their number rather than to classify them, and so no attempt was even made to identify which organisation was regulatory and which was not.²⁴

Accountors have therefore tended to focus their accountability efforts on the main peaks: the economic regulators (the Rail Regulator, Ofcom, Ofwat and Ofgem), with the Financial Services Authority, Civil Aviation Authority and Office of Fair Trading sometimes being included in that group and sometimes not, and to a lesser extent on the ‘social’ regulators (notably food safety, environment and

²² Better Regulation Task Force, *Independent Regulators* (London, 2003).

²³ Cabinet Office, *Public Bodies Reform – Proposals for Change* (London, 2010).

²⁴ Cabinet Office, *Government Response to the Public Administration Select Committee Report, “Smaller Government: Shrinking the Quango State”* Cm 8044 (London, 2011).

health and safety). The remaining swathes of the regulatory landscape are often left indistinctly drawn, with only a vague warning sign indicating ‘there be dragons’ marking their existence, until of course, a crisis strikes – for example the recent inquiries into the Care Quality Commission²⁵ or the Commission for Equality and Human Rights.²⁶

THE PROBLEMS OF ‘MULTIPLE HANDS’ AND SHIFTING ROLES

The second challenge is that frequently more than one regulator is engaged in regulating a particular sector and /or in achieving particular goals (often under the remit of different government departments), and, moreover that these tasks are shared with different parts of government. In most areas of regulation, there are multiple organisations involved, even where the regulators are ‘mega-regulators’, or the amalgamation of several pre-existing regulators. There are over twenty different bodies involved in the regulation of farming, for example, including Defra,²⁷ the Environment Agency, the Meat Hygiene Inspectorate, the Rural Payments Agency, the Food Standards Agency, Natural England and trading standards officers employed by local government.²⁸ Responsibilities in food safety, health and safety and environmental regulation are split between local authorities and national regulators, calling into question who is responsible for setting and attaining overall outcomes.²⁹

There are other examples. In the regulation of water, Ofwat is responsible for setting price controls on the water companies, and has to take account of the representations of Consumer Council for Water, as well as the strategic objectives set both by the Westminster government and by the Welsh Assembly. Those companies are also under obligations as to water quality, which is the responsibility of the Drinking Water Inspectorate (DWI) and the Environment Agency (EA). However, the level of financial resources that firms have available to invest in meeting their water quality obligations is significantly dependent on Ofwat’s decisions in the price review process. It can thus be difficult to work out who is responsible when those quality objectives are not met: is it the companies (for not complying), the EA or the DWI (for not regulating properly to ensure compliance), the Consumer Council for Water (for not making adequate

²⁵ Public Accounts Committee, *The Care Quality Commission: Regulating the Quality and Safety of Health and Adult Social Care*, Seventy-eighth Report of Session 2010–12, HC 1779 (hereafter CQC report).

²⁶ Public Accounts Committee, *Equality and Human Rights Commission*, Fifteenth Report of Session 2009–10 HC 124 (hereafter EHRC report).

²⁷ Department for the Environment, Farming and Rural Affairs.

²⁸ Independent Farming Regulation Task Force, *Striking a Balance: Reducing Burdens; Increasing Responsibilities; Earning Recognition – A Report on Better Regulation in Farming and Food Business* (London, 2011) (hereafter Farming Task Force report).

²⁹ It is notable that the Lofstedt Review recommended that the HSE should take over responsibility and authority for all health and safety inspections, removing the role of local authorities: R. Lofstedt, *Reclaiming Health and Safety for All: An Independent Review of Health and Safety Legislation* Cm 8219 (London, 2011) (hereafter Lofstedt Review).

representations), Ofwat (for not allowing companies to make sufficient profits to invest to meet quality requirements), the Westminster Government or the Welsh Assembly (for setting conflicting objectives)?³⁰ Financial regulation provides another good example. Despite a memorandum of understanding (MOU) between the Treasury, the Bank of England and the Financial Services Authority (FSA), there were significant failures in coordination and considerable misunderstandings as to whose responsibility it was to do what with respect to the rescue of Northern Rock in 2007.³¹

Moreover, the roles of organisations which are acting as accountors can also be fluid. As discussed below, a consumer panel may play the role both of engaged participant in the regulatory process, as well as an *ex post* accountor of that regulator's activities; Parliamentary involvement can demonstrate similar fluidity of roles. The question of 'who guards the guardians' is thus even further compounded, if the 'guardian' is an active participant in the very processes it is seeking to guard.

THE NATURE OF THE REGULATORY TASKS

The nature of the regulatory tasks and the ways in which regulators perform them can also pose challenges for accountors. First, the overall outcomes that regulators are meant to achieve are usually expressed in highly general terms: for example, to protect consumers or the environment, to ensure competition, to maintain financial stability or to uphold the rule of law. Moreover, their legal mandates often specify a range of objectives which they have to achieve, which may in some instances compete with one another. However, those mandates rarely give any indication of how trade-offs between objectives are to be made. There are also considerable difficulties in measuring performance against generally framed outcomes, in distinguishing which elements of that performance are due to the regulator and which to other causes, and determining the time period over which performance will be measured.³² Furthermore, assessing performance can require judgements to be made on counter-factuals: if there is no environmental degradation, is that because the environmental regulator has done a good job in preventing it and thus is a success, or does that show that it has not been sufficiently active as environmental indicators, though remaining stable, have not improved? Or is it because there has been an economic downturn and so industries are producing less pollution? If the financial system has remained stable, is that because of the regulators' actions or in spite of them?

³⁰ D. Gray, *Review of Ofwat and Consumer Representation in the Water Sector* (London, 2011) (hereafter Gray Review), 17.

³¹ Treasury Select Committee, *The Run on the Rock*, 5th Report of Session 2007-8 HC 56-1 (London 2007); J. Black, 'The Credit Crisis and the Constitution' in D. Oliver, T. Prosser and R. Rawlings (eds), *The Regulatory State* (Oxford: OUP, 2010), 92-129.

³² For good discussions of the issues see C. Coglianese, *Evaluating the Impact of Regulation and Regulatory Policy*, (Paris: OECD 2012); C. Radaelli and O. Fritsch, *Evaluating Regulatory Management Tools and Programmes*, (Paris: OECD 2012).

Regulators are also often tasked with roles which require a high degree of technical and specialised knowledge, but which are often highly contestable. Regulators in the area of telecommunications, water and energy, for example, have increasingly been required to consider a wide range of social objectives in addition to their economic objectives. Regulators' tasks also often involve managing risk: resolving such questions as how much money should be spent on installing safety equipment on trains, for example, requires difficult questions to be addressed of how much should be spent to save a person's life, and whether that sum should differ between rail, road or air transport.³³

Regulators' decisions can also be contestable because technical rules can have significant economic or redistributive consequences: how a 'market' is defined for the purposes of competition law is central to an assessment of whether a company has a dominant position within it, for example. In order to call regulators to account for the effectiveness of their decisions, accountors therefore need to have the technical knowledge necessary to understand what areas to probe, what questions to ask, and what answers to believe: should leverage ratios rather than risk models be used to set capital requirements; how should a market be defined for the purposes of defining market abuse under competition law; what levels of nitrates should be allowed to be disposed of in watercourses? However, by their very nature, specialist regulators have far greater technical knowledge of the substantive area they are regulating than do those calling them to account.

In the face of ill-specified and contested outcomes, and substantive decisions which require highly specialised knowledge to evaluate, accountors often resort to calling regulators to account not for their decisions but for their procedures instead: was appropriate consultation undertaken; was a regulatory impact analysis conducted; were sanctions imposed after following fair procedures?³⁴

THE OPACITY OF REGULATORY PROCESSES

However, accountors face a further problem, as the nature of regulatory activities can also present them with difficulties. Some aspects of these activities are highly visible, such as public consultation processes. Enforcement decisions are also published, though details of informal settlements reached are usually not. There is little surprise, therefore, that most attention of those calling regulators to account focuses on the 'input' processes of consultation or numbers of officials assigned to particular functions, and that 'outputs' are measured in terms of highly visible indicators such as numbers of inspections undertaken, successful enforcement actions or levels of fines imposed.

³³ See, eg the Lofstedt Review; E. Fisher, *Risk, Regulation and Administrative Constitutionalism* (Oxford: Hart Publishing, 2007).

³⁴ M. Power, *Managing Uncertainty* (Oxford, 2010); M. Power, *The Audit Society* (Oxford, 1997).

However, most of regulation occurs in practice between those two visible poles of ‘inputs’ and ‘outputs’. Regulation is a continuous process of negotiation, compromise and challenge – on both sides of the regulator-regulatee³⁵ relationship. It is very hard for outsiders to penetrate or have visibility of that process. Moreover, it has been argued by some that the move away from ‘command and control’ regulation (reliance on detailed rules backed by legal sanctions) to ‘new governance’ strategies which rely more on the professional judgement of regulators, such as regulation based on principles, or regulatory strategies such as management-based regulation which require firms to develop their own systems and processes which are then approved by the regulator (which is the norm in health and safety regulation) render the regulatory process more opaque as there are no clear standards with which regulatees have to comply, and to which regulators can be held to account. There are fears that they can thus open the regulator up to ‘capture’ by the regulated industry unless appropriate safeguards are put in place.³⁶ Whether or not such strategies are more porous and thus open to capture than a traditional ‘command and control’ approach is a moot point.³⁷ However, such ‘new governance’ strategies make far stronger demands on the professional judgement of regulator, who is charged with ensuring that outcomes have been achieved rather than simply assuring that there has been technical compliance with a set of rules. Correspondingly, they also require greater professional judgement on the part of accountants.³⁸ Whilst it is neither possible nor desirable for accountants to have access to the day to day activities of independent regulators, they need a greater understanding of regulatory strategies and the trade-off and choices that they involve, particularly where regulators have conflicting objectives and / or limited resources. The statutory requirement for Ofcom (regulator of telecommunications and postal services) to explain how it reconciles the interests of the citizen and the consumer in its decision making is an interesting example of how some transparency can be brought in to this difficult area. But often trade-offs require difficult decisions over the application of resources; understanding that there may simply not be sufficient resources to allow regulators to monitor or enforce regulations with the intensity that politicians or the public may want can be hard to accept, as the controversy over UK border controls in 2012 illustrated.

