

What Makes a Good Regulator?

by Rebecca Durcan

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One highlight of the recent Canadian Network of Agencies for Regulation (CNAR) conference was participating in the pre-conference workshop on What Makes a Good Regulator. Leading the workshop was an impressive international team that included:

- Mark Stobbs, Director of Scrutiny and Quality at the Professional Standards Authority for Health and Social Care in England and Wales
- Mary Russell, Acting National Director Notifications and National Manager (Transition) Intake and Assessment, Australian Health Practitioner Regulation Agency
- Claude Balthazard, Vice-President, Regulatory Affairs and Registrar, Human Resources Professionals Association (HRPA)
- Darrel Pink, practising in association with Steinecke Maciura LeBlanc and former Executive Director of the Nova Scotia Barristers' Society

as well as a team of five from Steinecke Maciura LeBlanc.

The format was innovative. Six topics were discussed for an hour each. First there was a brief presentation on the topic, followed by small group discussion. Each of the seven groups had two different questions to discuss related to the topic. Along with an introductory question that allowed each attendee to share a bit of their own experience on the issue, and a bonus question for groups that finished early, a total

of sixteen questions were discussed on each topic. The facilitators of each group then reported to the plenary. Given the calibre of the more than eighty attendees, consisting primarily of leading staff and Board members of various regulators across the country, a lot of fascinating points emerged. The format was not designed to provide conclusive answers to the question of “what makes a good regulator.” However, it did result in a lot of shared learning and provocative thoughts for further consideration.

Highlights on each topic include the following:

Risk-Based Regulation requires a complete rethinking of how a regulator prioritizes its activities. By first identifying the areas of greatest harm to the public (by both frequency and impact) and then planning how those risks can be most effectively and proportionately treated, regulators focus on the right things. Part of risk-based regulation is recognizing how different categories of practitioners approach their professional obligations. Measures to engage and change the behaviour of resistant and disengaged practitioners will be different than those that are effective with practitioners striving to be competent and ethical.

Performance Measures have become the subject of much discussion in recent years. However, with some exceptions, it is not yet feasible to measure whether regulators are having an impact on the behaviour of practitioners let alone the degree to which the public is actually protected by a regulator (compared to other methods of regulation, or even where there is no regulation at all). At the present time most regulators just measure and report on their activities and outputs (e.g., how many complaints were processed and the nature of their dispositions). Practically speaking, for

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A COMMENTARY ON LEGAL ISSUES AFFECTING PROFESSIONAL REGULATION

most regulators the next step is evaluating whether regulators are doing the “right things” in the “right ways”. This is called practice-based performance measurement. Even this approach requires significant effort to develop a consensus on the criteria to be applied. It also requires confidence in the, usually external, body conducting the measurement. The Professional Standards Authority of the United Kingdom is the current leader in this area. Ontario is also in the process of establishing a practice-based performance review system.

Complaints handling seems to be an area in which a regulator can easily attract criticism. Through the use of a case study, discussion focussed on three topics. The first was avoiding excessive delay, especially where it is instigated by the employer of the practitioner (e.g., as it conducts its own investigation). The second was involving complainants more in the process including fully explaining the process at its beginning and involving them in its resolution, if only to provide comments, particularly if the complaint is suitable for a restorative justice resolution. The third major area of discussion related to making remediation more effective through locating (or creating) available resources, dealing with practitioners who struggle with insight or self-assessment skills, and measuring whether the remediation changed behaviour.

Governance has been a staple of regulatory conferences for some years now. However, it now appears that change is afoot, particularly in British Columbia and Ontario. These changes include reducing the size of Boards to between 7-12 members, selecting Board members on the basis of skills and experience, reducing or even eliminating the majority of professional members on most regulator Boards and narrowing the mandate of

Boards to focus on regulatory strategy, policy making and performance oversight. Much of the small group discussion was about taking intermediate steps to prepare for these changes and on the longer term implications of these changes, such as the trend toward combining regulators.

Public Expectations and Oversight began with a discussion of the Australian experience where public dissatisfaction with regional regulation of health professions resulted in the creation of a national regulatory regime. Strategies for addressing public concerns include developing national registration standards, creating a national public register, evaluating the quality and consistency of disciplinary decisions, improving the disciplinary process (e.g., inconsistencies in disciplinary sanctions across professions), and improving ways of identifying and addressing bias. A national, Canadian oversight agency attracted some discussion.

Transparency typically involves two related but separate issues. The first is for the regulator to be open about its activities, processes and policy making. Policy making, in particular, requires an effective consultation processes with the public as well as the profession. Most discussion, however, was focused on the public register of practitioners. The benefits of a single provincial, or even national, public register was noted with some enthusiasm. Whether to include more or less information about practitioners on the public register produced vigorous debate. Implementing a rating system or client satisfaction mechanism requires more discussion.

A more detailed summary of the discussion on each of these topics can be found at: <https://www.sml-law.com/wp-content/uploads/2019/11/What-Makes-a-Good-Regulator-Highlights.pdf>