Moreover, if they are holding a regulator to account in terms of how effective it has been in achieving its statutory objectives, then accountants need a reliable way to assess the effectiveness of a regulator’s activities. However, both regulators

³⁵ ‘Regulatee’ is a term of art common in the regulatory literature to refer to those who are being regulated.

³⁶ J. Black, ‘Forms and Paradoxes of Principles Based Regulation’ (2008) 3(4) *Capital Markets Law Journal* 425-458; C. Ford, ‘New Governance in the Teeth of Human Frailty: Lessons from Financial Regulation’ (2010) *Wisconsin LR* 441-487.

³⁷ Writers such as Pearce and Tombs, for example, argue that a ‘compliance’ approach to the enforcement of CAC rules is an indication of capture, eg F. Pearce and S. Tombs, ‘Ideology, Hegemony and Empiricism’ (1990) 30 *British Journal of Criminology* 423-443.

³⁸ See P. May, ‘Regulatory Regimes and Accountability’ (2007) 1 *Regulation & Governance* 8–26.

and accountors have been struggling for some time to find appropriate ways to assess performance in terms of outcomes, rather than simply inputs or outputs.³⁹ There are nonetheless welcome attempts by regulators to assess their own outcomes, the FSA's Outcome Performance Reports, for example, and for accountors to do the same, such as the Consumer Impact Report of the Legal Services Board's Consumer Panel.⁴⁰

THE ROLE OF ACCTEES IN THE ACCOUNTABILITY RELATIONSHIP

Finally, accountability is a two-sided relationship: the acctee has to accept the 'right' of the accountor to hold them to account. The agencies discussed here have all been given legal mandates and powers, and are expected to operate independently from political control (and from 'capture' by the regulated industry). The balance between independence and accountability is inevitably one which is being continually negotiated between acctees and accountors. As a result, even organisations which are apparently in a strong institutional position can find their 'right' to act as accountor called into question. So the constitutional supremacy of the Westminster Parliament is strongly embedded in the UK's constitutional settlement (broadly defined), but there are practical limits to its ability to call regulators to account. Moreover Parliament's 'right' to call to account is not necessarily recognised by those it is trying to call to account, who may be less impressed with the niceties of constitutional law than orthodox accounts of Parliament's powers may suggest. Refusals by public bodies to provide Parliamentary Select Committees with the information they require are not frequent, but they do happen. A striking example is the recent refusal by the Court of Directors of the Bank of England to disclose details of discussions held during the financial crisis to the Treasury Select Committee (TSC) on the basis that they were not required to do so by the Freedom of Information Act.⁴¹ Another example, though this time from a Department, is the refusal by the government to disclose financial details relating to Network Rail to a recent PAC inquiry, which was justified on the basis that the Office of National Statistics had classified it as a private company, notwithstanding that its debt is underwritten by the government.⁴² (As an aside, in giving evidence to the PAC the Permanent

³⁹ See eg NAO, *Ofcom: The Effectiveness of Converged Regulation* HC 490 Session 2010-11 (London, 2010); Coglianese, *Evaluating the Impact of Regulation and Regulatory Policy*; and Radaelli and Fritsch, *Evaluating Regulatory Management Tools and Programmes*, n.32 above.

⁴⁰ See FSA, *Outcomes Performance Reports*, available at <http://www.fsa.gov.uk/about/aims/performance/opr>; Legal Services Board Consumer Panel, *Consumer Impact Report 2012* (London, 2012).

⁴¹ Treasury Select Committee, *Accountability of the Bank of England* Twenty First Report of Session 2010-12 HC 874 (London, 2011).

⁴² Public Accounts Committee, *Office of Rail Regulation: Regulating Network Rail's Efficiency*, Forty-First Report of Session 2010-11 (London, 2011), Minutes of Evidence, Q 183-225. The ONS plays an

Secretary to the Department of Transport thought the debt was so guaranteed, but the Alternate Treasury Officer of Accounts did not, though both agreed it was a private company.)⁴³

However, for the most part, regulators are used to being held to account, and whilst they may not enjoy the process, they do engage with it, not least to maintain their own legitimacy and reputation.⁴⁴ For example, although it initially refused to publish its report on the supervision of the Royal Bank of Scotland in the period prior to its rescue, citing the need for confidentiality, the FSA did capitulate in the face of strong political and media pressure, stemming initially from the TSC.⁴⁵ It also allowed the TSC to appoint two special advisors to review the report prior to publication and make amendments.⁴⁶ Indeed regulatory agencies are often active participants in accountability processes, doing much which goes beyond what is required by formal accountability arrangements. Regulators frequently engage in consultation and reporting practices which go beyond those required by statute, such as roadshows, focus groups, seminars, stakeholder meetings, annual public meetings, publication of minutes of board meetings (prior to the Freedom of Information Act),⁴⁷ the appointment of expert reviewers,⁴⁸ or the creation of consumer panels (for example, Ofcom).⁴⁹ Moreover, regulators seek to manage their legitimacy by publicising their activities, though as Hood and colleagues have noted, some are more publicity-seeking than others.⁵⁰ As Yeung has argued, regulators' presentational activities reveal the criteria by which they consider their

interesting role - when Northern Rock's debt became underwritten by the government in October 2007, the ONS classified it as a public company, four months before legislation was passed to do just that: Black, n. 33 above. Note that the NAO also assumed that Network Rail's debt is underwritten by the government: NAO, *Office of Rail Regulation: Regulating Network Rail's Efficiency* HC 828 Session 2010-2011 (London, 2011).

⁴³ Public Accounts Committee, *Office of Rail Regulation: Regulating Network Rail's Efficiency*, Forty-First Report of Session 2010-11 (London, 2011).

⁴⁴ Eg D. Carpenter, *Reputation and Power: Organizational Image and Pharmaceutical Regulation at the FDA* (Princeton, 2010).

⁴⁵ Letter from Andrew Tyrie, Chair of the Treasury Select Committee, to Lord Turner, Chair of the FSA, 13 December 2010, available on the TSC website. The report was published in December 2011: FSA, *The Failure of Royal Bank of Scotland – FSA Board Report* (London, 2011).

⁴⁶ Letter from Lord Turner to Andrew Tyrie, 28 March 2011.

⁴⁷ Eg M. Thatcher, 'Regulation after Delegation: Independent Regulatory Agencies in Europe' (2002) 9(6) *Journal of European Public Policy* 954-972; H. Rothstein, 'Precautionary Bans or Sacrificial Lambs? Participative Regulation and the Reform of the UK Food Safety Regime' (2004) 82(4) *Public Administration* 857-881.

⁴⁸ Eg the Office of the Rail Regulator appointed regulatory experts to review its methodology for its periodic review process of Network Rail, and publishes its processes including consultants' reports on its website: NAO, *Office of Rail Regulation – Regulating Network Rail's Efficiency* HC 828 Session 2010-11 (London: HMSO 2011).

⁴⁹ See for example Ofgem's response to DECC's Ofgem Review detailing its transparency arrangements: DECC, *Ofgem Review – Final Report* (London, 2011), Annex A. For an account of similar actions by US agencies see D. Rubinstein Reiss: 'Account Me In: Agencies in Quest of Accountability' (2011) 19 (2) *Journal of Law and Policy* 611-681; for accounts of how an agency can manipulate the accountability processes by the personnel that represent it see D. Carpenter, *Reputation and Power* (Princeton: Princeton UP, 2010).

⁵⁰ C. Hood, C. Scott, O. James, et al, *Regulation Inside Government: Waste-watchers, Quality Police, and Sleaze-Busters* (Oxford: Oxford University Press, 1999).

legitimacy to be judged by others.⁵¹ This is usually achieved by publicising enforcement actions, but regulators use also publicity to try to change the public image of the regulator and the regime it is implementing. For example the Health and Safety Executive has for several years published a ‘myth of the month’ on its website to dispel notions of ‘health and safety regulation gone mad’, though to little obvious effect on either behaviour or on the public’s views.⁵² Agencies can also mis-read what is required to maintain their legitimacy, or find themselves caught between conflicting accountability regimes. As noted above, the FSA’s initial refusal to publish its report on RBS was driven in significant part by concern that RBS would take legal action for breach of confidentiality, but it was a considerable political mis-calculation, and it was rapidly forced to reverse its position.⁵³

Thus, whilst it is conventional to bemoan the lack of accountability of regulatory agencies, the counter-argument is that they are often active participants in their accountability relationships, and even if they do not go beyond their statutory remits, at least they have a (relatively) clear mandate for which a clearly defined set of individuals and governance structure (chairman, chief executive and governing board) is accountable for delivering. If regulatory functions are simply swallowed up into large departmental behemoths, there is no clear organisational structure for their performance; tasks are fungible, as are the departmental units performing them; opportunities for meaningful stakeholder participation are limited in the absence of dedicated advisory committees; and the scale of Departments combined with the weaknesses of Ministerial responsibility is such that accountability is lessened, not enhanced. For example, in commenting on the coalition government’s Public Bodies Bill, the PAC argued that ‘bringing functions back into sponsor departments is likely to undermine other channels of accountability, particularly with relevant stakeholder groups, and risk leaving policies fighting numerous other priorities for ministerial attention. This will mean less effective accountability and challenge on a day-to-day basis.’⁵⁴ Whilst the government, predictably, disagreed with this comment, as indeed it stridently disagreed with most of the report (whilst of course, ‘welcoming’ it), it is argued that there is considerable force in the PAC’s view.

⁵¹ K. Yeung, ‘Presentational Management and the Pursuit of Regulatory Legitimacy: A Comparative Study of Competition and Consumer Agencies in the United Kingdom and Australia’ (2009) 87(2) *Public Administration* 274–294.

⁵² The Lofstedt Review also noted the role of occupational health and safety consultants, insurance companies and fears of litigation in significantly ratcheting up the health and safety obligations of firms and local authorities.

⁵³ FSA, *The failure of the Royal Bank of Scotland: Financial Services Authority Board Report* (London: FSA, 2011).

⁵⁴ Public Administration Committee, *Smaller Government: Shrinking the Quango State* Fifth Report Session 2010–11 (London, 2010), para 96.

ACCOUNTABILITY IN THE POLITICAL DOMAIN

Those seeking to call regulators to account thus face a significant set of challenges, which they have differing capacities to address. However, it has to be remembered that agencies are not passive actors in the accountability process: they are active participants who can act to manage their accountability relationships through communicative and other strategies in order to enhance their political and social legitimacy.

This section explores these dynamics by examining the role of four key regulatory accountors in the political domain. It looks first at accountability within the executive, focusing on the ways in which the 'better regulation' agenda is used to both control regulatory bodies and to call them to account. Although the core executive's 'better regulation' processes may not always engage the independent regulatory agencies, they provide an important context in which the activities of such regulators are often assessed by other accountors, notably Parliamentary Select Committees and the National Audit Office. The second part focuses on the role of Parliamentary Select Committees, highlighting the constraints that Parliament has in practice to meet the challenges outlined above in calling regulators to account, the ways in which it is meeting those challenges and the blurring of the boundaries between its role as accountor and other roles that it may play with respect to a regulatory body. The discussion then turns to the National Audit Office, and explores how its institutional position limits its ability to act as accountor, notwithstanding its considerable capacity. Finally the fourth part looks at a group of accountors, consumer panels which have legal mandates to represent the views of consumers to specified regulatory agencies, and draws on current debates on their reforms to highlight both the significance of accountability capacity, and the fluidity of roles that an accountor can play in regulatory processes, constantly moving from participant to accountor.

INTRA-EXECUTIVE ACCOUNTABILITY – FROM THE PERIPHERY TO THE CORE

Although we may speak of 'the executive' as a single entity, in practice it is internally fragmented. We can distinguish broadly between the 'core' executive, which in essence is the Cabinet Office and the Treasury, the 'extended' executive, by which is meant government departments and their various units, and the 'periphery', which includes the regulatory agencies which have separate legal status, mandates and powers. In practice different parts of the executive can have a significant role in calling other parts to account.⁵⁵ There is a strong functional and political reason for this. Politicians who are in power pass legislation to create regulatory agencies to which they delegate important public functions and around which they put in place legal structures to ensure the independence of

⁵⁵ Hood et al, n.50 above.

those agencies from political control. One of the challenges that the executive in particular faces is how to exercise some control over those agencies without violating (or being seen to violate) that act of delegation. There is thus a significant tension between the centrifugal forces which push functions out to the periphery, and the centre's need for control.⁵⁶ As a result, whilst we might have witnessed an internal fragmentation of the executive into a vast array of regulatory bodies, public-private contracting, outsourcing and so forth, we have seen a corresponding rise (though it may be with some considerable time-lag) in mechanisms being put in place by the core executive to enhance its capacity to control and coordinate the many-headed Hydra it has created.⁵⁷

One way to address the problem of control over regulatory or other 'arm's length' bodies is to reduce their number. 'Quango-burning' is nothing new; the allocation of functions has oscillated between agencies and departments since the establishment of inspectorates in the Victorian 'revolution in government' in the 19th century.⁵⁸ In 2010 the coalition government engaged in its own review exercise, and announced that 481 out of over 900 public bodies were to be reformed, reconstituted or abolished.⁵⁹ Nonetheless, despite some rationalisation, significant functions remain in the hands of independent or quasi-independent public bodies which may or may not have a separate legal mandate. It is important to note that there is a considerable spectrum of operational autonomy between organisations carrying out regulatory functions, with (broadly speaking) executive agencies which have no independent legal status enjoying the least independence, and those further out on the periphery with separate legal mandates having far more autonomy. Moreover, even within the latter group, there can be far a closer operational relationship in practice between some, formally independent, regulatory agencies and their Departments than there is between others. Formal powers do not necessarily give a true picture of what the relationships are in practice.

The main instrument that the core executive (ie the Cabinet Office and the Treasury) have to control regulators and call them to account is through their budgets, for the majority (though not all) are at least part funded by the state, with budgets set by the Treasury.⁶⁰ There is no doubt that the Treasury can have a significant impact on a regulators' capacity through its funding decisions, and has

⁵⁶ J. Black, 'Tensions in the Regulatory State' [2007] *Public Law* 58-73.

⁵⁷ See in particular Hood et al, n. 50 above.

⁵⁸ H.R. Greaves, *The Civil Service in the Changing State* (1949); F.M.G. Wilson, 'Ministers and Boards: Some Aspects of Administrative Development since 1832' (1954) 32 *Public Administration* 43-58; Fulton Committee, *The Report on the Committee on the Civil Service* Cmnd 3638 (HMSO, 1967); P. Holland, *The Governance of Quangos* (Adam Smith Institute, London, 1981); C. Hood, 'The Politics of Quangocide' (1980) 8 *Policy and Politics* 247-265; *Report on Non-Departmental Bodies* Cmnd 7797 London: HMSO, 1980).

⁵⁹ Cabinet Office, *Public Bodies Reform – Proposals for Change* (London, 2010). The Public Bodies Act 2011 confers on Ministers powers to abolish or merge bodies; modify a body's constitutional or funding arrangements; or transfer its functions elsewhere, subject to approval by Parliamentary resolution. In addition, triennial reviews of non-departmental public bodies have been introduced.

⁶⁰ For details on funding see Prosser, *The Regulatory Enterprise*.

recently imposed significant budget cuts (Ofcom's budget, for example, was cut by 28% in 2011). Whilst the House of Lords review of economic regulators found that on the whole the independence of those regulators had not been compromised by the funding arrangements in place,⁶¹ the issue of funding does considerably complicate Parliament's attempts to determine whether responsibility for regulators' performance should in specific instances lie with the executive or with the regulatory agency.

With respect to regulatory functions, it is through the 'better regulation' agenda that we have seen the marked 're-centring' of control by the core executive over regulatory processes, if not directly over regulatory decisions, particularly with respect to those regulators with considerable inspection and enforcement functions. Indeed the development of better regulation processes, at least in the UK, can be largely explained as attempts to develop intra-executive mechanisms of control by the core over the periphery.⁶² Despite its highly technical and often mundane nature, regulation has been a key political priority for successive administrations since the 1980s. The common mantra, through both Conservative and Labour governments, is that regulation is bad for business, and so bad for economic growth. Since the mid-1980s successive administrations, of whatever political hue, have tried to re-engineer regulatory processes under the banner of 'better regulation': trying to get independent regulators and the rest of government to 'do regulation better', and indeed to 'do "better regulation" better'.

Three strategies in particular have been used in the last 15 years.⁶³ These are first, the use of organisations within either the Cabinet Office or the Department for business (the name changes frequently) to monitor regulatory proposals issuing from within government Departments and some of their associated bodies, though not the independent regulatory agencies. Second, to establish specialist advisory bodies to advise the executive on what both Departments and independent regulators are doing, and to appoint ad hoc independent reviews to investigate either particular independent regulators or particular functions of a number of agencies, and to report and advise. Third, to impose cross-cutting duties on regulatory agencies through legal requirements and codes of practice. Each of these has the potential to make significant in-roads into the exercise of discretion by independent regulators, blurring the boundaries between independence, accountability and control, though their impact in practice is mixed.

⁶¹ House of Lords, *Review of Economic Regulators*. The exception was the funding of Postcomm, now absorbed into Ofcom.

⁶² C. Radaelli, 'Regulating Rule-Making via Impact Assessment' (2010) 23(1) *Governance* 89–108.

⁶³ For a brief history see R. Baldwin, M. Cave and M. Lodge, *Understanding Regulation* 2nd edition (Oxford: OUP, 2011).

GETTING GOVERNMENT TO ‘DO “BETTER REGULATION” BETTER’ – STRUCTURING DECISION MAKING

The move by central government to attempt to push the ‘de-regulation’ and subsequently the ‘better regulation’ agenda through government began in 1985 with the creation of individual Departmental Deregulation Units, responsible for identifying areas where regulation could be simplified or removed. Responsibilities were moved to the very top of government with the creation of a central Deregulation Unit as part of the Cabinet Office in 1995. The incoming Labour government kept the unit, though reconstituted and renamed it the Regulatory Impact Unit in 1997. All new regulatory proposals were to be accompanied by a ‘regulatory impact assessments’ (RIA) setting out predicted costs and benefits. On the recommendation of the Hampton Review, to which we return below, this was replaced in 2005 with the Better Regulation Executive (BRE), initially attached to the Cabinet Office but which moved in 2007 to the Department of Business, Enterprise and Regulatory Reform (BERR). Its emphasis broadened to comprise not only regulatory impact assessments, but as discussed below, a wider focus on burden reduction and regulatory processes, again following Hampton’s recommendations. It performed twice yearly reviews of departments, which were not published but were submitted to the Prime Minister for review.⁶⁴

Both the previous Labour administration and the current coalition government introduced further organisational and procedural reforms. The BRE’s role in reviewing departmental performance and further driving the ‘better regulation’ agenda across government continues. It is now advised now by the Better Regulation Strategy Group, which is an advisory group comprised of business and consumer representatives, and the two bodies share the same non-executive chairman.⁶⁵ The Cabinet has also replaced the Regulatory Accountability Panel with two new bodies. These are the Regulatory Policy Group, which scrutinises all new regulatory proposals and the impact assessments accompanying them. It then passes all proposals with satisfactory impact statements to the Reducing Regulation Committee, a body comprised of external members which considers the impact assessments and the associated rules which are proposed to be removed to ‘make way’ for the new requirements, including those implementing EU legislation.⁶⁶

⁶⁴ Ibid. In addition, the Regulatory Accountability Panel, a Cabinet Sub-Committee, chaired by the Chief Secretary to the Treasury, scrutinised departmental simplification plans and major policy proposals which were likely to impose a cost of over £20 million per annum or disproportionately impact a particular sector.

⁶⁵ HM Government, *Reducing Regulation Made Simple – Less Regulation, Better Regulation and Regulation as a Last Resort*, (London, 2010).

⁶⁶ NAO, *Department for Business, Innovation and Skills - Delivering Regulatory Reform*, HC 758 (London, 2011).

As a mechanism of simultaneous control and accountability, the better regulation agenda is felt more strongly the closer the regulator is in its operations to government departments, at whom these efforts are principally directed. However it is not clear what impacts they have really had. Successive National Audit Office (NAO) reviews of regulatory impact assessments performed by departments have shown them to be inadequate in a number of respects – often with significant operational consequences.⁶⁷ The NAO recently concluded, in effect, that government could do better in trying to do ‘better regulation’.⁶⁸ Nonetheless, whilst the outcomes remain unclear, the drive for internal control over regulatory processes from the very top of the political executive is indisputable.

USING SPECIALIST ADVISORS AND REVIEWERS

Executive control over regulatory policy making within departments has been accompanied by the use of specialist advisory bodies and independent reviews to advise on regulatory reform across the whole of the regulatory landscape. The Better Regulation Taskforce was created in 1997 and devised five principles of ‘good regulation’ which are now enshrined in legislation and widely referred to as the ‘PACTI’ principles: proportionality, accountability, consistency, transparency and targeting.⁶⁹ It conducted a considerable number of reviews into specific areas of regulation and into the conduct of regulation overall.⁷⁰ It was reconstituted as the Better Regulation Commission in 2006, but still reported to the Cabinet. Arguably two of its two most influential reports were *Less is More*, which set the current policy agenda on administrative burden reduction, and *Public Risk – the Next Frontier for Better Regulation*, which was produced at the request of the Prime Minister and in fact advocated its own demise.⁷¹ On the basis of the latter it was abolished and replaced by the Risk Regulation Advisory Council in 2008, which produced a series of reports, guides and tools to help policy-makers and the public tackle public risk. Its work programme ended in 2009, and it has not been replaced. Political attention has moved elsewhere.

The appointment of specialist advisors to investigate particular areas of regulation, either particular sectors or particular processes across sectors, has also been increasingly used. Most influential of these has been the Hampton Review of Inspection and Enforcement in 2005, which reviewed the inspection and enforcement activities of the non-economic regulators a number of regulators

⁶⁷ A review by the NAO found that proposals to restructure organisations in particular often had no or inadequate assessments of costs and benefits: NAO, *Reorganizing Central Government*, HC 452 (London 2010).

⁶⁸ NAO, *Delivering Regulatory Reform*.

⁶⁹ See Baldwin, Cave and Lodge n.63 above.

⁷⁰ Reports included *Alternatives to State Regulation* (London, 2000); *Economic Regulators* (London, 2000); *Independent Regulators* (London, 2003); *Imaginative Thinking for Better Regulation* (London, 2003); *Avoiding Regulatory Creep* (London, 2004); *Less is More – Reducing Burdens, Improving Outcomes* (London, 2005); *Risk, Responsibility, Regulation* (London, 2007).

⁷¹ The report, and request, followed its report, *Risk, Responsibility, Regulation* (London 2007).

including the Environment Agency, the Food Standards Agency, the Health and Safety Executive, the Financial Services Authority and the Civil Aviation Authority.⁷² The Hampton Review marked a shift to scrutinising more closely not just the consultation practices of regulators or the decisions they make but their operational systems and processes. Amongst other things, it recommended that regulators should adopt a risk based approach to inspection and enforcement, focusing resources on areas of greatest risk, and that regulators should be accountable for the efficiency and effectiveness of their processes, whilst remaining independent in the decisions they take.⁷³ Sector specific reviews have also been instrumental in prompting regulatory reform. Most recent are the reviews of Ofwat⁷⁴ and Ofgem,⁷⁵ of the regulation of the railways,⁷⁶ of the inspection and enforcement of the regulation of farming (which spans several agencies)⁷⁷ and of the enforcement policies and practices of the Health and Safety Executive,⁷⁸ each of which is likely to be the basis of legislation going forward, and which are discussed further below.

Whilst they may not form part of any formal ‘map’ of accountability relationships, such reviews do require regulators to give an account of their activities, and can provide a valuable resource for others seeking to hold them to account. Moreover, it is striking the extent to which such reviews set the agenda for other accountors. The Hampton review has been particularly influential in defining the ‘better regulation’ agenda for inspection and enforcement activities, and in particular for driving the development risk based regulation as a further element of the better regulation agenda. In the wake of the report, the Government codified the ‘Hampton Principles’ in the Legislation and Regulatory Reform Act 2006, and set up the Macrory Review of regulatory sanctions, which also led to the Regulatory Enforcement and Sanctions Act 2008, both discussed below. The Treasury and BERR⁷⁹ also appointed the NAO to evaluate how well five regulatory agencies were operating in accordance with Hampton principles, and reviewed a further 36.⁸⁰ Parliamentary Select Committees have picked up on the agenda without questioning it, and have urged regulators to adopt more principles-based approaches to regulation, and also to be more ‘risk-based’.⁸¹ It is worth pointing out how quickly accountability criteria shifted in the wake of the

⁷² Hampton Review of Inspection and Enforcement (London, 2005).

⁷³ Ibid.

⁷⁴ Gray Review, n.30 above.

⁷⁵ DECC, *Ofgem Review – Final Report* (London, 2011).

⁷⁶ R. McNulty, *Realising the Potential of GB Rail - Report of a Value for Money Study* (London, 2011) (hereafter McNulty report).

⁷⁷ Farming Task Force report.

⁷⁸ Lord Young, *Common Sense, Common Safety* (London, 2010); Lofstedt Review.

⁷⁹ Department for Business, Enterprise and Regulatory Reform, since renamed Department of Business, Innovation and Skills.

⁸⁰ For summary of reports on the initial five regulators see NAO, *Regulatory Quality: How Regulators are Implementing the Hampton Vision* (NAO, 2008).

⁸¹ House of Lords Regulatory Committee, *Economic Regulators*.

financial crisis, however, when all of a sudden not only did principles based regulation lose its allure, but accountors conveniently forgot that it had ever had one.⁸²

USING PRINCIPLES AND CODES – THE JURIDIFICATION OF BETTER REGULATION

In the last few years, we have also seen the increasing ‘juridification’ of principles of better regulation as they have morphed from general exhortations to statutory obligations. Thus what started off as instruments of political accountability evolved into ones of legal accountability, as well. The extent to which they are embedded in the legal mandates of individual regulators varies: the FSA, Ofcom and Ofgem are under statutory obligations to conduct regulatory impact assessments, for example, but Ofwat and the Office of the Rail Regulator (ORR) are not. However, there has been an increased move to introduce legal responsibilities to adhere to different parts of the better regulation agenda on a cross-regulator basis. The PACIT principles, for example, began as self-imposed guidance for one regulator (the Health and Safety Executive), were then adopted and promoted by the BRTF as cross-cutting principles for all regulators, as noted above, then enshrined in a non-legal Enforcement Concordat in 1998, incorporated in the legislative mandates of some regulators (for example, Ofcom and the Legal Services Board), and are now enshrined in the Legislative and Regulatory Reform Act 2006 (LRR Act) as statutory Principles of Good Regulation.⁸³ In addition, those regulators who wish to receive enhanced enforcement powers under the Regulatory Enforcement and Sanctions Act 2008 (RESA) have to demonstrate their compliance with the principles before the government will introduce an order conferring the powers on them. Thus far only the Environment Agency and Natural England have been granted additional powers.⁸⁴

The LRR Act also introduced the statutory Regulators’ Compliance Code, which enacts the principles recommended by the Hampton review, to which regulators are now required to have regard in the exercise of their general functions.⁸⁵ It is not clear that the Code has had a significant impact on the way that regulators operate, however. In its recent review of regulatory enforcement practices, the coalition government has expressed concern that the Compliance Code has not received the attention from regulators that it should have, though its greatest concern is that business feels that regulators are too onerous in their

⁸² J. Black, ‘The Rise, Fall and Fate of Principles Based Regulation’ in K. Alexander and N. Moloney (eds) *Law Reform and Financial Markets* (Cheltenham: Edward Elgar, 2011), 3-34.

⁸³ Regulatory Reform Act 2006 s.21(2).

⁸⁴ Others, for example the Health and Safety Executive, have decided not to apply on the basis that they do not need them.

⁸⁵ BERR, Regulators Compliance Code, Statutory Code of Practice for Regulators (2007), para 9.

enforcement practices (it is notable that the review did not seek the views of other stakeholders, including consumers).⁸⁶

So for the core executive at least, the better regulation agenda defines the criteria against which regulatory processes should be assessed, and it is through better regulation processes that the centre tries to exercise both control and accountability simultaneously. These processes have greater purchase with respect to government departments than they do on independent regulators on the far periphery. Nonetheless, even those regulators at the periphery have felt the pressure of the better regulation agenda through the injection of some of its core components into their legal mandates, as political accountability morphs into a source of legal accountability.

PARLIAMENTARY SELECT COMMITTEES

PARLIAMENT – ORGANISING ITSELF TO BE AN ACCOUNTOR

Whilst Parliamentary Select Committees may appear to be in a strong position to act as accountors, given the constitutional supremacy of Parliament, as noted above the complexity of the regulatory landscape and the number, range and scope of regulatory agencies that exists pose a significant challenge to their capacity to do so.

As a result Parliament has struggled with the question of how best to organise itself to call independent regulators to account.⁸⁷ In a recent report, the House of Lords Liaison Committee admitted as much: despite successive Select Committee reports from both Houses recommending the creation of a joint committee to scrutinise regulatory bodies, it argued that the scope was too broad for the remit of such a body to be successfully defined: "Regulation" in the sense of the establishment and enforcement of legal and other standards encompasses a huge sweep of public policy. The ad hoc committee [on economic regulators] found that the breadth of its remit was problematic, even in its more focussed form.⁸⁸ It concluded that the scale of the task, together with the current upheaval in the regulatory landscape, meant that departmental Select Committees were better placed to perform such a role on a regular basis.⁸⁹

⁸⁶ BIS, *Transforming Regulatory Enforcement* (London, 2011).

⁸⁷ House of Lords Constitution Committee, *The Regulatory State: Ensuring its Accountability*, 6th Report 2003–04, HL Paper 68 (London, 2004); House of Lords, *Report from the Select Committee on Regulators, UK Economic Regulators*, 2006–07, HL Paper 189 (London, 2006).

⁸⁸ House of Lords Liaison Committee, *New Proposals for Committee Activity* Second Report of Session 2010–12 (London, 2010), para 10.

⁸⁹ *Ibid*, paras 8–12.

There have been cross-sector investigations by ad hoc committees in both Houses. Nevertheless, Parliament's accountability activities remain principally the preserve of departmental Select Committees, certainly in the House of Commons. The House of Commons Select Committee structure deliberately follows the structure and responsibilities of Government departments. However, whilst there is a clear rationale for it, this mirroring of the executive's organisational structure has limitations, at least with respect to the accountability of regulatory agencies. As noted above, often the regulation of a particular sector is distributed between two or more regulators, which can in turn have different lead departments. This can create organisational silos within the executive, and indeed gaps in regulatory regimes, which are reinforced by the departmental Select Committee structure rather than addressed. For example, responsibility for the regulation of defined contribution pensions is split between the Pensions Regulator (Department for Work and Pensions) and the FSA (HM Treasury), which can result in gaps being created in regulatory regimes which are not picked up either by the lead departments or by the relevant Select Committees. The accountability structures thus reinforce the gaps rather than correcting them.⁹⁰

Moreover, in practice Parliament is an accountant that speaks with many voices. There is little apparent coordination between House of Commons Select Committees on their agendas, and certainly no clear systematisation in the timing, scope and incidence of review of regulators by each individual committee. Indeed it was this lack of systematic attention to regulatory agencies which the proponents of a single committee hoped such a body could address.⁹¹ Moreover, Select Committee reports show inconsistencies in the approach taken to the reviewing the regulatory bodies, either by the same committee over time or between committees, with little cross-referencing. This is not surprising given that the membership of committees changes regularly, but it does not facilitate systematic review. There can be also disputes as to which committee is responsible for what (for example differences between the Lords and the Commons as to who should call the UK Statistics Office to account)⁹², and diverging responses to the same event (for example the different responses of the PAC and TSC to the non-disclosure of the government indemnity to the Bank of England during the crisis).⁹³

It could be argued that there are merits in having unpredictable reviews – it keeps regulators on their toes.⁹⁴ That is true, but it is suggested that such randomised strategies are best when part of a broader systematic process which ensures that the same bodies are not reviewed over and over again whilst others are in effect ignored. One way to systematise Parliament's review function could

⁹⁰ NAO, *The Pensions Regulator – Regulating Defined Contribution Schemes* HC 466 (London, 2012).

⁹¹ House of Lords Constitution Committee, *The Regulatory State: Ensuring its Accountability*, 6th Report 2003–04, paras 199–204.

⁹² House of Lords Liaison Committee, First Report of Session 2007–8, HL 33 (London, 2008), Appendix 3.

⁹³ Black, n.31 above.

⁹⁴ Hood et al, n.50 above.

be for the committees of each House to agree a rolling timetable of review for the most important regulatory agencies, for example a convention to review every five years unless events make a review necessary within that period, and to agree a common set of core issues to investigate, adjusted as required by the agency's mandate and functions.⁹⁵ The triennial review process to be introduced under the Public Bodies Act 2011 may go some way to addressing this concern.

Even if Select Committees in both Houses were to adopt such a process, however, two issues remain. The first is that the Parliamentary timetable may simply preclude it from paying an active accountability role in a crisis. The financial crisis exploded in the summer of 2008, during Parliamentary recess. Decisions had to be taken with such speed that the affirmative resolution procedures put in place to ensure Parliamentary accountability, though followed, were simply a matter of form.⁹⁶ Crises do not follow Parliamentary session dates.

The second issue is that of motivating either the rest of Parliament or the government to take note of committee reports of either House. Select Committees can sometimes be quite despondent about their ability either to call to account or to impose consequences. For example, in reviewing the proposals to merge Postcomm's functions into Ofcom, the House of Commons Select Committee for Business and Enterprise commented that the model of accountability proposed (which was in fact the standard constitutional one of an annual report to Parliament followed by scrutiny by the relevant Select Committee) was 'fundamentally misconceived [...] Select Committees have no power to direct; we can only make recommendations in reports to the House. It is for the Government to take action.'⁹⁷ It argued in effect that its previous reports had been in vain, as it had had no power to make either the Government or the regulator think again. It concluded, perhaps rather fatalistically, 'only the Government has the resources and powers to monitor a regulator.'⁹⁸

However, we should not underestimate the significance that the reports can have. Despite the difficulties Parliament faces in calling regulators and the executive to account, it has nonetheless had some considerable impacts. The reviews of both Ofwat and Ofgem noted below stemmed in part from Select Committee recommendations. It was on the basis of the PAC report and witness evidence on the Care Quality Commission (CQC) that the government postponed the proposed abolition of the Human Fertilisation and Embryology Authority and the Human Tissue Authority and the transfer of their functions to the CQC.⁹⁹

⁹⁵ It may be that the government's newly introduced triennial review process for non-departmental public bodies may help Parliament to organise its attention in this regard.

⁹⁶ Black, n.31 above.

⁹⁷ House of Commons Business and Enterprise Committee, *The Postal Services Bill* Fifth Report of Session 2008–09 HC 172-I, para 96.

⁹⁸ *Ibid*, para 97.

⁹⁹ The government has since begun consultation on the issue: Department of Health, *Consultation on proposals to transfer functions from the Human Fertilisation and Embryology Authority and the Human Tissue Authority* (London, 2012).

Moreover, the detailed engagement of the Treasury Select Committee in calling both the regulator and the executive to account in the financial crisis, which has continued with the change in government, suggests that if they so wish, Parliamentary Select Committees can be formidable accountors. Indeed it may be that reforms within Parliament to the procedures for appointing members to Select Committees could serve to give those committees a greater sense of independence, which could enhance their willingness to call regulators to account.¹⁰⁰

DETERMINING RESPONSIBILITY AND APPORTIONING BLAME – FROM ‘MANY HANDS’ TO ‘NO HANDS’

Although capacity is important, it is recognised that there some accountability challenges cannot be resolved by throwing more resources at them. One of the most intractable difficulties in calling regulators to account is trying to determine who is responsible in any particular instance, regulators or the government, and therefore who to blame when things go wrong. As noted above, the regulatory landscape is highly complex with responsibilities frequently shared between regulators and the government, and with an inherent tension in their relationship between independence, control and accountability. In operational terms, coordination is at premium, issues can fall between gaps, and responsibilities can be unclear, to say the least. There is a risk that both the government and the regulator use the organisational complexity and ambiguity as to their respective roles to avoid responsibility.

If we recall Christopher Hood’s argument, that institutional structures are often designed largely to ensure that blame can be shifted away from their designer,¹⁰¹ then we should not be surprised at this outcome, though it does not make it any easier to address. When things go wrong, blame can pass quite quickly and easily to whoever seems to be the most proximate cause. However, as Hood argues, the challenge of calling to account ‘many hands’ can also turn into the challenge of finding there are ‘no hands’ when crises erupt, as each actor seeks to blame the other.¹⁰² Moreover, lack of clarity as to the responsibilities of each organisation can lead to paralysis, or at least severe bungling. As noted above, it was clear in the case of Northern Rock’s collapse, for example, that each of the Treasury, Bank of England and Financial Services Authority felt that the responsibility to act lay with the other, leading not only to difficulties in ascribing responsibilities after the event in the accountability process, but to significant failings in operations leading up to its failure and in its immediate management.¹⁰³

¹⁰⁰ See House of Commons Liaison Committee, *Rebuilding the House – Select Committee Issues* First Report Session 2009-10 (London 2010).

¹⁰¹ Hood, n.8 above.

¹⁰² Ibid.

¹⁰³ Treasury Select Committee, *Run on the Rock*; NAO, *Maintaining Financial Stability Across the UK Banking System*, HC 91 Session 2009-10 (London, 2009).

Successive Parliamentary Select Committee reports have criticised the government for blurring of the boundaries between its roles and responsibilities and those of the regulators in almost every area. For example, in a recent report reviewing the management of the risk of floods, the PAC commented that there were no clear lines of responsibility between local authorities, the Environment Agency and the Department. The Agency relied on the Department for funding flood protection initiatives, but that budget had just been cut and the Department had told the Agency to find funding elsewhere, and told local authorities to increase their contributions, whilst again cutting their budgets. In short, the committee argued that the Department was failing to accept ultimate responsibility.¹⁰⁴

Responsibilities can also be particularly unclear in the period when the agency is being established. For example, in a highly critical report on the Care Quality Commission (CQC), the PAC argued that although the Commission's governance and operations were poor, the Department of Health had considerably underestimated the task facing the CQC in merging three pre-existing regulators into one, requiring it to take on an expanded role with a reduced budget and without a defined set of objectives. In short, even though it was responsible for the Commission, it had not 'had a grip' on what the Commission was doing.¹⁰⁵ Similarly, although the PAC criticised the leadership of the Equality and Human Rights Commission, it found that the lead Department (which changed three times in the period leading up to its creation) did not have a clear project plan for the creation of the Commission, there was no budget in place and that the Commission's executive had had no say in which staff were to be transferred to it, leaving it without staff who had the necessary skills.¹⁰⁶ In this case, rather than try to apportion responsibility, the PAC simply (and probably rightly) blamed both for bringing the Commission into operation before it was properly prepared.

Another recurrent problem has been to identify who is responsible for defining the political, social or public interest goals that regulators should be pursuing, particularly with respect to the economic regulators. The McNulty Report into the regulation of the railways, for example, argued that the ways in which responsibilities for the regulation of Network Rail (the infrastructure provider) and the train operators was shared between the Office of the Rail Regulator (ORR) and the Department of Transport and the industry was unclear.¹⁰⁷ In addition, that the 'high level objectives' that the Department set every five years for the regulator and the industry were often contradicted by

¹⁰⁴ House of Commons Committee of Public Accounts, *Flood Risk Management in England*, HC 1659 (London, 2012).

¹⁰⁵ House of Commons Committee of Public Accounts, *Care Quality Commission: Regulating the Quality and Safety of Health and Adult Social Care* Seventy-eighth Report of Session 2010–12 HC 1779 (London, 2012), para 1.

¹⁰⁶ House of Commons Committee of Public Accounts *Equality and Human Rights Commission* Fifteenth Report of Session 2009–10, HC 124 (London, 2010).

¹⁰⁷ McNulty Report.

political decisions made in the interim to meet short term needs. It proposed that the ORR's remit and capacity should be considerably enhanced and that it should take over complete responsibility for regulation of the train operating companies as well as Network Rail, removing the Department's regulatory role, but leaving it the task of setting long term strategic goals.¹⁰⁸

Finding the balance between the operational independence of the regulator and the exercise of strategic direction by elected politicians is not an easy matter, however.¹⁰⁹ The recent review of Ofwat by David Gray, for example, emphasised the need for greater clarity in the respective roles of Ofwat and the Government.¹¹⁰ The Gray Review found a widespread demand among stakeholders for greater clarity on the Government's objectives for the sector and on the respective roles of Government, Ofwat and the other regulators. The regulation of water services is further complicated by the fact that Ofwat is also accountable to the Welsh Assembly, and the report found there was a need for greater coordination between the Westminster government and the Welsh Assembly on what their policy goals are. It recommended that they agree a memorandum of understanding (MOU) setting out their respective goals, and that their policy statements should be combined with clearer guidance to Ofwat as to how it should seek to balance its various duties in arriving at regulatory decisions. Moreover, in view of the number of regulatory bodies involved, government objectives for the water sector should be specified in a way that minimised the scope for conflict between the regulators.¹¹¹

A similar finding was made in the review of Ofgem conducted by the Department of Energy and Climate Change (DECC).¹¹² The review found that as Ofgem's role had become more complex, there had been a 'blurring of responsibilities between the Government and Ofgem causing some erosion of the regulatory certainty that independent regulation was designed to provide. It concluded that there was a need for 'an enduring solution that sees Government clearly taking responsibility for setting and communicating strategic direction, Ofgem's independent regulatory decisions forming a logical and coherent part of this broader strategic policy framework, and *ad hoc* interventions avoided where possible.'¹¹³

The DECC review recommended that the government should introduce a new, five-yearly statutory 'Strategy and Policy Statement'.¹¹⁴ The statement would set out the Government's policy goals for the sector; describe the roles and responsibilities of Government, Ofgem, and other relevant bodies; and define

¹⁰⁸ McNulty Report, para 4.3.

¹⁰⁹ See eg the evidence of Stephen Carter on his Report *Digital Britain*: HC 331-i Q 18, and the report of the House of Commons Business and Enterprise Committee, *The Postal Services Bill* Fifth Report of Session 2008–09 HC 172-I, para 99.

¹¹⁰ Gray Review.

¹¹¹ Ibid, Recommendation 1.

¹¹² DECC Review.

¹¹³ Ibid, para 6.

¹¹⁴ Ibid.

policy outcomes that Government considers the regulator to have a particularly important role in delivering. The regulator would then be expected to set out annually how it will deliver its contribution and monitor progress, and where progress is not on track, explain why and what action may need to be taken to mitigate the problems.

Such statements could bring a welcome degree of transparency to the relationship between government and the independent regulators, though as we saw in the case of Northern Rock, statements (or in that case an MOU) can prove to be less clear in ascribing responsibilities in any particular case. They can also become out of date, and / or departed from by governments, who instead intervene on an ad hoc basis to address short term political goals, as both the McNulty Report and Gray Review found with respect to rail and water. However, if the government could commit to such statements for a five year period, it could go some way to both providing the strategic direction that a regulator needs, and provide some clarity as to the respective responsibilities of each.

SHIFTING ROLES

The recommendations of the Ofgem Review also raised the question of how closely Parliament should become involved in policing the boundaries between control, independence and accountability. In the case of Ofgem, the DECC review proposed that the Statement and any subsequent revisions would also be subject to Parliamentary approval through the affirmative resolution procedure, which would require Parliament to debate and approve the Statement before it could come into force.¹¹⁵ This was presented as an opportunity to involve Parliament in holding the regulator to account, but a cynic could argue that it is also a way of ensuring Parliament signs off on the Statement, thus restricting its ability to criticise later on – allowing responsibilities between the accountor (Parliament) and the accountees (Ofgem and the government) to become unclear.

There is already a blurring of the boundaries of Parliament's role as accountor of Ofgem, because under the EU Third Package for Energy, it is national legislatures which have to approve the budgets of their energy regulators, not the executive.¹¹⁶ At present, the annual process for setting the budget is linked to Ofgem's consultation on its annual corporate plan, which provides an opportunity for interested parties, including DECC and the Treasury to raise any concerns. Following the consultation, Ofgem sets out its main estimates for Parliament, which then votes on whether to approve the budget.¹¹⁷ This process may be seen as giving Parliament a welcome voice, and of empowering it to 'impose

¹¹⁵ DECC Review, para 88.

¹¹⁶ Directive 2009/72/EC concerning common rules for the internal market in electricity.

¹¹⁷ NAO, *Performance of Ofgem – Briefing for the House of Commons Energy and Climate Change Select Committee* (London, 2010).

consequences', but it may complicate Parliament's role as an accountant. This raises the broader question: whether, and to what extent, does *ex ante* engagement preclude the organisation concerned from being an impartial *ex post* accountant? Does their *ex ante* involvement implicate them too greatly in the decisions and actions for which they then seek to hold the regulator to account? For example, Parliament (acting as accountant) may criticise Ofgem *ex post* for failures to achieve certain outcomes, but Ofgem may reply that it needs more funding in order to perform effectively, so that the reason it has failed is due to Parliament (acting as *ex ante* approver of its budget) and its refusal to allow it greater resources, thus implicating Parliament in the blame game. Moreover, who (realistically) calls Parliament to account for the budget Parliament provides to Ofgem is less than clear. The NAO, perhaps?

THE NATIONAL AUDIT OFFICE

The role of the National Audit Office (NAO) in calling regulators to account has been steadily increasing over the last ten to fifteen years, and there is no doubt that the NAO has now become a significant actor in the political accountability of regulators in the UK. This is not necessarily because it can impose any direct consequences on those regulators that it criticises: it has no powers to do anything other than report. It is rather because it has become a well-respected and valuable resource for other political actors, notably the executive and Parliament. In other words, by providing both the core executive and Parliament with detailed information and evaluation of regulators' activities, it enhances their capacity to call those regulators to account. Indeed, Parliament's accountability capacity would be severely reduced in the absence of the NAO. The NAO has developed considerable accountability capacity in terms of access to information, technical expertise in performance evaluation and in regulatory techniques, drawing on external advisors for sectoral expertise, and its reports are generally of a high quality.

However, strictly speaking the reviews that it undertakes are meant to be focused on the 'value for money' that a regulator provides. Thus it cannot criticise policy *per se*, only its implementation (though the line in practice may be blurred). Furthermore it can only examine the accounts and performance of those regulators which it is given the legal powers to examine: it was never granted the power to audit the Financial Services Authority, for example, on the basis that the FSA did not receive public funds (although the Treasury did commission a review by the NAO on specific aspects of the FSA's work).¹¹⁸

Moreover, its institutional position as government auditor has arguably limited the role that it could potentially play in providing a wider evaluation of a regulatory regime, as opposed to an evaluation of the performance of individual

¹¹⁸ This situation was criticised by the House of Lords Constitution Committee, *The Regulatory State*, paras 204-212. Under the Financial Services Bill 2011 the FSA's replacement, the Financial Conduct Authority, will be included in the NAO's remit.

organisations. That said, there are signs that the NAO is taking a more expansive view of its role, and it has engaged in cross-government evaluations recently, notably a highly critical review of reforms of the structure of government, and, less scathingly, of competition regulation.¹¹⁹ With respect to re-structurings, it found that successive governments were both very keen on reorganisation (there were over 90 reorganisations of government between May 2005 and June 2009), and very bad at it. In a conclusion which is relevant for the current exercise in reorganisation, it stated: “The value for money of central government reorganisations cannot be demonstrated given the vague objectives of most such reorganisations, the lack of business cases, the failure to track costs and the absence of mechanisms to identify benefits and make sure they materialise.”¹²⁰ In order for any change to occur, however, the NAO relies on the executive to take notice, and on Parliament, the media and others to ensure that it does.

The NAO can nonetheless play a significant role in helping Parliament call regulators and the government to account. In particular, its capacity to undertake detailed investigations is extremely important. For example, it played a critical role in the accountability processes relating to the 2007-9 financial crisis, providing Parliament and the public with two detailed reports on the handling of the crisis and assessing whether the billions of pounds taxpayers’ money that was used to prop up the system was in fact well spent.¹²¹ It concluded that it was,¹²² but its inquiries did reveal some failings. Notable of these was that the Treasury had failed to inform the chairs of the PAC and Treasury Select Committee of an indemnity of up to £18bn provided to the Bank of England at the height of the crisis to enable the Bank to provide emergency loans to RBS, Lloyds and HBOS of up to £60bn in October 2008. The government’s response was that it had been concerned that the information would leak, exacerbating the crisis, but it is notable that no *ex post* disclosure was made once this danger was over.¹²³ Without the NAO’s investigations, it is difficult to see how this information would have emerged.

The NAO is also becoming the ‘accountability resource of choice’ for both the core executive and for Parliament. The NAO has been used by the core executive (Cabinet Office and Treasury) to perform specific reviews to monitor the regulators’ implementation of policies and recommendations, and to perform successive reviews of departmental regulatory impact assessments. As noted above, the NAO conducted reviews jointly with the Treasury of the implementation of the Hampton recommendations by the five largest regulatory

¹¹⁹ NAO, *Reorganising Central Government* HC 452, Session 2009-10 (London, 2010); NAO, *Review of the UK’s Competition Landscape* (London, 2010).

¹²⁰ NAO, *Reorganising Central Government*, para 10.

¹²¹ The government provided US\$ 690bn in direct support to RBS, Lloyds and HBOS, and provided US2.06 trillion in guarantees to these and other banks: Bank of England, *Financial Stability Report* June 2009.

¹²² NAO, NNR and Maintaining Financial Stability.

¹²³ NAO *Maintaining Financial Stability*; Black, n.31 above.

agencies.¹²⁴ Committees of both Houses of Parliament have also asked the NAO to perform specific reviews on their behalf, for example of regulators' regulatory impact assessments, and to provide it with briefing papers on regulators or regulatory issues.¹²⁵ Indeed, a number of Select Committees have recommended that the NAO play a greater role in scrutinising regulators. For example, the House of Lords report on economic regulators recommended that the NAO be charged with reviewing the regulators' own post-implementation evaluations for their quality and objectivity, or conducting such evaluations itself.¹²⁶

However, there are indications of some confusion, at least on the part of the government, over the question of for whom the NAO acts, and to whom the NAO itself is accountable. In formal terms, the NAO acts on behalf of the PAC, to whom it presents its reports. However, as the government also uses the NAO to perform reviews on its behalf, the issue of for whom it is acting can become unclear in the minds of some, at least. For example in giving evidence to the recent PAC review of the Office of the Rail Regulator, the Permanent Secretary for the Department of Transport argued that the government determined the NAO's activities, only to have to be corrected by the Committee who pointed out that the NAO was funded directly by Parliament, not by the executive, and acted on Parliament's behalf, not the government's.¹²⁷ However, NAO reports on regulators, or in this case Network Rail, are approved by the lead Department before they are presented to the PAC,¹²⁸ which leaves the question unclear of who, in reality, the NAO is reporting to. Its institutional position is thus blurred: is it acting on behalf of Parliament, the government or both (but at different times?) Blurring boundaries, shifting positions and the endless question over the accountability of the accountors (or who guards the guardians) – each of these issues continues to pose challenges for regulatory accountability.

CONSUMER ADVOCACY BODIES

The final group of accountors to be considered here are consumer panels or advisory bodies. Engagement by 'civil society' in regulatory issues is usually far weaker than that of business, but to the extent it exists at all, it is usually stronger at the 'input' stages of policy processes (through consultation) than at other stages. For reasons that cannot be explored here, the last 15 to 20 years have seen an increase in the creation of specialist consumer representative committees or panels which are attached to individual regulators, or given a legal mandate to make representations to and to review the activities of a group of regulators. Such bodies are often created by statute, charged with representing consumer views,

¹²⁴ NAO, *Regulatory Quality*.

¹²⁵ Eg NAO, *Performance of Ofgem*; NAO, *A Review of Economic Regulators' Regulatory Impact Statements for the House of Lords Select Committee on Regulators* (London: NAO 2007).

¹²⁶ HL UK *Economic Regulators* para 1.10.

¹²⁷ House of Commons Committee of Public Accounts *Office of Rail Regulation: Regulating Network Rail's efficiency* Forty-first Report of Session 2010–12 HC 1036 (2011), qq 205 & 206.

¹²⁸ *Ibid*, Q 218.

performing reviews and issuing reports, and in many instances the regulator is under a statutory duty to respond publicly to their comments. Specialist consumer representative organisations exist in a number of key sectors, notably financial services (FSA Consumer Panel), water (CC Water), transport (Passenger Focus), aviation (Aviation Consumer Advocacy Panel), legal services (Legal Services Consumer Panel) and telecommunications and broadcasting (Communications Consumer Panel) and Healthwatch (CQC). In addition, Consumer Focus was created in 2008 to take over the consumer advocacy functions of the National Consumer Council, Energywatch and Postwatch. Some of these organisations are embedded in the regulator as dedicated advisory panels; others such as CC Water, Passenger Focus and Consumer Focus are separate external sectoral bodies.

The development of consumer panels which are embedded within regulatory structures is good example of a form of accountability which is ongoing and ‘interstitial’, sitting between the visible, formal processes of consultation prior to decisions, and ex post reviews of performance. There has been no systematic study of their effectiveness, but whilst some consumer panels have been criticised as ineffective, lacking sufficient information, expertise and influence,¹²⁹ others have been praised for their engagement and expertise, as discussed below. The engagement of consumers or other individuals in the regulatory process and in calling the regulator to account has the potential to be considerably enhanced through the operation of both panels and external sectoral bodies, but only if certain conditions are in place. Notably, their accountability capacity has to be adequate (including possessing appropriate personnel, technical expertise, financial resources, and access to information and research), they have to be able to respond quickly to changing events, their members need to have adequate negotiating and advocacy skills, and their personal authority and institutional position has to be such that they are respected by consumers, regulators and industry alike.¹³⁰ In other words, irrespective of any legal requirement that regulators take their views into account, consumer panels have to be afforded sufficient recognition by the regulator such that the regulator really does take note of what they say, and does not just ‘go through the motions’ of appearing to listen but in practice disregarding them.

In this regard, there can be advantages gained in having specialist consumer panels which are able to develop the highly technical knowledge and expertise required to engage properly with issues arising in each sector. However, the coalition government is currently proposing to abolish the majority of these specialist panels (with the exception of those in financial and legal services, as they

¹²⁹ Eg Henry Rothstein’s study of the Food Standards Agency’s Consumer Committee, which was in place from 2002-5: ‘Talking Shops or Talking Turkey? Institutionalizing Consumer Representation in Risk Regulation’ (2007) 32(5) *Science Technology Human Values* 582-607.

¹³⁰ An interesting perspective is provided by Consumer Focus, *Through Consumers’ Eyes* (London, 2011).

are not publicly funded) and instead to merge them all into a single ‘regulated industries’ unit within an expanded Citizens Advice service.¹³¹

There are strong arguments against such a proposal, but at least the consultation paper has prompted a fascinating debate on the relative capacities of different types of consumer organisations both to represent consumers and to call regulators to account. The government argued that an integrated consumer body would be able to create greater capacity by developing stronger cross-sectoral expertise and capability; to consider the cumulative impact on consumers of changes across sectors; to develop an integrated ombudsman system to deal with complaints and redress; to raise public awareness and understanding of who is representing their interests; and to reduce overall costs and improve efficiency¹³² (though it should be noted that the proposals have not been costed).¹³³ However the proposals have met significant opposition from regulators, consumer advocates and industry. Opponents to the proposals fall into two main camps: those who think that specialist consumer panels should be merged into a single ‘regulated industries panel’ but do not think that the function should be given to the Citizens Advice service, and those that think that specialist panels should be retained.

The generalist consumer advocacy bodies, such as Which?, Age UK, the National Consumers Federation and Consumer Focus sit in the first camp (and indeed the proposal for a single cross-sector advocacy body originated with Consumer Focus).¹³⁴ However these bodies expressed strong doubts as to whether the Citizens’ Advice service, which is a charity, would have sufficient skills, funding, powers and status to perform this role.¹³⁵ It would require a significant re-focusing of the Citizen’s Advice service, as well as a radical expansion and shift in the technical skills of its personnel. As the Consultation Paper itself recognises, ensuring that consumer interests are fully represented in these highly complex areas requires significant technical knowledge and expertise, an understanding of the trade-offs involved. In addition, though the Consultation Paper does not note this, they require considerable political, advocacy and negotiation skills.¹³⁶ It is not obvious that Citizen’s Advice currently has this capacity. New powers would also have to be given. For example, Consumer Focus at present has strong powers with respect to energy and postal services to

¹³¹ BIS, *Empowering and Protecting Consumers: Consultation on Institutional Changes for Provision of Consumer Information, Advice, Education, Advocacy and Enforcement*, (London, 2011), though CCWater, which was praised for its effectiveness in the Gray Review, will remain until after the 2014 price review. The proposals only cover BIS sponsored regulators; the eventual decisions on the transfer of sectoral consumer bodies into the proposed arrangements are a matter for the relevant departments and devolved administrations.

¹³² Ibid.

¹³³ See also NAO, *Reorganizing Central Government*.

¹³⁴ Regulated Industries and the Consumer, Consumer Focus (March 2011), available at <http://www.consumerfocus.org.uk/publications/regulated-industries-and-the-consumer>.

¹³⁵ Response of Age Concern, available at [http://www.ageuk.org.uk/Documents/EN-GB/For-professionals/Policy/BIS%20Empowering%20and%20protecting%20consumers%20\(Sept%202011\).pdf?dtrk=true](http://www.ageuk.org.uk/Documents/EN-GB/For-professionals/Policy/BIS%20Empowering%20and%20protecting%20consumers%20(Sept%202011).pdf?dtrk=true).

¹³⁶ BIS, *Empowering and Protecting Consumers*.

force companies or regulators to disclose information which it requires to fulfil its remit, powers which would be lost with the transfer of its functions to Citizens Advice service. Accountability to Parliament and the NAO also risks being lost. Under the current proposals, Citizens' Advice would remain a charity and as such would not be accountable to Parliament for its role, nor to the Welsh Assembly.¹³⁷ Its accountability to government would also be unclear – a familiar problem, as discussed above. Instead they argue that the remit of Consumer Focus should be expanded. This would have the advantage of having a specialist body with a specific legal mandate, with an established position and expertise, and a dedicated budget.

However, as a number of other responses noted, there are also considerable arguments against the creation of a generalist advocacy body, even if it had greater powers and accountability. There is a real risk that specialist knowledge will be lost, that the skills, financial resources and attention of any such organisation, and particularly a multi-function body such as the Citizen's Advice service, would be too widely spread. Moreover, as a significant part of the regulatory agenda is set at EU level, consumer advocacy has to have an international as well as a national dimension. It is doubtful, to say the least, that a single organisation could respond adequately at both national and EU levels to issues which cover most of the economy unless it was as equally well-resourced as all the existing consumer bodies.

Further, as it would lose the privileged access to information that many currently enjoy, a generalist consumer representative body which was external to the regulators would have to engage in more formal procedures to get the information that it needed from industry and the regulatory body. As a result, a non-specialist organisation is likely to become too detached from the regulators and from the issues involved, able only to observe and comment rather than engage and negotiate. As the Consumer Council for Water argued in its response: 'In our experience, most benefits for consumers are delivered by negotiating in detail on key issues at senior level in the sector, backed by real expertise and respect by the parties in that sector. In the water sector there are 22 companies and four main regulators with whom we negotiate. The complex nature and extent of the negotiations in water on behalf of consumers should not be underestimated.'¹³⁸ The result is likely to be a diminution in the accountability of regulators to consumer interests, rather than an enhancement.

¹³⁷ Response of Consumer Focus, available at <http://www.consumerfocus.org.uk/files/2009/06/Paper-5-Draft-consumer-landscape-response-27-September.pdf>.

¹³⁸ Response of the CC Water, available at www.ccwater.org.uk/.../Final_response_BIS_Landscape_Review_-_2011.

It is striking that many of the regulators who have specialist panels responded that they would be reluctant to lose them.¹³⁹ Those regulators argued that consumer panels which are embedded within regulatory structures, in other words which may share premises, some staff, and have good access to internal meetings or meetings with other interested parties, perform quite differently to generalist advocacy bodies – they are advisory bodies, not lobbyists, campaigners or consumer advisors.¹⁴⁰ As the National Consumers' Federation observed, there is a distinction between 'campaigning advocacy' and 'participatory advocacy'.¹⁴¹ Panels which are operationally embedded and located within regulators can have privileged access to policy processes and can provide targeted interventions at an early stage before policies are fully formed.¹⁴² Moreover, they provide regulators with the ability to 'test out' proposals at an early stage of their development, prior to public consultation.¹⁴³ Such panels can be a valuable source of information for regulators as to what consumer interests are on significant but highly technical issues which can have both national and international dimensions. There is a real risk that their abolition would lead to the loss of a valuable counter-balance to the views of industry representatives, which are far more vocally expressed. Further, the panels were seen as inexpensive and offering good value for money (a key government criterion). As Ofcom summarised: 'An expert panel can foster a close and constructive relationship with a regulator, respond quickly and flexibly across a wide range of issues, and operate with a small team of advisors and very low overheads.'¹⁴⁴ Moreover, regulators themselves recognised the importance of specialist consumer panels in providing legitimacy to the regulatory process, and reassurance to consumers that their interests were being effectively represented and taken into account.

The debate over the reform of the structure and role of consumer advocacy bodies provides a valuable insight both into the complexity of the accountability relationships that can exist between accountor and accountee, and highlights the fluidity of the roles that any one organisation can play within that relationship, in this case as the role of a consumer representative organisation shifts between representative, participant and accountor. Moreover, it illustrates that the capacity

¹³⁹ See for example responses from Ofcom, Financial Services Consumer Panel, OFT, National Consumer Federation, Legal Services Consumer Panel (endorsed by the Legal Services Board), Which?, Consumer Focus, and the findings of the Gray Review, n.30 above.

¹⁴⁰ Eg response of Legal Services Consumer Panel, available at http://www.legalservicesconsumerpanel.org.uk/publications/consultation_responses/documents/2011-09-27_BIS_EmpoweringandProtectingConsumers.pdf.

¹⁴¹ Response of National Consumers Federation, available at http://www.ncf.info/sites/default/files/NCF%20response%20to%20BIS%20consultation%20Empowering%20and%20Protecting%20Consumers_0.pdf; Welsh Affairs Select Committee, *Representation of consumer interests in Wales*, Seventh Report 2011-12 Session (2011).

¹⁴² D. Tambini, *Reforming Consumer Representation in UK Communications*, LSE Media Policy Brief 4 (LSE, 2011) available at <http://eprints.lse.ac.uk/38616/1/LEMPBrief4.pdf>; responses of Ofcom, available at <http://stakeholders.ofcom.org.uk/binaries/consultations/ofcomresponses/consumer-landscape-ofcom.pdf> and the Legal Services Consumer Panel.

¹⁴³ Response of Ofcom and Legal Services Consumer Panel.

¹⁴⁴ Response of Ofcom.

of an accountant to hold a regulator to account is determined by factors well beyond legal powers, but based in the possession of resources and of an institutional position which is such that both the regulator and others recognise the 'right' of that organisation, in this case both to participate and to hold to account.

However, again the balance between independence and engagement is inevitably a difficult one to strike, in this case between the role of the consumer body as a participant and its role as an accountant. The key challenge is to ensure that consumer representative bodies have sufficient information, access and status to make a real impact on the regulators' decision process, whilst remaining sufficiently independent from it.¹⁴⁵ Consumer representative bodies also need to be sufficiently accountable to those whose interests they are meant to be representing, and to ensure that they are representing the interests of all consumers, not just one particular sub-set. To this end, ensuring that consumer bodies have adequate funding to pursue independent research into consumers' needs and opinions, and into the impacts of policies on them, is vital. Without such research consumer bodies are inevitably prey to the risk (and accusation) that they represent only themselves, or at best a small sub-set of what is in reality a highly heterogeneous group. Conducting such research also enables them to build their own legitimacy in the absence of clear accountability arrangements. For at present, it is not clear to whom, if anyone, consumer panels are accountable, even if they are subject to requirements to issue publish reports to the world at large. That makes them accountable to everyone, but as we know, tasks that are assigned to everyone tend to be performed by no one. Again, the question of to whom the accountors are accountable remains unanswered.

SUMMARY AND PROSPECTS

Although there is a far wider array of accountability actors than those considered here, for any of them calling regulators to account is a challenging exercise. As we have seen, the key challenges are fivefold: notably the scale and scope of the regulatory landscape; the number and relationship between the different bodies involved (and their propensity to blame-shift); the technical complexity and contestability of the regulatory task; the opacity of regulatory processes; and the willingness of the accountee to be called to account. In addition, as we have seen, not only are the lines between independence, accountability and control often blurred, the roles of organisations which are acting as accountors can also be fluid. A consumer panel may play the role both of engaged participant in the regulatory

¹⁴⁵ Tambini, n.142 above; Rothstein, n.129 above; J. Black, *Report on Consumer Involvement in Regulatory Decision Making* (IDA Taskforce to Modernize Securities Regulation in Canada, 2006).

process, as well as an *ex post* accountant of that regulator's activities; Parliamentary involvement can demonstrate similar fluidity of roles, particularly if Parliament is determining the budget of the regulatory body. As noted at the outset, the difficulties in answering the question of 'who guards the guardians' are further compounded, if the 'guardian' is an active participant in the very processes it is seeking to guard.

Moreover, the capacity of different actors to call regulators to account is highly variable. There has been no 'grand design' of the current political structures of accountability, rather each has evolved and continues to evolve. Parliament, for example, has a strong institutional position as accountant, but its capacity is limited and it has struggled to organise itself in such a way as to perform a systematic and on-going accountability function with respect to the 'regulatory state'. In contrast, the institutional position of the NAO can at times seem confused, with both Parliament and the government arguing the NAO is acting for it, but its capacity to engage in the forensic investigations and technical analysis which are the necessary bedrock of any accountability process is significant. In an ideal world, the weaknesses in the institutional position and accountability capacity of one accountant would be compensated for in the strengths of another. But whilst there are some areas where this is so (such as the role of the NAO in supporting Parliament's capacity to call regulators to account), gaps still exist.

Other issues also remain: although there are signs that accountors are recognising the significance of the EU in setting the agenda, and in some cases the structures and processes, of regulatory agencies, this recognition has been too slow in coming, and accountors risk calling regulators to account for decisions over which they have little control, or in finding that their role has been displaced by EU organisations.¹⁴⁶ The lack of clarity over responsibilities for setting strategic objectives or for handling crises remains. The accountability problems raised both by 'many hands' and by 'no hands' can be acute. Concerns remain as to the ongoing effectiveness and impact of Parliamentary mechanisms of accountability, despite some successes in Parliament's reforms of its internal operations. As for accountability on behalf of consumers, there are real risks that the current proposals to reform consumer advocacy will prove to be yet another reform which is ill-thought through, ill-costed, which will bring no real benefits, and indeed could severely weaken regulatory accountability to citizens and consumers.

However, regardless of how well designed a system could be, or how capacities could be enhanced, the political accountability of independent regulatory agencies will always be complex and contested. Regulators operate in a broader context of multi-level and polycentric regimes in which responsibilities are widely dispersed, even at the national level. Furthermore, the core executive will continue to try to play a double game of delegation and control with respect to regulatory agencies, and to blur responsibilities whenever convenient to do so. It

¹⁴⁶ For examples with respect to the financial crisis see Black, n.31 above.

will always be the role of accountors to police the boundaries between the independence of regulatory agencies and their control by either the executive or industry, for that is not something that can be left either to the government or the agency themselves, but in so doing the role of accountors can sometimes blur into one of engaged participant. So tensions abound – but unless those tensions start to have pathological effects on the agency itself, they need not be a bad thing. It should not be surprising that accountability relationships that regulators have with their accountors are complex, that accountability can be challenging or difficult for both accountors and accountees, or that roles are shifting, that lines are blurred and that values are contested and contestable. It is the nature both of the relationship and of the task of accountability that these tensions will exist, and it is right that they do, at least up to a point. For without those tensions both regulators and their accountors will become complacent, which will be to their detriment, as well as ours.